STATE OF MAINE
KENNEBEC, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-24-01

DONALD J. TRUMP,

Petitioner,

v.

SHENNA BELLOWS, *in her official capacity as* **Secretary of State, State of Maine,**

Respondent,

KIMBERLEY ROSEN, THOMAS SAVIELLO, and ETHAN STRIMLING,

Parties-in-Interest.

OPENING BRIEF OF DONALD J. TRUMP

INTRODUCTION

It is a "'fundamental principle of our representative democracy,' embodied in the Constitution, that 'the people should choose whom they please to govern them.'"[1] For the first time in our nation's history, a Secretary of State has taken it upon herself to take away the choice of who should be a major party's nominee for President of the United States from the people, based on Section Three of the Fourteenth Amendment. This usurpation of the power of the people of Maine to choose their own political leaders is contrary to both state and federal law, including the Constitution of the United States.

The adjudication and challenge process under Sections 336 and 337 was never designed for a challenge like this, involving complex constitutional and factual issues. And in fact, Section 336 does not allow a challenge under Section Three of the Fourteenth Amendment. In applying Sections 336 and 337 to disqualify President Trump, the Secretary has exceeded her statutory authority under Maine law.

In addition, the *Ruling of the Secretary of State*, (the "*Ruling*") transgresses the federal Constitution. The Constitution commits decisions about Presidential qualifications to the voters and Congress—not individual Secretaries of State or other statewide election officials. Section Three of the Fourteenth Amendment is not self-enforcing and there is no currently operative enforcement statute that provides the Secretary—or anyone else save Congress—authority to enforce it. Moreover, Section Three neither restricts the presidency, nor applies

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[1] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)).

to President Trump, who did not serve as an "officer of the United States" or take an oath to "support" the Constitution. And, even if it could apply to President Trump, Section Three only restricts individuals from *holding* office—it does not prevent them from running for or being elected to office.

Finally, the Secretary applied the wrong legal standard in assessing whether the events of January 6, 2021, were an "insurrection" and whether President Trump "engaged" in insurrection. When the proper standards are applied, it becomes clear that the facts relied upon by the Secretary are woefully insufficient to support her broad legal and factual conclusions.

To make matters worse, the Secretary herself should never have considered the challenges. The *Ruling* issued from a biased decisionmaker who had repeatedly made statements prejudging the central issue of this case and expressing an intent to "protect" elections against people such as President Trump.

Accordingly, the *Ruling* should be vacated, this Court should declare that the Secretary has no authority to continue, maintain, or begin proceedings concerning President Trump's alleged disqualification as a candidate under Section Three of the Fourteenth Amendment, and this Court should require the Secretary to place President Trump on the Republican Presidential Primary ballot. Alternatively, the Court should remand the matter with instructions that Secretary transfer the matter to an unbiased official who has not pre-judged controlling law or President Trump's actions.

FACTUAL AND PROCEDURAL BACKGROUND

President Trump timely filed a "Presidential Primary Candidate's Consent" form ("Consent") (attached as Exhibit A), which was dated October 20, 2023, and received by the Secretary of State on November 17, 2023. The Consent lists three "Qualifications of President of the United States under U.S. Constitution, Article II, Section 1: Be a natural born U.S. Citizen[;] Have been a resident of the United States for at least 14 years[; and] Be at least 35 years of age." The Consent states "I further declare that my residence is in the municipality and state listed above; that I am enrolled in the party name on this consent; that I meet the qualifications to hold this office as listed above; and that this declaration is true."

The Secretary of State's office received three timely challenges to the nominating petition of President Trump. One, by Paul Gordon, alleged that President Trump is barred from office based on his claims to have won the 2020 election and the term limits provisions of the Twenty-Second Amendment ("Gordon Challenge"). A second, by Kimberly Rosen, Thomas Saviello, and Ethan Strimling (collectively, "Rosen Challengers"), alleged that President Trump was disqualified to hold office based on Section Three of the Fourteenth Amendment ("Rosen Challenge"). And the third, by Mary Ann Royal, alleged that President Trump violated his oath of office by engaging in insurrection ("Royal Challenge"). Notwithstanding the facial differences, the Secretary construed the Royal Challenge as raising the same Section Three challenge as the Rosen Challenge.[2]

On Monday, December 11, 2023, the Secretary issued a *Notice of Hearing* setting a hearing date on all three challenges for Friday, December 15, 2023. The *Notice of Hearing*

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[2] *Ruling* at 2.

further directed the parties to "exchange and file by email…lists of expected exhibits and witnesses no later than 5:00 pm on Wednesday, December 13, 2023." It further instructed any parties wishing to intervene to file a written request no later than 3:00 on Thursday, December 14, 2023. On December 14, 2023, the Secretary granted pro hac vice status to two attorneys, Mr. Scott Gessler and Mr. Gary Lawkowski, to appear at the hearing, along with Mr. Ben Hartwell, as counsel for President Trump.

On December 15, 2023, the Secretary granted intervention to Representative Mike Soboleski, granted limited intervention to Citizens for Responsibility and Ethics in Washington, and granted intervention to Mark Graber for the limited purpose of filing an amicus brief. The Secretary also denied intervention to John Fitzgerald and Michael Lake, but accepted their submissions as amicus briefs.

Also on December 15, the Secretary held a consolidated hearing on all three challenges. At that time, the Challengers had not provided President Trump their expected exhibits; President Trump objected to all but five exhibits, but the Secretary provisionally accepted all exhibits pending further briefing to resolve objections. The Secretary allowed President Trump to provide written evidentiary objections by 5:00 on Monday, December 18, 2023, and required responses by Tuesday, December 19, 2023, at 5:00. President Trump filed timely evidentiary objections and the Rosen Challengers filed a timely response brief. The Secretary also requested simultaneous closing argument briefs from the parties by 5:00 on Tuesday, December 19, 2023. President Trump and the Rosen Challengers submitted timely closing briefs.

On December 20, 2023, the Secretary requested additional briefing addressing the impact of the decision of the Colorado Supreme Court in *Anderson v. Griswold*, Case No. 23SA300, 2023 CO 63, 2023 WL 877011 (Dec. 19, 2023) on the proceedings at issue. President Trump and the Rosen Challengers filed briefs addressing this issue on December 21, 2023.

On December 27, 2023, President Trump filed a *Request to Disqualify the Secretary*, seeking the Secretary's recusal under 5 M.R.S. § 9063.

On December 28, 2023, the Secretary issued her *Ruling*, which:

- Rejected the *Request to Disqualify the Secretary* as untimely, and alternatively denied the Request on the basis that the Secretary was not biased;
- Held "most of the evidence submitted by the Rosen Challengers, and objected to by Mr. Trump, is admissible under 5 M.R.S. § 9057;"
- Denied the Gordon Challenge;
- Invalidated President Trump's consent form based on Section Three of the Fourteenth Amendment; and
- Suspended the effect of the Secretary's Ruling until such time as the Superior Court rules on any appeal or the time to appeal has expired.

On January 2, 2023, President Trump timely filed this appeal.

ARGUMENT

President Trump's arguments generally fall within two categories. First, the Secretary had no jurisdiction to disqualify President Trump under Section 336, and the Secretary should have recused herself due to her public, demonstrated bias.

Second, President Trump asserts that as a matter of federal, constitutional law, Section Three cannot apply. This second category raises the same federal issues considered by multiple state and federal courts across the country (including *Anderson v. Griswold*), and is currently under consideration by the United States Supreme Court.

This Court need not address the multiple federal issues, because the plain text of Section 336 does not allow the Secretary to bar President Trump under Section Three. Indeed, other courts and state officials have properly held that their state laws do not allow Section Three challenges, just as Maine law does not allow such challenges. Even assuming, solely for argument's sake, that Section 336 does apply, this court should reverse and remand the *Ruling* with instructions that the Secretary transfer the matter to an unbiased official for consideration of the Section Three issues.

I. State Law does not authorize the Secretary to consider Section Three Challenges to President Trump's candidacy.

The challenge procedures in 21-A.M.R.S. §§ 336 & 337 were never designed for a case like this. As this state's highest court held in *Arsenault v. Secretary of State*, the Secretary may not disqualify a candidate unless authorized by an express grant of power by the Legislature.[3] That Court reversed the Secretary's actions, ruling "[g]iven the fundamental importance of the right to vote and the right to participate in the political process, and given the painstaking detail of the election statutes, if the Legislature had intended to delegate to the Secretary the authority to add restrictions to this process, it would have done so explicitly." The narrow scope of Section 336's requirements, the limited review available

[3] *Arsenault v. Secretary of State,* 905 A.2d 285, 290 (Me. 2006).

under Section 337, and the unambiguous words of the form drafted by the Secretary and executed by President Trump, show that the Maine Legislature did not authorize the Secretary to consider Section Three challenges under either Sections 336 or 337. Since there was no grant of authority from the legislature, there is no basis for the Secretary's *Ruling*, and it must be vacated.

As an initial matter, Section 337 itself permits only a challenge to a candidate's petition or the signatures it contains. The Challengers did not bring a challenge on either ground, and the Secretary likewise did not base her decision on either ground. Accordingly, no cognizable challenge under Section 337 has been raised.

Next, Section 336 adopts Section 337's procedures to govern challenges to a candidate's consent but authorizes only a single basis for a challenge: when "any part of the declaration is found to be false."[4] This requirement imposes two substantive limits on challenges to a candidate's consent: first, one may only challenge the "declaration" portion of a candidate's consent form; and second, a challenge is limited to the veracity of the declaration. The Secretary's *Ruling* disregards these limitations and is thus beyond the scope of her authority.

A. Review Under Section 336 is Limited to a Candidate's "Declaration," Not a Candidate's Statement of Qualifications.

The word "declaration" is significant. Section 336 draws a textual distinction between a candidate's "declaration," which includes only a candidate's place of residence and party designation, and his or her "statement," which is "a statement that the candidate meets the

[4] 21-A.M.R.S. § 336(3).

qualifications of the office the candidate seeks."[5] Grammatically, Section 336 treats the "declaration" and the "statement" as two different things. The declaration does not include "a statement that the candidate meets the qualifications of the office the candidate seeks." If the drafters had wanted to include the "statement" as part of the declaration, it would have written that the "consent must contain a declaration of the candidate's place of residence, party designation, and a statement . . ." thereby treating the "statement" the same as "residence" and "party designation." But the statute is not written that way.

Likewise, the challenge provision of Section 336 treats "declaration" as separate from "statement." Specifically, under Section 336(3), one may challenge only the "declaration," not the "statement." Consistent with the *expressio unius est exclusio alterius* canon of statutory construction,[6] the inclusion of the "declaration" and the omission of the "statement" is significant and means that the challenge provisions of Section 336 are limited to challenges to the declaration—*i.e.*, residency and party designation.

Moreover, this limitation makes sense. The procedures set forth in Section 337 require challenges to take place on a highly expedited timeline. These procedures are designed to adjudicate simple factual disputes that can be resolved in a matter of days. Challenges to a candidate's residency or party designation generally present straightforward questions of fact, where the respondent knows—and already has possession of—all relevant

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[5] 21-A.M.R.S. § 336(3).

[6] *See, e.g., Violette v. Leo Violette & Sons, Inc.*, 597 A.2d 1356, 1358 (Me. 1991)("In construing the language of a statute, it is appropriate to apply the maxim '*expressio unius est exclusio alterius est.*'").

facts. Likewise, the facts and law regarding residency and party designation require little in-depth examination. As such, residency and party declaration are well suited to resolution on an expedited basis.

But challenges to a candidate's potential disqualification—such as challenges under Section Three—involve much more complex factual and legal questions. These types of disputes do *not* lend themselves to expedited adjudication, and the expedited process under Section 337 was never designed to adjudicate these complex issues. Here, for example, the record contains over 6,000 pages plus many hours of video, and it is wholly unreasonable to think that a Respondent can properly respond to that volume of evidence as it is presented during a hearing, or even with two days' notice. More alarmingly, a Respondent cannot possibly identify, develop, and present rebuttal evidence on such a short timeline. Section 336, therefore, properly limits challenges to just the declaration portion of a candidate's consent form (the residency and party designation), not the statement of qualifications. The challenges were thus outside the scope of Section 336 and the Secretary lacked authority under state law to issue her Secretary's Ruling.

The Secretary makes two arguments in a strained effort to justify her decision. First, the Secretary claims "[President Trump] points to no aspect of legislative history of Section 336 suggesting that this distinction is meaningful."[7] The Secretary's argument misses the mark because she did not find—and could not have found—that the statute is ambiguous. It is well-settled under Maine law that:

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[7] *Ruling* at 14.

> When a statute is unambiguous, we interpret the statute directly, without applying the rule of statutory construction that prefers interpretations ... that do not raise constitutional problems, and without examining legislative history, or the agency's interpretation. We look to legislative history and other extraneous aids in interpretation of a statute only when we have determined that the statute is ambiguous.[8]

Put differently, the text of the statute itself is paramount. Legislative history only matters if the text of the law is ambiguous. And Section 336 is not ambiguous. On its face it treats "statement" and "declaration" as separate, non-interchangeable terms each of which must be accorded a distinct meaning. "[C]ourts presume that when a legislature uses different words within the same statute, it intends for the words to carry different meanings,"[9] and "[d]ifferent words used in the same, or a similar, statute are assigned different meanings whenever possible."[10] Since the statute is not ambiguous, it was error for the Secretary to look to legislative history. The text itself is dispositive.

Even if the statute were ambiguous (and it is not), the absence of relevant legislative history is hardly probative, let alone dispositive, of the statute's proper meaning. Indeed, the Secretary advances a strange and unjustifiable legal standard, whereby a defendant shoulders the burden to show legislative history must support his position. The Secretary does not claim that the legislative history affirmatively supports *her* interpretation. She merely notes that President Trump did not provide legislative history to support his proffered interpretation. This formulation flips the burden in an administrative challenge and, in any

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[8] *Carrier v. Sec'y of State*, 2012 ME 142, ¶ 12, 60 A.3d 1241, 1245 (cleaned up).

[9] *Fair Elections Portland, Inc. v. City of Portland*, 2021 ME 32, ¶ 29, 252 A.3d 504, 512–13.

[10] *See* 2A Norman J. Singer & Shambie Singer, *Statutes & Statutory Construction* § 46:6 at 261 (7th ed. 2014), cited by *Fair Elections*, *supra.*

event, represents an improper approach to the use of legislative history. The challengers have the burden of proving their case, not President Trump,[11] and the Secretary cannot impute meaning to legislative silence.[12]

Second, the Secretary claims that 21-A.M.R.S. § 355 "incorporates analogous requirements for nomination petitions of non-party candidates [and] collapses the distinction entirely."[13] But this just is not true. Section 355 draws a clear distinction between a "statement" and a "declaration" and limits the challenge process to the declaration. At most, Section 335 defines "declaration" differently than Section 336, which only serves to underscore the different meaning to be accorded the term under the two sections. Specifically, Section 355(1) states "[t]he consent must contain a statement signed by the candidate that the candidate will accept the nomination of the general election." Section 355(3) then further states "[t]he consent must contain a declaration of the candidate's place of residence and the fact that the candidate has not been enrolled in a party qualified to participate in a primary or general election after March 1st of that election year and that the candidate meets the qualifications of the office the candidate seeks." And Section 355(3) goes on to provide that "[i]f, pursuant to the challenge procedures in Section 356, any part

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[11] 21-A.M.R.S. § 337(2)(B).

[12] *See, e.g., Brown v. Gardner*, 513 U.S. 115, 121, 115 S. Ct. 552, 557, 130 L. Ed. 2d 462 (1994) ("congressional silence 'lacks persuasive significance,'"), quoting *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994).

[13] *Ruling* at 14.

of the declaration is found to be false by the Secretary of State, the consent and the nomination petition are void."[14]

Far from supporting the Secretary's reasoning, Section 355 thus refutes it. First, Section 355 reinforces that the "statement" and "declaration" are two different things. The "statement" in Section 355 is described in subpart 1 and only subpart 1. The declaration is mentioned in subpart 3, which in turn contains a challenge process that is limited to the terms of the declaration.

Second, Section 355 shows that the legislature was perfectly capable of including candidate qualifications in its definition of "declaration." It chose not to in Section 336, a deliberate decision that must be given effect.[15] That omission is significant and demonstrates the error of Secretary's *Ruling*.

Review under Section 336 is limited to just a candidate's "declaration," which does not include his/her statement of qualifications.

B. There is no dispute that the information on the face of President Trump's consent is true.

Second, review under Section 336 is limited to the truth of the statements on the four corners of a candidate's consent form. Thus, the only issue is whether a candidate's written

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[14] 21 M.R.S. § 335.

[15] *See, e.g., Musk v. Nelson*, 647 A.2d 1198, 1201 (Me. 1994) ("When a statute already defines [a term] we are not free to re-define the term."); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54, 112 S. Ct. 1146, 1149, 117 L. Ed. 2d 391 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'")(cleaned up).

answers are true. Neither the Challengers nor the Secretary dispute that the information on President Trump's consent form is true. Instead, the Challengers sought—and the Secretary acceded—to stretch Section 336 beyond its limits by inquiring into a question President Trump was not asked on his consent form—even if the challenge could permissibly go beyond the *declaration* to the *statement*.

The word "false" is not defined in the statute, and thus must be given its common and ordinary meaning. "In considering the plain language of a statute, we construe any undefined words and phrases according to their common meaning."[16] "False" is a commonly used word with a commonly accepted meaning: "either untrue or intentionally untrue."[17] Thus, absent a showing that President Trump's declaration was false—that is, at a

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[16] *State v. Murphy*, 130 A.3d 401, 404 (Me. 2016).

[17] *Abdullahi v. Time Warner Cable, Inc.*, No. 2:13-CV-00440-JDL, 2014 WL 3341350, at *2 (D. Me. July 8, 2014) (citing *Black's Law Dictionary* 7th ed. (defining "false" as meaning "1. Untrue . . . 2. Deceitful; lying . . .") and *Merriam-Webster's Collegiate Dictionary* 11th ed., at 451 (defining "false" as including "1: not genuine . . . 2a: intentionally untrue . . . 2b: adjusted or made so as meaning to deceive . . . 3: not true [.]")). Indeed, as the First Circuit has emphasized, "false" is better understood as requiring an intent to deceive:

> "This primary and ordinary meaning of the word 'false' cannot be ignored. It is the primary meaning given in the ordinary lexicons of the English language. Webster gives as its primary meaning: 'Uttering falsehood; unveracious; given to deceit; dishonest.' As an adjective, it is correlative with the noun 'falsehood.' To charge a person with making a false statement, is equivalent to charging him with uttering a falsehood, and imputes moral delinquency to the person so charged.* * * In *Black's Law Dictionary*, under the title 'false,' it is said: 'In law, this word means something more than untrue; it means something designedly untrue and deceitful, and implies an intention to perpetrate some treachery or fraud.' In a recent and well accepted publication called 'Words and Phrases,' the word 'false' is thus defined:- 'False means that which is not true, coupled with a lying intent.' *Wood v. The State*, 48 Ga. 192, 297, 15 Am.Rep. 664. False in jurisprudence usually imports something more than the vernacular sense of 'erroneous' or 'untrue.'"

minimum untrue—no challenge under Section 336 can succeed. Yet none of the Challengers came close even to alleging—much less proving—that any part of his declaration or statement was untrue, much less intentionally untrue. Nor could they. The declaration and statement read as follows:

> I hereby declare my intent to be a candidate for the Office of President of the United States and participate in the Presidential Primary for the party named above to be held on March 5, 2024, in the State of Maine. I further declare that my residence is in the municipality and state listed above; that I am enrolled in the party named on this consent; *that I meet the qualifications to hold this office as listed above*; and that this declaration is true.[18]

The Secretary's *Ruling* raised no issue with the first sentence relating to President Trump's intent to be a candidate in the Maine Republican Primary. Nor did the Secretary's *Ruling* evaluate President Trump's residence or his enrollment in the Republican party—that is, the declaration. Rather, the Secretary's *Ruling* focuses entirely on other allegations—that he does not meet the qualifications to be President because of Section Three of the 14th Amendment. Setting aside the lack of substantive merit to these allegations under Section

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Wilensky v. Goodyear Tire & Rubber Co., 67 F.2d 389, 390 (1st Cir. 1933), quoting *Gilpin v. Merchants' National Bank*, 165 F. 607, 611 (3d Cir. 1908); *accord, e.g., United States v. Worthington*, 822 F.2d 315, 319 (2d Cir.), *cert. denied*, 484 U.S. 944, 108 S.Ct. 331, 98 L.Ed.2d 358 (1987) ("A false statement is … 'designedly untrue … and made with intention to deceive'"); *United States v. McCallum*, 788 F.2d 1042, 1046 (5th Cir.1985), *cert. denied*, 476 U.S. 1182, 106 S.Ct. 2915, 91 L.Ed.2d 544, *rehearing denied*, 478 U.S. 1031, 107 S.Ct. 11, 92 L.Ed.2d 767 (1986) ("a false statement or document [is] one 'made or used if it is untrue and is then known to be untrue'."); *United States v. Federbush*, 625 F.2d 246, 255 (9th Cir.1980) ("false … if known to be untrue or made with reckless indifference as to its truth or falsity"); *United States v. Olson*, 576 F.2d 1267, 1272 (8th Cir.), *cert. denied*, 439 U.S. 896, 99 S.Ct. 256, 58 L.Ed.2d 242 (1978) ("Information is false if it was untrue when furnished and was then known to be untrue by the person furnishing it.").

[18] State of Maine Presidential Primary Consent Form (emphasis supplied).

Three (discussed below), and even assuming for the sake of argument that Section Three applies, the Challengers' allegations would be irrelevant in this Section 336 proceeding because they would not render anything in President Trump's declaration (or even his statement) false. The above italicized words of the qualification portion of the statement cannot be fairly read to include any representation by President Trump concerning either Fourteenth Amendment disqualification or allegedly twice-elected status.

To the contrary, the qualifications portion of the statement is a narrowly drawn phrase limited to a certification that the candidate meets "the qualifications to hold this office *as listed above*." (Emphasis added). Interpretation of a document "start[s] with the language,"[19] and the one-page consent form could not be clearer about what the words "meet the qualifications to hold this office as listed above" mean. The words state "as listed above," and sure enough immediately above the declaration and statement portion of the form is a list of "Qualifications of President of the United States." That list—located above the statement—lists the three eligibility qualifications specified by Article II, Section 1 of the United States Constitution: one must (1) "Be a natural born U.S. citizen," (2) "Have been a resident of the United States for at least 14 years," and (3) "Be at least 35 years of age." This constitutes the only list on the form. Thus, the "qualifications to hold this office as listed above" are the three qualifications—and only those three qualifications—contained in that list that appears above.

President Trump's declaration and statement are true, not false. The only challenged portion—that he "meet[s] the qualifications to hold this office as listed above"—is

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[19] *Scott v. Fall Line Condominium Ass'n*, 206 A.3d 307, 311 (Me. 2019).

undisputedly true, and the *Ruling* does not contest that President Trump meets each of the Article II qualifications listed on the form. The qualifications "as listed above" do not include—and therefore the declaration and statement does not ask candidates to swear—that a person has not been disqualified under the Fourteenth Amendment or whether they have not been elected President of the United States twice before. As a result, regardless of the truth of the Challengers' claims regarding those issues, the qualifications portion of President Trump's declaration and statement is true on its face and provides no basis for a challenge under Section 336.

Unsurprisingly, given the plain meaning of the word "false" discussed above—"either untrue or intentionally untrue"—it is well-settled that a true certification cannot be "false" as a matter of law. For example, in *United States v. Gatewood*, the government contended that when Gatewood "certified that he had made payments to subcontractors and suppliers from previous payments made under a contract," his certification was false because he "had not made *full* payment to the subcontractors and suppliers from previous payments received from the United States Navy."[20] The Sixth Circuit rejected that claim as a matter of law, holding that because the certification that the defendant had signed was true, "the instant case is 'premised on a statement which on its face is not false.'"[21] The problem with the government's case in Gatewood—just like the underlying challenge here—is that the language of the certification simply did not require the person certifying it to attest to the

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[20] *United States v. Gatewood*, 173 F.3d 983, 987 (6th Cir. 1999)(emphasis supplied).

[21] *Id.* at 987.

facts that the complaining party contended were untrue. Thus, the court reasoned "[h]ere, the root of the problem lies in the certification itself, which could have been more artfully drafted. If the Navy had wanted to be sure that all payments then due the subcontractors had been made, it should have drafted the certification to reflect that desire."[22] By the same token, if the declaration (or statement) at issue here had been meant to encompass either of the issues raised by the Challengers it could—and should—have said so. It didn't. And as a result, the merits of the challengers' allegations have no bearing on the falsity *vel non* of President Trump's declaration. The Secretary's *Ruling* is beyond the scope of her authority as delegated by the legislature.

i. "As listed above" is a limitation, not an expansive catch-all

The Secretary's *Ruling* contravenes the plain text of Section 336 for two additional reasons. First, the Secretary claims that the word "as" is significant because "[i]ts presence...underscores that the qualifications are listed on the consent form as a convenience."[23] This argument is too cute by half.

This interpretation ignores the requirements of Section 336, which impose a duty upon the Secretary to list all qualifications; "[t]he Secretary of State shall provide a form on

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[22] *Id.*, *accord, e.g., United States v. Good*, 326 F.3d 589, 591-92 (4th Cir. 2003) (holding that a defendant who had denied committing certain specified crimes listed on an employment application had not made a false statement as a matter of law because embezzlement, the crime for which she had been convicted, was not one of the crimes listed on the form even though it was a crime that would have disqualified her from employment had it been disclosed); *cf. Stevens v. Moore*, 73 Me. 559, 563 (Me. 1882) ("For aught that appears the representations may be literally true, and if so, there can be no fraud in making them...").

[23] *Ruling* at 13.

which the consent of the candidate is made *that must include a list of the statutory and constitutional requirements of the office sought by the candidate.*"[24] The statute does not give the Secretary discretion to misleadingly list some, but not all, of the qualifications for office. In short, the statute requires the Secretary to provide a list of qualifications, but in her *Ruling* she now argues that she violated her statutory obligation by providing an incomplete list, designed merely to illustrate several examples, rather than all qualifications.

In context, the purpose of this requirement is straightforward; Section 336(3) requires a candidate to verify in his or her statement that he or she meets the qualifications for office "by oath or affirmation before a notary public or other person authorized by law to administer oaths or affirmations,"[25] presumably under penalty of perjury for a knowingly false statement.[26] A list of required qualifications ensures that candidates make an informed oath and truthfully swear to the requirements as set forth on the form promulgated by the Secretary. A list of *required* qualifications cannot be permitted to omit some of those required qualifications, subjecting candidates to the risk that they will inadvertently make a false statement based on requirements found nowhere on the Secretary's form. It would be neither fair nor reasonable for the Secretary to prepare a misleading oath by pointing to a list of three qualifications, and then later revealing as a surprise that those three qualifications

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[24] Section 336(1) (emphasis supplied).

[25] Section 336(3).

[26] *See* 17-A.M.R.S. § 451(1) (defining perjury to include "[i]n any official proceeding, a false material statement under oath or affirmation, or swears or affirms the truth of a material statement previously made, and he does not believe the statement to be true.").

were incomplete. The Secretary's interpretation defeats the purpose of having a list in the first place and would be grossly unfair to candidates. For this reason, the Secretary is estopped from arguing that she violated her statutory obligations and that a candidate who reasonably relied upon the form she promulgated should be penalized for her violation.[27]

Second, if "as" when used in "as listed above" instead were to instead mean "such as" (for example, "such as listed above"), then the inclusion of the phrase "listed above" would be pure surplusage. The sentence could properly simply read "I meet the qualifications to hold this office" and have the same meaning. It would merely repeat: (1) the document's title "Presidential Primary Candidate's Consent"; (2) the title of the list that appears just above the declaration: "Qualifications of President of the United States"; and (3) the opening words of the declaration and statement, which require the candidate to "declare my intent to be a candidate for the Office of President of the United States and participate in the Presidential Primary." In short, because those three phrases respectively make clear that (1) the form itself relates only to candidates for President; (2) the list of qualifications relates only to Presidents; and (3) the declaration and statement relates only to a candidacy for the Presidency. Accordingly, the words "as listed above" would serve no purpose whatsoever if they merely referred, in a generalized sense, to the office of the Presidency.

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[27] *See, e.g., Fortney & Weygandt, Inc. v. Lewiston DMEP IX, LLC*, 2019 ME 175, ¶ 16, 222 A.3d 613, 619 (equitable estoppel "precludes a party from asserting rights which might perhaps have otherwise existed, against another person who has in good faith relied upon [the party's] conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right.")(cleaned up).

By contrast, by referring to the only list in the document —a list of qualifications— President Trump's reading of the words "as listed above" properly assigns those words a unique and sensible function: to refer to the qualifications set forth by the Constitution's Qualifications Clause, by reference to the list on the page. Indeed, when creating the form the Secretary's office reasonably listed all applicable qualifications, in order to accurately inform candidates of their requirements and to supply a list so that candidates would make a correct and accurate oath before submitting a declaration and statement under penalty of perjury.

Third, the Secretary's proposed reading does not comport with ordinary English usage of the word "listed," because it ignores the only list on the page. As the Minnesota Supreme Court has explained:

> [T]o be "listed" means to be included or incorporated in a list, and a "list" is a series or number of connected names, words, or other items written or printed one after another. *E.g., The American Heritage Dictionary of the English Language* 1024 (5th ed. 2011) (defining the verb "list" as "[t]o make a list of; itemized" and a "list" as a "series of names, words, or other items written, printed, or imagined one after the other"); *New Oxford American Dictionary* 1019 (3d ed. 2010) (defining the verb "list" as "to make a list of" or to "include or enter in a list" and a "list" as "a number of connected items or names written or printed consecutively, typically one below the other"); *Webster's Third New International Dictionary* 1320 (2002) (defining "listed" as "incorporated in a list" and a "list" as "a simple series of words or numerals" or an "index, catalog, checklist").[28]

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[28] *State v. Carson*, 902 N.W.2d 441, 445 (Minn. 2017); *accord, e.g., State v. Soto-Perez*, 192 Ariz. 566, 568, 968 P.2d 1051, 1053 (Ct. App. 1998) ("The word 'listed' means 'incorporated in a list....*Webster's Third New Int'l Dictionary* 1320 (1971)."), *overruled on other grounds by State v. Perrin*, 222 Ariz. 375, 214 P.3d 1016 (Ct. App. 2009).

The office of President is not "listed" on the page. It is instead "identified" or "named." Even if either of those words been used in place of listed the Secretary's argument still would not make sense, because her reading also ignores the use of the word "as." No one fluent in English would reasonably write "the office as named above," (rather than "the office named above") and accordingly the word "named" cannot be substituted for the word "listed." But the actual declaration uses the word "listed," not a different word.

Lastly, the Secretary's strained effort to manufacture ambiguity fails. "Document language is ambiguous if it is *reasonably* susceptible to different interpretations."[29] Ambiguity is to be determined from the perspective of "an ordinary or average person."[30] Language is interpreted according to its "generally prevailing meaning,"[31] and a court should not "strain to find ambiguity."[32] "[C]anons of construction require that a document be construed to give force and effect to all of its provisions."[33] And Maine courts will "avoid an

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[29] *Champagne v. Victory Homes, Inc.*, 897 A.2d 803, 805-06 (Me. 2006) (emphasis supplied).

[30] *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 34 (1st Cir. 2001) (applying Maine law).

[31] *Guilford Trans. Indus. v. Pub. Utils. Comm'n*, 746 A.2d 910, 914 (2000) (quoting Restatement (Second) of Contracts § 202(3)(A) (1981)).

[32] *Barrett Paving Materials, Inc. v. Cont'l Ins. Co.*, No. CIV. 04-61-BS, 2005 WL 2877742, at *11 (D. Me. Nov. 1, 2005) (citing *Langer v. United States Fid. & Guar. Co*, 552 A.2d 20, 22 (Me. 1988), report and recommendation adopted, No. CIV. 04-61-B-S, 2006 WL 287951 (D. Me. Feb. 1, 2006), *aff'd*, 488 F.3d 59 (1st Cir. 2007); *accord City of Augusta v. Quirion*, 436 A.2d 388, 394 (Me. 1981) (a document's plain language should not be "stretched or tortured to provide meaning sufficient" to advance one party's interpretation).

[33] *Acadia Ins. Co. v. Buck Const. Co.*, 756 A.2d 515, 517 (Me. 2000).

interpretation that renders meaningless any particular provision."[34] Indeed, an interpretation that renders portions of a document redundant or superfluous "is not reasonable."[35]

The words "qualifications...as listed above," in conjunction with the fact that the document contains only a single list which is explicitly labeled a list of qualifications, leaves no room for doubt in any "ordinary or average reader" that the phrase "as listed above" refers to the list of qualifications that appears immediately above it. No ordinary or average reader could find the Secretary's reading of the form anything but absurd.

In short, the natural reading of the consent form is that a candidate attests that he or she meets the qualifications that are set forth above. The Secretary's strained interpretation of the word "as" is incorrect.

ii. A Section 336 challenge is an inappropriate vehicle to challenge the sufficiency of the consent form.

The Secretary claims that because she has a duty to list qualifications on the consent form, she has an independent obligation to assess candidate qualifications regardless of the text of the consent form.[36] She further claims that "[a]ny alternative interpretation would suggest that [she] can pick and choose which qualifications are applicable in designing a candidate consent form."[37] This straw-man argument disregards the plain text of the statute and conflates two separate questions.

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[34] *SC Testing Tech., Inc. v. Department of Envtl. Protection*, 688 A.2d 421, 424 (Me.1996).

[35] *Dow v. Billing*, 224 A.3d 244, 251 (Me. 2020).

[36] *See Ruling* at 12-13.

[37] *Id.*

As discussed above, Section 336 is explicitly limited to assessing whether "any part of the declaration is found to be false." That is it. It does not include an independent authority to assess other potentially relevant criteria no matter what the text of the consent form signed by the candidate actually read.

Whether a candidate's consent form is "false" is a distinct question from whether the Secretary properly promulgated the consent form in the first place. The Secretary is correct that she does not have authority under state law to pick and choose which qualifications are applicable in designing a consent form.[38] If the Secretary believes that the list of qualifications on the consent form was incomplete, then it is her duty under state law *to correct the form going forward.* But she cannot use the Section 336 challenge process to punish President Trump for her own failures.

And the Secretary cannot use an expedited administrative proceeding to impose new and heretofore unknown qualifications on candidates for office *after* candidates have filed their petitions and consented to appear on the ballot in conformity with state procedures. President Trump truthfully answered the questions that were asked of him by the Secretary on the consent form promulgated by the Secretary, and that is all that may be adjudicated in the Section 336 process.

The Maine Legislature has not authorized the Secretary to uphold a challenge on any basis other than falsity of the "declaration." It is undisputed that President Trump's "declaration" —the declaration that the Secretary promulgated and required him to sign—

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[38] Though, as discussed below, claiming this authority may run afoul of *federal* law. Moreover, this does not address whether a potential *disqualification* under Section Three of the Fourteenth Amendment is properly considered a *qualification* for purposes of Section 336.

(and for that matter the statement as well) is true and therefore cannot be false as a matter of law. The Secretary's Ruling is contrary to law and must be reversed and vacated.

II. President Trump's procedural due process rights were violated by the lack of an impartial administrative adjudicator and the compressed timeline.

A. The right to Due Process guarantees an unbiased adjudicator.

While there are some decisions from the Law Court on bias, the law in Maine is not very well developed, and it conflicts with the decisions of the United States Supreme Court. For example, the Law Court has stated that to show bias, a litigant must overcome a presumption that the state administrator acted in good faith.[39] In contrast, the United States Supreme Court has concluded that there need not be a showing of actual bias.[40] Accordingly, this case presents an opportunity for the Maine courts to clarify the applicable standards and, as they must, to harmonize Maine cases with the requirements of due process as set forth by the Supreme Court. But whichever standard is used, there is plentiful evidence in the record showing unequivocal statements by the Secretary demonstrating that she had prejudged key legal and factual issues in this matter, necessitating the need for a reversal and remand.

Due process requires an unbiased judge or adjudicator.[41] The Due Process Clause protects against actual bias, and it also protects a party even when one does not show actual

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[39] *See, e.g., Friends of Maine's Mountains v. Bd. of Envtl. Prot.*, 2013 Me. 25, ¶ 23.

[40] *See, e.g., Rippo v. Baker*, 580 U.S. 285, 287 (2017).

[41] *Id.*; *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016); *see also Lane Const. v. Town of Washington*, 2008 Me. 45, ¶ 29; 5 M.R.S. § 9063(1).

bias, but nonetheless "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."[42] Under this standard, "[t]he Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias."[43] In addition, in *Withrow v. Larkin*, the Supreme Court stated that "not only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent *even the probability* of unfairness."[44]

The Due Process Clause "applies to administrative agencies which adjudicate as well as to courts."[45] "In an agency proceeding, parties have a right to an impartial presiding officer."[46] In situations where the potential for actual bias is too high to be constitutionally tolerable, the due process clause requires the judge or decisionmaker to recuse herself.[47]

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[42] *Id.* (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

[43] *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). The Court also noted that in cases where a judge's impartiality is in question, the judge is also subject to more "stringent and detailed ethical rules." *Id* at 12.

[44] *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) (emphasis supplied) (internal quotations omitted).

[45] *Id.* at 47 (1975); *see also Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) ("'[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.'" K. Davis, Administrative Law Text § 12.04, p. 250 (1972)); 5 M.R.S. § 9063(1).

[46] *AquaFortis Assocs., LLC v. Me. Dep't of Envtl. Prot.*, 2018 Me. Super. LEXIS 36, *21 (citing 5 M.R.S. §§ 9062, 9063 and *Sevigny v. City of Biddeford*, 344 A.2d 34, 40 (Me. 1975)); *see also Gorman v. Univ. of R.I.*, 837 F.2d 7, 15 (1st Cir. 1988) ("an impartial and independent adjudicator 'is a fundamental ingredient of procedural due process'" . . . a quasi-judicial board "presupposes the indispensable prerequisites of integrity and objectivity").

[47] *Rippo*, 580 U.S. at 286; *see also Sevigny v. Biddeford*, 344 A.2d 34, 40 (Me. 1975) (holding that the mayor did not have "the requisite freedom from bias and prejudgment"

Courts have concluded that where a hearing officer makes public comments on a case before the agency or has shown prejudgment on the facts or issues before the court, there is bias requiring reversal. For example, in *Cinderella Career & Finishing Schools, Inc. v. FTC,* the D.C. Circuit Court of Appeals reversed an agency decision where one of the commissioners had made public comments giving the appearance that the case has been prejudged. The court's disqualification test looked to whether a disinterested observer could conclude that the agency had, in some measure, adjudged the facts as well as the law of a particular case in advance of hearing it.[48]

The present case is far more egregious than the *Cinderella* case, as Secretary Bellows made several statements showing that she already possessed well-ingrained opinions on the facts and legal issues in this case prior to the hearing, and she further had close relationships with two of the Challengers. All this she failed to disclose.

B. Secretary Bellows prejudged this case and made biased remarks about the ultimate issues in controversy.

Secretary Bellows prejudged the case, commented on the factual and legal issues to be determined, and engaged in repeated conduct which from an objective perspective indicates a strong probability of actual bias.

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and that "the Mayor's failure to recuse, in spite of valid objections to his role as presiding officer, so prejudiciously tarnished the entire removal hearing as to deny to the plaintiff his right to procedural due process.").

[48] *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970); *see also New Eng. Tel.& Tel. Co. v. Pub. Util. Comm'n*, 448 A.2d 272, 280 (Me. 1982) (approving the *Cinderella* decision and stating that bias is shown when it appears that the agency has prejudged the facts or issues before it).

First, on February 13, 2021, Secretary Bellows issued a public statement on Twitter (since renamed X) which stated in full:

> The Jan 6 insurrection was an unlawful attempt to overthrow the results of a free and fair election. Today 57 Senators including King & Collins found Trump guilty. That's short of impeachment but nevertheless an indictment. The insurrectionists failed, and democracy prevailed.[49]

Second, also on February 13, 2021, the Secretary followed up on her own tweet. Referring to the impeachment vote, she stated:

> Not saying not disappointed. He should have been impeached. But history will not treat him or those who voted against impeachment kindly.[50]

Third, on January 6, 2022—one year after the events of January 6, 2021—the Secretary further endorsed the view that the events on January 6, 2021, constituted an insurrection from which democratic governance needed protection. Specifically, she tweeted about a media report about her efforts to "protect" election officials, ballot and voting machine integrity:

> One year after the violent insurrection, it's important to do all we can to safeguard our elections.
>
> WMTW TV @WMTWTV Jan 6, 2022
> Maine secretary of state seeks to protect election officials, ballot and voting machine integrity.[51]

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[49] R. 824.

[50] R. 825.

[51] R. 824.

There is also additional evidence that the Secretary was well acquainted with the challengers, specifically Ethan Strimling and Thomas Saviello. Strimling and the Secretary were both executives at the same company at the same time. Moreover, Saviello claims to know the Secretary very well personally. This information is being contemporaneously submitted pursuant to Rule 80C(e) in the Motion to Supplement the Record. These facts should have been disclosed by the Secretary prior to the December 15, 2023 hearing. Each of these facts shows troubling bias. The Secretary made explicit comments on the ultimate factual and legal issues prior to the hearing, and she even stated that history would not kindly treat those who disagreed with her. Under any reasonable standard for bias, these statements and relationships show actual bias about the very matters before the Secretary in this case, tainting the proceeding, and creating a deprivation of procedural due process.

C. Secretary Bellows should have disclosed her statements and relationships, which would have afforded President Trump the opportunity to object before the hearing.

When President Trump's counsel learned of these remarks—less than two weeks after this highly expedited challenge was filed—counsel promptly filed a motion with the Secretary asking her to disqualify herself from this matter. The Secretary denied the motion as untimely and based her decision on 5 M.R.S. § 9063(1).

The statute in question, however, dictates that a timely charge of bias shall be determined and made part of the record. The charge of bias was timely in this case as it was made before the decision was announced. Moreover, considering the extremely compressed deadlines in this case, it was unreasonable to require the President to make a motion to disqualify within days—perhaps hours—of being notified of the challenge. And one does

not waive or lose due process protections by failing to immediately object to a biased adjudicator. The fair administration of justice requires an impartial adjudicator; it does not rely on artificially-compressed timelines to lodge an objection, particularly when the Secretary in this case failed to disclose her strong, public comments.

And placing the burden on President Trump to investigate and expose the Secretary's actions and current relationships ignores the Secretary's obligation to discharge her duties in a transparent, fair manner. The Secretary should have raised this issue herself without the necessity of a motion. "Prompt recusal of a decision maker from a position of influence over administrative decision-making can effectively eliminate any opportunity for an individual with a potential conflict of interest to taint the proceedings."[52]

Nonetheless, the Secretary also concluded that even had the motion had been timely, she would have ruled that she "could preside over this matter impartially and without bias."[53] Indeed, this case amply demonstrates that "[b]ias is easy to attribute to others and difficult to discern in oneself."[54] The Secretary misapplied the legal standard articulated by the U.S. Supreme Court. The standard does not depend merely on whether the Secretary actually acted in a biased manner, but it also includes whether the Secretary's conduct, from an objective perspective, constituted the probability of actual bias.[55] Here, there is little

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[52] Macirowski, *A Practical Guide to Superior Court Practice in Maine*, § 9.2.4 (Humphrey & Robitzek eds., 2015 & Supp. 2020) (citing *Maquoit Bay, LLC v. Dep't of Marine Res.*, 2022 ME 19, ¶ 22, 271 A.3d 1183).

[53] *Ruling* at 4-5.

[54] *Williams*, 579 U.S. at 8.

[55] *Rippo*, 580 U.S. at 287.

doubt that the Secretary harbored a deep bias against President Trump and prejudged this matter. The Secretary made multiple public comments in which she took a pointed and forceful position on the very issues raised by the Challengers. And every one of her comments matched the Challengers' position. Accordingly, at a *minimum*, this Court should find that the Secretary's prior comments and conduct constituted the probability of actual bias which has exceeded the constitutional threshold. Moreover, the Secretary's comments reveal actual bias. The Secretary pre-judged this matter, through a string of comments over the course of eleven months. Any reasonable observer should be deeply disturbed by the Secretary's obvious bias.

The Secretary should have admitted her bias, recused herself, and transferred her responsibility to an impartial deputy, to fairly resolve the challenge.

D. A judge or prospective juror who had made the same comments as the Secretary would be required to be recused.

Our justice system requires judges and jurors to be fair and impartial. The same standards should apply to the Secretary. For example, the Code of Conduct for United States Judges and the Maine Code of Judicial Conduct both dictate that judges recuse themselves for the appearance of bias as well as actual bias stemming from public statements prejudging a matter appearing before them. Similarly, a judge who held close relationships with the parties would also likely recuse himself or herself.

While the Code of Conduct for United States Judges and the Maine Code of Judicial Conduct do not explicitly govern the Secretary, the same due process protections apply

when the Secretary acts in a judicial capacity. Code of Conduct for United States Judges provides that "[a]n appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired.... A judge must avoid all impropriety and appearance of impropriety."[56]

Similarly, in Cannon 3 the Code of Conduct for United States Judges, the rules provide that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." This includes where "(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding," and where "(e) the judge has ... expressed an opinion concerning the merits of the particular case in controversy."[57]

Moreover, if any Superior Court judge encountered a prospective juror who (1) had preconceived judgments of what had happened in the case, (2) made strident public statements regarding the factual and legal issues in dispute, or (3) was friends with a party, there can be no doubt that such judge would excuse the prospective juror without the need for a preemptory challenge. Here, the Secretary met all three conditions.

This further reinforces the point that Secretary Bellows should have recused herself in the first instance without the necessity of a motion to be filed by the Petitioner. If a

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[56] Code of Conduct for United States Judges, Canon 2A; *see also* Maine Code of Judicial Conduct, Rule 1.2.

[57] Code of Conduct for United States Judges, Canon 2A; *see also* Maine Code of Judicial Conduct, Rule 2.11(A)(1, 3, 4).

prospective judge or juror who had made these statements would not be allowed to serve as an arbiter in this case, then neither should the Secretary.

E. The compressed hearing timeline did not afford President Trump adequate due process.

The United States Supreme Court has recognized that the liberty interests affected by ballot access restrictions "rank among our most precious freedoms."[58] Accordingly President Trump must be afforded due process before being stripped of his right to run for office. The "fundamental requirement of due process is that a party must be given notice and an opportunity to be heard.[59]

In determining whether a "hearing must be granted at a meaningful time and in a meaningful manner"[60] this Court employs a balancing test:

> That test requires us to consider three distinct factors to determine whether the administrative procedures provided [] are constitutionally sufficient to protect an individual's due process rights:
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> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[61]

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[58] *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983), *quoting Williams v. Rhodes*, 393 U. S. 23, 393 U. S. 30-31 (1968).

[59] *Doe v. HHS*, 2018 ME 164, ¶ 15, *citing Kirkpatrick v. City of Bangor*, 1999 ME 73, ¶ 15, 728 A.2d 1268; *Martin v. Unemployment Ins. Comm'n*, 1998 ME 271, ¶ 15, 723 A.2d 412.

[60] *Kirkpatrick*, 1999 ME 73, ¶ 15, 728 A.2d 1268 (quotation marks omitted).

[61] *Doe v. HHS*, 2018 ME 164, ¶ 17 (quotations and citations omitted).

Here, the process employed by the Secretary violated President Trump's due process rights. First, this matter affects "our most precious freedoms." Namely, it affects the right of Maine citizens to vote for their presidential candidate of choice, as well as the President Trump's right to garner votes and support in Maine. This democratic process is the cornerstone of American governance, and the Secretary's actions have denied Maine voters a critical and important choice.

Second, the risk of an erroneous deprivation is overwhelming. President Trump had less than three days to learn about and prepare for a hearing in this matter. And the time necessary to engage counsel, learn about the specifics of this case, and physically appear at the hearing meant that President Trump's counsel realistically had less than a day to prepare. Meanwhile, the Challengers entered approximately six thousand pages into the record, plus videos. President Trump's counsel did not have an opportunity to review this evidence until after the hearing. And although the Challengers included evidence from the Colorado proceeding, they excluded *all* of the evidence submitted by President Trump in that hearing – something that counsel did not learn until after the Secretary had concluded the hearing. And it was wholly unreasonable for counsel to supplement the record in the impossibly short timeframe available.

It is difficult to imagine a proceeding that could afford *less* notice and meaningful opportunity to be heard: Mere days' notice. The inability to fully review Challengers' evidence until *after* the hearing. And inadequate time to identify and assemble evidence, including witnesses and exhibits outside of what those submitted by the Challengers. As a

point of comparison, the Secretary allowed President Trump four days' notice prior to the hearing, while she herself took more than three times as long – 13 days -- to issue her *Ruling*.

The risk that the Secretary erroneously deprived President Trump of his rights is not merely high – it is overwhelming. In Colorado the trial court allowed 54 days, and even then that timeline drew a scathing dissent. As Justice Samour recognized in his dissent from the majority opinion in *Anderson*, "the truncated procedures and limited due process provided by [Colorado law] are wholly insufficient to address the constitutional issues currently at play."[62] He properly labelled the Colorado hearing a "procedural Frankenstein"[63] where President Trump was subjected "to the substandard due process of law:"[64]

> There was no basic discovery, no ability to subpoena documents and compel witnesses, no workable timeframes to adequately investigate and develop defenses, and no final resolution of many legal issues affecting the court's power to decide the Electors' claim before the hearing on the merits.
>
> There was no fair trial either: President Trump was not offered the opportunity to request a jury of his peers; experts opined about some of the facts surrounding the January 6 incident and theorized about the law, including as it relates to the interpretation and application of the Fourteenth Amendment generally and Section Three specifically; and the court received and considered a partial congressional report, the admissibility of which is not beyond reproach.[65]

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[62] *Anderson v. Griswold* at ¶ 330 (Samour J. dissenting).

[63] *Id.* at ¶ 339.

[64] *Id.* at ¶ 276.

[65] *Id.* at ¶¶ 340-341.

In sum, Justice Samour scathingly criticized the proceedings in Colorado: "I have been involved in the justice system for thirty-three years now, and what took place here doesn't resemble anything I've seen in a courtroom."[66] "[W]hat transpired in this litigation fell woefully short of what due process demands."[67] "How is this result fair? And how can we expect Coloradans to embrace this outcome as fair?"[68]

This was criticism levelled at a five day hearing, scheduled 54 days after the complaint, conducted by a court of law. Here, the Secretary allowed *four* days' notice and a one day hearing.

Finally, the governmental interest in allowing scant notice is highly limited, while the governmental interest in ensuring open ballot access is high. And the Secretary could easily have afforded President Trump additional time. The administrative burden would have been slight.

A. The proper remedy is to vacate and remand for re-adjudication.

This Court should vacate the Secretary's *Ruling* and remand the matter for a fair and impartial rehearing. "When the objective risk of actual bias on the part of a judge [or decisionmaker] rises to an unconstitutional level, the failure to recuse cannot be deemed harmless."[69] When the probability of actual bias has exceeded the constitutional threshold,

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[66] *Id.* at 342.

[67] *Id.* at ¶ 278.

[68] *Id.* at ¶ 346.

[69] *Williams*, 579 U.S. at 16.

Courts have not hesitated to vacate the decision and remand the matter to be re-adjudicated.[70] Accordingly, the Petitioner requests that this court vacate and remand the decision to be decided by a neutral factfinder.

III. Disqualification of a Presidential candidate presents a question reserved for the Electoral College and Congress, not a state election official.

Congress—not a state court nor administrative hearing before a Secretary of State—is the proper body to resolve questions concerning a presidential candidate's eligibility. The U.S. Supreme Court established broad categories for what are nonjusticiable political questions:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; [and 6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[71]

Courts in Maine have looked to the *Baker* factors to determine whether a question presented in state court is a nonjusticiable political question.[72]

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[70] *See Rippo*, 580 U.S. at 287 (vacated and remanded as the Nevada Supreme Court applied the wrong legal standard when they determined there was no actual bias, rather than the probability of actual bias); *Williams v. Pennsylvania*, 579 U.S. 1 (vacated and remanded when the Chief Justice of the Pennsylvania Supreme Court failed to recuse himself); *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970) (vacated and remanded when the administrative adjudicator made public comments referring to a case before the administrative agency which constituted the probability of actual bias).

[71] *Baker v. Carr*, 369 U.S. 186, 217 (1962).

[72] *See, e.g., Swayer v. The Legislative Council*, Case No. CV-04-97, 2005 WL 2723817 (ME Sup. Ct. Mar. 16, 2005); *see also generally Maine Senate v. Secretary of State*, 183 A.3d 749 (2018) (applying political question doctrine).

Unlike in *Swayer* and *Maine Senate*, which involved questions of state law and the Maine Constitution, this case presents questions of *federal* constitutional law. "[I]n the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority" under the federal Constitution."[73] "It is no original prerogative of state power to appoint a representative, a senator, or a president for the union."[74] Neither Congress nor the federal Constitution give the Secretary of State of Maine authority to resolve questions of disputed presidential qualifications.

First, there is a textually demonstrable constitutional commitment to Congress to resolve questions regarding presidential qualifications. The Constitution expressly provides that:

> [I]f the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.[75]

Similarly, both Article II and the Twelfth Amendment prescribe a role for Congress in Presidential elections.[76] Section Three embodies a clear textual commitment of authority to

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[73] *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000).

[74] *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (quoting 1 Story § 627).

[75] U.S. Const. amend. XX, § 3.

[76] U.S. Const. art. II, cl. 3; *id.* at amend. XII.

Congress, giving it the power to lift any "disability" under Section Three.[77] And Section Five of the Fourteenth Amendment expressly provides that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[78] Were this Court to prevent President Trump from appearing on the ballot, it would interfere with this mechanism. Responsibility for the enforcement of Section Three is vested by the Constitution in Congress—and only in Congress. This case therefore presents a nonjusticiable political question.

Given this textual commitment, it is little surprise that both the United States District Court for the District of New Hampshire and the Michigan Court of Claims have recently held that questions of President Trump's alleged disqualification under Section Three present a nonjusticiable political question.[79] "[T]he vast weight of authority has held that the Constitution commits to Congress and the electors the responsibility of determining matters of presidential candidates' qualifications."[80] Previously, the Third Circuit observed that a challenge to the qualifications of then-candidate Obama (based on his nationality) was a

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[77] U.S. Const. amend. XIV, § 3.

[78] *Id.* at § 5.

[79] *See Castro v. N.H. Sec'y of State*, Case No. 23-cv-416-JL (D.N.H. Oct. 27, 2023) *aff'd on other grounds* -- F.4th --, 2023 WL 8078010 (1st Cir. Nov. 21, 2023); *LaBrant v. Benson*, Case No. 23-000137-MZ at 10-20 (Mich. Ct. Cl. Nov. 14, 2023) (attached as **Exhibit B**), *aff' on other grounds* Case No. 368628 (Mich. Ct. App. Dec. 14, 2023) (per curiam);*Trump v. Benson*, Case No. 23-000151-MZ at 14-26 (Mich. Ct. Cl. Nov. 14, 2023) (attached as **Exhibit C**).

[80] *Castro* at 19 (footnote omitted).

political question not within the province of the judiciary.[81] Multiple district courts have reached the same conclusion.[82]

State courts have largely agreed.[83] This includes two substantially similar decisions

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[81] *See Berg v. Obama*, 586 F.3d 234, 238 (3d Cir. 2009).

[82] See *Grinols v. Electoral College*, No. 2:12–cv–02997–MCE–DAD, 2013 WL 2294885, at *6 (E.D. Cal. May 23, 2013) (dismissing a challenge to President Obama's qualifications for office, stating, "the Constitution assigns to Congress, and not to federal courts, the responsibility of determining whether a person is qualified to serve as President of the United States. As such, the question presented by Plaintiffs in this case—whether President Obama may legitimately run for office and serve as President—is a political question that the Court may not answer."); *Taitz v. Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373 (S.D. Miss. Mar. 31, 2015) (noting the presidential electoral and qualification process "are entrusted to the care of the United States Congress, not this court" and that the disqualification claims were therefore nonjusticiable); *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008) ("It is clear that mechanisms exist under the Twelfth Amendment and 3 U.S.C. § 15 for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify. Issues regarding qualifications for president are quintessentially suited to the foregoing process. Arguments concerning qualifications or lack thereof can be laid before the voting public before the election and, once the election is over, can be raised as objections as the electoral votes are counted in Congress. The members of the Senate and the House of Representatives are well qualified to adjudicate any objections to ballots for allegedly unqualified candidates. Therefore, this order holds that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance. Judicial review—if any—should occur only after the electoral and Congressional processes have run their course.").

[83] *See, e.g.*, *Strunk v. New York State Bd. Of Elections*, No. 6500/11, 2012 WL 1205117, *11 (Sup. Ct. Kings County NY Apr. 11, 2012) ("Plaintiff's complaint essentially challenges the qualifications of both President OBAMA and Senator McCAIN to hold the office of President. This is a non-justiciable political question. Thus, it requires the dismissal of the instant complaint."); *Keyes v. Bowen*, 189 Cal.App.4th 647, 660 (2010) ("[R]equir[ing] each state's election official to investigate and determine whether the proffered candidate met eligibility criteria of the United States Constitution, giving each the power to override a party's selection of a presidential candidate" would be a "truly absurd result" because "[w]ere the courts of 50 states at liberty to issue injunctions restricting certification of duly-elected presidential electors, the result could be conflicting rulings and delayed transition of power in derogation of statutory and constitutional deadlines." Accordingly, "[a]ny investigation of eligibility is best left to each party, which presumably will conduct the appropriate background check or risk

issued by the Michigan Court of Claims, which also noted that *Baker* "factors 2, 4, 5, and 6 apply to the instant case."[84] The Michigan court noted that the sheer number of cases concerning presidential qualifications "presents the risk of completely opposite and potentially confusing opinions and outcomes, which will certainly 'expose the political life of the country to months, or perhaps years, of chaos,'" "there is no 'limited and precise rationale' to guide this Court and others that is also 'clear, manageable, and politically neutral,'" and "[b]ecause the cases involve the office of the President, such confusion and lack of finality will be more pronounced."[85]

It would be beyond absurd—particularly in light of the Fourteenth Amendment's enlargement of federal authority—that this issue would be nonjusticiable by federal courts yet properly heard and decided by courts in fifty-one jurisdictions, let alone state election officials, acting unilaterally, in fifty-one jurisdictions. The election of the President of the United States is a national matter, with national implications, that arises solely under the federal Constitution and does not implicate the inherent or retained authority of the states.[86]

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that its nominee's election will be derailed by an objection in Congress, which is authorized to entertain and resolve the validity of objections following the submission of the electoral votes."); *Jordan v. Secretary of State Sam Reed,* No. 12-2-01763-5, 2012 WL 4739216, at *1 (Wash. Super. Aug. 29, 2012) ("I conclude that this court lacks subject matter jurisdiction. The primacy of congress to resolve issues of a candidate's qualifications to serve as president is established in the U.S. Constitution.").

[84] *LaBrant et. al. v. Benson*, Case No. 23-000137-MZ (November 14, 2023), at 15; *Trump* at 19.

[85] *LaBrant* at 18-19; *Trump* at 23 (citations omitted).

[86] *See generally Cook,* 531 U.S. at 552 ("It is no original prerogative of state power to appoint a representative, a senator, or a president for the union.").

Further, in the absence of enforcement legislation adopted under section 5 of the Fourteenth Amendment, courts and state election officials lack manageable standards for resolving disputes over presidential disqualifications. Procedurally, Section Three is silent on whether a jury, judge, or lone state election official makes factual determination and is likewise silent on the appropriate standard of review, creating the prospect of some courts or officials adopting a preponderance of the evidence standard, others a clear and convincing evidence standard, while still others requiring a criminal conviction. Similarly, states have different approaches to voter standing to challenge candidate qualifications. As a result, a voter in one state may be able to challenge a presidential candidate's qualifications, while similarly situated voters in another state cannot. Substantively, the terms "engage" and "insurrection" are unclear and subject to wildly varying standards, as described further below. The result is that fifty-one different jurisdictions may (and have) adopted divergent rulings based on different standards on the same set of operative facts.

Resolving these conflicts requires making policy choices among competing policy and political values. These are fundamentally legislative exercises that are properly suited for Congressional resolution.

Moreover, the result of divergent standards and determinations is particularly problematic in presidential elections. As this Court has recognized, "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest" because "the President and the Vice President of the United States are the only

elected officials who represent all the voters in the Nation" and "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States."[87]

By purporting to exclude President Trump from the ballot, the Secretary has usurped Congress' authority. In response, the Secretary claims that the ability of states to regulate the time, place, and manner of elections provides authority to unilaterally judge disputed presidential qualifications.[88] But "[t]he states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them."[89] Otherwise, states could add their own qualifications to individuals running for President, creating a chaotic environment of conflicting qualifications.[90] While states are delegated some power to impose procedural requirements, such as requiring candidates to "muster a preliminary showing of support" before appearing on the ballot, they cannot add new substantive requirements,[91] even if recast as procedural ballot access conditions.[92] The Secretary lacks authority under the federal Constitution for her ruling.

IV. Section Three of the Fourteenth Amendment is not self-enforcing and requires

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[87] *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983) (footnotes and citations omitted).

[88] As described above, even if the legislature were able to give the Secretary authority to adjudicated disputed disqualifications under Section Three, it has not done so through the Section 336 process.

[89] *U.S. Term Limits,* 514 U.S. at 802 (citation omitted).

[90] *Id.* at 805 (states do not have authority to add qualifications).

[91] *Schaefer v. Townsend*, 215 F.3d 1031, 1038 (9th Cir. 2000).

[92] *Term Limits*, 514 U.S. at 829-35; *Schaefer*, 215 F.3d at 1037-39.

Congressional legislation.

Section Three is not self-executing and thus may not be enforced by state officials or private actors because there is no congressional enforcement legislation currently in existence. The Supreme Court has repeatedly held that Section Five of the Fourteenth Amendment confers exclusive power on Congress to determine "whether and what legislation is needed to" enforce it.[93] "Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective."[94] Thus, absent enforcement legislation—none of which is currently in effect—Section Three allows no state enforcement or private actions.

And it is well-established that the states do not have this same authority to enforce the Fourteenth Amendment. Federal courts have long held that Congress creates exclusive constitutional remedies: The Fifth Circuit held that 42 U.S.C. §1983 is the appropriate vehicle for asserting violations of constitutional rights;[95] the Sixth Circuit ruled "we have long held that § 1983 provides the exclusive remedy for constitutional violations;"[96] the Eighth Circuit

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[93] *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 33 (1991) (Scalia, J., concurring) ("It cannot rightly be said that the Fourteenth "Congress is authorized to enforce the prohibitions by appropriate legislation. Some Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform.").

[94] *Ex parte Va.*, 100 U.S. 339, 345 (1879); *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921) ("[T]he Fourteenth Amendment [does not] furnishe[] a universal and self-executing remedy.").

[95] *Burns-Toole v. Byrne*, 11 F.3d 1270, 1273 n.3 (5th Cir. 1994).

[96] *Foster v. Michigan*, 573 F. App'x. 377, 391 (6th Cir. 2014).

stated that Congress intended 42 U.S.C. §1983 as an exclusive remedy for municipal constitutional violations and "no reason exists to imply a direct cause of action (for such violations) under the fourteenth amendment,"[97] and the Ninth Circuit has found ruled that "a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. §1983."[98]

Section Three's history confirms that enforcement legislation was required before any disqualification could be enforced. In *Griffin's Case*, issued only months after the passage of the Fourteenth Amendment, Chief Justice Salmon Chase, sitting as circuit judge for Virginia, held that only Congress can provide the means to enforce Section Three.[99] He cogently explained why federal legislation was required to implement Section Three's disqualification provision:

> For, in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate. To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable; *and these can only be provided for by congress.*
>
> Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that 'congress shall have power to enforce, by appropriate legislation, the provision of this article.'
>
> There are, indeed, other sections than the third, to the enforcement of which legislation is necessary; *but there is no one which more clearly requires legislation in order to give effect to it.* The fifth section qualifies the third to the same extent as it would if the whole amendment consisted of these two sections. *And the final clause of the third section itself is significant. It gives to congress absolute control of the whole operation of the amendment.* These are its words: 'But congress may, by a vote of

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[97] *Cedar-Riverside Assocs. v. City of Minneapolis*, 606 F.2d 254 (8th Cir. 1979).

[98] *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9thCir. 1992).

[99] *Griffin's Case*, 11 F. Cas. 7, 22 (C.C.D. Va. 1869).

> two-thirds of each house, remove such disability.' Taking the third section then, in its completeness with this final clause, it seems to put beyond reasonable question the conclusion that the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, and to be made operative in other cases by the legislation of congress in its ordinary course.[100]

That case has never been overruled. And it has been affirmed repeatedly.[101]

And it was not questioned by Congress, which promptly enacted the Enforcement Act, granting federal prosecutors (but not state election officials) authority to enforce Section Three by seeking writs of *quo warranto* from federal (not state) courts. They immediately started doing so, until the Amnesty Act of 1898 removed all Section Three disabilities.

There is no authorization statute currently in force. The Enforcement Act was codified as 13 Judiciary ch. 3, sec. 563 and later recodified into 28 Judicial Code 41. But in 1948, Congress repealed 28 U.S.C. § 41 in its entirety.[102] In 2021, legislation to create a cause

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[100] *Id.* at 26 (emphasis added).

[101] *See In re Brosnahan*, 18 F. 62, 81 n.73 (C.C.W.D. Mo. 1883) (McCrary, J., concurring); *Hansen v. Finchem*, 2022 Ariz. Super. LEXIS 5 (Maricopa Cnty. Sup.Ct. 2022) ("Plaintiffs have no private right of action to assert claims under the Disqualification Clause"), *aff'd on other grounds*, 2022 Ariz. LEXIS 168 (Ariz. S.Ct. May 9, 2022); *Rothermel v. Meyerle*, 136 Pa. 250, 254 (1890) (citing *Griffin's Case*, 11 F. Cas. at 26) ("[T]he fourteenth amendment, as indeed is shown by the provision made in its fifth section, did not execute itself."); *State v. Buckley*, 54 Ala. 599, 616 (Ala. 1875) (same); *Cale v. Covington*, 586 F.2d 311, 316–17 (4thCir. 1978) (no implied cause of action under Fourteenth Amendment because it is not self-executing).

[102] *See* Act of June 25, 1948, ch. 646, §39, 62 Stat. 869, 993; Act of June 25, 1948, ch. 645, §2383, 62 Stat. 683, 808.

of action to enforce Section Three, failed.[103] Thus, Congress has not enacted any method for enforcing Section Three.

V. Section Three does not apply to the Presidency because that position is not an "Office Under the United States."

Section Three begins "[n]o person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State . . ." It does not list the presidency. Moreover, it lists offices in descending order, beginning with the highest federal officers and progressing to the catch-all term "any office, civil or military, under the United States." Thus, to find that Section Three includes the presidency, one must conclude that the drafters decided to bury the most visible and prominent national office in a catch-all term that includes low ranking military officers, while choosing to explicitly reference presidential electors. This reading defies common sense and is not correct.

The Constitution creates five positions: President, Vice-President, Senator, Representative, and Presidential Elector; but the plain text of Section Three excludes the President and Vice-President. This omission is controlling. "The expression of one thing implies the exclusion of others."[104]

Next, Section Three uses the disjunctive "or" to create two distinct, separate prohibitions; one may not "be" a Senator, Representative or Elector. Or one may not "hold" any office "under the United States, or a State." The first category identifies specific

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[103] H.R. 1405, 117th Cong. (2021).

[104] Bryan A. Garner & Antonin Scalia, Reading Law, 96-98 (West, 2012).

Constitutional positions. The second refers to offices one "holds." "[N]othing is to be added to what the text states or reasonably implies."[105] The exclusion of the President from the first category cannot imply the opposite—that the most important elected, Constitutional position is implicitly (and silently) included in a generalized, catch-all phrase. To the contrary, the Supreme Court has "often remarked that Congress does not hide elephants in mouseholes by altering the fundamental details of a regulatory scheme in vague terms or ancillary provisions."[106]

Section Three also lists disqualified positions in descending order from the weightiest Constitutional position (Senator) to the lowest (state officers). It is wholly illogical to exclude the most important Constitutional offices in the enumerated list while including them in a general catch-all focused on less important offices.

Legislative history demonstrates that drafters rejected inclusion of the Presidency.[107] Courts properly infer legislative intent by comparing committee drafts to the final language.[108] The first draft began: "No person shall be qualified or shall hold the office of

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[105] *Id.* at 87-91.

[106] *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001) (cleaned up); *Sackett v. EPA*, 143 S. Ct. 1322, 1340 (2023).

[107] *See* Brief of Amicus Curiae Professor Kurt T. Lash in support of Respondent-Appellee and Intervenors-Appellees, *Anderson v. Griswold*, Case No. 2023SA00300 (Colo. 2023) (**Exhibit D**).

[108] *See Nixon v. United States*, 506 U.S. 224, 231-232 (1993) (rejecting second to last draft and relying on the plain textual language); *Lee v. Weisman*, 505 U.S. 577, 613 (1992) (Souter, J., concurring)(looking to sequence of amendments); *Utah v. Evans*, 536 U.S. 452, 474 (2002) (reviewing previous drafts); *District of Columbia v. Heller*, 554 U.S. 570, 604 (2008) (analysis of precursors to amendment); *Id.* at 590n. 12 (Stevens, J. dissenting)(relying on previous draft); *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct.

President or Vice-President of the United States, Senator or Representative in the national congress."[109] Congress consciously removed the office of the President from this list, substituting instead presidential Electors.

Any other inference is speculation. The phrase "any office now held under appointment from the President of the United States, requiring the confirmation of the Senate" was broadened to explicitly include lesser federal offices not subject to Senate consent, and state offices. The counterintuitive inference that the catch-all simultaneously included the higher office of President cannot overcome the decision to remove explicit language identifying the President.

Moreover, to interpret "office under the United States" to include any generic "officer" would mean that the phrase "office under the United States" would also swallow Senators and Representatives. Both are considered generic "officers" in the generic sense, as a matter of binding precedent,[110] as referenced by the Constitution,[111] and as the term is commonly used.[112] Indeed, people commonly refer to Senators and Representatives as

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2141, 2180-2181 (2023) (analyzing Thaddeus Stevens' introduced version of the Fourteenth Amendment); *Evenwel v. Abbott*, 578 U.S. 54, 66 (2016) (same).

[109] Cong. Globe 39th Cong., 1stSess. 919 (1866) (emphasis supplied).

[110] U.S. *Term Limits*, 514 U.S. at 804-805 n.17 ("Constitution treats both the President and Members of Congress as federal officers").

[111] Art. I, § 2, cl. 5 ("[t]he House of Representatives shall chuse their Speaker and other Officers"); Art. I, §3, cl.5 ("[t]he Senate shall chuse their other Officers, and also a President pro tempore").

[112] *Roudebush v. Hartke*, 405 U.S. 15, 28 (1972) (Senators take an "oath of office"); *Powell v. McCormack*, 395 U.S. 486, 570 (1969) (Stewart, J. dissenting) (Representatives take an "oath of office"); *McGrain v Daugherty*, 273 U.S. 135, 156 (1927) (congressional members

"officeholders" and one commonly contacts a Senator's or Representative's "office," which is run by an "officer."

The use of "office under the United States" in Article I refers to appointed federal offices, not the presidency. That clause prohibits a person from first being elected Senator or Representative and then subsequently being appointed federal office at the same time, or likewise holding an office and subsequently becoming a Senator or Representative. Thus, "holding any office under the United States" parallels "being appointed to any civil Office under the Authority of the United States" and properly refers to an office, not an elected President or Vice-President. And the Framers never considered that a person might hold two federal offices simultaneously.

In addition, the amount of evidence that Challengers and their amici have adduced treating Section Three as applying to the presidency is limited, boiling down to a single newspaper article. The other supposed examples they cite are nothing of the sort. For example, an article in the *Gallipolis Journal* did not even refer to the final version of Section Three; it lamented that the proposed amendment would not bar southern leaders from any federal office, not just the presidency.[113] A single sentence in a Milwaukee newspaper claiming that Section Three would disqualify Jefferson Davis from the presidency stands as the sole direct evidence. This one sentence cannot demonstrate electoral knowledge or intent.

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protected by "oath of office"); *Shaffer v. Jordan*, 213 F.2d 393, 394 (9th Cir. 1954) ("office of Representative in Congress").

[113] *Gallipolis Journal*, February 21, 1867.

Section Three responded to the Civil War. Purposeful removal of the Presidency from Section Three was not an error, but entirely rational. The framers had little concern that a former confederate could become President, based on the restrictions on Presidential Electors, the large Northern population base, and the expected voting strength of emancipated slaves. History proves their views correct. Section Three does not restrict the presidency.

VI. Section Three does not apply to President Trump because he has never served as an "Officer of the United States" and has never taken an Article VI "Oath to Support the Constitution."

Similarly, Section Three's disqualification can apply only to those who have "previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States."[114] It is undisputed that President Trump never took such an oath as a member of Congress, as a state legislator, or as a state executive or judicial officer.

The Constitution's text and structure make clear that the president is not an "officer of the United States."[115] The phrase "officer of the United States" appears in three constitutional provisions apart from Section Three, and in each of these constitutional provisions the president is excluded from the meaning of this phrase. The Appointments Clause requires the president to appoint ambassadors, public ministers and consuls, justices

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[114] U.S. Const. amend. XIV, § 3.

[115] *See* Brief submitted by Professor Seth Barrett Tillman as amicus curiae in support of Intervenor-Appellee/Cross-Appellee Donald J. Trump, *Anderson v. Griswold*, Case No. 2023SA00300 (Colo. 2023) (**Exhibit E**).

of the Supreme Court, and "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."[116] The Commissions Clause similarly requires the President to "Commission all the Officers of the United States."[117] The president does not (and cannot) appoint or commission himself, and he cannot qualify as an "officer of the United States" when the Constitution draws a clear distinction between the "officers of the United States" and the president who appoints and commissions them.

The Impeachment Clause further confirms that the president is not an "officer of the United States." It states: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[118] The clause treats President and Vice President separately from "all civil Officers of the United States." There would be no basis to separately list the president and vice president as permissible targets of impeachment if they were to fall with-in the "civil Officers of the United States." If that phrase were to encompasses the president and vice president, then the Impeachment Clause would say that the "President, Vice President and all other civil Officers of the United States" are subject to impeachment and removal.

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[116] U.S. Const. art. II, § 2, cl. 2 (emphasis added).

[117] U.S. Const. art. II, § 3 (emphasis added).

[118] U.S. Const. art. II, § 4 (emphasis added).

Then, there is the textual requirement that Section Three applies only to those who took an oath to "support" the Constitution of the United States—the oath required by Article VI.[119] The president swears a different oath set forth in Article II, in which he promises to "preserve, protect, and defend the Constitution of the United States"—and in which the word "support" is nowhere to be found.[120] The argument that an oath to "preserve, protect, and defend" is just another way of promising to "support" fails, because the drafters of Section Three had before them both the Article VI and Article II oaths, and chose to apply Section Three only to those who took Article VI oaths. And conflating the two oaths would create ambiguity and contradiction, because the president was not understood to be included as an "officer of the United States."

VII. Section Three bars individuals from *Holding* Office, not from being elected to office.

Section Three of the Fourteenth Amendment prohibits individuals only from *holding* office: "No person shall *be* a Senator or Representative in Congress, or elector of President and Vice-President, or *hold* any office, civil or military, under the United States . . ."[121] It does not prevent anyone from *running* for office, or from *being elected* to office, because Congress

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[119] *See* U.S. Const. art. VI, § 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution" (emphasis added)).

[120] *See* U.S. Const. art. II ¶ 8.

[121] U.S. Const. amend. XIV, § 3 (emphasis added).

can remove a Section Three disqualification at any time—and Congress can remove that disability after a candidate is elected but before his term begins.[122]

This distinction makes sense. Even if there is a "disability" under Section Three, it may be lifted by a two-thirds vote of each House. Thus, a putatively disqualified candidate may still appear on the ballot and win election. Indeed, indisputably disqualified candidates have been selected for office. For example, Challengers' witness, Professor Magliocca—who was relied upon by the Secretary in her ruling—referenced Zebulon Vance, who was appointed to be a United States Senator by the North Carolina legislature but prohibited from serving in the Senate. The Fourteenth Amendment did not enjoin or prohibit the North Carolina legislature from selecting Mr. Vance; it merely prohibited him from holding the office of United States Senator.

Similarly, "[u]nder [Section Three Congress has admitted] persons ... who were ineligible at the date of the election, but whose disabilities had been subsequently removed."[123] Moreover, this distinction is reinforced by the Twentieth Amendment, which provides the procedures to identify the President if that disability is not removed.

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[122] *See id.* ("But Congress may by a vote of two-thirds of each House, remove such disability.").

[123] *Smith v. Moore*, 90 Ind. 294, 303 (1883); *see also Privett v. Bickford*, 26 Kan. 52, 58 (1881) (analogizing to Section Three, concluding that voters can vote for ineligible candidates who can only take office once the disability is removed); *Sublett v. Bedwell*, 47 Miss. 266, 274 (1872) ("The practical interpretation put upon [Section Three] has been, that it is a personal disability to 'hold office,' and if that be removed before the term begins... the person may take the office.").

The Ninth Circuit decision in *Schaefer v. Townsend* illustrates this point. The court evaluated California law requiring Congressional candidates to reside in California when filing nomination papers and declared that provision unconstitutional because it added qualifications not found in the Constitution. Namely, that an individual must be an inhabitant of the state "when elected,"[124] which differs from "when nominated" because nonresident candidates can "inhabit" a state after nomination, but before election.[125]

"[T]he states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them."[126] Otherwise, states could add their own qualifications to individuals running for President, creating a chaotic environment of conflicting qualifications.[127] Just like the manner of counting electoral college votes is dictated by federal statute and the Constitution, so too with presidential qualifications. Federal law must reign supreme; states may not add additional qualifications beyond those listed in the Constitution.[128] No precedent permits a

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[124] *Schaefer*, 215 F.3d at 1034.

[125] *Id.* at 1036-37; *accord Greene v. Secretary of State for Georgia*, 52 F.4th 907, 913–16 (11th Cir. 2022) (Branch, J., concurring) ("[B]y requiring Rep. Greene to adjudicate her eligibility under § 3 to run for office through a state administrative process without a chance of congressional override, the State imposed a qualification in direct conflict with the procedure in § 3—which provides a prohibition on being a Representative and an escape hatch.").

[126] *U.S. Term Limits, Inc.*, 514 U.S. at 802 (citation omitted).

[127] *Id.* at 805.

[128] *Id.*

lone state to adjudicate the qualifications of a presidential candidate or a president-elect. That is Congress's role.

VIII. President Trump Did Not "Engage" in "Insurrection"

A. The Events of January 6, 2021, Were Not an "Insurrection"

Section Three was modeled partly on the original Constitution's Treason Clause and partly on the Second Confiscation Act, which Congress had enacted in 1862. Section Two of the Confiscation Act punished anyone who "shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States ... or give aid or comfort thereto."[129]

Section Three, ratified six years later with the rest of the Fourteenth Amendment, similarly covers "insurrection or rebellion." Unlike the Confiscation Act, however, Section Three omits any penalty for 'incit[ing] or "assist[ing]" an insurrection, and it penalizes only actually "engag[ing] in" insurrection.[130]

The year after the Confiscation Act became law, Chief Justice Chase—an appointee of President Lincoln—construed these terms and held the Act prohibits only conduct that "amount[s] to treason within the meaning of the Constitution," not any lesser offense.[131] Indeed, the Chief Justice concluded that not just any form of treason would do: he construed Section 2 of the Act to cover only treason that "consist[ed] in engaging in or

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[129] 12 Stat. 589 & 627 (1862); *see* 18 U.S.C. § 2383.

[130] U.S. CONST. amend XIV, § 3.

[131] *United States v. Greathouse*, 26 F. Cas. 18, 21 (C.C.N.D. Cal. 1863).

assisting a rebellion or insurrection."[132] In the same case, another judge confirmed and clarified that, for these purposes, "engaging in a rebellion and giving it aid and comfort[] amounts to a levying of war" and that insurrection and treason involve "different penalt[ies]" but are "substantially the same."[133] Contemporary dictionaries confirmed this definition. John Bouvier's 1868 legal dictionary defined *insurrection* as a "rebellion of citizens or subjects of a country against its government" and *rebellion* as "taking up arms traitorously against the government."[134]

Congress's immediate post-ratification consideration of Section Three itself reflects the same understanding. In 1870—just two years after the Fourteenth Amendment was ratified—Congress considered whether a Representative-elect from Kentucky was disqualified by Section Three when, before the Civil War began, he had voted in the Kentucky legislature in favor of a resolution to "resist [any] invasion of the soil of the South at all hazards."[135] The House found that this was not disqualifying.[136] Similarly, in 1870, the House also considered the qualifications of a Representative-elect from Virginia who, before the Civil War, had voted in the Virginia House of Delegates for a resolution that Virginia should "unite" with "the slaveholding states" if "efforts to reconcile" with the North should

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[132] *Id.*

[133] *Id.* at 25 (Hoffman, J.).

[134] *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* (Philadelphia, G.W. Childs, 12th ed., rev. and enl. 1868).

[135] CONG. GLOBE, 41st Cong., 2nd Sess. 5443 (1870).

[136] *Id.* at 5447.

fail, and stated in debate that Virginia should "if necessary, fight," but who after Virginia's actual secession "had been an outspoken Union man."[137] The House found that this was not disqualifying under Section Three.[138] By contrast, the House did disqualify a candidate who "had acted as colonel in the rebel army" and "as governor of the rebel State of North Carolina."[139]

The riot that occurred at the Capitol on January 6, 2021, was terrible. But it was not a war upon the United States. The January 6 rioters entered the Capitol, stayed inside for a few hours, and then left. Ultimately, Congress counted the electoral votes early the next morning. Not a single piece of evidence shows that the rioters made war on the United States or tried to overthrow the government. The Secretary's *Ruling* does not point to a single instance of anyone being shot by the rioters. The *Ruling* does not point to a single instance of someone being stabbed by the rioters. The only people who died at the riot and because of the riot were protestors.[140]

Even if all the facts in the Complaint are true, rebellion or insurrection is a federal crime, and no court in the United States has found President Trump guilty of 18 U.S.C. § 2383. To the contrary, the Senate found President Trump not guilty of impeachment charges

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[137] *Hinds' Precedents of the House of Representatives of the United States*, 477 (1907).

[138] *Id.* at 477–78.

[139] *Id.* at 481, 486.

[140] The sole police officer to die did so of natural causes—a stroke. Williams, Pete, "Capitol Police Officer Biran Sicknick died of natural causes after riot, medical examiner says," NBC News, April 19, 2021, https://www.nbcnews.com/politics/politics-news/capitol-police-officer-brian-sicknick-died-natural-causes-after-riot-n1264562, last visited October 6, 2023.

of insurrection brought by the 117th Congress.[141] No court in the United States has found President Trump guilty under 18 U.S.C. § 2383. Not a single prosecutor has filed an indictment against President Trump for rebellion or insurrection, much less obtained a conviction on such a charge. Nor has a single prosecutor charged any of the 1,000+ people connected to the riot at the Capitol under 18 U.S.C. § 2383, the federal criminal statute that covers "insurrection."[142] The events of January 6 devolved into a riot that was repugnant to any objective observer. But they were not an "insurrection."

While the Secretary does not offer a precise definition of "insurrection," her operative facts suggest that finding with respect to "insurrection" is premised on two elements: the "violent disruption of Congress's duty" and "a transparently public use of force."[143] But this is a far too broad definition that, if adopted, would transform any riot that disrupts government activity into an "insurrection," introduce tremendous uncertainty into whether a "protest" will be deemed an "insurrection," and risks chilling protected First Amendment activities.

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[141] *See* Impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors, H. 24, 117th Cong. (2021). The Senate's not guilty vote can be found at https://www.senate.gov/legislative/LIS/roll_call_votes/vote1171/vote_117_1_00059.htm (last visited on October 6, 2023).

[142] *United States v. Griffith*, Criminal Action No. 21-244-2 (CKK), 2023 WL 2043223, at *3 fn. 5 (D.D.C. Feb. 16, 2023), (finding that "no defendant has been charged with [18 U.S.C. § 2383]"); *See also*, Alan Feuer, *More Than 1,000 People Have Been Charged in Connection with the Jan. 6 Attack*, N.Y. TIMES (Aug. 1, 2023), https://www.nytimes.com/live/2023/08/01/us/trump-indictment-jan-6#more-than-1000-people-have-been-charged-in-connection-with-the-jan-6-attack.

[143] *Ruling* at 26.

For example, prior to President Trump's 2017 inauguration, protest groups organized under the "umbrella organization" "DisruptJ20" with the specific goal of disrupting President Trump's inauguration.[144] Clashes between police and demonstrators on and around January 20, 2017, turned violent.[145] Thus, activities to dispute President Trump's inauguration would appear to satisfy the Secretary's definition of "insurrection." Yet, rather than be treated as traitors, rebels, or insurrections, the individuals arrested for violence on and around January 20, 2017, largely had their charges dropped by the Department of Justice.[146]

There cannot be two standards of justice. Thus, the Secretary's broad definition of "insurrection" is not and cannot be correct. The events of January 6, 2021, devolved into a declared riot. But they did not rise to the level of becoming an insurrection.

B. President Trump Did Not "Engage" in Insurrection

Even assuming *arguendo* that the events of January 6, 2021, can be classified as an "insurrection," President Trump did not "engage" in it. The framers of the Fourteenth

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[144] *See* Peter Hermann, *Meetings of activists planning to disrupt inauguration were infiltrated by conservative group*, Wash. Post (Jan. 25, 2017), https://www.washingtonpost.com/local/public-safety/meetings-of-activists-planning-to-disrupt-inauguration-were-infiltrated-by-conservative-media-group/2017/01/24/b22128fe-e19a-11e6-ba11-63c4b4fb5a63_story.html.

[145] *See* Jonathan Landay and Scott Malone, *Violence flares in Washington during Trump inauguration*, Reuters (Jan. 21, 2017), https://www.reuters.com/article/us-usa-trump-inauguration-protests-idUSKBN1540J7/.

[146] *Government drops charges against all inauguration protesters*, The Associated Press (Jul. 6, 2018), https://www.nbcnews.com/news/us-news/government-drops-charges-against-all-inauguration-protesters-n889531.

Amendment made a deliberate choice that Section Three should cover only actual "engage[ment] in" insurrection or rebellion (or assisting a foreign power), not advocating rebellion or insurrection. As noted above, Congress modeled Section Three partly on the original Constitution's Treason Clause and partly on the Second Confiscation Act (enacted in 1862). The Second Confiscation Act made it a crime to "incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or...give aid or comfort thereto, or...engage in, or give aid and comfort to, any such existing rebellion or insurrection."[147] In other words, it drew distinctions between inciting, assisting, or giving aid or comfort on the one hand and engaging on the other. The plain implication is that they refer to separate and distinct concepts.[148]

The word "engage" connotes active, affirmative involvement. To wit, Black's Law Dictionary defines "engage" to mean "employ or involve oneself; to take part in; to embark on."[149] This suggests a significant level of activity, not mere words or inaction.

This textual analysis is supported by the historical context. The same representatives who voted for the Fourteenth Amendment understood that, under its terms, even strident and explicit antebellum advocacy for a future rebellion was not "engaging in insurrection" or

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[147] 12 Stat. 589, 627 (1862); *see* 18 U.S.C. § 2383.

[148] *See* ANTONIN SCALIA & BRIAN A. GARNER, *supra* ("[A] material variation in terms suggests a variation in meaning.").

[149] BLACK'S LAW DICTIONARY (11th ed. 2019).

providing "aid or comfort to the enem[y]."[150] The facts relied upon in the Secretary's Ruling fall well short of how Congress has understood and applied Section Three in practice.

Moreover, contrary to Secretary's suggestion, President Trump's speech falls well short of "inciting" the riot.[151] "If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition."[152] "Indeed, the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office."[153] Speech on matters of public concern—even controversial or objectionable speech on matters of public concern—is protected by the First Amendment.[154]

These basic principles apply, even in the context of Section Three, which must be read *in pari materia* with the First Amendment. For example, the Supreme Court considered the Georgia legislature's refusal to seat an elected candidate on the ground that his strident criticisms of the Vietnam War "gave aid and comfort to the enemies of the United States" and were inconsistent with an oath to support the Constitution.[155] The Court held that the

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[150] *See supra* (discussing the post-ratification history of Section Three).

[151] *See* Compl. at ¶ 22.

[152] *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) (citing *Texas v. Johnson*, 491 U.S. 397 (1989); *Snyder v. Phelps*, 562 U.S. 443 (2011); *Nat'l Socialist Party of Am. v. Skokie*, 432 U.S. 43 (1977) (*per curiam*)).

[153] *Eu v. San Francisco City Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989).

[154] *See, e.g., Snyder v. Phelps,* 562 U.S. 443 (2011).

[155] *Bond v. Floyd,* 385 U.S. 116, 118–23 (1966).

candidate's speech was protected by the First Amendment and could not be grounds for disqualification.[156]

This is not, as the Secretary suggests, "permit[ing] the First Amendment to override a qualification for public office."[157] Rather, it is applying the most basic tools of statutory and constitutional interpretation. To wit, the jurist Thomas Cooley advised in 1868—contemporaneously with the adoption of the Fourteenth Amendment—that "one part [of a text] should not be allowed to defeat another, if by any reasonable construction the two can be made to stand together."[158] There is no inherent reason for tension between Section Three and the First Amendment. Any conflict stems purely from the Secretary's overly broad interpretation of the term "engage," and should serve as a flashing billboard that the Secretary's approach is incorrect.

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[156] *Id.* at 133–37.

[157] *Ruling* at 32.

[158] Bryan A. Garner & Antonin Scalia, Reading Law, 180 (West, 2012) (quoting Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, 58 (1868)); *accord, e.g.*, 16 Am. Jur. 2d Constitutional Law § 67, *Harmonizing Constitutional Amendments with Antecedent Constitutional Provisions* ("In accordance with the general rule that harmony in constitutional construction should prevail whenever possible, an amended constitution must be read as a whole as if every part of it had been adopted at the same time and as one law. Effect should be given to every part of the constitution, as amended, and amendments should be construed so as to harmonize with other constitutional provisions rather than one that would create a conflict between them. In other words, the supreme court will consider a constitutional amendment as a whole and, when possible, adopt an interpretation of the language which harmonizes different constitutional provisions rather than an interpretation which would create a conflict between such provisions.") (Footnotes omitted.).

Even assuming *arguendo* that incitement could qualify as "engaging" under Section Three, speech must clear a very high First Amendment threshold to rise to the level of "incitement." Even "advocacy of the use of force or of law violation" or of "'the duty, necessity, or propriety' of violence" falls short of that threshold.[159] The "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."[160] "What is required, to forfeit constitutional protection," is speech that (1) "specifically advocates for listeners to take unlawful action" and (2) is likely to produce "*imminent* disorder"—not merely "illegal action at some indefinite future time."[161] And as the Court recently underscored in *Counterman v. Colorado*, incitement requires a showing of "specific intent...equivalent to purpose or knowledge."[162]

Under the *Brandenburg* test—and contrary to the Secretary's *Ruling* that brushed off President Trump's First Amendment argument with one sentence—President Trump's comments did not come close to "incitement," let alone "engagement" in insurrection. As the Sixth Circuit recognized, "the fact that audience members reacted by using force does not transform...protected speech into unprotected speech."[163] And, as a D.C. Circuit judge

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[159] *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

[160] *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002); *Nwanguma v. Trump*, 903 F.3d 604, 610 (6th Cir. 2018).

[161] *Nwanguma*, 903 F.3d at 610 (cleaned up); *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (emphasis added).

[162] *Counterman v. Colorado*, 600 U.S. 66, 81 (2023) (citing *Hess v. Indiana*, 414 U.S. 105, 109 (1973)).

[163] *Nwanguma*, 903 F.3d at 610.

remarked at argument last year, if "you just print out the [President's January 6] speech...and read the words ... it doesn't look like it would satisfy the [*Brandenburg*] standard."[164]

The Secretary did not and could not identify any statement by President Trump that explicitly advocated for illegal conduct. President Trump's only explicit instructions called for protesting "peacefully and patriotically," to "support our Capitol Police and law enforcement," to "[s]tay peaceful," and to "remain peaceful."[165] Former President Trump's calls for peace and patriotism notwithstanding, the courts have made clear that angry rhetoric falls far short of an implicit call for lawbreaking.

Moreover, the Secretary's suggestion that President Trump "engaged" in an insurrection through his supposed inaction during the riot at the Capitol fails as a matter of textual interpretation and practical common sense.[166] First, as described above, the word "engage" connects active, affirmative involvement. It does not and cannot mean inaction.

Second, there is no manageable standard for assessing Presidential inaction. Instead, the Secretary's insinuation is an invitation to turn every policy dispute about the use of force (or lack thereof) into a Section Three debate that would have broad implications for the

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[164] Tr. of Argument at 64:5–7 (Katsas, J.), *Blassingame v. Trump*, No. 22-5069 (D.C. Cir. Dec. 7, 2022) (**Exhibit F**).

[165] R. 4328, *The January 6th Report* 117th Cong. 586 (2022) (Which records that President Trump ensured to tell the crowd at the Ellipse to protest "peacefully and patriotically"); @realDonaldTrump, Twitter (Jan. 6, 2021, 2:38 PM), https://twitter.com/realDonaldTrump/status/1346904110969315332; @realDonaldTrump, Twitter (Jan. 6, 2021, 3:31 PM), https://twitter.com/realDonaldTrump/status/1346912780700577792.

[166] *See Ruling* at 31

exercise of the power of the Presidency, particularly in foreign affairs. For example, President Obama and then-Secretary Clinton were famously criticized for the alleged lack of response to the 2012 attack on U.S. government facilities in Benghazi, Libya.[167] That attack lasted far longer than the January 6 riot. Did their inaction constitute providing "aid" to America's enemies, who were at the time actively killing American officials? To ask the question is to illustrate the dilemma the Secretary's *Ruling* would create. Presidents and other government officials must exercise their judgment in determining when and how to respond to crises. It is part of what they are elected to do. Accordingly, their "inaction" may not serve as the basis for a claim of "engaging" in an insurrection.

Third, the Secretary does not sit in judgment to determine the reasonableness of the President's actions or inactions in deploying the United States armed services. For her to do so would violate long-standing Supreme Court precedent. As the Supreme Court has made clear, it is not appropriate even for federal courts—much less for state officials— to second guess a President's exercise of discretion granted by either the Constitution or by federal statute. Such claims present nonjusticiable political questions, raise insuperable separation of powers concerns, and in the case of a state court or official raise issues under the Supremacy Clause.

This was most recently illustrated in *United States v. Texas*, in which the Court held that a group of states could not challenge under the Take Care clause the Executive's exercise of discretion not to enforce certain immigration laws passed by Congress that

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[167] *See, e.g.*, Jake Tapper & Dana Bash, *Former Deputy Chief of Mission in Libya: U.S. Military Assets Told to Stand Down*, CNN (May 7, 2013), https://www.cnn.com/2013/05/06/politics/benghazi-whistleblower/index.html.

explicitly required that the federal government "shall" arrest and detain certain non-citizens.[168] The Court held that the plaintiffs lacked standing, while emphasizing that the concerns that drove that determination were "built on a single basic idea—the idea of separation of powers."[169] The Court further explained that lawsuits challenging the President's exercise of discretionary authority under the Take Care clause—even where the statute at issue contains mandatory "shall" language that the Executive is alleged to have flouted—"run up against the Executive's Article II authority to enforce federal law....Under Article II, the Executive Branch possesses authority to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.'"[170] Moreover, "[i]n addition to the Article II problems raised by judicial review of the Executive Branch's arrest and prosecution policies, courts generally lack meaningful standards for assessing the propriety of enforcement choices...."[171] "All of those considerations help explain why federal courts have not traditionally entertained lawsuits of this kind....Our constitutional system of separation of powers 'contemplates a more restricted role for Article III courts.'"[172]

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[168] *United States v. Texas*, 599 U.S. 670, 674 (2023).

[169] *Id.* at 676 (internal citation omitted).

[170] *Id.* at 678 (citations omitted).

[171] *Id.* at 679.

[172] *Id.* at 681.

Unlike the court in *Texas*, the Secretary has identified no statute containing mandatory "shall" language, and the case against a state court or official second-guessing a President's exercise of entirely discretionary authority is even clearer. Under the *Baker v. Carr* factors, it cannot be denied that the decisions—*e.g,* whether and when to send in the National Guard[173]—the Secretary second-guesses have been expressly allocated to the president either by the Constitution (the Take Care clause) or by statute. And all involve discretionary issues that she second-guessed with the luxury of hindsight and without meaningful standards for conducting that exercise.

As the Supreme Court made clear in *Texas*, there are other forums in which a President's exercise of such discretion may appropriately be examined.[174] The Supreme Court specifically noted the possibility of Congressional oversight—and President Trump was impeached but not convicted over the events of January 6—and the role that elections appropriately play in holding elected officials to account.[175] But it is not a state official's appropriate role to substitute her judgment for that of the President on such an issue.

Accordingly, to the extent that the Secretary's *Ruling* rests on a belief that the President should have exercised his discretion differently on January 6, this Court must reverse it.

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[173] In this connection, the United States Supreme Court has made clear that a President's decision-making regarding the use of military force is a discretionary function that may not be second-guessed. *Martin v. Mott*, 25 US 19, 31-32 (1827). *See also Luther v. Borden*, 48 US 1, 44-45 (1849) (holding that the President has the exclusive, unreviewable authority to call out the militia to support the lawful government of a state in the case of an insurrection).

[174] *Id.* at 685.

[175] *Id.*

President Trump did not "engage" in an insurrection as a matter of law. Thus, the Secretary's Ruling is wrong as a matter of law.

IX. The Secretary improperly relied upon the January 6th report as the evidentiary basis for her Ruling.

The Challengers entered approximately 6,000 pages of evidence, plus videos. Nearly all of the information stems from the January 6th Report—including the exhibits, interviews, documents, videos, statements, and reports upon which the Select Committee relied upon while drafting the Report. In addition to issues surrounding the formation and bias of the Select Committee, this Report presents substantial evidentiary issues, including improper legal conclusions and speculation, hearsay, and other problems that render the Report the antithesis of the "kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs."[176]

The Report itself is hearsay and each of the statements that it contains, quotes, and relies upon—the documents, the testimony, the transcribed interviews, and the like—is also inadmissible hearsay. Further, the Report is unreliable and untrustworthy as a product of a politically motivated and biased grandstanding exercise. Indeed, the Report is so unreliable that almost none of the Report's Eleven Recommendations, taking up a mere four pages out of over 800, have been adopted. For example, the Electoral Count Act and the several criminal statutes discussed in the Report have not been amended per the Select Committee's recommendations; the House of Representatives' civil subpoena enforcement authority has not been clarified; and not one person present at the Capitol on January 6, 2021, has been

[176] 21-A M.R.S § 9057(2).

indicted—much less convicted—under 18 U.S.C. § 2383. Instead, the Report, in line with its aim, has largely been used against President Trump in efforts to remove his name from state primary election ballots. Even the judge in *Anderson*[177] announced in her Final Order that she only considered and cited 31 of the Report's conclusions, even though the petitioners in that case originally sought to admit all 411 conclusions. Thus, even a tribunal predisposed to remove President Trump from the ballot did not find the vast majority of conclusions to be reliable.[178] The Secretary should refuse to admit the Report.

A. As the product of a biased committee, the January 6th Report itself is unreliable and untrustworthy.

The formation of the Select Committee that issued the Report, and the Report itself, are fraught with problems that cannot now be rectified. All members on the Select Committee—prior to their appointment onto the Select Committee—voted to impeach President Trump for incitement of insurrection and had released statements denouncing President Trump for inciting an insurrection or words to that effect, which shows that they had arrived at their conclusion before their investigation had begun. Indeed, not a single member who disagreed with the decision to impeach President Trump—which included nearly half of the House's 435 Representatives—served on the Select Committee, demonstrating a complete and unprecedented break with House procedures. The Speaker of the House refused to allow the Minority Leader to pick members who might offer a different view, and as a result, minority members who had voted against impeachment had

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[177] *Anderson v. Griswold*, Docket No. 2023-CV-32577, 2023 WL 8006216 (Colo. Dist. Ct. 2023).

[178] *See id.* at *7 n.7.

no opportunity to select or examine competing witnesses, or ask questions that would rebut the impeachment narrative, or offer the Select Committee differing opinions. Further, contrary to normal Congressional procedures, the Select Committee was exceedingly unusual because it was staffed with prosecutors, rather than normal congressional staff. And political, pro-impeachment Representatives directed the Committee's operations on a daily basis. One investigator on the Select Committee even served as the personal attorney for one of the Committee members, reinforcing that investigators had no independence from the political Committee members. The predetermined and political nature of the Report make its findings unreliable.

When considering the admissibility of Congressional reports, triers-of-fact are instructed to judge trustworthiness according to a "nonexclusive list of four factors [that the Advisory Committee to the rules of evidence] thought would be helpful in passing on this question: (1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held;" and (4) possible motivation problems.[179] In *Coleman v. Home Depot, Inc.*, the Third Circuit stated:

> Most notably, a report may be untrustworthy "if the report appears to have been made subject to a suspect motivation. For example, if the public official or body who prepared the report has an institutional or political bias, and the final report is consistent with that bias." *Federal Rules of Evidence Manual* 1688–89 (Stephen A. Saltzburg et al. eds., 7th ed. 1998); *see also Pearce v. E.F. Hutton Group, Inc.*, 653 F.Supp. 810, 814 (D.D.C.1987) (excluding findings made in a congressional report because, "[g]iven the obviously political nature of Congress, it is questionable whether any report by a committee or subcommittee of that body could be admitted under rule 803(8)(C) against a

[179] *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 n.11 (1988); *Barry v. Tr. of Int'l Ass'n Full Time Salaried Officers & Emps. of Outside Local Unions & Dist. Counsel's (Iron Workers) Pension Plan*, 467 F. Supp. 2d 91, 97 (D.D.C. 2006).

private party. There would appear to be too great a danger that political considerations might affect the findings of such a report").[180]

"Congressional reports are not entitled to an additional presumption of trustworthiness or reliability—beyond the one already established in the Advisory Committee Notes—simply by virtue of having been produced by Congress."[181] "[C]ourts have based their decisions in part on the possibility that partisan political considerations, as well as elected officials' tendency to 'grandstand,' have influenced the factual findings, conclusions, or opinions included in Congressional reports."[182] Courts have also emphasized "whether members of both parties joined in the report, or whether the report was filed over the dissent of the minority party. Where the former has occurred . . . courts have been more likely to reject challenges to the admissibility of Congressional reports."[183] "[R]eports that are truly reliable on a methodological and procedural level are less likely to provoke bitter divisions than those that have politics, rather than policy or truth-seeking, as their ultimate objective."[184] Chief here are the concerns of political bias and motivation, as President Trump demonstrates below.

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[180] *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1342 (3d Cir. 2002).

[181] *Barry*, 467 F. Supp. 2d at 98; see also *Anderson v. City of New York*, 657 F. Supp. 1571, 1577–79 (S.D.N.Y. 1987) (finding subcommittee report unreliable and inadmissible based on the four factors and that the committee engaged in grandstanding and heard testimony from interested parties).

[182] *Barry*, 467 F. Supp. 2d at 98 (collecting cases).

[183] *Id.* (collecting cases).

[184] *Id.* at 99.

The January 6th Report is more akin to the House report discussed in *Barry* than it is to the Senate Report.[185] Unlike the Senate Report at issue in that case, the January 6th Report was not only the product of bias and political grandstanding, but it was also completed without any meaningful involvement of minority viewpoints, the minority party, or minority staff. This was highly irregular for a congressional committee and left no opportunity for the expression of dissent.[186] The report was also full of "inflammatory rhetoric."[187] The Select Committee relied on carefully selected witnesses and a handpicked set of evidence to prove a predetermined political narrative the Committee's operations also showed its bias.

Any assertion that the Select Committee was established or run to produce a reliable, bipartisan, factual investigation is simply false. The Select Committee was established and run as a highly partisan kangaroo court, intended to create support for the Democrat Party's favored political narrative. After a failed attempt to establish a bipartisan commission, on June 28, 2021, then-Speaker Nancy Pelosi introduced H. Res. 503, "Establishing the Select Committee to Investigate the January 6th Attack on the United States Capitol." Two days later, the House passed H. Res. 503 on a near party-line vote of 222 yeas and 190 nays. Notably, only two Republicans—Reps. Cheney and Kinzinger, who were President Trump's political rivals and had voted to impeach him for the events of January 6—voted in favor of H. Res. 503.[188]

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[185] *Id.* at 100-01.

[186] *See id.*

[187] *See id.* at 101.

[188] Kristin Wilson and Clare Foran, Only two House Republicans vote for the January 6 select committee, CNN, June 30, 2021, available at:

H. Res. 503 instructed the Speaker to appoint thirteen members to the Committee, only five of which shall be appointed "after consultation with the minority leader." Thus, from the beginning, the Select Committee was designed to have an 8-5 imbalance that substantially favored the Democrat majority. Speaker Pelosi appointed Chairman Thompson to serve as chair of the Committee and appointed six additional Democrat members: Reps. Lofgren, Schiff, Aguilar, Murphy (FL), Raskin, and Luria, all of whose statements judging President Trump's culpability for the events of January 6th—*before* the January 6 Select Committee was even formed—have been established for the Secretary of State. She also appointed Republican Rep. Cheney without any designation of position. Then-House Minority Leader Kevin McCarthy recommended five Republican members to serve on the Committee, consistent with H. Res. 503: Rep. Jim Banks of Indiana to serve as Ranking Member and Reps. Rodney Davis of Illinois, Jim Jordan of Ohio, Kelly Armstrong of North Dakota, and Troy Nehls of Texas to serve as additional minority members. Unwilling to allow an effective minority position on the Select Committee—even with the pre-baked 8-5 Democrat majority—Speaker Pelosi refused to appoint Rep. Banks to serve as Ranking Member. Nor did she appoint any of Minority Leader McCarthy's other recommended minority members. In a public statement, she acknowledged that her refusal to appoint the members recommended by the then-Minority Leader was an "unprecedented decision."[189]

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https://edition.cnn.com/2021/06/30/politics/republicans-january-6-select-committee-vote/index.html (last visited December 14, 2023).

[189] Press Release, Nancy Pelosi, Speaker, U.S. House of Representatives, Pelosi Statement on Republican Recommendations to Serve on the Select Committee to Investigate the January 6th Attack on the U.S. Capitol (July 21, 2021), available at:

Instead, Speaker Pelosi appointed Rep. Kinzinger—the only Republican other than Rep. Cheney who voted in favor of H. Res. 503—and left four vacancies.

On July 21, 2021, Minority Leader McCarthy issued a statement condemning Speaker Pelosi's partisan actions and sheer abuse of power:

> Speaker Nancy Pelosi has taken the unprecedented step of denying the minority party's picks for the Select Committee on January 6. This represents an egregious abuse of power and will irreparably damage this institution. Denying the voices of members who have served in the military and law enforcement, as well as leaders of standing committees, has made it undeniable that this panel has lost all legitimacy and credibility and shows the Speaker is more interested in playing politics than seeking the truth.
>
> Unless Speaker Pelosi reverses course and seats all five Republican nominees, Republicans will not be party to their sham process and will instead pursue our own investigation of the facts.[190]

Speaker Pelosi's actions achieved their intended result, and the Select Committee effectively lacked minority party representation, including a minority staff. Witnesses who disagreed with the Select Committee's narrative were therefore not called, aggressive cross-examination of witnesses did not occur, a minority report was not issued, and findings regarding the many failures of House security, intelligence, and communications problems that contributed to what occurred on January 6th were not included in the January 6th Report. Speaker Pelosi left no stone un-turned in ensuring that the Select Committee would achieve

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https://web.archive.org/web/20211222223910/https://www.speaker.gov/newsroom/72121-2 (last visited December 14, 2023).

[190] Minority Leader McCarthy Statement about Pelosi's Abuse of Power on January 6th Select Committee, Jul. 21, 2021, available at: https://www.cbsnews.com/news/kevin-mccarthy-jan-6-committee-picks-removed-pelosi-rejects-jim-jordan-jim-banks/ (last visited December 17, 2023).

the intended result, appointing an open and partisan Democrat, Timothy Heaphy, as the Chief Investigator of the Select Committee even after Heaphy had donated thousands of dollars over his career to Democrats and Democratic party causes. And, thus, from the very beginning, the Select Committee was an exercise in partisanship and not neutral fact-finding.

The Committee was irregularly composed. House Rules dictate that a committee chair shall designate "[a] member of the majority party . . . as vice chair of the committee."[191] On September 2, 2021, Chairman Thompson announced in a press release that "he has named Representative Liz Cheney (R-WY) to serve as the Vice Chair of the Select Committee."[192] Rep. Cheney was a member of the Republican Conference of the House of Representatives, and thus was not formally a member of the majority party. That she was nonetheless designated for the position of Vice Chair of the Select Committee—and was given one of the 8 seats originally designated for a Democrat member—is ample indication that she was understood to be what she was: a fanatical political opponent of President Trump who used her Select Committee membership to target him politically.

The Committee held its first hearing on July 27, 2021.[193] After the hearing, Chairman Thompson reportedly "told reporters the select committee could have another hearing in

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[191] House Rule XI(2)(d).

[192] Press Release, Bennie Thompson, Chairman, Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, Chairman Thompson Announces Representative Cheney as Select Committee Vice Chair (Sept. 2, 2021), available at: https://january6th-benniethompson.house.gov/news/press-releases/chairman-thompson-announces-representative-cheney-select-committee-vice-chair (last visited December 17, 2023).

[193] Press Release, Select Committee, Select Committee to Investigate the January 6th Attack on the United States Capitol to Hold First Hearing July 27th (Jul. 20, 2021), available at: https://january6th-benniethompson.house.gov/news/press-releases/select-committee-

August while the House is scheduled to be in a seven-week recess."[194] But the Committee did not have another hearing in August 2021; nor did it have another hearing for the remainder of 2021. Instead, the Committee waited almost a year to hold a second hearing, holding it on June 9, 2022, right at or before the majority of the 2022 midterm primary and primary runoff elections. The Committee subsequently held seven additional hearings during the summer of 2022: on June 13, 2022, June 16, 2022, June 21, 2022, June 23, 2022, June 28, 2022, July 12, 2022, and July 21, 2022.[195] After holding no hearings for two and a half months, the Committee decided to hold one more hearing on October 13, 2022—less than one month before the 2022 midterm elections.

It is no secret that the two nominally Republican Select Committee members—each of whom had declared their positions when they voted to impeach President Trump well before the Select Committee was formed—openly attacked President Trump throughout the life of the Committee, often on matters having nothing to do with the events of January 6. For example, at the October 13, 2022, hearing of the Select Committee, Congressman Kinzinger focused on his policy disagreements with President Trump's orders pursuant to his authority as commander in chief of the armed forces, stating "President Trump issued an

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investigate-january-6th-attack-united-states-capitol-hold-first (last visited December 14, 2023).

[194] Melissa Macaya et al., Capitol Riot Committee Holds First Hearing, CNN (Jul. 27, 2021), available at: https://www.cnn.com/politics/live-news/jan-6-house-select-committee-hearing-07-27-21/h_f000be289ea8ac4e1fb4b992b3d0b80e (last visited December 14, 2023).

[195] Select Committee, Past Hearings, available at: https://january6th-benniethompson.house.gov/news/press-releases/thompson-cheney-opening-statements-select-committee-hearing (last visited December 14, 2023).

order for large-scale US troop withdrawals. He disregarded concerns about the consequences for fragile governments on the front lines of the fight against ISIS and Al-Qaeda terrorists." Congressman Kinzinger further referenced conversations between the President and his subordinates, including General Keith Kellogg, National Security Advisor to the Vice President, and General Mark Milley, Chairman, Joint Chiefs of Staff. Of course, none of this had anything to do with the events of January 6. Numerous articles highlight both Rep. Kinzinger's and Rep. Cheney's anti-Trump bias and their continued obsession with President Trump.[196]

The Select Committee issued the January 6th Report on December 22, 2022. But throughout its lifespan, its partisan rancor was the subject of criticism. From its inception,

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[196] Brian Naylor, GOP Rep. Adam Kinzinger, who voted to impeach Trump, won't run for reelection, NPR, October 29, 2021, available at: https://www.npr.org/2021/10/29/1050454729/gop-rep-adam-kinzinger-who-voted-to-impeach-trump-wont-run-for-reelection (last visited Oct. 16, 2023); Steve Peoples and Paul Weber, Kinzinger goes to Texas in search of anti-Trump Republicans, Associated Press, April 30, 2021, available at: https://apnews.com/article/donald-trump-adam-kinzinger-elections-illinois-political-organizations-4a8ca7b3e66818622c146c7b65f04aaf (last visited December 14, 2023); Rick Pearson, US Rep. Adam Kinzinger says he'll focus on GOP anti-Trump movement rather than run for statewide office, Chicago Tribune, Jan. 5, 2022, available at: https://web.archive.org/web/20220201044329/https://www.chicagotribune.com/politics/ct-adam-kinzinger-trump-20220106-6lm6rmlikvhefnah5p5y3pcgea-story.html (last visited December 14, 2023); Kristina Peterson, Liz Cheney Draws More GOP Fire Over Anti-Trump Stance, Wall Street Journal, May 4, 2021, available at: https://www.wsj.com/articles/liz-cheney-draws-more-gop-fire-over-anti-trump-stance-11620161615 (last visited December 14, 2023); Julia Manchester, 58 percent say Jan. 6 House committee is biased: poll, The Hill, Aug. 2, 2021, available at: https://thehill.com/homenews/house/565981-58-percent-say-jan-6-commission-is-biased-poll/ (last visited December 14, 2023).

Americans saw through the partisanship. Poll results released in August 2021 confirmed that perception:

> A majority of voters say they believe the House select committee investigating the Jan. 6 attack on the Capitol is biased, according to a new Harvard CAPS-Harris Poll survey. Fifty-eight percent of voters polled said they believed the committee set up by Speaker Nancy Pelosi (D-Calif.) was biased, while 42 percent said they thought it was fair. Americans want an examination of the riots over the summer and the origins of the virus over investigating Jan. 6th," said Mark Penn, the co-director of the Harvard CAPS-Harris Poll survey. "The voters reject the Pelosi move to toss Republicans off of the committee and see it now as just a partisan exercise.[197]

One year after the events of January 6th, Minority Leader McCarthy stated, "Unfortunately, one year later, the majority party seems no closer to answering the central question of how the Capitol was left so unprepared and what must be done to ensure it never happens again . . . . Instead, they are using it as a partisan political weapon to further divide our country."[198] Shortly thereafter, Minority Leader McCarthy stated, "It is not serving any legislative purpose. The committee's only objective is to attempt to damage its political opponents — acting like the Democrat Congressional Campaign Committee one day and the DOJ the next." He continued:

> The committee has demanded testimony from staffers who applied for First Amendment permits. It has subpoenaed the call records of private citizens and their financial records from banks while demanding secrecy not supported by law. It has lied about the contents of documents it has received. It has held

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[197] *See* Julia Manchester, *58 percent say Jan. 6 House committee is biased: poll*, The Hill (Aug. 2, 2021), https://thehill.com/homenews/house/565981-58-percent-say-jan-6-commission-is-biased-poll/(last visited January 8, 2023, 2:29 PM).

[198] Monique Beals, McCarthy says Democrats using Jan. 6 as 'partisan political weapon', The Hill, Jan. 2, 2022, available at: https://thehill.com/homenews/house/587954-mccarthy-says-democrats-using-jan-6-as-partisan-political-weapon-ahead-of/ (last visited December 14, 2023).

> individuals in contempt of Congress for exercising their Constitutional right to avail themselves of judicial proceedings. And now it wants to interview me about public statements that have been shared with the world, and private conversations not remotely related to the violence that unfolded at the Capitol. I have nothing else to add.
>
> As a representative and the leader of the minority party, it is with neither regret nor satisfaction that I have concluded to not participate with this select committee's abuse of power that stains this institution today and will harm it going forward.[199]

House Republicans repeatedly protested and condemned the Select Committee's partisanship. On June 8, 2022, for example, Rep. Bice of Oklahoma issued a statement highlighting that the Select Committee was merely a political stunt:

> After a year of overreaching subpoenas and dramatized hearings, the next show trial event from the January 6 Select Committee will take place Thursday, during prime time. This further proves that this biased committee does not intend to investigate what occurred on Jan. 6, but instead weaponize the government for their own political gain.
>
> As you may remember, there were two bills voted on by the House of Representatives last year regarding Jan. 6. I voted in favor to establish a fair, nonpartisan commission, modeled on the September 11 Commission, to fully investigate the security failure and ensure that this incident at our Nation's Capital would not happen again. . . .
>
> However, I vehemently opposed legislation that established the January 6 Select Committee, because I was deeply concerned it would be nothing but political theater for House Democrats. Sadly, this is precisely what we are witnessing today. In creating the membership of this committee, Speaker Pelosi broke 232 years of House precedent, trampling over the rights of the Minority party, by rejecting Republican's chosen Members, including Rep.

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[199] Barbara Sprunt, The top House Republican won't comply with Jan. 6 panel request to voluntarily testify, NPR, Jan. 12, 2022, available at: https://www.npr.org/2022/01/12/1072544752/jan-6-panel-investigating-insurrection-requests-kevin-mccarthys-voluntary-testim (last visited December 14, 2023); Leader McCarthy's Statement about Pelosi's Illegitimate Select Committee, Jan. 12, 2022, available at: https://www.wunc.org/2022-01-12/the-top-house-republican-wont-comply-with-jan-6-panel-request-to-voluntarily-testify (last visited December 14, 2023).

> Banks (R-IN) and Rep. Jordan (R-OH). This move eliminated the objectivity and legitimacy of this committee from the very start. . . .
>
> Now, many Democrats on the committee are even using it to call for the dismantling of our institutions, including the electoral college. They have also called to nationalize all election laws completely disregarding federalism and trampling over states' rights. A major goal of the committee is becoming increasingly clear: to normalize and ram through a far-left agenda.
>
> I strongly opposed what we are seeing today, which is a dangerous, political stunt. Our country could have benefited from a bipartisan commission that would have worked to protect the People's House and keep Americans who visit and work there safe and secure in the future, while also holding Pelosi and those in charge accountable for their failures. Unfortunately, the reasons why I voted against the Jan. 6 Select Committee have come true. No progress has been made, Republicans have no voice, and Democrats continue their witch hunt against the Republican party to distract from their catastrophic foreign and domestic policy failures.[200]

Minority Leader McCarthy, on June 9, 2022, delivered remarks calling the Select Committee illegitimate and echoing Rep. Bice's concerns:

> Speaker Pelosi's Select Committee on January 6 is unlike any committee in American history. In fact, it's the most political and least legitimate committee in American history. It has used congressional subpoenas to attack Republicans, violate due process, and infringe on the political speech of private citizens. It has been caught altering evidence—including text messages from Ranking Member Jordan. It has permanently damaged the House and divided the country. It's a smokescreen for Democrats to push their radical agenda . . . . To be clear, the violence at the Capitol that day was wrong, and we have repeatedly denounced it. But keeping the Capitol safe is not the point of Pelosi's illegitimate Select Committee. From the beginning, the Select Committee refused to investigate the real circumstances that led to the riot, including the lack of security around the Capitol. They also ignored left-wing mob violence, which led to riots and loss of life across the country. When House Republicans proposed investigating these facts, Speaker Pelosi did not respond for 3 months. Then, she jumped to create the Select Committee. Not only that, she rejected my picks to serve on that Committee—violating 232

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[200] Stephanie Bice, Democrats' Partisan Jan. 6th Committee, June 8, 2022, available at: https://bice.house.gov/media/weekly-columns/democrats-partisan-jan-6th-committee (last visited December 14, 2023).

> years of House tradition. Pelosi rejected Congressman Banks, a distinguished Afghanistan veteran. She rejected Congressman Jordan, the ranking member of the Judiciary Committee. But while she rejected qualified Republicans, she appointed radical Democrats. She appointed Chairman Thompson, who — to be clear — objected to presidential electors in 2005. She appointed Congressman Raskin, who also objected to presidential electors in 2017 AND called for President Trump's impeachment before Trump took office. And she appointed Congressman Schiff, despite his years of lying about the Russia-Collusion Hoax and the Hunter Biden Laptop. The future of our nation rests on the ability of Americans to trust our political system, to have safer streets, to have affordable food and gas, and to have confidence that elected officials are listening to real concerns. Democrats are using January 6 to avoid accountability for making the nation less safe and less prosperous. But Americans are not fooled by Democrats' distractions. And Republicans are not deterred from focusing on the issues that matter most to them. Now I want to bring up Congressman Jim Banks. As we said at the time Speaker Pelosi rejected my picks to serve on the committee—Republicans would be conducting our own investigation. And Jim Banks has led that.[201]

Vice President Pence referred to the partisan nature of the Select Committee as a "disappointment."[202] He refused to provide testimony to the Select Committee, stating, "The Congress has no right to my testimony. . . . We have a separation of powers under the Constitution of the United States, and I believe it sets a terrible precedent for the Congress to summon a vice president of the United States to speak about deliberations that took place at the White House."[203] He also stated that "It seemed to me in the beginning, there was an

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[201] Leader McCarthy, House GOP: The Select Committee is Illegitimate, June 9, 2022, available at: https://wpde.com/news/nation-world/house-republicans-promise-to-investigate-jan-6-panel-congress-insurrection-investigation-administration-commitee-rodney-davis (last visited December 14, 2023).

[202] Caroline Linton, Pence says he thinks there will be "better choices" than Trump for president in 2024, CBS News, Nov. 16, 2022, available at: https://www.cbsnews.com/news/mike-pence-donald-trump-2024-better-choices-face-the-nation-interview/ (last visited December 14, 2023).

[203] *Id.*

opportunity to examine every aspect of what happened on January 6, and to do so more in the spirit of the 9/11 Commission — nonpartisan, nonpolitical, and that was an opportunity lost."[204] Members of the United States Senate felt the same way about the Select Committee.[205]

As Congressman Nehls' Declaration makes clear, besides being partisan, the Select Committee also engaged in dishonest behavior. In one remarkable display—later admitted by the Select Committee's spokesman when the press reported it—Select Committee staff doctored evidence and a Member of the Committee publicly presented that falsified evidence during a hearing. In addition, the Select Committee doctored silent video captured by security cameras in the House, adding a soundtrack to make their presentation more dramatic.

But Republicans were not the only ones condemning the Select Committee for its obvious political nature. Ted Van Dyk penned an op-ed in the Wall Street Journal, stating "Count me as a Democrat disappointed by the way my party has responded to Donald Trump . . . ." He continued:

> The House Jan. 6 hearings offered an opportunity to examine Mr. Trump's activities carefully. But it didn't happen. Thursday's opening statements by Chairman Bennie Thompson and Republican Rep. Liz Cheney were more like prosecutors' closing arguments than introductions to a fact-finding inquiry.

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[204] Brady Knox, Mike Pence says he will not testify to Jan. 6 committee, Washington Examiner, Nov. 16, 2022, available at: https://www.washingtonexaminer.com/news/justice/pence-not-testify-jan-6-committee (last visited December 14, 2023).

[205] Melissa Quinn, Rubio says January 6 committee is a "complete partisan scam," CBS News, Feb. 7, 2022, available at: https://www.cbsnews.com/news/marco-rubio-january-6-committee-partisan-face-the-nation/ (last visited December 14, 2023).

> Ms. Cheney read aloud a statement by Mr. Trump that was supposed to implicate him in inciting his followers-but she left out that he told his followers: "Go home."
>
> The committee members included harsh Trump critics like Rep. Adam Schiff. Speaker Nancy Pelosi rejected Republican members nominated by Minority Leader Kevin McCarthy and allowed only Mr. Trump's outspoken Republican opponents-Ms. Cheney and Rep. Adam Kinzinger —to serve on the committee. As a result, chances for a bipartisan outcome were lost and any minority report will be undertaken outside the committee. There will be no consensus on any findings, only further polarization.[206]

Media outlets aired the Democrats' open secret that coverage of the Select Committee's work during prime time would be a tool in the Democratic Party's arsenal to continue to control the House past 2022. The New York Times wrote, "With their control of Congress hanging in the balance, Democrats plan to use made-for-television moments and a carefully choreographed rollout of revelations over the course of six hearings . . . to persuade voters that the coming midterm elections are a chance to hold Republicans accountable for [January 6th]."[207] The partisan motivation of House Democrats shone in this primetime opportunity to grandstand. To underscore its partisan purpose, the House Democrats hired a television producer to orchestrate their hearings in order to maximize their political impact in the runup to the 2022 election.

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[206] Ted Van Dyk, Jan. 6 Hearing Disappoints This Democrat, Wall Street Journal, June 12, 2022, available at: https://www.wsj.com/articles/jan-6-hearing-disappoints-this-democrat-partisan-cheney-thompson-investigation-security-trump-11655038308 (last visited December 14, 2023).

[207] Annie Karni and Luke Broadwater, Jan. 6 Hearings Give Democrats a Chance to Recast Midterm Message, The New York Times, June 7, 2022, available at: https://web.archive.org/web/20230105192247/https://www.nytimes.com/2022/06/07/us/politics/jan-6-hearings-tv-democrats.html (last visited December 14, 2023).

If the political bent of the Select Committee was not already clear by the way it was formed and staffed, the conduct of the Committee in ensuring the achievement of the purposes of H.R. 503 further illuminates the issue. According to H.R. 503, the Select Committee had three purposes: 1) "To investigate and report upon the facts, circumstances, and causes relating to the January 6, 2021, domestic terrorist attack upon the United States Capitol Complex;" 2) "To examine and evaluate evidence developed by relevant Federal, State, and local governmental agencies regarding the facts and circumstances surrounding the domestic terrorist attack on the Capitol;" and 3) "To build upon the investigations of other entities and avoid unnecessary duplication of efforts by reviewing the investigations, findings, conclusions, and recommendations of other executive branch, congressional, or independent bipartisan or nonpartisan commission investigations into the domestic terrorist attack on the Capitol." Instead, the "evidence" and "findings" of the January 6th Report focused almost exclusively on the conduct of President Trump before and after the General Election in 2020. Staffers intimately involved with the information-gathering arm of the Select Committee and the role information learned through the Select Committee's investigation played in the drafting of the January 6th Report have lamented "that important findings unrelated to Trump will not become available to the American public."[208] Further, that certain information related to President Trump and useful to him in his ongoing legal matters is unavailable to both him and the public after the Select Committee's failure to

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[208] Jacqueline Alemany, Josh Dawsey and Carol D. Leonnig, Jan. 6 panel staffers angry at Cheney for focusing so much of report on Trump, The Washington Post, Nov. 23, 2022, available at: https://www.washingtonpost.com/politics/2022/11/23/liz-cheney-jan-6-committee/ (last visited December 14, 2023).

properly archive is concerning. It further highlights the underlying point that the Select Committee was only ever an exercise in political grandstanding culminating in a political hitjob against President Trump.[209]

The January 6th Report, rooted in political bias and grandstanding aimed in part to secure a Democratic majority in Congress during the 2022 midterm elections is a poisonous tree under which Challengers intend to introduce allegedly damning evidence. As noted above, President Trump challenges this use of the January 6th Report and *all* documents, statements, reports, and videos cited by or derivative of that report.

Challengers will undoubtedly object that the Minority Leader's decision not to appoint other Republican members to serve in place of those whom Speaker Pelosi refused to seat was a self-inflicted wound. But regardless of how blame is to be apportioned between Congressional Democrats and Republicans for the fact that the January 6 Select Committee Report was a partisan political exercise rather than a non-partisan fact-finding exercise, at the end of the day it *is the product of a partisan political exercise and President Trump had no more role in causing that outcome than he did representation on the Committee.*

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[209] Catherine Yang, Trump Trying to Subpoena Records Missing From January 6 Select Committee Archives, The Epoch Times, Oct. 11, 2023, available at: https://www.theepochtimes.com/us/trump-trying-to-subpoena-records-missing-from-january-6-select-committee-archives-5508235?utm_source=Morningbrief&src_src=Morningbrief&utm_campaign=mb-2023-10-12&src_cmp=mb-2023-10-12&utm_medium=email&cta_utm_source=Morningbrief&est=5%2BJlyMJcrOKGUi2B32%2FyfcDMISXGc31irTxezMWPoFLWGt%2FYwpOGHC9rOxL8 (last visited December 14, 2023).

This politicized committee, put together specifrically to blame President Trump for the January 6 violence and not to conduct an impartial fact-finding, resulted in a report that is not the "kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs."[210]

B. The January 6th Report is Hearsay.

The January 6th Report is itself hearsay under Maine Rule of Evidence 802. Rule 802 generally forbids out-of-court statements that "[t]he declarant does not make while testifying at the current trial or hearing [and that a] party offers in evidence to prove the truth of the matter asserted in the statement."[211] Here, President Trump, the party whose presence on the Maine ballot is being challenged, was not a party to the Select Committee's proceedings, had no lawyer or other representative to protect his interests, and had no opportunity to cross-examine the witnesses, to introduce testimony or documents, or to question the accuracy or truth of the Report's conclusions or the information that formed the basis for those conclusions. The Select Committee has been widely recognized as a political show trial or partisan political star chamber. It broke the normal rules in the way it was formed and the way it conducted itself. And its goal was not a search for truth, but rather an effort to support a predetermined political conclusion. That conclusion drove the public hearings, which were orchestrated by a television producer and featured highly edited (and sometimes doctored) "evidence" for dramatic effect. Challengers now offer this political, partisan

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[210] 21-A M.R.S § 9057(2).

[211] Me. R. Evid. 801-802.

document as evidence, and President Trump's inability to challenge or rebut that evidence violates his right to due process.

The Report and its evidentiary basis do not fit within any exception to the hearsay rule found in the Maine Rules of Evidence, including Maine Rule of Evidence 803(8), which allows records or statements of a public office only if:

> (A) It sets out:
> (i) The office's regularly conducted and regularly recorded activities;
> (ii) A matter observed while under a legal duty to report; or
> (iii) Factual findings from a legally authorized investigation.
>
> (B) The following are not within this exception to the hearsay rule:
> (i) Investigative reports by police and other law enforcement personnel;
> (ii) Investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party;
> (iii) Factual findings offered by the state in a criminal case;
> (iv) Factual findings resulting from special investigation of a particular complaint, case, or incident; and
> (v) Any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

The Maine Rules of Evidence explicitly disallow "[f]actual findings resulting from special investigation of a particular . . . incident."[212] Even if the Secretary found that bar unpersuasive, she erred by failing to conclude that the circumstances surrounding the drafting of the Report indicate a lack of trustworthiness, and even if she were *allowed* to consider the Report—which she is not—that she should not have done so due to the Report's lack of reliability.

These hearsay problems show that the January 6 Report is not "kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs."[213]

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[212] Maine Rule of Evidence 803(8)(B)(iv).

[213] 21-A M.R.S § 9057(2).

C. The Report and Excerpted Findings Contain Multi-Level Hearsay and Other Evidentiary Concerns.

The Report is also inadmissible because it contains multi-level hearsay under Maine Rule of Evidence 805 for which Challengers must find valid exceptions. Without such valid exceptions, the multi-level hearsay is evidence that should not be considered because such hearsay is not reliable enough to be relied upon to make important decisions about serious affairs.[214]

As the Court in *Barry* noted, when a congressional report includes out-of-court statements that are also hearsay, hearsay within hearsay is present.[215] "These other hearsay statements are admissible only 'if each part of the combined statements conforms with an exception to the hearsay rule provided in' the [] Rules of Evidence."[216] The January 6th Report quotes and relies upon hundreds of other reports, documents, videos, and third-party statements. *Each is hearsay.* The Secretary of State erred in considering the multi-level hearsay in the January 6th Report over President Trump's objections.

The Report is irrelevant, lacks foundation that Challengers could have developed in the record (but chose not to), is unauthenticated by the record in this case, and represents an improper attempt to get testimony not subject to cross-examination into the record. President Trump also objected to the findings from the January 6th Report Challengers seek to admit in Exhibit No. 77, which contains their own evidentiary issues and are inadmissible

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[214] 21-A M.R.S § 9057(2).

[215] *Barry*, 467 F. Supp. 2d at 102.

[216] *Id.*

for the same reasons applicable to the untrustworthy and unreliable January 6th report: they come from an untrustworthy report, they contain numerous instances of hearsay, including hearsay within hearsay, they demonstrate improper legal conclusions, and the Select Committee out of which these "findings" emanate was politically motivated to do the work it believed the Senate—whose constitutional duty it was to try President Trump for incitement of insurrection—failed to do. Not one member who disagreed with the pre-determined outcome that President Trump was at fault for the events of January 6—by voting not to impeach President Trump or issuing a statement disagreeing with that determination—was allowed to sit on that committee. President Trump hereby incorporates all of his arguments regarding the January 6th Report's inadmissibility here.

The January 6th Report contains hundreds of "findings" that Challengers provide no evidence to support or that contain hearsay in and of themselves. Many of these findings also rely upon evidence that would be inadmissible in a court of law or any fair tribunal. The Secretary erred in relying on any of them.

D. Specific Objections.

The Report contained over 400 conclusions, and it is not entirely clear which the Secretary relied on. Nonetheless, President Trump objects to some of the most pertinent conclusions, as follows:

1. Beginning election night and continuing through January 6th and thereafter, Donald Trump purposely disseminated false allegations of fraud related to the 2020 Presidential election in order to aid his effort to overturn the election and for purposes of soliciting contributions. These false claims provoked his supporters to violence on January 6th.

This finding is speculation and opinion, not fact. Second, it is hearsay. Third, it contains hearsay within hearsay because the statement incorporates sources of information that seek to prove the truth of the matter asserted. Fourth, it is not relevant under Rule 402 because it does not tend to prove that President Trump engaged in an insurrection or provided aid or comfort to enemies on January 6, 2021. Fifth, if offered, it would be improper character evidence against President Trump. Sixth, it contains improper legal conclusions made outside of the administrative setting.

2. Knowing that he and his supporters had lost dozens of election lawsuits, and despite his own senior advisors refuting his election fraud claims and urging him to concede his election loss, Donald Trump refused to accept the lawful result of the 2020 election. Rather than honor his constitutional obligation to "take Care that the Laws be faithfully executed," President Trump instead plotted to overturn the election outcome.

This finding contains the same issues noted above in the first specific objection.

3. Despite knowing that such an action would be illegal, and that no State had or would submit an altered electoral slate, Donald Trump corruptly pressured Vice President Mike Pence to refuse to count electoral votes during Congress's joint session on January 6th.

This finding contains the same issues noted above in the first specific objection.

4. Donald Trump sought to corrupt the U.S. Department of Justice by attempting to enlist Department officials to make purposely false statements and thereby aid his effort to overturn the Presidential election. After that effort failed, Donald Trump offered the position of Acting Attorney General to Jeff Clark knowing that Clark intended to disseminate false information aimed at overturning the election.

This finding contains the same issues noted above in the first specific objection.

5. Without any evidentiary basis and contrary to State and Federal law, Donald Trump unlawfully pressured State officials and legislators to change the results of the election in their States.

This finding contains the same issues noted above in the first specific objection. Further, it contains conclusions that were not supported by evidence Challengers successfully introduced showing that President Trump's pressure upon "state officials and legislators" was "unlawful." They did not specify any state or federal law that prohibited such behavior, how President Trump's behavior actually violated those laws, and why President Trump's speech was not protected by the First Amendment.

6. Donald Trump oversaw an effort to obtain and transmit false electoral certificates to Congress and the National Archives.

Jan. 6th Report at 4. This finding contains the same issues noted above in the first specific objection. Further, it contains conclusions that should have been supported by evidence, i.e., Challengers should have successfully introduced evidence showing that President Trump "oversaw" an effort to obtain and transmit alternate slates of electors and that any potential alternate slate of electors gave rise to "false electoral certificates." They did not do so.

7. Donald Trump pressured Members of Congress to object to valid slates of electors from several States.

This finding contains the same issues noted above in the first specific objection. Further, it was not supported by evidence Challengers successfully introduced showing that the slate of electors that President Trump encouraged various Members of Congress to object to were "valid."

8. Donald Trump purposely verified false information filed in Federal court.

This finding contains the same issues noted above in the first specific objection.

9. Based on false allegations that the election was stolen, Donald Trump summoned tens of thousands of supporters to Washington for January 6th. Although these supporters were angry and some were armed, Donald Trump instructed them to march to the Capitol on January 6th to "take back" their country.

This finding contains the same issues noted above in the first specific objection.

10. Knowing that a violent attack on the Capitol was underway and knowing that his words would incite further violence, Donald Trump purposely sent a social media message publicly condemning Vice President Pence at 2:24 p.m. on January 6th.

Jan. 6th Report at 5. Although the tweet itself would be admissible, the remainder is inadmissible for the reasons stated above in the first specific objection. This finding purports to know what President Trump knew, which is an impossibility without his presence before the Select Committee. Further, whether President Trump's words "would incite further violence" is a legal conclusion.

11. Knowing that violence was underway at the Capitol, and despite his duty to ensure that the laws are faithfully executed, Donald Trump refused repeated requests over a multiple hour period that he instruct his violent supporters to disperse and leave the Capitol, and instead watched the violent attack unfold on television. This failure to act perpetuated the violence at the Capitol and obstructed Congress's proceeding to count electoral votes.

This finding contains the same issues noted in the first specific objection above. Further, this finding attempts to claim knowledge about what President Trump knew, and when, without any basis to make such a claim. Further, whether President Trump received "repeated requests over a multiple hour period" is hearsay. Finally, Challengers must introduce

evidence indicating that President Trump's "failure to act" perpetuated the "violence at the Capitol" or otherwise "obstructed Congress's proceeding to count electoral votes."

12. Each of these actions by Donald Trump was taken in support of a multi-part conspiracy to overturn the lawful results of the 2020 Presidential election.

This finding contains the same issues noted in the first specific objection above. Whether a "conspiracy" existed is a legal conclusion for which Challengers must introduce evidence to support, including evidence that President Trump entered into an agreement with the specific intent to cause the rioters to storm the capitol to prevent the counting of the electoral votes. Challengers did not even try to accomplish this.

13. The intelligence community and law enforcement agencies did successfully detect the planning for potential violence on January 6th, including planning specifically by the Proud Boys and Oath Keeper militia groups who ultimately led the attack on the Capitol. As January 6th approached, the intelligence specifically identified the potential for violence at the U.S. Capitol. This intelligence was shared within the executive branch, including with the Secret Service and the President's National Security Council.

This finding contains the same issues noted in the first specific objection above.

14. Intelligence gathered in advance of January 6th did not support a conclusion that Antifa or other left-wing groups would likely engage in a violent counter-demonstration, or attack Trump supporters on January 6th. Indeed, intelligence from January 5th indicated that some left-wing groups were instructing their members to "stay at home" and not attend on January 6th. Ultimately, none of these groups was involved to any material extent with the attack on the Capitol on January 6th.

This finding contains the same issues noted in the first specific objection above. Whether Antifa's involvement in the events of January 6th were "material" is a legal conclusion for which Challengers must present supporting evidence.

Throughout the Report, statements from President Trump's advisors and associates at the time are cited and quoted to establish findings. But findings citing those sources cannot be statements of a co-conspirator because Challengers have not alleged—much less shown—a conspiracy to engage in insurrection. Similarly, government reports cited and quoted to establish findings do not always show what agency, group, or source gathered or submitted the "intelligence" in question. They are also hearsay. And assuming that some report would have been available to President Trump, like a summary of a report that does not show the full context, does not show one's state of mind. Further, many of the findings are needlessly cumulative and often irrelevant, especially where they mention "far-right extremist groups" with which President Trump had no communications. The actions of those groups have no bearing on President Trump's state of mind or his intent on January 6th. Additionally, the Select Committee took many of President Trump's statements out of context and without reference to further statements President Trump made asking those gathered in D.C. to be "peaceful" and to "go home." The Report also relies on transcribed interviews and depositions, which present their own hearsay issues. Lastly, the Report uses the word "believes" and improperly speculates throughout the Report, which must lead the Secretary of State to conclude these findings are speculative at best. If Challengers wished to admit each of the findings into evidence, they must have overcome this omnibus hearsay

objection and demonstrate each finding fits into a proper exception. That, ultimately, was Challengers' burden, which they did not meet.

E. **President Trump was prejudiced by the admission of inadmissible evidence.**

The admission of this "evidence" prejudiced President Trump in a number of ways. First, the January 6 Report's political bias prejudiced President Trump because the Select Committee spent millions of dollars to create a report with cherry-picked evidence that President Trump never had access to and could not use.

Further, President Trump was unable to cross-examine the witnesses, preventing him from "testing the reliability of testimony through examination in open court."[217] The Maine Supreme court has held explicitly that the ability to cross-examine adverse witnesses "is constitutionally required in almost every setting where important decisions turn on questions of fact."[218] The conclusions that rely on hearsay do not provide any specific information about who said what to whom—they just baldly assert that someone said something to President Trump or to someone else. Without cross-examination, President Trump was unable to challenge any of this hearsay, prejudicing his ability to challenge the purported factual determinations that resulted in this "important decision." For instance, President Trump was unable to cross-examine witnesses who claimed he participated in a conspiracy

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[217] *Jusseaume v. Ducatt*, 2011 ME 43, ¶ 13.

[218] *Id., citing In re Maine Clean Fuels, Inc.*, 310 A.2d 736, 746 (Me. 1973) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970)) and U.S. Const. amend. XIV (Due Process Clause), § 1; Me. Const. art. 1, § 6-A (Due Process Clause).

to attack the Capitol and prevent the counting of the electoral votes. Cross-examination of those persons would have shown that no such conspiracy existed, and that the individuals lacked personal knowledge of any efforts on the part of President Trump to engage in one. Cross-examination would also have shown that not one of the witnesses could testify that President Trump intended for the attack on the Capitol to occur. He would also have been able to challenge the one-sided narrative about intelligence regarding the risks to the Capitol on January 6, which was at best ambiguous, if not showing a lack of concern in the intelligence community regarding those risks. It would also have allowed President Trump to examine witnesses with control over the Capitol security to highlight why they chose not to implement his instruction to deploy national guard troops that day.

Third, President Trump did not have the ability to even review the evidence in a meaningful fashion, let alone identify countervailing evidence as he did not have subpoena power or the time required to obtain and review such evidence from the Select Committee – to the extent it even exists any longer and was not destroyed by the Select Committee and its staff.

This prevention by the Secretary of his ability to challenge the evidence prevented President Trump from exercising his due process rights to properly defend himself. It resulted in the admission of evidence that is not the "kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs."[219]

[219] 21-A M.R.S § 9057(2).

CONCLUSION

For the foregoing reasons, this Court should reverse and vacate the Secretary's Ruling and order that President Trump appear on the Republican Party Presidential Primary Ballot for the State of Maine. Alternatively, if the Court rests its decision solely on due process violations caused by the Secretary's bias, it should reverse and remand for a rehearing.

Respectfully submitted this 8th day of January 2024.

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STATE OF MICHIGAN

COURT OF CLAIMS

ROBERT LaBRANT, ANDREW BRADWAY, NORAH MURPHY and WILLIAM NOWLING,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State,

Defendant.
_____/

OPINION AND ORDER

Case No. 23-000137-MZ

Hon. James Robert Redford

OPINION AND ORDER DENYING PLAINTIFFS' REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF

In the instant case, 23-000137-MZ, plaintiffs come before the Court seeking declaratory and injunctive relief to:

1. Declare Donald J. Trump is disqualified from holding the office of President of the United States pursuant to Section 3 of the Fourteenth Amendment to the Constitution of the United States;

2. Permanently enjoin the Secretary of State from including Donald J. Trump on the ballot for the 2024 presidential primary election and;

3. Permanently enjoin the Secretary of State from including Donald J. Trump on the ballot for the November 5, 2024 general election as a candidate for the office of President of the United States.

For the reasons which will be set forth below the Court holds:

1. Michigan's Constitution of 1963, art 2, § 4 and MCL 168.614a and 168.615a prescribe the manner a person may have their name placed on the Michigan presidential primary ballot and in so doing direct the actions the Secretary of State shall take.

EXHIBIT B

2. The Fourteenth Amendment arguments of plaintiffs present a political question that is nonjusticiable at the present time. [1]

The Court will therefore DENY plaintiffs' prayer for declaratory relief and for a permanent injunction as relates to the Michigan primary election ballot for 2024. [2]

I. STANDARD OF REVIEW

MCR 2.605, which affords the Court the power to enter a declaratory judgment, "incorporates the doctrines of standing, ripeness, and mootness." *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). MCL 2.605(A)(1) provides, "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." To obtain declaratory relief, a plaintiff must thus show that he is an interested party and allege a "case of actual controversy" within the jurisdiction of the court. "An actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters of Mich v Sec'y of State*, 506 Mich 561, 586; 957 NW2d 731 (2020). A court "is not precluded from reaching issues before actual injuries or losses have occurred," but there still must be "a present legal

[1] The Court thanks and acknowledges the parties', proposed intervenor's, and all amicus curiae filers' thoughtful and comprehensive submissions received by the Court.

[2] The Court notes there are three cases that seek relief related to the 2024 Michigan presidential primary election: *Davis v Benson et al.*, 23-000128-MB, *LaBrant et al. v Benson,* 23-000137-MZ, and *Trump v Benson,* 23-000151-MZ. Because the cases are not consolidated and to facilitate immediate and individual appellate review of each opinion and order if desired by a litigant, while the Court may discuss some aspects of other cases in each opinion and order, the Court will seek to set forth the entire basis of the Court's rulings in each individual opinion and order, recognizing that there will be some redundancy in the respective cases.

controversy, not one that is merely hypothetical or anticipated in the future." *Id.* The bar for standing is lowered in cases concerning election laws, but even in election cases, a party may not bring a declaratory-judgment action on the basis that they "*might* affect his or her interests in the future" or because "they only want instruction going forward." *Id.* at 587-588 (emphasis added). In addition, in determining whether a present controversy exists, "[a] claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all." *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273, 282; 761 NW2d 210 (2008). See also *Thomas v Union Carbide Agricultural Prod Co*, 473 US 568, 580-581; 105 S Ct 3325; 87 L Ed 2d 409 (1985).

II. HISTORICAL INFORMATION

A. BRIEF BACKGROUND OF THE UNITED STATES CONSTITUTION

On September 17, 1787, the Constitution of the United States was agreed upon in the Constitutional Convention and transmitted to Congress by George Washington, the President of the Constitutional Convention. See Myers, *History Of The Printed Archetype Of The Constitution Of The United States Of America,* 11 Green Bag 2d 217 (2008). The Constitution was thereafter transmitted to the several states for consideration on September 28, 1787. See *id.* Following ratification by the states, March 4, 1789, was selected as the date upon which the operation of the government under the Constitution would commence.

The Constitution has Seven Articles which generally address the following:

Article I	The Legislature
Article II	The Executive
Article III	The Judiciary
Article IV	The Relationships between the Federal Government & States, Creation of New States

Article V The Amendment Process

Article VI The Supremacy Clause and the Oath required of persons holding certain offices to support the Constitution

Article VII The Ratification Process for the United States Constitution

On September 25, 1789, Congress transmitted twelve proposed Amendments to the Constitution to the states, ten of which were adopted and became the Bill of Rights, effective December 15, 1791. Since its adoption, in total, the Constitution has been amended 27 times. See US Const, Am I-XXVII. Of these amendments, the following specifically address the office of the President: the XII, XX, XXII, XXIII, and XXV. The XII, XIV and XXIII Amendments also, *inter alia*, address the office of presidential electors.

B. POST-BILL OF RIGHTS & PRE-CIVIL WAR AMENDMENTS

The Eleventh Amendment, ratified February 7, 1795, placed certain limits on the judicial power unrelated to the matter at bar. The Twelfth Amendment, ratified June 15, 1804, set forth the process by which electors would vote for President and Vice President.

C. CIVIL WAR

In November 1860, Abraham Lincoln was elected the Sixteenth President of the United States. Between December 20, 1860 and June 8, 1861, 11 states voted to secede from the United States.

On February 8, 1861, the Constitution for the Provisional Government of the Confederate States of America was adopted.[3] Jefferson Davis was selected to be Provisional President of the

[3] Yale Law School, Lillian Goldman Law Library, The Avalon Project https://avalon.law.yale.edu/19th_century/csa_csapro.asp, accessed November 13, 2023.

Confederate States of America on February 18, 1861.[4] On March 11, 1861, the Constitution of the Confederate States of America was adopted.[5]

On April 12, 1861, the federal enclave and military reservation at Fort Sumter, South Carolina was bombarded by cannon fire. On April 9, 1865, at Appomattox Court House, Virginia, the Army of Northern Virginia surrendered to the Union Army.

D. THE THIRTEENTH, FOURTEENTH & FIFTEENTH AMENDMENTS TO THE U.S. CONSTITUTION
THE CIVIL WAR AMENDMENTS

The Thirteenth Amendment, ratified December 6, 1865, abolished slavery. US Const, Am XIII.

The Fourteenth Amendment, ratified July 9, 1868, contains five sections including Section 3, the subject of this case, referred to as the Insurrection Clause. US Const, Am XIV.

The Fifteenth Amendment was ratified February 3, 1870, and prohibited states from denying the right to vote on the basis of race, color, or previous condition of servitude. US Const, Am XV.

III. ANALYSIS

A. PLAINTIFFS' ALLEGATIONS

Plaintiffs filed their complaint September 29, 2023. The complaint alleges actions and instances of inaction by Donald J. Trump, before, during, and after January 6, 2021, that plaintiffs

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[4] https://www.britannica.com/biography/Jefferson-Davis, accessed November 10, 2023.

[5] Yale Law School, Lillian Goldman Law Library, The Avalon Project, https://avalon.law.yale.edu/19th_century/csa_csa.asp, accessed November 13, 2023.

allege make him ineligible to stand for election for the office of President of the United States, on the basis of Section 3 of the Fourteenth Amendment to the United States Constitution.

B. LEGAL ANALYSIS

1. MICHIGAN'S CONSTITUTION AND STATUTES PRESCRIBE ELIGIBILITY TO BE PLACED ON THE MICHIGAN PRESIDENTIAL PRIMARY BALLOT

The Court finds that the statutory steps currently involved in any candidate being placed on the Michigan presidential primary ballot demonstrate that plaintiffs cannot show that they are entitled to a declaratory judgment with respect to an individual who is running in the Michigan primary election for the office of President. This is because the 1963 Michigan Constitution grants the power to the Michigan Legislature to regulate elections under Const 1963, art 2, § 4(2) and because the Legislature has specifically delineated the process by which an individual is to be placed on a presidential primary ballot.

Const 1963, art 2, § 4(2) provides the Michigan Legislature the power to "enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." The Legislature in turn has prescribed the process and eligibility for a presidential candidate to be placed on the primary ballot in the mandatory requirements set out in MCL 168.614a and MCL 168.615a. MCL 168.614a(1) requires:

> Not later than 4 p.m. of the second Friday in November of the year before the presidential election, the secretary of state *shall* issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section [MCL 168.613a]. The secretary of state *shall* make the list issued under this subsection available to the

public on an internet website maintained by the department of state. [Emphasis added.][6]

MCL 168.614a(2) provides for the state chairperson of each political party to then file a list of individuals whom they consider to be potential presidential candidates for that party and requires the Secretary to make that list available to the public. MCL 168.615a then requires the Secretary to place the candidates so identified on the presidential primary ballot unless a candidate withdraws. "Except as otherwise provided in this section, the secretary of state *shall* cause the name of a presidential candidate notified by the secretary of state under [MCL 168.614a] to be printed on the appropriate presidential primary ballot for that political party." MCL168.615a(1) (Emphasis added).

Under those requirements, while the Secretary is mandated to act, she retains discretion as to what media sources to consider when choosing which candidates to list on the notices she provides to the respective political parties under MCL 168.614a. However, the ultimate decision is made by the respective political party, with the consent of the listed candidates.[7] Given this comprehensive statutory scheme, there are substantial questions whether plaintiffs' complaint,

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[6] The Court notes, at oral argument on November 9, 2023, in this case and Cases 23-000128-MB and 23-000151-MZ, the attorney for the Secretary of State indicated that, in accordance with the Michigan Court Rules regarding deadlines that fall upon a weekend or legal holiday, the issuance of the list of individuals described in MCL 168.614a(1) would be transmitted on Monday, November 13, 2023, instead of Friday, November 10, 2023, because November 10, 2023, was the state of Michigan holiday in observance of Veteran's Day.

[7] The Court notes that candidates seeking to be placed on the presidential primary ballot in Michigan, if not included in the process outlined above and as provided by MCL 168.614a, may seek ballot access through a nominating petition process set forth in MCL 168.15a(2).

taken in the light most favorable to plaintiffs, supports a conclusion that other qualifications to be placed on the presidential primary ballot may be imposed by the Court. [8]

The Court is further persuaded by the analysis of the Minnesota Supreme Court in its November 8, 2023 order in *Growe et al. v Simon*, ___ NW2d ___ (Minn, 2023). As in the instant case, petitioners in *Growe* asked the Court to determine that Donald Trump was disqualified from holding the office of President under Section 3, and requested that the Court direct the Minnesota Secretary of State to exclude him from Minnesota's March 5, 2024 primary ballot and from the 2024 general election ballot.

The Court first determined, as the Court does here, that any question concerning Donald Trump's placement on the general election ballot is not ripe, or "about to occur" as required for relief under Minn Stat 204B. Turning to the question of disqualification to be placed on the primary ballot, the Court discussed the steps involved in placing candidates on the presidential primary ballot. Similar to the steps in the instant case, Minnesota's procedure involves placement on the ballot after the Chair of the Republican Party of Minnesota provides his name to the Minnesota Secretary of State.

The Court determined that, although the Minnesota Secretary of State and administration officials "administer the mechanics of the election," primary elections are designed as an aid to the respective political parties in choosing their nominees at the national conventions:

> The Legislature enacted the presidential nomination primary process to allow major political parties to select delegates to the national conventions of those parties; at those conventions the selected delegates will cast votes along with delegates from all of the other

[8] Similarly, this is among the reasons that this Court will not order the Secretary to place former President Trump on the primary ballot. The relevant statutory provisions contain the only way set out by the Legislature for a candidate to be placed on the ballot.

> states and territories and choose a presidential candidate who will subsequently appear on general election ballots. See Minn. Stat. § 207A.11(d) (2022) (explaining that the presidential nomination primary "only applies to a major political party that selects delegates at the presidential nomination primary to send to a national convention"). This is "a process that allows political parties to obtain voter input in advance of a nomination decision made at a national convention." *De La Fuente v Simon*, 940 NW2d 477, 492 (Minn, 2020). Thus, although the Secretary of State and other election officials administer the mechanics of the election, this is an internal party election to serve internal party purposes, and winning the presidential nomination primary does not place the person on the general election ballot as a candidate for President of the United States. As we explained in *De La Fuente*, in upholding the constitutionality of this statutory scheme for the presidential nomination primary, "[t]he road for any candidate's access to the ballot for Minnesota's presidential nomination primary runs only through the participating political parties, who alone determine which candidates will be on the party's ballot." 940 N.W.2d at 494-95. And there is no state statute that prohibits a major political party from placing on the presidential nomination primary ballot, or sending delegates to the national convention supporting, a candidate who is ineligible to hold office. [*Growe*, slip op pp 2-3].

Similarly, in Michigan, the procedures outlined in MCL 168.614a and MCL 168.615a provide the specific and explicit mechanism by which the Secretary of State is to place candidates on the 2024 Michigan presidential primary ballot. They are designed to assist the parties in determining their respective presidential candidates, and the Legislature has not provided any prohibition as to who may be placed on such ballots, irrespective as to whether the individual may either serve as a general election candidate or ultimately serve as President if elected.

In addition, the sheer number of steps involved in any candidate becoming a political party's candidate for President, in addition to the requirement that the candidate wins the general election, show that declaratory relief is not proper, at least at this time.

The Michigan Republican Party must list Mr. Trump as a Republican primary candidate in Michigan. Should they do so, he would then have to win said primary, which may well be affected by outside events that have occurred by that time. If he wins the Michigan primary, he would still have to prevail in primary challenges in the other states and win the vote at the Republican National

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

In determining whether to apply the political-question doctrine, the Supreme Court identified six factors relevant to the political-question doctrine in the 1962 case, *Baker v Carr*, 369 US 186; 82 S Ct 691; 7 L Ed 2d 663 (1962).

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. [*Id.* at 217.]

With respect to factor 1 concerning who has the responsibility of making a factual determination of whether a person can serve under Section 3, the well-thought-out analysis and conclusion in *Castro v New Hampshire Sec'y of State*, ____ F Supp 3d ___ (D NH, 2023) (Docket No. 23-CV-416-JL, issued October 27, 2023) is helpful. This was a similar case to the matter at bar in which the plaintiff sought an injunction barring the New Hampshire Secretary of State from placing former President Trump's name on the New Hampshire Republican primary ballot because of an alleged disqualification under Section 3.

After discussing whether the plaintiff had standing, and setting out the *Baker* factors, the *Castro* Court provided the following analysis:

> The defendants contend that Castro's claim triggers the first *Baker* formulation, and they cite a number of cases that support their position. Indeed, state and federal district courts have consistently found that the U.S. Constitution assigns to Congress and the electors, and not the courts, the role of determining if a presidential candidate or president is qualified and fit for office—at least in the first instance. Courts that have considered the issue have found this textual

assignment in varying combinations of the Twelfth Amendment and the Electoral Count Act, 3 U.S.C. § 15, which prescribe the process for transmitting, objecting to, and counting electoral votes; the Twentieth Amendment, which authorizes Congress to fashion a response if the president elect and vice president elect are unqualified; and the Twenty-Fifth amendment and Article I impeachment clauses, which involve Congress in the removal of an unfit president from office.

For example, in *Robinson v Bowen*, the plaintiff moved for a preliminary injunction removing Senator McCain from the 2008 California general election ballot on the ground that he was not a "natural-born citizen," as required under Article II of the U.S. Constitution. 567 F Supp 2d 1144, 1145 (ND Cal 2008). The *Robinson* Court denied the motion and dismissed the case upon finding, in part, that the plaintiff's challenge raised a nonjusticiable political question. The *Robinson* Court noted that the Twelfth Amendment and the Electoral Count Act provide that "Congress shall be in session on the appropriate day to count the electoral votes," and that Congress decides upon the outcome of any objections to the electoral votes. *Id.* at 1147. The *Robinson* Court reasoned that

> It is clear that mechanisms exist under the Twelfth Amendment and [the Electoral Count Act] for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify. Issues regarding qualifications for president are quintessentially suited to the foregoing process . . . . Therefore, this order holds that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance. Judicial review—if any—should occur only after the electoral and Congressional processes have run their course.

Id. (citing *Texas v United States*, 523 US 296, 300-02, 118 S Ct 1257, 140 L Ed 2d 406 (1998)).

Similarly, in *Grinols v Electoral Coll*, the plaintiffs moved for a temporary restraining order halting the re-election of then-President Obama on the ground that he was ineligible for office because he was not a natural-born citizen. 2013 WL 211135, at *1. The *Grinols* Court denied the motion largely because it found the plaintiffs' claim "legally untenable." *Id.* at *2. It reasoned, in part, that "numerous articles and amendments of the Constitution," including the Twelfth Amendment, Twentieth Amendment, Twenty-Fifth Amendment, and the Article I impeachment clauses, "make it clear that the Constitution assigns to Congress, and not the Courts, the responsibility of determining whether a person is qualified to serve as President. As such, the question presented by Plaintiffs in this case—whether President Obama may legitimately run for office and serve as President—is a political question that the Court may not answer." *Id.* at * 4.

Courts across the country have reached the same conclusion, based on similar reasoning. See, e.g., *Kerchner v Obama*, 669 F Supp 2d 477, 483 n 5 (D

NJ 2009) (referencing the Twelfth and Twentieth Amendments, as well as Congress's role in counting electoral votes, and concluding that "it appears that" the plaintiffs' constitutional claims premised on President Obama's purported ineligibility are "barred under the 'political question doctrine' as a question demonstrably committed to a coordinate political department"), aff'd 612 F3d 204 (3d Cir 2010); *Taitz v Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *16 (SD Miss Mar. 31, 2015) ("find[ing] no authority in the Constitution which would permit [the court] to determine that a sitting president is unqualified for office or a president-elect is unqualified to take office[,]" and concluding that "[t]hese prerogatives are firmly committed to the legislative branch of our government"); *Jordan v Secretary of State Sam Reed*, No. 12-2-01763-5, 2012 WL 4739216, at *1 (Wash Super Aug. 29, 2012) ("The primacy of congress to resolve issues of a candidate's qualifications to serve as president is established in the U.S. Constitution.").

Critically, Castro does not present case law that contradicts the authority discussed above—nor has the court found any.

* * *

In sum, the vast weight of authority has held that the Constitution commits to Congress and the electors the responsibility of determining matters of presidential candidates' qualifications. Castro provides no reason to deviate from this consistent authority. Thus, it appears to the court that Castro's claim—which challenges Trump's eligibility as a presidential candidate under Section 3 of the Fourteenth Amendment—raises a nonjusticiable political question. As such, even if Castro did have standing to assert his claim, the court would lack jurisdiction to hear it under the political question doctrine. [*Castro*, slip op pp 7-9 (footnotes omitted).]

The Court agrees with the above analysis. Additionally, the actions of those to whom Section 3's disqualification provision applied and Congress's post-civil war responses to the various problems with the way "disabilities" were initially removed support the conclusion that Congress is primarily responsible for taking actions to effectuate Section 3.

The Fourteenth Amendment was ratified July 9, 1868. After this, the 1872 General Amnesty Act and the Amnesty Act of 1898 were passed.

The 1872 General Amnesty Act provided:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein), That all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States. [17 Stat 142]

The 1872 law cleared over 150,000 former Confederate troops who had taken part in the American Civil War. See Heritage Library, <https://heritagelib.org/amnesty-act-of-1872#>, accessed November 10, 2023

Subsequently, Congress removed the Section 3 disability from those remaining individuals, enacting the Amnesty Act of 1898. This Act provides, "[t]hat the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed." Act of June 6, 1898, ch 389; 30 Stat 432.

That Congress could remove the Section 3 bar to serving, at least with respect to individuals barred at that time,[9] by enacting a law to "remove" the disability, en masse, even to those who could be said to be barred from service, but had not yet personally sought such relief, itself indicates that Congress not only had the power to remove the disability when asked by a specific candidate, but also possesses the broader "proactive" power to decide how to apply Section 3 in the first instance.

Arguments have been made that Congress's only role with respect to Section 3 is to remove a disability only after the judicial branch has determined that the individual cannot serve. For

[9] The Court notes that there is disagreement over whether the enactment of the Amnesty Act was also intended to apply prospectively to future individuals who would otherwise be barred from holding office under Section 3. However, the Court need not reach that issue at this time.

example, in *Anderson v Griswold*, Colorado Denver District Court, Docket No. 2023-CV-32577, issued October 25, 2023, slip op p 17, the Court stated that Congress "has disavowed any ability it once had to consider objections other than [those in 3 USC 15(d)(2)(B)(*ii*), when 1) "the electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors according to section 5(a)(1)", or 2) "where the vote of one or more electors has not been regularly given."] including any regarding the constitutional qualifications of the President-elect." However, Section 5 of the Fourteenth Amendment explicitly provides Congress with the "power to enforce, by appropriate legislation, the provisions of this article." The fact that Congress may have, at least for the moment, decided not to address this question prior to judicial intervention does not change the fact that they have the power to do so, and have certainly done so in the past.

With respect to the remaining factors set out in *Baker*, the Court notes that factors 2, 4, 5, and 6 apply to the instant case.

In Bradley and Posner, *The Real Political Question Doctrine*, Stanford Law Review, Vol. 75 (2023), the authors discuss how the "prudential" concerns in the *Baker* factors play into the use of the doctrine. Notably, two United States Supreme Court decisions after *Baker* support an analysis that some questions fall within the doctrine, at least in part, because of the related prudential concerns of causing "chaos", see *Nixon v United States*, 506 US 224, 236; 113 S Ct 732; 122 L Ed 2d 1 (1993), or because the courts would be pulled into recurring and highly partisan disputes, such as in the instant case, see *Rucho v Common Cause*, ___ US ___; 139 S Ct 2484, 2507; 204 L Ed 2d 931 (2019).

In *Nixon*, a case involving former United States District Judge Walter L. Nixon's impeachment trial before the Senate, the Court held that a challenge to the Senate's use of a

committee to receive evidence during an impeachment trial, similar to the way congressional committees investigated early Section 3 cases, raised a political question. The impeached judge in *Nixon* argued that the Senate's use of the committee was inconsistent with the Constitutional requirement that the Senate "try" impeachment cases. However, as discussed in *The Real Political Question Doctrine*, pp 1070-1072, the Court found that the first *Baker* factor applied even though the Constitution did not specify that the Senate had exclusive authority to decide the relevant trial procedures to be used for impeachments. *Nixon*, 506 US at 228-229. Its reason for doing so involved prudential concerns. In reaching its conclusion, the Court specifically tied the first and second factors together, and held "the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Id.* After its analysis of Article I, § 3, cl 6, the Court further held that the "chaos" involved in attempting to fashion relief supported the finding of a political question. In doing so, this case provides support for the premise that attempting to resolve the question of whether former President Trump appears on the Michigan primary ballot, or any other ballot, is nonjusticiable.

> In addition to the textual commitment argument, we are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability. See *Baker v Carr*, 369 US, at 210, 82 S Ct, at 706. We agree with the Court of Appeals that opening the door of judicial review to the procedures used by the Senate in trying impeachments would "expose the political life of the country to months, or perhaps years, of chaos." 290 US App DC, at 427, 938 F2d, at 246. This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated. Equally uncertain is the question of what relief a court may give other than simply setting aside the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to

> create an additional judgeship if the seat had been filled in the interim? [*Nixon*, 506 US at 236.]

See also *id.* at 253 (Souter, J., concurring in the judgment) (discussing that one significant consideration was "the potentiality of embarrassment from multifarious pronouncements by various departments on one question", and stating, "As the Court observes, judicial review of an impeachment trial would under the best of circumstances entail significant disruption of government." (citation omitted)).

In *Rucho*, Chief Justice Roberts wrote:

> Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." *Marbury v Madison*, 1 Cranch 137, 177, 2 L Ed. 60 (1803). Sometimes, however, "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth v Jubelirer*, 541 US 267, 277; 124 S Ct 1769; 158 L Ed 2d 546 (2004) (plurality opinion). In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction. *Baker v Carr*, 369 US 186, 217; 82 S Ct 691; 7 L Ed 2d 663 (1962). Among the political question cases the Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Id.* [*Rucho*, 139 S Ct at 2494.]

Rucho involved a request to intervene in light of a complaint alleging partisan gerrymandering by Republicans in North Carolina and Democrats in Maryland. The Supreme Court held that the challenges raised a political question. *Id.* at 2506-2507. The Court emphasized the difficulty that courts would have with resolving such claims using a "limited and precise rationale" that was also "clear, manageable, and politically neutral." *Id.* at 2498 (quotation marks and citation omitted). The Court found that intervention in "heated partisan issues" required such constraints, *id.*, because "[w]ith uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id.* (quotations and citations omitted). The Court also noted that

the circumstances were such that "the Constitution provides no basis whatever to guide the exercise of judicial discretion." *Id.* at 2506. With respect to the caution against becoming embroiled in recurring and highly partisan districting disputes, the Court further held:

> [I]ntervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role. [*Id.* at 2507.]

The instant case presents the potential for running afoul of these principles. In the companion case of 23-000128-MB, the Secretary has included in Exhibit 1, a list of active and recently dismissed state and federal cases, each involving former President Trump. There are 37 cases on the Secretary's list, and it does not include either of the companion cases currently before this Court. Should this trend continue, it is conceivable that there could be 50 state cases, and a number of concurrent federal ones, each with a judicial officer or officers who "even when proceeding with best intentions," have the potential to issue partial or even totally conflicting opinions on the basis of a significant number of potentially dispositive issues. Some of these cases, such as *Anderson*, are already proceeding to trial.[10] Prior to the United States Supreme Court's intervention, none of these opinions, or factual findings, are binding on any other court.

The questions involved are by their nature political. The number of cases presents the risk of completely opposite and potentially confusing opinions and outcomes, which will certainly "expose the political life of the country to months, or perhaps years, of chaos." Moreover, there

[10] The Court notes, *Anderson* and *Castro* discussed above reached opposite conclusions with respect to whether the question is justiciable. This Court agrees with the *Castro* Court that it is not.

is no "limited and precise rationale" to guide this Court and the others that is also "clear, manageable, and politically neutral." Because the cases involve the office of the President, such confusion and lack of finality will be more pronounced. *Nixon*, 506 US at 236.

In determining if a question is justiciable, it is worthwhile to consider what the judiciary is asked to determine. In this case, some questions while complex, are nonetheless straightforward and embrace traditional means of legal decision-making. Is a specific office sought covered? Has a person taken a previous oath that is applicable?

Others are far more nuanced and complex. This Court recognizes the judiciary does not avoid questions because they are nuanced, complex, or difficult; however, when applying the *Baker* principles and standards, it seems appropriate in this case to ask:

What is an insurrection or a rebellion? What is it to engage in it or to give aid and comfort to the enemies of the Constitution?

Does it require a war of 1,458 days with 620,000 killed and battles throughout the land? [11] Could it be based on actions of physical violence, lawlessness, destruction, interruption of legislative sessions all of which take place on a single day even if allegedly supported by and aided by speeches and comments and actions and inactions by an individual before, during, and after that day? Could it be a political speech that some may argue encourages or incites others to act in ways they believe results in moral culpability on the part of the speaker for physical violence?

[11] American Battlefield Trust https://www.battlefields.org/learn/articles/civil-war-casualties, accessed November 13, 2023.

The short answer is–there are as many answers and gradations of answers to each of these proffered examples as there are people called upon to decide them.

The inappropriateness of the judicial branch resolving these questions, tendered by Section 3 of the Fourteenth Amendment, includes that the judicial action of removing a candidate from the presidential ballot and prohibiting them from running essentially strips Congress of its ability to "by a vote of two-thirds of each House, remove such a disability." Also, it takes the decision of whether there was a rebellion or insurrection and whether or not someone participated in it from the Congress, a body made up of elected representatives of the people of every state in the nation, and gives it to but one single judicial officer, a person who no matter how well intentioned, evenhanded, fair and learned, cannot in any manner or form possibly embody the represented qualities of every citizen of the nation–as does the House of Representatives and the Senate. Nor is that judicial officer provided the "power to enforce, by appropriate legislation, the provisions of this article," Section 5. [12]

[12]Plaintiffs argue that the chaos created by permitting Mr. Trump to run, and become the President-elect, prior to having Congress adjudicate whether he is disqualified under Section 3, would be far worse than that which is presently occurring. Because the Constitution contains direction on what will occur should a President-elect fail to qualify for office (see US Const, Am XX, § 3) or is unable to discharge the duties of his office (see US Const, Am XXV, § 4), this Court respectfully disagrees. As unsettling as such a process could be, it is the process provided for in the Constitution and is preferable to potentially having 50 or more separate trials or evidentiary hearings, which will undoubtably rely on nonstandard definitions of "insurrection or rebellion" or what constitutes providing "aid and comfort" to an "enemy" of the United States, where the results could then be completely contradictory and which would then have to survive the various state appellate processes—all in the extremely short time before the various state primaries. Also, the Court respectfully finds plaintiffs' argument that the United States Supreme Court would then be able to manage subsequent appeals and ultimately determine these issues in time for the effective administration of various primary elections speculative.

IV. CONCLUSION

For each of the reasons discussed above, the Court DENIES declaratory relief to plaintiffs in 23-000137-MZ.

IT IS SO ORDERED.

This is a final order and closes this case.

Date: November 14, 2023

Hon. James Robert Redford
Judge, Court of Claims

State of Maine
Presidential Primary Candidate's Consent

Republican **Party**

Legal name of candidate as it will appear on the ballot: *(See Title 21-A, §601(2)(H) for requirements for listing candidates' names on the ballot.)*

Trump	Donald	J.
(Last name and suffix, if any)	(First name)	(Middle name or initial)

Phonetic pronunciation of name for accessible audio ballot DON -UHLD J TR-UHMP

Voting Residence Address of Candidate: Palm Beach (City/Town) Florida (State)

Qualifications of President of the United States (U.S. Constitution, Article II, Section 1)

- Be a natural born U.S. Citizen
- Have been a resident of the United States for at least 14 years
- Be at least 35 years of age

Candidate's Consent

I hereby declare my intent to be a candidate for the Office of President of the United States and participate in the Presidential Primary for the party named above to be held on March 5, 2024, in the State of Maine. I further declare that my residence is in the municipality and state listed above; that I am enrolled in the party named on this consent; that I meet the qualifications to hold this office as listed above; and that this declaration is true.

(Signature of Candidate)

Subscribed to and sworn before me on this date: 20th day of oct 2023 (Date)

(Signature of Notary Public)

KRISTIN G POCIS
Notary Public - State of Florida
Commission # HH 271536
My Comm. Expires Jul 26, 2026
Bonded through National Notary Assn.

Kristin G Pocis
(Printed Name of Notary Public)

Filing deadline for Candidate's Consent and Presidential Primary Nomination petitions to be received by the Division of Elections is 5 p.m., Friday, December 1, 2023.

EXHIBIT
A