STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-2024-01

DONALD J. TRUMP,

Petitioner,

v.

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

Respondent,

and

KIMBERLEY ROSEN, THOMAS SAVIELLO, and **ETHAN STRIMLING**

Parties-in-Interest.

PARTIES-IN-INTEREST RULE 80C BRIEF

INTRODUCTION

Donald Trump must not appear on Maine's Republican primary ballot because he is disqualified from public office under Section 3 of the Fourteenth Amendment. Maine law gives the Secretary of State the authority to hear and adjudicate challenges to presidential candidates' qualifications for office. Both the Supremacy Clause of the Constitution and the Secretary's oath of office makes clear that Secretary Bellows was charged with abiding and enforcing the United States Constitution and Maine law. Secretary Bellows appropriately acted upon this authority, holding that former President Trump did not meet the qualifications for the office he seeks and therefore cannot appear on the presidential primary ballot. This court should affirm the Secretary's robust and well-reasoned decision.

Former President Trump and his counsel argue that this Court should give way in deference to his popularity and polling numbers. But to do so would be to cancel the Constitution, threatening the integrity of Maine's elections, undermining the rights of Maine Republican primary voters who want to vote for eligible candidates, and increasing the threat of future attacks on our democracy.

That the events of January 6, 2021 were an insurrection against the Constitution and that Donald Trump incited those events are beyond serious dispute. In the aftermath of January 6th, a bipartisan chorus including both chambers of Congress and even Trump's own impeachment lawyer referred to the events as an insurrection. Numerous federal judges, including those appointed by Republican and Democratic presidents, have referred to January 6th as an

insurrection. The only three modern court decisions to reach the merits of a Section 3 challenge found that January 6th was an insurrection under Section 3, and the two courts to reach the merits in a Section 3 challenge to Trump's candidacy found that he had incited—and thus engaged in—that insurrection. Bipartisan votes in the House and the Senate confirmed that Donald Trump incited the January 6th insurrection. The Secretary's ruling is also consistent with the findings of the 16-month bipartisan investigation and findings of the January 6th Committee that January 6th was an insurrection and that Trump was its very real cause.

As the Secretary heard in the unrebutted testimony from Professor Gerard Magliocca and read in the amicus from Professor Mark Graber, the nation's two leading scholars on Section 3 who have written peer-reviewed works on the topic before January 6th, Section 3 applies to the President and the Presidency. It would be absurd to conclude that Section 3's framers—who were primarily concerned with disqualifying former Confederate *leaders* such as Jefferson Davis—would have broadly barred oath-breaking insurrectionists from all federal and state offices *except* for the Presidency. The Presidency is not beyond the reach of Section 3 and Donald Trump is not above the law. President Trump's attempt to overturn the 2020 election would have disenfranchised more than 435,000 Maine voters. The framers of the Fourteenth Amendment understood the risk of allowing such an individual to take high office again and ratified Section 3 specifically to prevent that threat.

BACKGROUND AND PROCEDURAL HISTORY

The following background and procedural history is taken from the Ruling of the Secretary of State dated December 28, 2023 (the "Ruling"), except as noted. Petitioner Donald Trump ("Mr. Trump" or "Petitioner") was the 45th President of the United States. On January 20, 2017, he swore an oath to "preserve, protect, and defend the Constitution of the United States." On November 3, 2020, he was defeated in his attempt at reelection. Rather than accept defeat, he perpetrated a months long campaign of election denial, stoking the tempers of his extremist followers, and ultimately inciting an insurrection on the United States Capitol on January 6, 2021, in order to prevent Congress from certifying the votes of the electoral college as required by the Constitution. Pursuant to section 3 of the Fourteenth Amendment to the United States Constitution ("Section 3"), he is therefore disqualified from holding the office of President.

On November 17th, 2023, Mr. Trump filed in the office of the Secretary of State (the "Secretary") his petition, containing a required candidate consent, to appear on the Maine Republican presidential primary ballot scheduled for March 5, 2024. The Secretary of State's office subsequently received three challenges to Mr. Trump's petition, filed pursuant to the procedures contained in 21-A M.R.S. § 337, prior to the 5:00 December 8, 2023 deadline. One of those challenges was filed by Parties-in-Interest Kimberley Rosen, Thomas Saviello, and Ethan Strimling (collectively, the "Challengers").

Challengers' filing asserted two alternative grounds for invalidating Mr. Trump's petitions: first, that "having previously taken an oath to support the Constitution, Trump engaged in insurrection against the same, and therefore is now ineligible to hold any office, civil or military, under the United States."; and second, that if the declaration on Trump's signed candidate consent was construed "as being limited to the qualifications contained on the list of constitutional requirements prepared by the Secretary and appearing on the form on which it was made, the consent is invalid because . . . the list is incomplete." (R. 296-97.)

On Monday, December 11, 2023, the Secretary issued a Notice of Hearing setting a consolidated hearing for December 15, 2023. The parties exchanged witness and exhibit lists by 5:00 PM on December 13, as required by the Secretary. Five additional parties intervened prior to the Secretary's December 14 deadline, including Citizens for Responsibility and Ethics in Washington ("CREW") and Professor Mark Graber, who intervened solely to submit an amicus brief (the "Graber Br.").

At the hearing, the Secretary admitted Challengers' first five exhibits without objection, and provisionally admitted Challengers' remaining exhibits numbered 6 through 112, pending resolution of objections. The Secretary also admitted Mr. Trump's sole exhibit, his signed consent form, which was identical to Challengers' exhibit 1. Challengers called one witness, Professor Gerard Magliocca from the Indiana University School of Law. Mr. Trump called none. The parties presented oral argument on the scope of the Secretary's authority under Maine

statute and federal law, but waived oral closing arguments in lieu of submitting closing briefs.

At the close of the December 15 proceedings, the Secretary noted that the hearing would be continued for the limited purpose of resolving evidentiary objections, and that she would deliver her decision within five business days of the hearing's completion. (R. 287, 291.) Written evidentiary objections were to be received by 5:00 pm on December 18, with responses due by 5:00 the following day. Closing legal briefs were to be due by 5:00 on December 19.

Following the Colorado Supreme Court's decision in *Anderson v. Griswold*, 2023 CO 63 (Dec. 19, 2023), the Secretary invited supplemental briefing on the significance of that decision for this matter, if any, to be due by 8:00 pm on December 21. On December 27, Mr. Trump filed a request that the Secretary disqualify herself from presiding over this matter, due to his discovery of three tweets the Secretary had made between February 13, 2021 and January 6, 2022.[1]

On December 28, the Secretary issued her Ruling, invalidating Mr. Trump's petitions. In her Ruling, the Secretary denied Mr. Trump's disqualification request as untimely, and stated that even had the request been timely, it would have been denied because her "decision is based exclusively on the record before [her], and it

[1] Challengers' filed an opposition to that request at 9:00 pm on December 27, but due to technical errors with the Secretary's email system, it was not received prior to her decision, and does not appear in the record. The arguments made in that opposition are largely incorporated herein. *See infra*, § III.A.

has in no way been influenced by [her[political affiliation or personal views about the events of January 6, 2021."

On January 2, Mr. Trump timely filed this appeal. Challengers entered their appearance as Parties-in-Interest on January 4.

STANDARD OF REVIEW

Judicial review of the Secretary of State's decision on a registered voter's challenge brought pursuant to the procedures contained in 21-A M.R.S. § 337 "must be conducted in accordance with the Maine Rules of Civil Procedure, Rule 80C, except as modified by this section." 21-A M.R.S. § 337(2)(D).

Rule 80C does not permit the Court to overrule an agency decision "unless it: violates the Constitution or statutes; exceeds the agency's authority; is procedurally unlawful; is arbitrary or capricious; constitutes an abuse of discretion; is affected by bias or error of law; or is unsupported by the evidence in the record." *Kroger v. Dep't of Env't Prot.*, 2005 ME 50, ¶ 7, 870 A.2d 566 (*quoting* 5 M.R.S. § 11007(4)). The appealing party bears the burden of persuasion. *Anderson v. Me. Pub. Emp. Ret. Sys.*, 2009 ME 134, ¶ 3, 985 A.2d 501.

A court, reviewing the agency decision, must examine "the entire record to determine whether, on the basis of all the testimony and exhibits before it, the agency could fairly and reasonably find the facts as it did." *Friends of Lincoln Lake v. Bd. of Env't Prot*, 2010 ME 18, ¶ 13, 989 A. 2d 1128 (quoting *Int'l Paper Co. v. Bd. of Env't Prot.*, 1999 ME 135, ¶ 29, 737 A.2d 1047) (quotation marks omitted). "The

court may not substitute its judgment for that of the agency on questions of fact[.]" 5 M.R.S. § 11007(3).

Construing a statute, a court must "interpret every statute de novo as a matter of law to give effect to the intent of the Legislature, first by examining its plain language." *Reed v. Sec'y of State*, 2020 ME 57, ¶ 14, 232 A.3d 202 (quotation marks omitted). Where that language is unambiguous, the court applies the statute according to its unambiguous meaning. *Id.* "If, however, a statute is ambiguous—i.e., it is reasonably susceptible to different interpretations—[the court] defer[s] to the agency's reasonable construction when the agency is tasked with administering the statute and it falls within the agency's expertise." *Id.* (quotation marks omitted). The court must, therefore, defer to the Secretary's "reasonable interpretation of . . . ambiguous statutes." *Id.* ¶ 18; *see also Melanson v. Sec'y of State*, 2004 ME 127, ¶ 15, 861 A.2d 641 (deferring to the Secretary interpretation of an election statute).

ARGUMENT

I. The Constitution Empowers the States to Run Their Presidential Elections and Maine's Legislature Has Exercised that Authority by Requiring the Secretary to Evaluate Presidential Candidate Qualifications.

A. States Have Broad Constitutional Authority to Run Presidential Elections.

The Constitution's Electors Clause empowers state legislatures to "direct" the "manner" of appointing presidential electors. U.S. Const. art. II, § 1, cl. 2. This clause gives the states "far-reaching authority" to run presidential elections, "absent some other constitutional constraint." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020); *see also* (R. 5115-16) (Amicus Br. of Free Speech for People at

7-8 ("FSFP")). Under this authority, "the States have evolved comprehensive . . . election codes regulating in most substantial ways . . . state and federal elections," including the "selection and qualification of candidates." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Here, the Maine legislature has exercised its constitutional power by authorizing ballot access challenges to presidential primary candidates. *See* 21-A M.R.S. §§ 336; 337; 443; *infra* § II.A.

Sections 336 and 337 advance Maine's "legitimate interest in protecting the integrity and practical functioning of the political process" by permitting it "to exclude from the ballot [presidential] candidates who are constitutionally prohibited from assuming office." *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (upholding exclusion of a naturalized citizen from presidential primary ballot); *Hassan v. New Hampshire*, No. 11-cv-552, 2012 U.S. Dist. LEXIS 15094 at *1, 10 (D.N.H. Feb. 8, 2012) (same); *Lindsay v. Bowen*, 750 F.3d 1061, 1063-65 (9th Cir. 2014) (upholding exclusion of a 27-year-old from presidential primary ballot); *see also Bullock v. Carter*, 405 U.S. 134, 145 (1972) ("a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies."); *Louisiana ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 632 (1869) ("the State has obviously a great interest in" enforcing Section 3 "and a clear right to" do so). It is irrelevant that Section 3's text only prohibits *holding* office rather than *running* for office because Maine law empowers the Secretary to deny ballot access to a candidate "ineligible *to assume the office* of president." *Hassan*, 495 F. App'x at 948 (rejecting identical argument

with respect to enforcement of natural-born citizen requirement at ballot access stage).[2]

The states' interest in policing their ballots is at its apex in presidential elections. A state must ensure its electoral votes are not wasted on an unqualified candidate. Yet under Trump's view, "every 'state would be powerless to prevent' 'fraudulent or unqualified candidates such as minors, out-of-state residents, or foreign nationals'" from running for President. *Cawthorn v. Amalfi*, 35 F.4th 245, 265 (4th Cir. 2022) (Wynn, J., concurring). "It is hard to believe the State legislatures that ratified the Constitution signed up for such a charade." *Id.*

B. Maine law unambiguously delegates to its Secretary of State the duty to adjudicate a challenge to the qualifications of a presidential primary candidate.

Although not every state has exercised its constitutional authority to exclude unqualified candidates from the ballot, Maine has established a statutory regime to challenge presidential candidate qualifications that unambiguously delegates the duty to adjudicate such a challenge to the Secretary of State. *See* 21-A M.R.S. §§ 336-337; 442-443 (2023). Specifically, Maine has established a challenge procedure under 21-A M.R.S. § 337 that empowers "a registered voter residing in the electoral

[2] Counsel for Trump embraced this view when he was Colorado's Secretary of State. In 2012, then-Secretary Scott Gessler insisted "any candidate who does not meet the minimum Constitutional requirements for the office of the Presidency may not be placed on the ballot for that office." Answer ¶ 27, *Hassan v. Colorado*, No. 11-cv-3116, ECF No. 27 (D. Colo. Apr. 24, 2012); *accord* (R. 5575) (Letter from Colorado Secretary of State to Abdul K. Hassan (Aug. 12, 2011)).

division of the candidate concerned" to "challeng[e] the validity of a primary petition."[3]

Unlike in some states, where a challenge may *only* be brought in the general election, Maine's general election challenge procedure only applies to unenrolled candidates seeking to qualify directly for the ballot by petition. *See* 21-A M.R.S. § 356. Any challenge to the eligibility of party candidates must occur in the primary, and the challenge procedure is directly made applicable to presidential primary elections. 21-A M.R.S. § 443 ("The Secretary of State shall determine if a petition [to appear on the ballot in a presidential primary election] meets the requirements of sections 335, 336 and 442, subject to challenge and appeal under section 337."). Trump's citations to dismissals of similar challenges in other state's courts on state law grounds are inapposite: other states do not have Maine's statutes.

Section 336(3) requires a candidate to swear that he meets the qualifications for the office he seeks. It is not ambiguous. It states:

> "The consent must contain a declaration of the candidate's place of residence and party designation and **a statement that the candidate meets the qualifications of the office the candidate seeks,** which the candidate must verify by oath or affirmation before a notary public or other person authorized by law to administer oaths or affirmations that the declaration is true. If, **pursuant to the challenge procedures in section 337, any part of the declaration is found to be false by the Secretary of State, the consent and the primary petition are void.**"

Id. (emphasis added). A candidate who declares that he "meets the qualifications of" President, but does not actually meet those qualifications would be making a "false"

[3] No party challenged the voter registration status of any challenger. (R. 3.)

declaration, regardless of whether they act with the intent to make a false statement.

Determining whether a declaration is "false" may occasionally require looking beyond the papers and making complex factual determinations, just as does determining whether petition signatures are fraudulent. *See e.g. Boyer v. Sec'y of State*, No. AP-18-20 (Apr. 26, 2018), *aff'd sub nom Linn v. Sec'y of State*, Mem-18-41, 2018 Me. Unpub. LEXIS 42 (May 8, 2018) (the Secretary, in section 337 proceedings, invalidating over 200 signatures on the basis of a finding of fraud); *see also Me. Taxpayers Action Network v. Sec'y of State*, 2002 ME 64, 795 A.2d 75 (the Secretary, in proceedings under 21-A M.R.S. § 905, invalidating over 3,000 petition signatures on the basis of a finding of identity fraud on the part of the circulator). This is the purpose of the challenge hearing under § 337(2). If the Petition or Consent were facially invalid, the Secretary would simply not accept it as not "properly completed." § 337(1).

Similarly, in such proceedings the Secretary may be called upon to wrestle with complex constitutional issues. *See e.g., Jones v. Sec'y of State*, 2020 ME 113, 238 A.3d 982 (holding that the First Amendment to the United States Constitution did not require the Secretary to accept signatures on petitions circulated by out of state residents, in violation of Me. Const. art. IV, pt. 3, § 20).[4] There is no principled way to distinguish the substantive constitutional issues posed by Section 3 from other presidential qualifications in the Constitution, or for that matter any other

[4] The First Circuit later disagreed. *We The People PAC v. Bellows*, 40 F.4th 1 (1st Cir. 2022).

issues posed by provisions of the Maine or United States constitutions. When called upon, the Secretary must apply them all.

1. Section 336 makes the candidate's "statement" subject to challenge as part of his "declaration."

Petitioner Trump argues that the *expressio unius* canon should be applied to the text of Section 336, resulting in what he characterizes as an unambiguous statute that excludes the "statement that the candidate meets the qualifications of the office the candidate seeks" from the scope of the "declaration" that may, pursuant to a challenge, be "found to be false by the Secretary of State. . . ." (Pet. Br. at 8.) But the *expressio unius* canon is only applied to *ambiguous* statutory provisions. *Boles v. White*, 2021 ME 49, ¶ 18, 260 A.3d 697 (stating unequivocally that the *expressio unius* "maxim has no application to language that is unambiguous. . . ."). And, of course, if the language is ambiguous, the Court must defer to the Secretary's reasonable interpretation. *Melanson*, 2004 ME 127, ¶ 15, 861 A.2d 641.

Likewise, next Trump misapplies the corollary to the presumption of consistent usage—that "when a legislature uses different words within the same statute, it intends for the words to carry different meanings,"—required "statement" and "declaration" be afforded different meanings. (Pet. Br. 10) (*quoting Fair Elections Portland, Inc. v. City of Portland*, 2021 ME 32, ¶ 29, 252 A.3d 504, 512–13). But he fails to explain what that difference in meaning might be—and in fact treats them as synonyms, both meaning roughly: a written assertion signed under an oath administered by a notary.

Rather, because the language is unambiguous, it must be read to require the candidate's consent "must contain a declaration of" (1) "the candidate's place of residence and party designation" and (2) "a statement that the candidate meets the qualifications of the office the candidate seeks," both of which, as part of the declaration, "the candidate must verify by oath or affirmation before a notary public or other person authorized by law to administer oaths or affirmations *that the declaration is true.*" 21-A M.R.S. § 336(3) (emphasis added). As Trump later concedes, there can be no sensible reading which would have the "statement" not be sworn before the notary. (Pet. Br. 18.) But the notary is only charged with administering an oath or affirmation that the *declaration* is true.

The legislative history confirms the Challengers' reading. From 1987 until 1995, a challenge brought pursuant to 21-A M.R.S. § 336(3) was only made applicable to a declaration of the candidate's residence and party designation. *See* P.L. 1987, ch. 214 (enacting section 336(3) to originally require only "a declaration of the candidate's place of residence and party designation which the candidate must verify by oath or affirmation. . . ."). Only later was section 336(3) amended to insert a "statement" into the middle of the sentence. P.L. 1995, ch. 459, § 24. The statement of fact attached to that bill—a package of updates to the election code submitted by the Secretary's office—indicated that the words "statement" and "declaration" were being used interchangeably, referring to the existing "declaration" being amended as "the *statement* required of a candidate in the candidate's consent . . . ." L.D. 1461, Statement of Fact, at 39 (117th Legis. 1995).

Because L.D. 1461 only added this provision to party candidate petitions covered under section 336, and not nonparty petitions provided for in section 355, the Secretary followed up to correct the inconsistency in the next legislature as part of another agency bill. *See* P.L. 1997, ch. 436, § 51. On this second pass, as noted in the Secretary's ruling (R. 14), the Secretary's office simplified the language by omitting any mention of a "statement." *Id.* (requiring the consent to contain "a declaration of the candidate's place of residence . . . and that the candidate meets the qualifications of the office the candidate seeks."). Crucially, the summary attached to the Secretary's proposal did not list the amendment among the bill's "substantive changes," implying that it was instead one of many "minor technical changes in the election laws to correct statutory references and *maintain consistency with changes to other sections of the law.*" L.D. 1731, Summary, at 39 (118th Legis. 1997). And, as Petitioner acknowledges, the Secretary's application of section 336(3), like section 355(3), has consistently been to include the "statement" as *part of* the declaration being verified before a notary. (Pet. Br. 14) (printing the text of what was signed under oath before a notary on the candidate consent, including the "statement" and ending by verifying "that *this declaration* is true." (emphasis added)).

2. It makes no difference whether the declaration that the Petitioner signed is limited to only certain qualifications.

The Secretary's error in printing a form that does not include all presidential qualifications does not change the statutory requirement that the form "*must* contain . . . a statement that the candidate meets the qualifications of the office the

candidate seeks" not just a subset of those qualifications, and that the candidate "*must* verify by oath or affirmation" that he or she meets all qualifications for office they seek. 21-A M.R.S. § 336(3) (emphasis added); 21-A M.R.S. § 7 (Use of words) ("When used in this Title, the words 'shall' and 'must' are used in a mandatory sense to impose an obligation to act in the manner specified by the context."); *see Melanson v. Sec'y of State*, 2004 ME 127, ¶ 12, 861 A.2d 641 (holding that the purpose of a party unenrollment form filed pursuant to 21-A M.R.S. § 354 "is to aid the Secretary in fulfilling his responsibilities in the election process by ensuring that any person who may be placed on a ballot meets the statutory requirements."). Here, the statutory requirement that the candidate certify he meets the qualifications for office is not ambiguous, and preempts the Secretary's form. *Doane v. Dep't of Health & Hum. Servs.*, 2017 ME 193, ¶ 13 ("If a regulation conflicts with an existing statute, the statute controls.").

The declaration contained on the Secretary's promulgated form must be construed according to the fundamental principle that a construction which validates must be given preference over one which invalidates. *See State v. Davenport*, 326 A.2d 1, 6 (Me. 1974) ("The cardinal principle of statutory construction is to save, not to destroy.") Bryan A. Garner & Antonin Scalia, Reading Law, 66 (West, 2012) (explaining the maxim *ut res magis valeat quam pereat*). If Petitioner's declaration can be construed to apply to *all* qualifications of the office of President, it must be. The Secretary has offered such a construction. R. 13 (treating the phrase "as listed above" as merely a parenthetical reference provided for

convenience rather than a limitation on the scope of the declaration). At the hearing, Challengers suggested an alternative. R. 55 (referring instead to the nearest reasonable referent: the office being sought); *see also* Garner & Scalia, 152 (describing the nearest-reasonable-referent canon). Otherwise, the consent itself—and therefore Trump's petition—is simply invalid because it does not conform with statute.[5] And any attempt by Trump or the Secretary to now cure the defect would be futile because doing so would only bring us back to the merits of this challenge.

Trump's equitable estoppel argument (Pet. Br. 19) falls flat, because he in no way changed his position for the worse in reliance upon the Secretary's form. *See HHS v. Pelletier*, 2009 ME 11, ¶ 17, 964 A.2d 630 ("To prove equitable estoppel against a governmental entity, the party asserting it must demonstrate that (1) the statements or conduct of the governmental official or agency induced the party to act; (2) the reliance was detrimental; and (3) the reliance was reasonable.") To succeed here, he would need to show (1) that had the Secretary either listed Section 3 among the qualifications for office or omitted the words "as listed above" from the declaration, he would not have signed the form and simply would have declined to compete in Maine's primary; and (2) that he somehow suffered harm by having now signed the form aside from not being allowed to compete in the primary. Of course,

[5] This basis for invalidating Trump's petitions would not require invalidating other candidates' petitions for two reasons: first, no other candidates' petitions were challenged on this basis, and second, even if they had been, the defect would be immaterial to their qualifications. Other candidates could have just as easily signed a proper declaration had the Secretary provided one.

he can make no such showing because his disqualification from holding office results from the language in the Constitution, not that on the form.

Petitioner is plainly wrong that section 337 proceedings are inappropriate for a challenge to the declaration language contained on the consent form itself (Pet. Br. 22-23), for three reasons. *First*, the Secretary's past practice indicates an expansive interpretation of what may be considered in a challenge to "the validity of a primary petition" under section 337(2)—and its nearly identical companion section 356(2)—to encompass the entirety of the accompanying consent and certification forms. *See, e.g.*, *Melanson*, 2004 ME 127, ¶ 4 (noting, in a section 356 challenge to a nonparty nomination petition, that "for many years the Secretary has followed a practice that incorporates both the petition form and the consent and certification, though two documents, as one petition."). *Second,* the language of section 336 itself demonstrates that the consent is part of the primary petition. 21-A M.R.S. § 336(2) (providing that a consent will remain valid "even though it may be *part of a primary petition* which is void. . . ."). *Third*, the 2019 statute adopting procedures for the presidential primary expressly includes within the permissible scope of a section 337 challenge the question of whether a petition "meets the requirements of section[] . . . 336 . . . ." 21-A M.R.S. § 443 (2023). A declaration that a candidate meets some, but not all, of the constitutional qualifications of the office he seeks does not "meet[] the requirements" of section 336. Challengers expressly raised this alternative basis for invalidating Trump's petitions in their initial filing with the Secretary. (R. 297.)

Here, because the purpose of the challenge procedure is to allow voters to challenge the validity of a primary petition, and that challenge procedure is expressly made applicable *both* to the truth or falsity of whether a candidate "meets the qualifications of the office the candidate seeks," 21-A M.R.S. § 336(3) (2023) *and* whether the petition "meets the requirements of sections 335, 336 and 442," 21-A M.R.S. § 443 (2023), adjudication of the merits of the constitutional question was within the Secretary's jurisdiction.

C. The Secretary was required to enforce Section 3 as a "qualification[] of the office" of President, just as she would Article II qualifications.

If the Secretary has authority to enforce the qualifications for the Presidency set forth in Article II of the Constitution, then surely she has the authority to enforce Section 3, as well. The states have an affirmative duty under the Supremacy Clause to enforce the U.S. Constitution through applicable state law procedures. "The Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." *Howlett v. Rose*, 496 U.S. 356, 367 (1990). "The Supremacy Clause makes those laws 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure." *Id.* In keeping with these bedrock principles of federalism, states have historically enforced Section 3 pursuant to state statutes and procedural rules.[6] This rule applies equally when state laws charge state

[6] *New Mexico ex rel. White v. Griffin*, 2022 WL 4295619 (N.M. Dist. Ct. Sept. 6, 2022) (adjudicating Section 3 challenge under state quo warranto law); *Worthy v. Barrett*, 63 N.C. 199, 202 (1869) (mandamus); *In re Tate*, 63 N.C. 308 (mandamus); *Louisiana ex rel. Sandlin*

agencies with adjudicatory duties. *See Rowan v. Greene*, No. 222582-OSAH-SECSTATE-CE-57-Beaudrot (Ga. Off. Admin. Hr'gs May 6, 2022) https://perma.cc/M93H-LA7X.

As explained above, it is immaterial that Maine's Presidential Primary Candidate Consent form does not specifically list Section 3 of the Fourteenth Amendment as a "qualification" for the Presidency.[7] The Secretary correctly determined that the Legislature's "principal concern" both in requiring candidates to affirm their qualifications for office and separately requiring the Secretary to list those qualifications is "not whether a candidate is truthful on the form, but more fundamentally whether the candidate is qualified for office." (R. 13) (emphasis in original). The form also omits the Twenty-Second Amendment, which provides that "[n]o person shall be elected to the office of the President more than twice." Surely this omission does not mean that the Secretary would be required to list former Presidents Barack Obama or George W. Bush on a presidential primary ballot despite their ineligibility under the Twenty-Second Amendment. That would defeat the purpose of the statute. Rather, insofar as the consent form's list of qualifications

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v. Watkins, 21 La. Ann. 631, 632 (1869) (quo warranto); *see also* Ex. 81, Magliocca Brief at 18–19.

[7] The list of qualifications required by 21-A M.R.S. § 336(1) was a legislative afterthought, of which the text of section 336(3) makes no mention, suggested by the Secretary's office in 2011 as an olive branch after a legislator proposed making the Secretary affirmative verify the qualifications of *all* legislative candidates prior to any challenge. *See* L.D. 285 (125th Legis. 2011); Comm. Amend. A to L.D. 285, No. H-341 (125th Legis. 2011).

conflicts with the actual qualifications set forth in the U.S. Constitution, the Constitution controls.

Trump wrongly argues that Section 3 imposes a "disqualification" from public office rather than a "qualification." (Pet. Br. 23, n.38.) For starters, that claim is wrong: numerous courts have recognized that Section 3 imposes a "qualification" for office. *See, e.g.*, *Cawthorn v. Amalfi*, 35 F.4th 245, 265 (4th Cir. 2022) (Wynn, J., concurring); *id.* at 275 (Richardson, concurring in the judgment); *Greene v. Raffensperger*, 599 F. Supp. 3d 1283, 1316 (N.D. Ga. 2022); *New Mexico ex rel. White v. Griffin*, 2022 WL 4295619, *16 (N.M. Dist. Ct. Sept. 6, 2022); (R. 1739) (Final Order, *Anderson v. Griswold*, No. 2023CV32577 (Colo. Dist. Ct., Nov. 17, 2023), ¶ 226); *see also* Cong. Globe, 39th Cong., 1st Sess. 3036 (June 8, 1866) (statement of Sen. Henderson) (Section 3 "fix[es] a qualification for office" and is not a "punishment mean[t] to take away life, liberty, or property"); *Castro v. Fontes*, 2023 WL 8436435, at *1, n.2 (D. Ariz. 2023); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 n.2 (1995) (assuming without deciding that Section 3 is a qualification). At any rate, this is a distinction without a difference—Trump points to no Maine authority distinguishing between qualifications and disqualifications.

II. The Secretary of State has Jurisdiction to Consider Section 3.

A. The Political Question Doctrine Does Not Apply Here.

Challengers' claim does not present a nonjusticiable political question. "In general, the Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189,

194 (2012). The political question doctrine is "a narrow exception to this rule." *Id.* at 195. It does not apply merely because a case has "political implications." *Id.* Rather, it applies when "there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Id.* Trump does not make, and thus forfeits, any argument about judicially manageable standards. Nor have courts or the Secretary had any difficulty adjudicating Section 3 cases generally, including its application to Trump. *See Anderson v. Griswold*, 2023 CO 300, ¶ 124 (citing cases). And if there is any "textually demonstrable commitment" of presidential candidate qualifications, it is *to the states*, not to Congress. *See supra* § I.

1. The Political Question Doctrine Does Not Constrain the Authority of State Constitutional Officers.

Trump's argument fails out of the gate because the political question doctrine does not constrain the authority of the Secretary of State—a state constitutional officer. The doctrine only limits the jurisdiction of *federal courts* under Article III of the Constitution. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (noting that the "political question doctrine" is part of the "concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Art. III"); *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (same); *Al-Tamimi v. Adelson*, 916 F.3d 1, 7 (D.C. Cir. 2019) (holding that the political question doctrine is a limitation on federal courts' Article III jurisdiction). The Secretary, of course, is not a court, but rather is an elected constitutional officer of Maine. Trump cites no case where a court held that

the federal political question doctrine constrains the decision-making authority of elected state officials, nor have Challengers identified any.

If anything, Trump's argument that adjudicating presidential qualifications presents a nonjusticiable political question would limit *this court's* jurisdiction to hear this case.[8] As explained above and below, Maine law commits the adjudication of presidential qualifications for the primary election to a coordinate branch of government, the Secretary of State. As such, if adjudication of presidential qualifications did present a nonjusticiable political question, it would be the Secretary's decision that would receive deference from this court.

2. The Constitution Does Not Textually Commit the Evaluation of Presidential Candidate Qualifications to Any Branch of the Federal Government

Even if one erroneously bolts the federal courts' Article III political question doctrine onto the Secretary's decision, it still does not apply. As the Colorado Supreme Court in *Anderson* correctly determined, nothing in the Constitution explicitly vests in Congress or the Electoral College any power—let alone the *exclusive* power—to evaluate a presidential candidate's constitutional qualifications. *See Anderson* 2023 CO 300 ¶¶ 116-119 (finding no textual commitment in Article II, the Twelfth Amendment, the Fourteenth Amendment, or the Twentieth Amendment); *accord Elliott v. Cruz*, 137 A.3d 646 (Pa. Commw. Ct. 2016) (challenge to presidential primary candidate Ted Cruz's eligibility did not raise a political

[8] Because there are judicially manageable standards to interpret Section 3, Challengers do argue that the Court may not review the Secretary's determination—this only serves to demonstrate the untenability of Trump's argument.

question), *aff'd*, 635 Pa. 212 (2016); *Williams v. Cruz*, OAL Dkt. No. STE 5016-16 (N.J. Off. of Admin. Law Apr. 12, 2016), https://perma.cc/7G6F-AL3J (same).

For instance, the Twelfth Amendment "does not vest the Electoral College with power to determine the eligibility of a Presidential candidate"; it only charges the "Electoral College [with] select[ing] a candidate for President and then transmit[ting] their votes to the nation's 'seat of government.'" *Elliott*, 137 A.3d at 650-51 (quoting U.S. Const. amend. XII). Nor does the Twelfth Amendment give Congress any "control over the process by which the President and Vice President are normally chosen," *id.* at 651; it merely tasks Congress with the duty to "count[]" the votes of the electors, U.S. Const. amend XII. While the Constitution says Congress shall be the "Judge of the . . . Qualifications of its own Members," art. I, § 5, cl. 1, it does not make Congress the "Judge" of presidential qualifications, reinforcing that such a function "has not been textually committed to Congress." *Elliott*, 137 A.3d at 651.

Nor does the Twentieth Amendment make such a textual commitment. By its terms, the Amendment only applies *post-election*, once there is a "President elect." U.S. Const. amend. XX, § 3. "[N]othing in the Twentieth Amendment states or implies that Congress has the *exclusive* authority to pass on the eligibility of candidates for president," nor does it "prohibit[] states from determining the qualifications of presidential candidates." *Lindsay*, 750 F.3d at 1065.

If anything, Section 3's text suggests Congress *lacks* the power to determine the President's disqualification under the Fourteenth Amendment. Section 3

requires a "vote of two-thirds of each House" to remove the disqualification. U.S. Const. amend. XIV, § 3. Allowing Congress to decide by a simple majority that a candidate is qualified would render the supermajority requirement a nullity.

The Supreme Court requires a far clearer "textually demonstrable constitutional commitment" before declaring an issue non-justiciable. *See, e.g.*, *Nixon v. United States*, 506 U.S. 224, 228-29 (1993) (impeachment trial procedure was a political question because the Constitution provides that "'[t]he Senate shall have the sole Power to try all Impeachments'"); (R. 5314) (*Anderson* District Court 10/25/2023 Order, 18, citing cases).

Many courts and administrative bodies have decided challenges to presidential candidate qualifications under state ballot access rules. *See* (R. 5118-21) (FSFP Colorado Br. 10-13, citing cases); *see also Elliott*, 137 A.3d 646; *Hassan*, 495 F. App'x 947; *Lindsay*, 750 F.3d 1061. And Trump's cited cases are readily distinguishable. *See Anderson*, 2023 CO 300, ¶ 120; (R. 5300-5314) (*Anderson* District Court 10/25/2023 Order, 4-18); (R. 5122-5128) (FSFP Br. 14-20). Not one involved a ballot access challenge authorized by state law. And nearly all involved plaintiffs seeking to *annul the results* of an election or *remove* the sitting President--remedies that exceed state authority. Those cases are irrelevant before an election, where Article II expressly commits elector selection to the states. *See supra* § I.

Trump's cases also offer "little analysis" of what constitutional provisions they rely on, *see, e.g.*, *Castro v. N.H. Sec'y of State*, 2023 WL 7110390, at *9 & n. 29 (D.N.H. Oct. 27, 2023) (relying on political question cases that admittedly lacked

"searching analysis of the text and history of" pertinent constitutional provisions because *pro se* plaintiff waived counterarguments), *aff'd*, 2023 WL 8078010, at *5 (1st Cir. Nov. 21, 2023) (dismissing on standing and declining to reach political question doctrine "because of the limited nature of the arguments"); *see also* (R. 5306) (*Anderson* District Court 10/25/2023 Order, 10); (R. 1677-78) (*Anderson* District Court Final Order ¶ 13 & n.2). This is hardly compelling authority.

Trump's position would also have calamitous prospects: the only way to enforce Presidential qualifications would be by Congress during its January 6th Joint Session, *after millions of voters chose that candidate.* Trump offers no explanation why the framers would, by granting exclusive authority to Congress, design a system where voters must wait until after a presidential election to learn whether the winning candidate is qualified to assume office. Common sense and the events of January 6, 2021, teach that this is a recipe for disaster. It would lead to precisely "the sort of electoral 'chaos' that the Supreme Court has repeatedly held States are constitutionally empowered to mitigate" by policing their ballots of unqualified candidates *before* any votes are cast. *Cawthorn*, 35 F.4th at 266 n.4 (Wynn, J., concurring) (quoting *Storer*, 415 U.S. at 730); *see also* (R. 5155-5156) (Br. of Amicus Curiae Colo. Common Cause and Mary Estill Buchanan, 17-18). And, because a federal question is involved here, the U.S. Supreme Court can resolve any conflicts between states.

B. Section 3 Can be Enforced at the Ballot Access Stage

Trump wrongly claims that Section 3 cannot be enforced prior to an election because it only applies to holding office, not running for office. That argument disregards Section 3's text and history, as well as case law approving of pre-election enforcement of other presidential qualifications.

Section 3 imposes a *present* disqualification from officeholding. *New Mexico ex rel. White v. Griffin*, 2022 WL 4295619, at *25 (N.M. Dist. Ct. Sept. 6, 2022) (Section 3 disqualification was effective upon officeholder's engagement in the January 6th insurrection). Thus, Trump is disqualified under Section 3 *right now* and has been since January 6, 2021. The hypothetical possibility that Congress could "remove[]" Trump's disability does not negate that. Any constitutional qualification for the Presidency (including those based on age, citizenship, and residency) could be eliminated by amending the Constitution; that does not make it unenforceable before election day. *See Hassan*, 495 F. App'x at 948 (states may exclude candidates "constitutionally prohibited from *assuming* office") (emphasis added); *supra* § I. Besides, the notion that supermajorities of both Houses of Congress will grant Trump Section 3 amnesty before January 20, 2025, if ever, is fanciful. Trump offers nothing to suggest it is even a remote possibility.

Section 3 has been enforced in connection with elections before. After the Civil War, the Union Army enforced Section 3 as part of state elections held in post-Confederate states that were under military reconstruction. *See* (R. 329) (Amicus Brief of Professor Mark Graber, 5). While this enforcement did not occur through ballot access laws like Maine's, that is because ballot access laws *did not exist that*

time—particularly in the post-Confederate states, which had no operative state laws of any kind. (R. 201, 240) (testimony of Professor Gerald Magliocca). Most recently, in 2022, a Georgia administrative law judge adjudicated a Section 3 challenge to a congressional candidate on the merits. *See Rowan v. Greene*, No. 222582-OSAH-SECSTATE-CE-57-Beaudrot (Ga. Off. Admin. Hr'gs May 6, 2022), https://perma.cc/M93H-LA7X.

Enforcing Trump's existing disqualification would not strip Congress of its amnesty power. Far from it, if the Secretary "were to disqualify . . . Trump, there would be nothing standing in the way of Congress immediately removing that disability." (R. 5313) (*Anderson* 10/25/2023 Order, 17 n.4). But Maine has an election to run and a compelling interest in protecting the integrity of its ballots. Trump has no right to override that interest based on implausible speculation that a supermajority of Congress might someday before January 20, 2025, grant him amnesty. If Trump wants this disqualification removed, he should request amnesty from Congress right now.

The cases cited by Mr. Trump are inapt. *See* (Pet. Br. 54.) Three of the cases addressed, under state law, whether to remove a currently qualified candidate after an election merely because they were disqualified during the election. None of these cases addressed the states' constitutional authority to exclude from the ballot candidates disqualified under Section 3, let alone did they hold that states are *powerless* to do so.

Trump's comparison to the Constitution's residency qualifications for Congress is also unpersuasive. (Pet. Br. 54-55.) Those qualifications include a controllable temporal trigger: they are tied to a person's residency status "when elected." Section 3, by contrast, imposes an immediate disability once a covered officeholder engages in proscribed conduct. Compare U.S. Const. art. I, § 2, cl. 2; § 3, cl. 3, with amend. XIV, § 3. Thus, Maine does not impose an extra-constitutional qualification on candidates by enforcing their present Section 3 disability. *Cf. Schaefer v. Townsend*, 215 F.3d 1031, 1036 (9th Cir. 2000).

Similarly, enforcing Section 3 at the ballot access stage does not run afoul *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). *Thornton* invalidated a state constitutional amendment that imposed an "additional qualification" (a term limit) for congressional candidates beyond those in the Constitution. *Id.* at 835-36. The Court made clear it was *not* opining on the states' ability to enforce qualifications in the Constitution, expressly including "§ 3 of the 14th Amendment." *Id.* at 787 n.2; *Cawthorn*, 35 F.4th at 264 (Wynn, J., concurring).

C. No Federal Enforcement Legislation is Required to Activate Section 3

Trump's argument that Section 3 is not "self-executing and thus provides for no private right of action" is both irrelevant and wrong. It is irrelevant because Challengers did not assert a cause of action directly under the Fourteenth Amendment; they brought an administrative challenge under *Maine law* to enforce a constitutional qualification for office. And it is wrong because Section 3 is "self-executing" in the sense that courts must enforce it where, as here, a proper

cause of action calls for it. *See* (R. 5315-16) (*Anderson* 10/25/2023 Order, 19-20).

Certain cases cited by Trump stand for the irrelevant proposition that the Fourteenth Amendment confers no "implied cause of action for damages." *Cale v. City of Covington*, 586 F.2d 311, 313 (4th Cir. 1978); *see also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 33 (1991) (Scalia, J., concurring) (reasoning that the Fourteenth Amendment does not furnish "a universal and self-executing *remedy*"). These cases say nothing about the states' settled authority to "execute" the Fourteenth Amendment *through their own laws. See Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 264 (1933) (states may prescribe "the form or method of procedure by which federal rights are brought to final adjudication in the state courts"); *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164 (1997) (discussing "federal constitutional claims . . . raised by way of a cause of action created by state law").

Indeed, the Supremacy Clause explicitly "charges state courts with a coordinate responsibility to enforce [federal] law according to their regular modes of procedure." *Howlett v. Rose*, 496 U.S. 356, 367 (1990). That means states *must* enforce Section 3 where state law procedures allow. And historically that's what state courts have done, even without federal enforcement legislation. *See supra*; (R. 5316) (*Anderson* 10/25/2023 Order at 20 & n.5 (citing cases)); (R. 330-31) (Graber Br. 6-7); (R. 185-86) (Magliocca testimony). Trump's own expert in Colorado admitted that states could pass laws implementing other provisions of the Fourteenth Amendment. *See* (R. 3606).

Under Trump's reading, state enforcement of the Fourteenth Amendment without federal legislation is unconstitutional. That is absurd and no authority supports it. Trump cites cases saying that 42 U.S.C. § 1983 displaces any implied federal causes of action. *Foster v. Michigan*, 573 F. App'x 377, 391 (6th Cir. 2014). But the "§ 1983 remedy" does not displace state law; it is "*supplementary* to any remedy any State might have." *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 177 (2023). Because Congress has not legislated to preempt state enforcement of Section 3, states may pass laws giving it effect. *See also* (R. 187) (federal enforcement legislation not intended to limit enforcement of Section 3).

Nor does anything in the Fourteenth Amendment's text suggest that federal legislation is required to activate Section 3. To the contrary, Section 3's authorization of Congress to "remove such disabilit[ies]" by a two-thirds vote "connotes taking away something which has already come into being." *Cawthorn*, 35 F.4th at 248, 260. Section 3 itself creates the disability. *See* (R. 2541-42) (noting that ex-Confederates inundated Congress with thousands of amnesty requests immediately after Section 3 was adopted, demonstrating that they understood themselves to be disqualified even without a formal adjudication); (R. 329-331) (Graber Br. 7, explaining that Section 3 was historically understood to be self-executing).

Section 5 of the Fourteenth Amendment, which says, "Congress shall have the power to enforce" the Amendment, does not displace the coordinate duty of the states to do so. Indeed, the Supreme Court has made clear that the Constitution's

Reconstruction Amendments—each of which include materially identical enforcement provisions—impose "self-executing" limits that courts have the "power to interpret," even without congressional legislation. *City of Boerne v. Flores*, 521 U.S. 507, 522, 527 (1997) (Fourteenth Amendment); *Civil Rights Cases*, 109 U.S. 3, 20 (1883) (Thirteenth and Fourteenth Amendment); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009) (Fifteenth Amendment). It is *the courts'* interpretation of the Fourteenth Amendment that constrains *Congress's* Section 5 enforcement power, not the other way around. *Boerne*, 521 U.S. at 524-29 (legislation must be proportional and congruent to constitutional harm, the meaning of which is interpreted by courts).

Trump's reading of Section 5 also makes no sense: it would allow a simple majority in Congress to nullify *the entire Fourteenth Amendment* by repealing or failing to enact enforcement legislation, thereby making "Congress superior to the Constitution." (R. 329-29, 332) (Graber Br. 4-5, 8). "[S]o gross an absurdity cannot be imputed to the framers of the constitution." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 355 (1819).

Chief Justice Chase's non-binding opinion as a circuit judge in *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869), is not to the contrary. That case arose in a unique historical context with no application here: in 1869, Virginia was an "unreconstructed" territory under federal military control, *id.* at 11, and it lacked any operative state law that could have enforced Section 3, *id.* at 14. And Chase only addressed whether Section 3 could be enforced collaterally through a federal habeas petition. He had no occasion to decide whether a functional state like Maine could pass its own legislation enabling Section 3 enforcement. *See Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 170 (2004) ("Questions ... neither brought to the attention of the court nor ruled upon ... are not to be considered as having been so decided as to constitute precedents."). *See also* (R. 229-31) (debates on Enforcement Act of 1870 never mentioned *Griffin*'s case).

Moreover, Chase later reversed his position in the treason prosecution of Jefferson Davis, where he agreed (again as a circuit judge) with Davis's counsel that Section 3 "executes itself" and "needs no legislation on the part of congress to give it effect." *In re Davis*, 7. F. Cas. 63, 90, 102 (C.C.D. Va. 1871). These

"contradictory holdings . . . draw both cases into question and make it hard to trust Chase's interpretation." *Cawthorn*, 35 F.4th at 278 n.16 (Richardson, J., concurring in the judgment); *see also* (R. 332-34) (Graber Br. 8-10). And to the extent that Griffin could be read to apply outside of its limited historical context, it cannot be squared with *Boerne* and other binding precedents.

Nor will the lack of federal Section 3 enforcement legislation lead to any "patchwork" of inconsistent rulings on Trump's eligibility. As noted above, the U.S. Supreme Court will have the opportunity to resolve any conflicting rulings on Trump's disqualification if they arise.

III. This Proceeding Afforded Trump the Appropriate Level of Process

Trump's due process objections are baseless. First, his factual bias accusations are frivolous and the associated legal arguments are unsound. Second, a compressed timeline is not inconsistent with due process, and here the expedited process did not deprive him of any opportunity to present or rebut evidence.

A. None of Trump's accusations demonstrate actual bias or suggest an unreasonable risk of bias.

1. Trump's argument that Maine's due process standards are inconsistent with federal law is false.

Trump argues (Pet. Br. 24-26) that Maine case law is inconsistent with Supreme Court precedent. Not so. Instead, Petitioner's arguments distort the relevant holdings to present unsound arguments. In *Rippo v. Baker*, 580 U.S. 285 (2017), the United States Supreme Court held that that under some extreme circumstances, "the probability of actual bias on the part of the judge or

decisionmaker is too high to be tolerable." *Id.* at 287 (*quoting Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). It did not hold, as Trump claims, that a due process violation no longer requires demonstration of actual bias. Maine courts have adopted the standard from *Rippo*, *see e.g.*, *Brengelmann v. Land Resources of New England & Canada, Inc.*, 393 A.2d 174, 178 (Me. 1978), and have simply recognized that the probability of actual bias will "rise to a constitutional level only in the most extreme of cases[.]" *Estate of McCormick*, 2001 ME 24 ¶ 16, 765 A.2d 552 (*quoting Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (quotation marks omitted). This case does not come close.

The exceptionally rare cases in which appellate courts have found an intolerable probability of bias—absent any showing of actual bias in the record—are easily distinguishable and involved indicia of potentially outcome-determinative bias while the proceeding was pending. In *Cinderella Career & Finishing Schs., Inc. v. FTC.*, 425 F.2d 583 (D.C. Cir. 1970), the chairman of the Federal Trade Commission made a public speech about issues *while they were before him. Id.* at 589-591. In *Rippo*, 580 U.S. 285, a judge was under investigation for bribery by the District Attorney's Office *while it was trying the case before him. Id.* at 285. Petitioner Trump cannot cite any case where a few brief remarks about issues of national prominence and concern made several *years* before any matter came before an adjudicator created an intolerable risk of bias.

2. Trump's factual allegations are trivial.

Trump's allegations are limited to a set of three tweets, a false claim that a decade ago the Secretary worked with Challenger Ethan Strimling, and his claim that Challenger Tom Saviello "knows [the Secretary] very well, personally" because they served in the Maine Senate at the same time. None of these allegations, whether taken individually or collectively, comes close to establishing actual bias or an intolerable risk thereof.

a) The Secretary's years-old tweets do not show bias or prejudgment of any issue.

The horrific events of January 6, 2021 were nationally-televised and immediately at the center of public discourse. Attorney Gessler, before the Colorado Supreme Court, admitted that the events of that day, at least those known to the public on February 13, 2021, "are relatively uncontroverted with respect to what actually happened." (Rosen Video Ex. 35 at 1:45:08). Beginning in the immediate wake of the attack on the Capitol, many Americans, including elected officials of both major parties, began referring to the attack that they witnessed as an insurrection. That included even Trump's own lawyer during his second impeachment trial *on the same day* as two of the Secretary's tweets that Trump now argues demonstrate her bias. Cong. Rec., 117th Cong., Vol. 167, No. 28, S717, S733 (Feb. 13, 2021) (statement of Michael van der Veen, admitting "everyone agrees" there was "a violent insurrection of the Capitol" on January 6th). The common usage of "insurrection" to describe the attack did not fade. A year later, a little after the time of the Secretary's third tweet, Republican Majority Leader Mitch McConnell stated unequivocally, "We all were here. We saw what happened. It was a violent

insurrection for the purpose of trying to prevent the peaceful transfer of power after a legitimately certified election, from one administration to the next. That's what it was." Sahil Kapur, *McConnell calls Jan. 6 a 'violent insurrection,' breaking with RNC*, NBC News, Feb 8, 2022, https://www.nbcnews.com/news/amp/rcna15404.

The Secretary's years-old use of that common vernacular and the allegation that she held an opinion about the Senate's bipartisan majority vote to convict Trump in his second impeachment falls far short of making this one of the "most extreme of cases" in which the alleged possibility of bias becomes "too high to be tolerable." *Rippo*, 580 U.S. at 287; *Estate of McCormick*, 2001 ME 24 ¶ 16. There is no evidence that the Secretary prejudged any of the numerous constitutional and statutory issues raised in this case, including whether former President Trump is disqualified under Section 3, whether the events of January 6 constituted an "insurrection" against the Constitution within the meaning of the Fourteenth Amendment, or whether state law provides for Trump to be barred from the Republican presidential primary ballot. Nor is there any other showing capable of overcoming the assumption that she is a "[wo]man of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *Turner v. Apollonio*, 441 A.2d 679, 684 (Me. 1982) (quoting *Withrow v. Larkin*, 421 U.S. 35, 55 (1975)).

Trump's deployment of years-old *public statements* is not only insufficient, it is untimely and unsupported by the record.[9] He had ample opportunity prior to the

[9] Trump has made similarly frivolous, last-ditch recusal motions including in both the Colorado ballot challenge—where the trial court rejected the motion, but ultimately ruled

hearing, particularly if he availed himself of the opportunity to continue it, to raise the Secretary's public statements and did not do so. He also had ample opportunity during the hearing to observe her actual conduct of the proceedings on and after December 15th and cite actual indicia of bias affecting those proceedings. He cited no such conduct or indicia in his disqualification request, and has not now added any substantive complaints two weeks later. That is because—regardless of any personal opinions the Secretary expressed three years ago—the proceedings in this matter have been indisputably "conducted in an impartial manner." 5 M.R.S. § 9063(1); *cf. Sevigny v. Biddeford*, 344 A.2d 34, 40 (Me. 1975) (noting the "strained relationship, bordering on animosity," existing between the presiding officer and the party before him, evident in the record, "at the time of the hearing."). Whatever personal views she once held, she would be more than capable of years later setting them aside to base her factual determinations solely on the evidentiary record before her. *See Lane Const. v. Town of Washington*, 2008 ME 45, ¶ 30, 942 A.2d 1202 (evidence establishing it was "clear that the [presiding officer] *personally* supported [the] application" is insufficient unless it also "prov[es] that his conduct at the meetings was biased or that he participated in them from a standpoint of predisposition.")

b) The new allegations show even less.

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in his favor (R. 1783-84)— and in his still-pending criminal case in Washington, D.C. *See* Alan Feuer, Judge Denies Trump's Request That She Recuse Herself in Election Case, New York Times, Sept. 27, 2023, https://www.nytimes.com/2023/09/27/us/politics/trump-jan-6-chutkan-recusal.html.

In a filing well after the close of business on January 8, hours after his brief was filed, Petitioner Trump submitted a Motion to add new evidence to the record. But the majority of that new evidence does not show what he claims it shows. Challenger Ethan Strimling never worked "at the same company at the same time" as the Secretary. The evidence actually shows that Ethan Strimling resigned as Executive Director of LearningWorks upon being sworn in as Mayor of Portland. Mot. to Supplement, Ex. 5 (Press Herald article). Shenna Bellows was hired by the organization's board of directors as his interim replacement a week later. *Id.* Other exhibits Petitioner Trump seeks to introduce further support the conclusion that Ethan Strimling *was*, but *is no longer*, the head of LearningWorks. *See Id.*, Ex. 1 (stating that Strimling "*was* the Executive Director of LearningWorks" (emphasis added)); Ex. 2 (a LinkedIn profile that appears never to have been updated to include Strimling's employment as Mayor of Portland from 2015-2019); Ex. 3 (a biography published to promote a radio episode dated July 8, 2012).[10]

Additionally, Challenger Tom Saviello served in the Maine Senate with Secretary Bellows from 2016 to 2018. As a result, he can say that he "know[s] her very well, personally." If adjudicatory proceedings could not be presided over by professional acquaintances of the parties before them, this state could not function. No more needs to be said.

B. <u>The proceedings provided more than sufficient process.</u>

[10] That the evidence submitted *itself* shows the allegations to be false calls into question whether the attorneys who signed the motion even bothered to read their submission.

Trump's arguments that he received insufficient process are illusory. First, Trump was steeped in the issues and evidence related to this case long before it was brought. Much of the underlying evidence in this case was generated in the week-long bench trial in *Anderson* in which Trump was a party–intervening to litigate the same issues at play here–and had ample opportunity and similar motive to cross-examine adverse witnesses. *See* (R. 315-7) (Letter from CREW to the Secretary, at 3-5 (Dec. 14, 2023)). Trump's lead counsel in Maine is surely aware of that fact, as well as any evidence and testimony heard in that case, *because he represented Trump in Colorado.* If this were a judicial proceeding, testimony from *Anderson* would be admissible under the Maine Rules of Evidence. *See id.* Surely the admission of such evidence in this administrative proceeding—with its laxer evidentiary rules, *see* 5 M.R.S. 9057—does not violate due process.

Further, while *Anderson* conducted the first full evidentiary hearing in a Section 3 challenge against Trump, he has litigated Section 3 challenges against him around the country both as an intervenor and as a plaintiff to enjoin any potential decision to disqualify him. *See, e.g.*, Donald J. Trump for President 2024, Inc.'s Resp. to Petition Challenging His Placement on 2024 Primary General Election Ballots at 3, *Growe v. Simon*, No. A23-1354 (Minn. Sept. 27, 2023) (seeking Trump campaign's intervention on his behalf to preserve his personal jurisdiction objection, stating that it is "fully prepared to vindicate his interests as a candidate," and noting that it refers to Trump and the "Campaign" interchangeably); *Trump v. Benson*, 23-000151-MZ at 7-8 (Mich. Ct. Cl. Nov. 13, 2023) (summarizing Trump's

claims for declaratory relief against Secretary of State after third party claims against Secretary to keep Trump off primary ballot); *Davis v. Wayne Cty. Elec. Comm.*, 23-012484-AW at 4 (Mich. App. Dec. 14, 2023) (describing Trump's intervention in case brought against county commission to bar him from primary ballot); *LaBrant v. Sec'y of State,* 23-000137-MZ at 1 (listing Trump as Intervening Appellee) (Mich. App. Dec. 14, 2023). Trump was indisputably aware of both the legal bases of challenges against him and the vast majority of the evidence against him—all based on publicly-available information and included in various petitions to which he responded—before this case was initiated.

Trump complains that he was not prepared for the challenge hearing in Maine, but running for President was *his* choice and it was incumbent upon *him*, not Maine voters or the Secretary of State, to make himself prepared for the ballot access procedures in this state. A former president with a large campaign staff, teams of lawyers, and awareness that his eligibility for the presidency is in dispute, could and should have anticipated and prepared for a challenge under the well-known procedures enacted under Maine law. Furthermore, candidates regularly fail to qualify for presidential primary ballots because they fail to meet a state's reasonable statutory ballot access requirements. *See, e.g.*, *Christie v. Bellows*, No. AP-23-42, 2023 Me. Super. LEXIS 17 (Dec. 21, 2023) (state restriction on ballot access based on petition signatures justified exclusion of Chris Christie on 2024 presidential primary ballot). The burden to appear on the ballot thus falls on the candidate seeking the privilege of office.

Nor does Trump have any fundamental constitutional right to candidacy that might trigger heightened due process protections. *See Casey v. Town of Yarmouth*, 514 F. Supp. 3d 306, 319 (D. Me. 2021) ("[I]t is well-established that '[c]andidacy does not rise to the level of a fundamental right.'") (quoting *Torres-Torres v. Puerto Rico*, 353 F.3d 79, 83 (1st Cir. 2003) (per curiam); *see also Clements v. Fashing*, 457 U.S. 957, 963 (1982) (plurality opinion) (same); *Supreme v. Kan. State Elections Bd.*, No. 18-cv-1182, 2018 WL 3329864, at *5–*6 & n.27 (D. Kan. July 6, 2018) (rejecting procedural due process challenge to residency requirement for state office because "there is no fundamental right to run for office" and the plaintiff "failed to specifically identify" any constitutionally-protected "interest he alleges entitled him to procedural due process"); (R. 5324) (*Anderson* 10/28/2023 District Court Order on burden of proof, 3, holding that Trump had no "fundamental liberty interest" in being on Colorado's ballot). Any constitutional interest of either Trump or voters in having Trump's name certified to the primary ballot is narrowed by the qualifications set forth in the Constitution itself. Like other constitutional qualifications for the presidency based on age, citizenship, and residency that the Secretary is charged with enforcing under Maine law, "Section Three of the Fourteenth Amendment narrows the First Amendment right to run for office..." *Griffin v. White*, 2022 WL 2315980, at *12 (D.N.M. June 28, 2022). And as the Law Court has explained, "[a] state indisputably has a compelling interest in preserving the integrity of its election process." *All. for Retired Ams. v. Sec'y of State*, 2020 ME

123, ¶ 15, 240 A.3d 45 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)). The Law Court has further explained that, in challenging a ballot regulation, a

> flexible standard applies. A court considering a challenge to a state election law must weight the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the [petitioner] seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by the rule. . . .

Christie, 2023 Me. Super. at *21 (quoting *All. for Retired Ams.*, 2020 ME 123, ¶ 17).

The Court went on to explain that

> [w]hen a state election law imposes only reasonable, nondiscriminatory restrictions upon a candidate's rights, the State's important regulatory interests are generally sufficient to justify the restrictions. No bright line rule separates permissible election-related regulation from unconstitutional infringements.

Id. (internal citations and quotations omitted). Petitioner's interest in appearing on the ballot is weighed against the State's substantial interest in only listing qualified candidates on the presidential primary ballot. Here, the State has a significant interest that justifies the Secretary's refusal to list an ineligible candidate on the ballot.[11] Insofar as Trump is challenging the procedure itself, the state's interest justifies the restriction.

[11] The Secretary's decision thus protects, rather than infringes upon, the rights of Maine Republican primary voters. It ensures that their votes will not be wasted on a candidate who cannot assume the presidency. Furthermore, Trump has no standing to assert the rights of Maine voters and his attempts here are ironic, given that his efforts to overturn the 2020 election would have disenfranchised hundreds of thousands of Maine voters, and tens of millions of other American voters.

Furthermore, Trump was afforded sufficient process as required by Maine law.[12] Maine law requires that presidential primary candidate qualifications be adjudicated through challenge procedures under 21-A M.R.S. § 337(2) and governed under the Maine Administrative Procedure Act. And Trump now has the opportunity to appeal the adverse judgment before the Superior Court, and will again be able to appeal to the Law Court. *Id.* Both the Superior Court and Law Court review the Secretary's interpreting the constitution—where Trump has focused the vast majority of his effort both before the Secretary and here—de novo. *See e.g. Burr v. Dep't of Corr.*, 2020 ME 130, ¶ 20, 240 A.3d 371. Were Trump's position correct, Maine's longstanding candidate challenge procedure would be unconstitutional. That is absurd and no authority supports it.

C. The evidence relied upon by the Secretary was admissible under Maine's Administrative Procedure Act, and the process for admitting it was constitutionally sound.

Trump likewise complains that the timing and form of the hearing and the amount of evidence against him deprived him of due process. This is untrue. As an initial matter, Trump is litigating this challenge on this schedule because he chose to do so; he took a calculated risk to forego seeking a continuance and defend this claim quickly. Trump's complaints after making that choice ring hollow. So too does Trump's claim that he is unaware of and cannot review the evidence against him in

[12] To suggest that he should have been given even more process, Trump quotes at length from a dissent in the appeal of *Anderson* regarding processes provided under Colorado law. (Pet. Br. 34.) That opinion was not adopted by any of the other six justices on the Colorado Supreme Court, which reversed the trial court and held Trump disqualified under Section 3. *See Anderson* 2023 CO ¶ 257.

this challenge. The events of January 6 and his role in them have been the subject of intense investigation, criminal and civil litigation, and public scrutiny for nearly four years. As Trump's counsel acknowledged, and as described *supra*, Trump has been defending ballot access cases in multiple states, including in a recently concluded five-day trial in Colorado that is still being appealed. That trial relied on the same evidence brought in this challenge and was defended by the same counsel for Trump. *See generally*, (R. 1673-1774) (*Anderson* District Court Final Order). Virtually none of that evidence pertains to facts and events that were previously unknown to Trump; instead, it is evidence of Trump's own public statements and events that have been at the center of public discourse about one of the most analyzed days in American history. *Id.*

1. The Evidence from *Anderson v. Griswold* is Admissible Under Any Standard.

Trump's arguments that the Secretary's consideration of evidence from *Anderson v. Griswold* was improper entirely misses the point. Challengers properly introduced sworn testimony and Trump's statements as evidence admissible under both section 9057 and the Rules of Evidence. Both the testimony and the exhibits introduced through that testimony are "the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs." Even under the Rules of Evidence, moreover, both that testimony and Trump's statements are admissible: the testimony in the Colorado case was subject to cross-examination by Trump and the witnesses were unavailable to testify at the Friday hearing, which

makes that testimony admissible under M.R.E. 804. *See, e.g.*, (R. 1780, 2154, 2522, 2932, 3378).

2. The January 6 Report is Admissible.

Trump claims that the Secretary erred in admitting and considering the The *Final Report, Select Committee to Investigate the January 6th Attack on the United States Capitol* (the "January 6 Report"). *See* (R. 828-1672). In so doing, he both misapplied the law and Rules of Evidence and inaccurately cast the January 6 Report as the well from which virtually all other evidence sprung. The January 6 Report is plainly admissible and was just one piece of the extensive evidence on which the Secretary relied.

The January 6 Report, as determined by the Secretary, the Colorado District Court, and the Colorado Supreme Court, is reliable and admissible under both M.R.S. §9057 (2) and M.R.E. 803(8)(A), which excludes from the hearsay rule "records" setting out "factual findings from a legally authorized investigation" unless "sources of information or other circumstances indicate lack of trustworthiness." *See* (R. 1688) (*Anderson* District Court Final Order, ¶ 38). Admissibility is presumed and the party seeking exclusion "bears the burden of demonstrating that the report is not trustworthy." *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, 96 (D.D.C. 2006) (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988) and F.R.E. 803 advisory committee's note).

Under *Barry*, the reliability of the January 6 Report depends on balancing four factors: "(1) the timeliness of the investigation; (2) the special skill or expertise of the investigating official; (3) whether a hearing was held and the level at which it was conducted; and (4) possible motivation problems. *Barry,* 467 F. Supp. 2d at 97. Trump does not dispute, and has waived any argument to the contrary, that the first three *Barry* factors, as described in *Anderson*, "weigh strongly in favor of reliability." (R. 1682) (*Anderson* District Court Final Order, ¶ 25, citing temporal proximity to January 6, an investigation by "well-staffed, highly skilled" attorneys, and the Committee's 10 public hearings). Rather, he claims that the findings of the Committee in the January 6 Report are untrustworthy because of alleged bias in the House Select Committee to Investigate the January 6th Attack on the United States Capitol (the "Committee"). (Pet. Br. at 69.) Trump cites no authority for the proposition that, under the applicable balancing test or Maine law, claimed indicia of unreliability can be outcome-determinative when *Barry*'s other factors are met.

Trump's latest effort to undercut the established reliability of the January 6 report is long on accusation and short on fact. His brief relies entirely on evidence of statements, primarily criticisms of the Committee's work by Trump's political allies, that do not appear in the record. This entire line of argument, accordingly, must be disregarded.

To the extent the Court considers this external evidence of supposed motivation problems, which it should not, it must be rejected. *Nowhere* does Trump identify a finding that is incorrect or unsupported. Instead, as he did unsuccessfully

in *Anderson* and before the Secretary, Trump argues that the January 6 Committee was not bipartisan, irregularly constituted, and politically motivated and that–despite Trump's failure to identify any inaccurate findings–the January 6 Report and its findings must be unreliable.

Trump made the same arguments in *Anderson* and, after hearing the evidence, the District Court rejected them and admitted the January 6 Report. (R. 1680-88) (*Anderson* District Court Final Order, ¶¶ 20-38). The Colorado Supreme Court affirmed. *Anderson*, 2023 CO 63, ¶¶ 162-175. In so doing, both courts identified powerful indicia of the thorough and objective process by which the Committee conducted its investigation and created the January 6 Report, including: the examination of more than 1,000 witnesses who overwhelmingly were Trump administration officials and Republicans, the review of over 1 million documents, hundreds of hours of video, and 60 court rulings, openness of the Committee members to any outcome, unanimity in the Committee's conclusions, and the membership of two multi-term Republicans, including the third-highest ranking House Republican. *Id.*; (R. 1682, 1685-86) (*Anderson* District Court Final Order, ¶¶ 24-26, 31–34).

Trump asserts, as he did in *Anderson*, that Committee members—who had lived January 6 and heard evidence during an impeachment inquiry—were biased because they voted to impeach him for inciting an insurrection and publicly stated that he was culpable. (R. 1682, ¶¶ 25-26.) The Colorado courts found that no alleged bias tainted the January 6 Report, crediting testimony that the members had

merely formed a hypothesis that was then tested through meticulous investigation. (R. 1682, 1685-86, ¶¶ 26, 33); *Anderson*, 2023 CO 63, ¶ 167. Even if it had not, Trump cites no authority that knowledge of matters of public information and investigation constitute a "motivation problem" under *Barry*. 467 F. Supp. 2d at 97.

In the face of unrefuted proof that the January 6 Report was meticulously developed and not influenced by the alleged biases of its members, Trump resorts to simply repeating the inadmissible criticisms of Trump's political allies, none of whom were involved in any aspect of the Committee's investigation or the development of the January 6 Report. Their fundamental argument, that the Committee is illegitimate because it did not have specific Republican members of Congress requested by Republican leadership and therefore was driven by anti-Trump politcal animus, is contradicted by simple fact. Congressional Democrats originally sought to appoint an independent and bipartisan commission to investigate the insurrection of January 6. (R. 981-82) (January 6 Report). But that legislation failed in the Senate despite bipartisan support when it could not obtain enough Republican votes to survive a filibuster. *Id.*

Still committed to proceeding on a bipartisan basis, Speaker Nancy Pelosi announced the formation of a House Select Committee that would have eight members appointed by the Speaker and five members appointed by Republican minority leader Kevin McCarthy. (R. 983.) One of Speaker Pelosi's nominees was a Republican (Rep. Liz Cheney), meaning that the proposed composition of the Committee would be seven Democrats and six Republicans. *Id.*

Ultimately, Republicans chose to boycott. Two of Mr. McCarthy's five selections (Rep. Jim Jordan and Rep. Jim Banks) were not serious choices for a genuine investigation. Rep. Jordan was a material witness in the January 6 Committee's investigation. *See* (R. 983). Representative Banks not only voted to decertify the 2020 election, but also made statements suggesting that the Committee needed to investigate the "Biden administration's" response to January 6, even though (of course) President Biden had not yet taken office. *Id.* Because these two representatives appeared bent on delegitimizing the Committee's investigation before it even began, Speaker Pelosi determined they should not be seated on the Committee. *Id.* Still, she made clear she would seat the remaining three Republican nominees and invited Rep. McCarthy to nominate two additional Republican names. (R. 983-84.) Rather than do so, Rep. McCarthy made a tactical decision to withdraw *all* of his nominees from the January 6 Committee. *Id.*

That certain Trump allies who may have had a political motive to sabotage the investigation into the insurrection on January 6 did not participate in the investigation does not mean its findings were biased or otherwise unreliable. To the contrary, the Committee's findings derived from a careful and deliberative process by a bipartisan investigative staff, and reflected the unanimous findings of a committee composed of both Republicans and Democrats. There is no basis for exclusion, as the Colorado courts correctly concluded. *See* (R. 1684-87) (*Anderson* District Court Final Order, ¶¶ 24–26, 30–34, 37) (finding various indicia that investigation was thorough and unbiased in response to Trump's bias claims, no

minority report because the January 6 Report was adopted unanimously, no minority staff because it was "actively prevented" by Republican leadership, Trump chose not to participate in adversarial process by refusing Committee subpoena and declining to challenge findings at Hearing); *Anderson*, 2023 CO 63, ¶ 170.

Trump also repeats partisan criticism of the conduct of the Committee not in the record–again only from those who were not involved in the work of the Committee or creation of the January 6 Report. But none of his arguments have any bearing on the accuracy or reliability of the January 6 Report itself, let alone overcome the *only evidence in the record* on the creation of the Report in the record, which both *Anderson* and the Secretary determined to confirm its reliability. For example, Trump complains about the conduct of public hearings without explanation of how holding public hearings, which *Barry* identifies as indicia of *reliability*, injected bias into the January 6 Report itself. *See* 467 F. Supp. 2d at 97; *see also* (Pet. Br. 76-77). His suggestion that not enough of the January 6 Report's recommendations have been undertaken also finds no place in the *Barry* analysis and he cites no case that anyone's later adoption of a Congressional reports' recommendations has any bearing on its reliability. *See* 467 F. Supp. 2d at 97; *see* (Pet. Br. 68-69). In no instance, of course, does Trump identify any finding of the January 6 Report–let alone one that was cited by the Secretary in her opinion–that was inaccurate because of the bias he alleges without evidence must have permeated it.

The reliability of the January 6 Report is further bolstered by the fact its fundamental premises were confirmed by the factual record in *Anderson*–the only litigation where Trump was challenged to refute its findings. Trump did not just fail to do so, he "was unable to provide . . . *any* credible evidence which would discredit" them. (R. 1688) (*Anderson* District Court Final Order, ¶ 37) (emphasis added). Instead, the evidence in *Anderson* supported all of the January 6 Report's material conclusions. The unrefuted testimony of the insurrection's survivors establishes the fact of an insurrection. The testimonies of Officers Hodges and Pingeon and Representatives Swalwell and Buck, bolstered by additional unchallenged evidence, establish that a mob of thousands came to the Capitol from the area of the Ellipse, understood that it was acting at Trump's direction, communicated through word and deed its common purpose of stopping the vote certification to keep Trump in power, launched a deadly attack on the Capitol and the officers defending it, violently breached the building, and forced the suspension of the Constitutional transfer of power. (R. 1718-25) (same, ¶¶ 146-150, 153-168, 176-179). That evidence alone establishes that there was an insurrection.

With respect to Trump's role, Trump's public statements demonstrate his courtship of political extremists; his knowledge and approval of extremist conduct by his supporters; repeated false allegations of fraud and a stolen election; attacks on state officials, the Supreme Court, Congress, and Vice President Pence; calls by Trump to come to Washington on January 6; and directives for his supporters to "fight" before they "don't have a country anymore." (R. 1699-1718, 1724-25, 1727-28)

(same, ¶¶ 65-77, 79-85, 87-96, 101, 103-106, 108-113, 115, 118-122, 125-127, 129, 135-140, 144-145, 170, 172-173, 178, 186-187, 189-190). They include the Ellipse speech that Trump used to finally send the mob to the Capitol, his misleading tweets about the ongoing attack, his 2:24 pm tweet attacking Vice President Pence, his sympathetic 4:17 pm message to the mob, and his warning to the public that "these are things and events that happen" when he does not get what he wants. (R. 1724-25, 1728) (same ¶¶ 170, 172-173, 178, 180, 189-190). Trump's public statements alone are sufficient to establish his intent and his engagement in the insurrection.

Extensive additional evidence supports these conclusions. For example, Trump's own witnesses and evidence confirmed that his supporters react to his speeches and came to Washington because they believed the election was stolen, Trump knew that extremists were in Washington on January 6, thousands of people stayed outside the security checkpoints at the Ellipse, and their purpose was to stop the certification. (R. 1693, 1711) (same, ¶¶ 48, 126, citing testimony of Trump witness K. Pierson); (R. 1712-13, 1717) (same, ¶¶ 130, 132, 143, citing testimony of Trump witness A. Kremer); (R. 1725) (same, ¶¶ 168, citing testimony of Trump witness K. Buck). Unrebutted expert testimony established the links between Trump's public statements, political extremists, and his incitement of the attack on the Capitol, and the unused courses of action to quell the attack available to Trump. (R. 1698-1704, 1706-07, 1709, 1717-18, 1723, 1726-27) (same, ¶¶ 61-87, 105, 107, 109, 117, 142-145, 165, 181-85, basing conclusions on testimonies of Professors Simi

and Banks). Unrefuted documentary evidence established the violent reaction of the crowd to Trump's Ellipse speech, the size of the crowd there, the weapons and military gear used by the mob, the mob's approach from the Ellipse, and the attack itself. (R. 4382-4431, 5461-71, 5614).

Trump's further claim that the January 6 Report contained "hearsay within hearsay" is incorrect and insufficient. 5 M.R.S. § 9057 functionally eliminates the hearsay rule, subject to the evidence being the type reasonable people would rely on. He identifies no specific portion of any January 6 Report finding that contains impermissible hearsay but merely asserts a sweeping objection. To the extent the Objection refers to statements by Trump, statements and documents establishing Trump's knowledge, conversations between Trump and his agents, statements of Trump supporters offered to establish his influence, and statements reflecting the then-existing emotional condition of the mob, they are all either not hearsay or fit at least one hearsay exception.

Trump objects to 14 specific conclusions of the January 6 Report—none of which were cited by the Secretary in her ruling—with a litany of misplaced arguments. (Pet. Br. 90-94.) His hearsay objection to each of these ignores the fact that they are based on statements by Trump or other statements establishing his state of mind. The conclusions are not speculation or opinion, but well-established facts, and highly relevant to the issue of whether Trump engaged in an insurrection. The factual conclusions contained within the January 6 Report fall squarely within M.R.E. 803(8).

Finally, Trump cannot demonstrate that the Secretary's admission of the January 6 Report, even if one accepts any of his arguments, materially altered the Secretary's decision. The January 6 Report was not, as Trump suggests, the central piece of evidence in this case. The Secretary's decision cites to it only six times, and only three times in isolation, fewer citations than to two other government reports about to which Trump does not specifically object. (R. 25-26, 29-31) Her decision does not include any of the 14 specific findings that Trump claims are hearsay or any specific finding to which he objects. In sum, Trump makes no effort to explain how the Secretary's actual limited reliance on the January 6 Report impacted that finding, particularly against the voluminous other evidence upon which the Secretary relied.

IV. Trump is Disqualified from Public Office under Section 3 of the Fourteenth Amendment

To determine whether Trump is disqualified from office under Section 3 of the Fourteenth Amendment, the Secretary correctly answered the following questions: First, is the Presidency an "office . . . under the United States" that disqualified individuals may not hold? Second, did Trump swear an oath "to support the Constitution" as "an officer of the United States"? Third, was there an "insurrection or rebellion against" the "Constitution of the United States"? And fourth, did Trump "engag[e] in" that insurrection? *See Griffin*, 2022 WL 4295619, at *16. The answer to each of these questions, as she concluded is yes.

A. Section 3 of the Fourteenth Amendment Applies to Former President Trump

1. Oath-Breaking Insurrectionists May Not Assume the Office of the Presidency

Section 3 prohibits a disqualified individual from holding "any office, civil or military, under the United States." Text and history establish beyond doubt that this broad language includes the office of the Presidency.[13]

a) The Constitution's Text Establishes that the Presidency is an Office

We know that the Presidency is an "office . . . under the United States" because the Constitution repeatedly says so. The Constitution refers to the Presidency as an "Office" 25 times. *See* U.S. Const. art. II, § 1; *see also id.* art. I, § 3; art. II, § 4; amends. XII, XXII, XXV; *see also* The Federalist Nos. 39, 66, and 68 (Hamilton and Madison repeatedly referring to the President as holding an "office"). Given Section 3's focus on constitutional oaths, it is particularly notable that the Constitution requires the President to swear, prior to "the Execution of his Office," to "faithfully execute the Office of President of the United States[.]" U.S. Const. art. II, § 1. *See Anderson*, 2023 CO 63, ¶¶ 129-143.

Section 3 thus applies to the Presidency. It prohibits disqualified individuals from holding "*any office*, civil or military, under the United States," using deliberately broad language that permits no exceptions. U.S. Const. amend. XIV § 3 (emphasis added); *see United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some

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[13] Leading Fourteenth Amendment scholars have confirmed this point. *See, e.g.*, Graber Maine Amicus Br. 8-11, 19; William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section 3*, 172 U. Pa. L. Rev. (forthcoming 2024) (manuscript at 104–12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751; John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. (forthcoming 2023) at 6–22, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4440157.

indiscriminately of whatever kind.'" (citation omitted)). Nor can there be doubt that the President's "office" is "under the United States." Section 3 uses "under the United States" only to distinguish federal offices from offices "under any State." U.S. Const. amend. XIV § 3.[14]

These outcomes would have been unthinkable to the Constitution's framers. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 355 (1819) (rejecting reading of the Constitution that would have resulted in "so gross an absurdity [it could not] be imputed to the framers of the constitution").

There would have been no reason to specifically enumerate the Presidency, because it so clearly falls within the general language of "any office." *See N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 302 (2017) ("The *expressio unius* canon applies only when 'circumstances support[ ] a sensible inference that the term left out must have been meant to be excluded.'"). For the same reason, it is unsurprising that Section 3 does not specifically mention Supreme Court justices; they, too, are covered because they hold "offices." *See* U.S. Const. art. III (referring to federal judges as "hold[ing] their Offices" and to "their Continuance in Office").

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[14] Other constitutional provisions using the phrase "office under the United States" make clear that the phrase covers the Presidency. If the Presidency is not an "office . . . under" the United States, then a President could: simultaneously serve as both President and as a member of Congress, U.S. Const. art. I, § 6; accept emoluments or even titles of nobility from a foreign sovereign, U.S. Const. art. I, § 9; hold office as President (but no other federal office) despite previously being impeached and removed from office, U.S. Const. art. I, § 3; serve as a presidential elector in his own re-election, U.S. Const. art. II, § 1; and face a "religious Test" as a "Qualification" to his office, U.S. Const. art. VI.

That stands in sharp contrast to "Senator[s] or Representative[s] in Congress" and "Electors for President or Vice President." The Framers needed to enumerate those positions precisely because they were not obviously "offices." Electors do not hold "office"—they are selected for a discrete purpose and a single vote, after which their duty is discharged. See U.S. Const. art. II § 1; *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890) (electors "are no more officers or agents of the United States than are . . . the people of the States when acting as electors of representatives in congress."). Similarly, the Constitution nowhere refers to Senators or Representatives as holding "office," and in fact implies they do not. *See* U.S. Const. art. II, § 1 ("no Senator or Representative, or Person holding an Office . . . under the United States, shall be appointed an elector" (emphasis added)).

In short, the Constitution repeatedly declares the Presidency to be an "Office" in unambiguous terms that brook no dissent. *See, e.g.*, *D.C. v. Trump*, 315 F. Supp. 3d 875, 883 (D. Md. 2018) (for purposes of the foreign emoluments clause, "the only logical conclusion" from Constitution's text "is that the President holds an 'Office of Profit or Trust under the United States'" (cleaned up)), *vacated as moot*, 141 S. Ct. 1262 (2021); *see also Trump v. Mazars USA*, LLP, 39 F.4th 774, 792 (D.C. Cir. 2022) (noting that the foreign emolument clause applies to all federal offices "including the President"). Where the text is so clear, the analysis must end there.

b) Historical Evidence Confirms the Presidency Is an "Office under the United States"

As Professor Magliocca testified in this proceeding, the congressional debates over Section 3 likewise reveal a clear intent to cover the office of the Presidency. In

the Senate debate, Senator Reverdy Johnson of Maryland asked why former rebels "may be elected President and Vice-President of the United States, and why did you omit to exclude them?" Maine Senator Lot Morrill of Maine responded: "Let me call the Senator's attention to the words 'or hold any office, civil or military, under the United States.'" Senator Johnson replied: "Perhaps I am wrong as to the exclusion from the presidency; no doubt I am." Cong. Globe, 39th Cong., 1st Sess. 2899 (1866) (emphasis added). In other words, Congress questioned whether the Presidency was an "office . . . under the United States" and determined the answer was "yes." Nobody in the debates later suggested that this reading was wrong. (R. 2576); (R. 191-192).

In reaching a contrary conclusion, the Colorado district court relied on an early draft of Section 3 that expressly referred to the office of President. (R. 1688) (*Anderson* District Court Final Order, ¶ 303). The Colorado Supreme Court correctly reversed. *See Anderson*, 2023 CO 63, ¶ 137 (warning that, "it is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process.") (*quoting Dist. of Columbia v. Heller*, 554 U.S. 570, 590 (2008)). At any rate, this history further confirms Section 3 applies to the Presidency. The earlier draft provided that those who had engaged in rebellion would be ineligible to hold:

"[T]he office of President or vice president of the United States, Senator or Representative in the national congress, or any office now held under appointment from the President of the United States, and requiring the confirmation of the

Senate[.]" Cong. Globe, 39th Cong., 1st Sess. 919 (1866). There are a few notable features of this draft. First, it confirms the Presidency was understood to be an "office." Second, it highlights Congress's desire to exclude rebels from the Presidency. Third, the draft catch-all "any office" clause was considerably narrower than the final version of Section 3, applying only to offices requiring Presidential appointment and Senate confirmation. This general language would not cover the Presidency, and so that office needed to be specifically enumerated.

There is no evidence that by later broadening this catch-all to include "any office . . . under the United States," Congress actually intended to exclude the Presidency. *See* (R. 2584-85). The most reasonable inference is that they dropped the specific reference to the Presidency once the broadened catch-all made it redundant.

Other contemporaneous debates reveal a consensus that Section 3 disqualified Confederate leaders like Jefferson Davis from the Presidency unless Congress removed the disability by a two-thirds vote. (R. 192-193.) Professor Magliocca presented a list of twenty-one examples of individuals treating it as common knowledge that Section 3 of the Fourteenth Amendment excluded former insurrectionists, including Jefferson Davis, from becoming President. (R. 4500-02.) Upon request by Mr. Trump's attorney, Professor Magliocca provided six additional sources supporting his opinion that were not included in his expert report or considered by the Colorado district court. *See* (R. 209-210).[15]

[15] These additional sources appear to have been omitted from the administrative record.

The argument that excluding insurrectionist presidential electors would prevent an insurrectionist from becoming President is unpersuasive and devoid of historical support. The historical record reveals a consensus that Davis was disqualified—not merely that it should be harder for him to win. Also, Section 3 only covers those who had previously sworn an oath to support the Constitution, and a hypothetical Davis presidential campaign would have had no difficulty finding former rebels who had never previously held public office and could therefore serve as electors.

2. Section 3 Covers Insurrectionist Former Presidents.

Section 3 disqualifies all who engage in insurrection after "having previously taken an oath . . . as an officer of the United States . . . to support the Constitution of the United States[.]" *See also* (R. 184) (oath breaking as moral perjury unworthy of public trust). This applies to Trump, because his Presidential oath included a duty to support the Constitution and because the President is an "officer of the United States." *See* (Rosen Video Ex. 6) (video of Trump taking Presidential Oath of Office).

a) The President Takes an Oath to "Support the Constitution"

The Constitution contains two oath of office provisions. Article VI obligates all members of Congress and State legislatures, and "all executive and judicial officers, both of the United States and of the several States," to swear an oath to "support this Constitution." U.S. Const. art. VI. For most officers, the Constitution does not dictate the exact wording that this oath must take. However, the President

must meet this general obligation through a specific and more demanding oath set out in Article II: he must "to the best of my Ability, preserve, protect and defend the Constitution of the United States." U.S. Const. art. II § 1. By swearing the stronger Article II Presidential oath, Trump necessarily also undertook a duty to "support" the Constitution. By definition, one who "defends" something "supports" it. Samuel Johnson, *A Dictionary of the English Language* (5th ed. 1773) ("defend": "to stand in defense of; to protect; to support"); Webster's American Dictionary of the English Language (1857) ("defend": "to support or maintain"); (R. 3618-3620.) (Trump's expert admitting that "as a practical matter" the obligation to "defend" the Constitution includes the obligation to "support" it). Nineteenth century Presidents repeatedly gave speeches acknowledging that their Presidential oaths imposed a duty "to support" the Constitution. *See* James D. Richardson, *A Compilation of the Messages and Papers of the Presidents*, 1789-1897, Vol. 1 at 232, 467 (Adams, Madison); Vol. 2 at 625 (Jackson); Vol. 8 at 381 (Cleveland).

Contrary to Trump's assertions, there is no separate "Article VI oath." Article VI does not dictate the language that must be used in any oath; it merely requires the enumerated officers to take *an* oath to support the Constitution. Nor is the President *excluded* from the officers enumerated in Article VI. To the contrary, the President is plainly one of the "executive ... Officers ... of the United States" who must take an oath required by Article VI—and the particular language of that oath is set forth in Article II. Trump offers no textual or historical argument to the contrary.

The linguistic difference between an oath "to support" and an oath to "preserve, protect, and defend" is irrelevant here. If anything, that a former President broke an even more demanding oath would provide more reason why Section 3 should and does apply to him.

The historical evidence confirms the common sense intuition that particular words of the oath do not matter to Section 3. *See* (R. 331-32) (Graber Br. 8-9). A federal judge at the time charged a grand jury that Section 3 is not limited to those whose oaths used the "precise words of the amendment: 'to support the Constitution of the United States." The Public Ledger, Dec. 2, 1870, at 3 (newspaper reprinting federal grand jury charge). Although "there ha[ve] been slight differences in the forms of these oaths," Section 3 applies to any oath that "substantially, though not literally" imposes an obligation to support the Constitution. *Id.* The President's oath does just that. *See also* 12/15/2023 Hearing 5:41:40-5:46:30 (Magliocca) (no historical evidence of making a distinction between the Presidential oaths and other oaths).

b) The President is an "Officer of the United States"

i) An "officer" is one who holds an office

As laid out in detail above, both text and history establish that the Presidency is an "Office" under the United States. That conclusion also resolves the related question whether former President Trump was an "officer of" the United States for purposes of Section 3. A public "officer" is simply one who holds a public "office." *See* (R. 332-33) (Graber Br. 9-10). The structure of Section 3 confirms this

understanding. Section 3 has a near-total symmetry between the persons disqualified by Section 3 and the positions from which those persons are excluded.[16] For example, Section 3 covers the position of "Senator or Representative in Congress" and individuals who broke an oath taken as a "member of Congress."[17] Similarly, it covers the position "any office, civil or military, under the United States" and individuals who broke an oath taken as an "officer of the United States." The best understanding of this symmetry is that "officers" are synonymous with those who hold "offices." *See* Vlahoplus, *supra*, at 22-27 (describing the "essential harmony" of the "office" and "officer" terms); *see also* U.S. Const., art. II, § 4 (impeachment of "Officers" results in their removal "from Office").

Judicial decisions at the time confirmed that "officer" in Section 3 meant anyone who holds an office and swears the required oath. In applying Section 3 to disqualify a county sheriff, the North Carolina Supreme Court drew "the distinction between an officer and a mere placeman . . . by making his oath the test. Every officer is required to take not only an oath of office, but an oath to support the Constitution . . . of the United States. . . . [T]he oath to support the Constitution is the test." *Worthy v. Barrett*, 63 N.C. 199, 202, 204 (1869). Similarly, the Florida Supreme Court in an opinion construing Section 3 as incorporated through the

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[16] The one clear exception is presidential electors, which are included in the list of barred offices but not in the list of covered persons. *See* Baude & Paulsen, *supra*, at 106-107.

[17] The express inclusion of legislative officials in Section 3 is not surprising; unlike the President, there was uncertainty in the 1860s about whether members of Congress held "office" or were "officers" Cong. Globe, 39th Cong., 1st Sess. at 3939 (debating this issue at length).

Florida Constitution defined "[a]n officer of the State" as "a person in a public charge or employment, commissioned or authorized to perform any public duty, under an oath to support the Constitution and Government, and to perform the duty faithfully." *In the Matter of the Executive Communication of the 14th October*, 1868, 12 Fla. 651, 651–62 (1868). Because the President holds the office of the Presidency and swears an oath to support the Constitution, he is an "officer" under the plain language of Section 3.

ii) Attorney General Opinions, judicial decisions, and other historical sources.

In interpreting Section 3, Attorney General Stanbery's opinions likewise made clear that "officer of the United States" includes anyone who holds an "office" requiring an oath to the Constitution, including the President. In his first opinion, Stanbery wrote that the term "'officer of the United States' within the meaning of [Section 3] . . . is used in its most general sense, and without any qualification, as legislative, executive, or judicial," including "military as well as civil officers of the United States who had taken the prescribed oath." 12 U.S. Op. Att'y. Gen. 141, 158 (1867) (emphasis added). He explained why Section 3's application to federal officers was all-inclusive: "[T]he violation of the official oath" relates to "fealty to the United States, which is broken by rebellion against the United States[.]" *Id.* Thus, "the reason is apparent for including all officers of the United States, and for making the disenfranchisement more general and comprehensive as to them." *Id.* (emphasis added). In other words, no former federal official who broke their oath could be trusted to hold federal office again.

Stanbery's second opinion was even more direct in equating "officer" and "office." He declared that "Officers of the United States" includes, "*without limitation,*" any "person who has at any time prior to the rebellion held any office, civil or military, under the United States, and has taken an official oath to support the Constitution of the United States." 12 U.S. Op. Att'y Gen. 182, 203 (1867) (emphasis added). Consistent with this broad and common sense view, Stanbery declared the President to be an "executive officer." *Id.* at 196.

Stanbery's opinions provide exceptionally persuasive evidence of the historical understanding. They came in 1867—after Congress sent the Fourteenth Amendment to the States, but before the requisite three- fourths of States had ratified it. *See* (R. 2554-65). At that time, the Union was organizing constitutional conventions in former confederate states that would vote on new state constitutions and on ratification of the Fourteenth Amendment. 12 U.S. Op. Att'y. Gen. at 141-42. The Reconstruction Acts provided that no person could vote for delegates to those conventions if they would be disqualified by the proposed Section 3. Id. Stanbery's opinions interpreting the Reconstruction Acts (and by incorporation Section 3) therefore directly impacted public debates on that Constitutional provision. And they were legally binding: Andrew Johnson's cabinet approved Stanbery's opinions and directed the Union Army to follow them. *See* (R. 2554-65)..

Short of a U.S. Supreme Court opinion directly on point, contemporaneous opinions from the U.S. Attorney General adopted by the Cabinet and implemented by the U.S. military at the President's command are about the best historical

evidence one can get. Stanbery was specifically concerned about the scope of state officials captured by the phrase "executive or judicial officer of any State." 12 U.S. Op. Att'y Gen. at 155 ("I have said, that in addition to the class of officers who clearly come within the terms of the act, as judicial and executive officers of the State. . . there remain a vast body of officers whose status is in some way to be defined."). He had no such qualms about "officer of the United States," which uses the "term officer . . . in its most general sense, and without any qualification." *Id.* at 158. The President is not some fringe, low-level state officer who the Framers of the Fourteenth Amendment may have had good reason for exempting and for whom the language of Section 3 is not clear. The President either is or is not included; there is no "maybe" that could warrant resort to a rule of lenity. Moreover, while Stanbery believed the Reconstruction Acts should be construed cautiously because they were "retrospective, penal, and punitive," 12 U.S. Op. Att'y Gen. at 159-60, the same logic does not apply to Section 3 which is not applied retroactively, and merely "fix[es] a qualification for office"; it is not a "punishment mean[t] to take away life, liberty, or property." Cong. Globe, 39th Cong., 1st Sess. 3036 (1866) (Sen. Henderson).

Other historical evidence likewise confirms what the text already makes plain. By the time the Fourteenth Amendment was ratified, the phrase "officer of the United States" was widely understood to include the President. *See* Vlahoplus, *supra*, at 13–22; Graber, *supra*, at 13–21. This usage extends back to the founding, when George Washington was described as "the first executive officer of the United States." Vlahoplus, *supra*, at 17; *see also* The Federalist No. 69 (Hamilton) ("The

President of the United States would be an officer elected by the people[.]"). Presidents were regularly called the "chief executive officer of the United States," including Jefferson, Jackson, Van Buren, Harrison, Polk, Taylor, Fillmore, Buchanan, Lincoln, Johnson, Grant, and Garfield. Vlahoplus, *supra*, at 17-20.

These were not isolated or meaningless references—they were consistent, came in contexts laden with significance, and often were close in time to the ratification of Section 3. (R. 2572-75.) For instance, President Andrew Johnson issued many presidential proclamations (equivalent to executive orders today) that invoked his status as "chief executive officer of the United States" as a basis for his power to adopt reconstruction measures. (R. 2572-73); Richardson, *supra*, at 312–31. During Andrew Johnson's impeachment in 1868 (the year the Fourteenth Amendment was ratified), members of Congress repeatedly referred to him the same way—again, in a context where the President's status as an "officer" actually mattered. (R. 2585-87); Cong. Globe, 40th Cong., 2d Sess. 236, 513 (1868) (Rep. Evarts and Rep. Bingham).

Members of the 39th Congress who enacted the Fourteenth Amendment also repeatedly referred to the President as an officer. *See* Graber Maine Amicus Br. 11.

Before this year, no court has squarely considered whether the President qualifies as an "officer of the United States" under Section 3 of the Fourteenth Amendment because we have never before had an insurrectionist President. But for nearly 200 years, judicial decisions have consistently referred to the President as an "officer." The year the Fourteenth Amendment was ratified, the Supreme Court

said: "We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority." *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 676–77 (1868). This was a constant refrain from the Supreme Court in the nineteenth century.[18]

More recent Supreme Court decisions specifically addressing constitutional issues related to the President have made the same point. In *U.S. Term Limits, Inc. v. Thornton*, the Supreme Court held that various clauses of the original Constitution "reflect the idea that the Constitution treats both the President and Members of Congress as federal officers." 514 U.S. 779, 804–05 n.17 (1995). And in *Nixon v. Fitzgerald*, the Court discussed the President's "unique position in the constitutional scheme," whose vesting of executive power "establishes the President as the chief constitutional officer of the executive branch." 457 U.S. 731, 749–50 (1982).[19]

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[18] *Menard's Heirs v. Massey*, 49 U.S. (8 How.) 293, 309 (1850) ("the President or some other officer"); *Embry v. United States*, 100 U.S. (10 Otto) 680, 685 (1879) ("[n]o officer except the President"); *United States v. McDonald*, 128 U.S. 471, 473 (1888) (quoting Embry); United States v. Am. Bell Tel., 128 U.S. 315, 363 (1888) ("the president or . . . any other officer of the government"). Lower courts likewise referred to the President as an officer. See, e.g., *United States ex rel. Stokes v. Kendall*, 26 F. Cas. 702, 752 (C.C.D.D.C. 1837) ("The president himself ... is but an officer of the United States[.]), aff'd, 37 U.S. (12 Pet.) 524 (1838); *Ex parte Merryman*, 17 F. Cas. 144, 152 (C.C.D. Md. 1861) (calling the President "that high officer").

[19] *See also Clinton v. Jones*, 520 U.S. 681, 699 n.29 (1997) (quoting *Fitzgerald*); *Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992) (referring to the President as a "constitutional officer"); *Cheney v. U.S. District Court for the District of Columbia*, 541 U.S. 913, 916 (2004) (mem. op. by Scalia, J.) (referring to "the President and other officers of the Executive"); *In re Sealed Case*, 121 F.3d 729, 748 (D.C. Cir.1997) (the President is "the chief constitutional officer").

To the extent that Trump relies on several cases to suggest that "officers of the United States" must be appointed rather than elected, *see, e.g.*, *Free Enterprise Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 497–98 (2010), these cases are irrelevant here because they interpret the President's power to appoint "other Officers of the United States" under the Appointments Clause. The President does not appoint himself and therefore the Appointment Clause's phrase "other officers" has no bearing on whether the President is an officer. *See* President Donald J. Trump's Mem. of Law. in Opp. to Mot. to Remand, *New York v. Trump*, 1:23-cv-3773-AKH, ECF No. 34, at 2–9 (S.D.N.Y., filed June 15, 2023) (Trump brief acknowledging the President is an officer and that the Appointments Clause has no bearing in analogous context); *See* (R. 3624-27).

iii) Other constitutional provisions

While Trump argues that other Constitutional provisions do not include the President as an "officer," each provision is either distinguishable or does not support his position. First, none of the cited provisions of the original Constitution attempt to define "officer of the United States," much less say that the President is not one. Specifically:

Appointments Clause: This clause says only that the President "shall appoint" ambassadors, Supreme Court Justices, "and all *other* Officers of the United States[.]" U.S. Const. art. II, § 2 (emphasis added). The President does not appoint himself, and so is clearly not an "other" officer of the United States. That does not

remotely imply he is not "an" officer. Rather, the use of "other" implies that the President is an officer.

Article VI: Article VI requires "all executive and judicial Officers. . . of the United States" to swear an oath "to support" the Constitution. But the President does exactly that—he simply does so by means of a more demanding oath spelled out word-for-word in Article II. See *supra* § II.A. As noted, there is nothing in Article VI suggesting the President is not included in "all executive . . . Officers . . . of the United States."

Impeachment Clause: The clause provides that "[t]he President, Vice President, and all civil Officers of the United States" may be impeached. U.S. Const. art. II, § 4. The key word here is "civil": because the President is both the chief executive officer and the Commander-in- Chief, he is both a military and civil officer. U.S. Const. art. II, § 2. Because military officers are not subject to impeachment, to avoid confusion, the Impeachment Clause needed to specifically identify the President. And for the Vice President, because they also serve as President of the Senate, adding them to this list ensures that this legislative role does not prevent their impeachment.

Commissions Clause: The Commissions Clause says that the President "shall Commission all the Officers of the United States." U.S. Const. art. II, § 4. But this clause, situated in a section and a paragraph conveying powers on the President, means only that the President alone (and nobody else) "has the power to commission" officers. Edward S. Corwin, The President: Office and Powers 78 (4th

ed. 1957). It does not mean, and no authority suggests, that the President is somehow excluded from the class of officers of the United States, any more than a rule that "Plaintiff shall . . . serve on all parties an opening brief" means the plaintiff is not a party. C.R.C.P. 106(a)(4)(VII). In any event, the President requires no commission since he is an "officer elected by the people." The Federalist No. 69 (Hamilton).

None of the references to "officers of the United States" in these unrelated constitutional provisions overcome the natural meaning of the text: because the Constitution says the Presidency is an "office," the person who holds it is an "officer." *See Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1372 (Fed. Cir. 2006) (Gajarsa, J., concurring in part) ("An interpretation of the Constitution in which the holder of an 'office' is not an 'officer' seems, at best, strained").

In any event, these provisions of the original Constitution, adopted 80 years before the Fourteenth Amendment, do not control the meaning of Section 3. *See New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2127 (2022) ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." (emphasis in original)). Suppose for the sake of argument that, in 1787, the phrase "officer of the United States" had some technical, term-of-art meaning that was somehow narrower than "holder of an office under the United States." If that were so, the overwhelming textual, historical, and judicial evidence cited above would make clear the sands of time buried that technical distinction well before the Fourteenth Amendment's adoption.

Thus, the Secretary did not decide what the term "officer" means in unrelated provisions of the original Constitution to decide this case. Nor did the Secretary need to decide whether Alexander Hamilton was somehow wrong about prevailing 1780s usage of "officer" when he called the President an "officer" of the United States. The Federalist No. 69 (Hamilton). The Secretary needed only decide what "officer of the United States" meant in 1868, and in a context that used the term "in its most general sense, and without any qualification." 12 U.S. Op. Att'y. Gen. at 158. Those who adopted Section 3 clearly understood that this unqualified term included the President. *See* (R. 335) (Graber Br. 11).

2. Excluding the Presidency and the President from Section 3 Would Yield Absurd Results

The text and history of the Constitution all emphatically support the conclusion that Section 3 applies to the President and the Presidency. But so too does basic common sense. When interpreting the Constitution's text, courts are "guided by the principle that 'the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Dist. of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (citations omitted); *see also Whitman v. Nat'l Bank of Oxford*, 176 U.S. 559, 563 (1900) ("The simplest and most obvious interpretation of a Constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption" (citations omitted)). Applying straightforward interpretation— rather than hyper-technical lawyering and "secret-code" hermeneutics—reveals the implausibility of the claim that Section 3 excludes the President and the Presidency. *See* Baude and

Paulsen, *supra*, at 105, 108–109. The framers of Section 3 as well as the Maine citizens who ratified the Fourteenth Amendment "believed ... that Section Three applied to all past and present federal officers and disqualified those officers who participated in insurrections from all offices." (R. 341) (Graber Br. at 17).

The contrary argument must be that even though the Constitution repeatedly says the President holds a federal "office," that office is somehow not an "office under" the United States (what else could it be under?); or that even though the President holds an "office," he is not an "officer" (and presumably the Presidency is therefore an officer-less office?); or that Section 3 was intended to cover only weaker, and not stronger, oaths to the Constitution (but why on Earth would that be?). These interpretations would have confounded the people who ratified the Fourteenth Amendment. Nor would such a reading be consistent with the purpose of Section 3. Section 3 is a "measure of self-defense," Cong. Globe, 39th Cong., 1st Sess. 2918–19 (Sen. Willey); it gives "the Constitution a steel-clad armor to shield it and [the people] from the assaults of faithless domestic foes in all time to come." Speech of Hon. John Hannah, Cincinnati Commercial, Aug. 25, 1866, at 22. Those who hold the highest offices can wreak the most havoc on the Constitution. Supporters of the Fourteenth Amendment would have been aghast at the notion that it prohibited a Confederate leader like Jefferson Davis from serving as a county sheriff, *see Worthy*, 63 N.C. at 204, or as a mere elector for President, *see* amend. XIV § 3, but allowed him to serve as the Commander-in-Chief of the very Union that he had so violently betrayed.

And Section 3 was intended to "strike at those who have heretofore held high official position, and who therefore may be presumed to have acted intelligently." Cong. Globe, 39th Cong., 1st Sess. 3036 (1866) (Sen. Henderson). As Professor Graber explains, the framers of Section 3 sought to prevent confederate leaders like Jefferson Davis from becoming president, and arguments that the Electoral College might prevent that "are mistaken." (R. 335, 343) (Graber Br. 11, 19. It would thus be nonsensical to exclude the former Commander-in-Chief who engaged in insurrection from its coverage while at the same time disqualifying former low-level state officials.

Exempting the President and Presidency from Section 3 would also conflict with the broader constitutional design. The qualifications for the Presidency are the most stringent in the Constitution, including for age, residency, and U.S. citizenship. *Compare* U.S. Const. art. I, § 2, cl. 1, and *id.* art. I, § 2, cl. 3, with *id.* art. II, § 1, cl. 5. Reading the Presidency out of Section 3 would mean that, unlike other qualifications for office, the Constitution imposes a less stringent requirement on the Presidency than on virtually every other federal and state officer in the country.

The Court should not assume that the Fourteenth Amendment's framers intended this bizarre result, nor that they made a mistake. It is "of little significance" that the specific fact pattern here is "one with which the framers were not familiar"; the Court must give effect to the Constitution's "great purposes" and reject interpretations that "defeat rather than effectuate" those purposes. *United*

States v. Classic, 313 U.S. 299, 316 (1941). Here, text, history, and purpose all show that those who adopted Section 3 intended it to cover the Office of the Presidency and insurrectionist former Presidents.

B. The Events On and Surrounding January 6, 2021, Were an Insurrection Against the Constitution

Historically, "insurrection" meant "any public use of force or threat of force by a group of people to hinder or prevent the execution of law."(R. 1740) (*Anderson* District Court Final Order, ¶ 233). This definition comports with historical examples of insurrection before the Civil War, with antebellum dictionary definitions and judicial opinions, and with other authoritative legal sources. (R. 187-90, 199-200); (R. 1740-42) (*Anderson* District Court Final Order, ¶¶ 234-40); (R. 2542-51). However, Section 3 qualifies the term "insurrection" by the phrase "against the same," referring to the Constitution of the United States. U.S. Const. amend. XIV, § 3. "That limits the scope of the provision by excluding insurrections against state or local law, and including only insurrections against the Constitution." (R. 1740) (*Anderson* District Court Final Order, ¶ 231). Thus, a Section 3 insurrection refers to "(1) a public use of force or threat of force (2) by a group of people (3) to hinder or prevent execution of the Constitution of the United States." *Id.* ¶ 240.

The January 6 attack on the Capitol and surrounding events easily meet this standard. A mob of thousands of Trump supporters attacked the Capitol. (R. 1718, 1743) (*Anderson* District Court Final Order, ¶¶ 147, 242). The mob breached the Capitol and disrupted the constitutionally mandated peaceful transfer of power. (R.

1719, 1725) (same, ¶¶ 151-52, 177). The mob was armed and violently attacked police officers, injuring over 170 and killing one. (R. 1720-21) same, ¶¶ 155-58); Ex. 60 at 1 (GAO Report, Feb. 2023); Exs. 67-72, 75 (videos of violent attacks on police officers). Members of the mob spoke of revolution and intended to and did obstruct the electoral vote count mandated by Article II and the Twelfth Amendment. (R. 1722-25, 1743) (*Anderson* District Court Final Order, ¶¶ 162-63, 168, 179, 244). The violent attack to stop this core constitutional function "easily" qualifies as an "insurrection" "against the Constitution" for purposes of Section 3. (R. 1718-24, 1743) (same, ¶¶ 146-68, 241-44); *see also* (R. 200) (drafters would have thought that violent disruption of peaceful transfer of power constitutes an insurrection against the Constitution).

Trump's claim that "insurrection" means "levying war" for purposes of the Treason Clause only buttresses this conclusion. Trump Opening Br. 14. Historically, "levying war" included any "insurrection" in which "a body of men" seek to "oppose and prevent by force and terror, the execution of a law." *United States v. Mitchell*, 2 U.S. (2 Dall.) 348, 349 (C.C.D. Pa. 1795) (Marshall, C.J.); *accord In re Charge to Grand Jury - Neutrality L. and Treason*, 30 F. Cas. 1024, 1025 (D. Mass. 1851); *Case of Fries*, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800) (Chase, J.); *United States v. Hanway*, 26 F. Cas. 105, 127-28 (C.C.E.D. Pa. 1851); Graber Maine Amicus Br. 19-21. Trump's own authority used the same definition. *See United States v. Greathouse*, 26 F. Cas. 18, 26 (C.C.N.D. Cal. 1863) (Field, J.).

Trump asserts January 6 was not violent enough, but it was more violent than historical insurrections referenced by Section 3's framers. (R. 2543-46.) Nor does "insurrection" require officers to be "shot" or "stabbed." *Compare* Trump Opening Br. 15-16 with *Case of Fries*, 9 F. Cas. at 930 ("[M]ilitary weapons" like "guns and swords" "are not necessary to make such insurrection or rising amount to a levying war, because numbers may supply the want of military weapons, and other instruments may effect the intended mischief."); *Charge to Grand Jury*, 30 F. Cas. at 1025-26 (similar). The Colorado district court also correctly found that the mob's overriding purpose was to obstruct certification of the election; that fact was obvious, including to Trump's own witnesses. (R. 1722-24, 1743) (*Anderson* District Court Final Order, ¶¶ 162-68, 243-44).

Like the Colorado Supreme Court, this court need not define the outer perimeter of what constitutes an insurrection against the Constitution. It suffices for this Court to "conclude that any definition of 'insurrection' for purposes of Section Three would encompass a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish a peaceful transfer of power in this country." *Anderson*, 2023 CO ¶ 184.

Trump argues that because he has not been charged with or convicted of the crime of insurrection under 18 U.S.C. § 2383, the events of January 6 could not have been an insurrection and he could not have engaged in one. (Pet. Br. 55-58.) This is obviously wrong. As Trump acknowledges, the Second Confiscation Act, the

precursor to 18 U.S.C. § 2383 was enacted in 1862, six years prior to the ratification of the Fourteenth Amendment and therefore could not have been intended to implement Section 3. (Pet. Br. at 60.) The criminal insurrection statute and Section 3 are textually different and have different purposes. To name a few, 18 U.S.C. § 2383 and Section 3 are intended to cover a different class of people, all citizens versus former oath-takers, have different consequences, criminal sanctions versus disqualification from office, and apply to insurrections against different institutions, the United States versus the Constitution. *Compare* 18 U.S.C. § 2383 *with* U.S. Const. amend. XIV, § 3. Finally, no person who has been adjudicated to be disqualified under Section 3 has been convicted under the criminal insurrection statute.[20]

C. Trump engaged in the insurrection

Trump's conduct and words "were the factual cause of . . . the January 6, 2021 attack on the United States Capitol." (R. 1718) (*Anderson* District Court Final Order, ¶ 145). Trump called his supporters to Washington on January 6, "incited" them with words that "explicitly" and "implicitly" commanded violence, and they then violently stormed the Capitol. (R. 1718, 1724-28, 1762-67) (same, ¶¶ 144-45, 169-93, 288-98). Even though the standard of proof is a preponderance of evidence,

[20] President Trump repeatedly approvingly cites to Justice Samour's dissent in *Anderson.* Justice Samour argued that 18 U.S.C. § 2383 "arguably enables the enforcement of Section Three," apparently misunderstanding that the Second Confiscation Act was enacted six years before the Fourteenth Amendment. *Anderson,* 2023 CO ¶ 276 (Samour, J. dissenting) Even Trump, recognizing the absurdity of this argument, does not argue that the Second Confiscation Act implemented Section 3.

the Colorado district court in *Anderson* found by "clear and convincing evidence" that Trump's language was "likely to incite imminent violence" and was intended to do so. (R. 1732, 1762-67) (same, ¶¶ 209, 288-98). Trump thereby engaged in insurrection.

The phrase "engaged in" insurrection is not limited to taking up arms but includes "incitement to insurrection." (R. 1745-49) (*Anderson* District Court Final Order, ¶¶ 250-55). Binding Attorney General opinions directed that Section 3's "engaged in" language includes any "direct overt act," including "incit[ing] others," intended to further the insurrection or rebellion. 12 Op. Att'y Gen. 141, 164 (1867); 12 Op. Att'y Gen. 182, 205 (1867). Judicial decisions interpreting Section 3 similarly held that it covers any "voluntary effort to assist the Insurrection or Rebellion." *United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D. N.C. 1871); *accord Worthy v. Barrett*, 63 N.C. 199, 203 (1869); *Griffin*, 2022 WL 4295619, at *19. And antebellum treason cases that informed Section 3 held that "levying war" included "inciting and encouraging others" to commit treason. *In re Charge to Grand Jury*, 30 F. Cas. 1032, 1034 (C.C.S.D. N.Y. 1861); *accord In re Charge to Grand Jury-Treason*, 30 F. Cas. 1047, 1048-49 (C.C.E.D. Pa. 1851); *Ex parte Bollman*, 8 U.S. 75, 126 (1807) (Marshall, C.J.); *see also* (R. 190) (engagement means any voluntary act by word or deed in furtherance of insurrection).

Section 3 was focused on rebel *leaders*, who often engage through incitement rather than by taking up arms themselves. (R. 1748-49) (*Anderson* District Court Final Order, ¶ 255). Thus, excluding incitement would "defeat the purpose" of

Section 3. *Id.* And given that criminal statutes are usually wordier than constitutional provisions, Trump is wrong to argue that the explicit inclusion of "incitement" in certain criminal insurrection statutes suggests an intent to exclude incitement from Section 3. (R. 1746-47) (same, ¶¶ 252-53).

It is not necessary that an individual act with the intent to engage in insurrection. Instead, it is sufficient that an individual acted with the intent "of aiding and furthering the common unlawful purpose" of the insurrection or rebellion. 6 James D. Richardson, A Compilation of the Messages and Papers of the Presidents 528-31 (1897) ("In Cabinet," June 18, 1867, summary item 16); *id.* at 552-56 ("War Dep't, Adjutant-General's Office, Washington," June 20, 1867); *see also*, 12 Op. Att'y Gen. 141, 164 (1867) (those who "were engaged in the furtherance of the common unlawful purpose" are disqualified (emphasis added)). And intent may be "infer[red] from circumstantial evidence" including "the fact that the risk was obvious." *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

"[P]rior to the January 6, 2021 rally, Trump knew that his supporters were angry and prepared to use violence" and "did everything in his power to fuel that anger" by repeatedly asserting false accusations of election fraud. (R. 1704-08, 1710, 1712) (*Anderson* District Court Final Order, ¶¶ 87-112, 120-22, 128). After the electors voted, Trump urged his supporters to come to Washington, D.C., on January 6, falsely claiming that Pence had the authority to overturn the election results and that the allegedly stolen election was an "act of war." (R. 1708-12) (same, ¶¶ 113-19, 121-22, 127).

Knowing the risk of violence and that the crowd was angry and armed, (R. 1713-15, ¶¶ 134-35), Trump incited violence both explicitly and implicitly. He repeatedly called out Pence, told the crowd to "fight like hell" and used other variations of "fight" 20 times, repeatedly insisted that "we" (including the agitated crowd) could not let the certification happen, and promised that he would march with them to the Capitol. (R. 1713-16, ¶¶ 135, 137-38.) He said "[w]hen you catch somebody in a fraud, *you're allowed to go by very different rules*," commanding the crowd to use unlawful means rather than normal political advocacy. (R. 1713-15, 1717, ¶¶ 135, 144.) The most inflammatory remarks of his speech were not in his prepared remarks; Trump added that language. (R. 1716, ¶¶ 136-39.) During the speech, listeners shouted, "storm the Capitol!" and "invade the Capitol Building!" (R. 1717, ¶ 141.) "Trump's Ellipse speech incited imminent lawless violence" and "was intended as, and was understood by a portion of the crowd as, a call to arms." (R. 1717-18, ¶¶ 144-45.)

Trump used this incendiary language knowing and intending that supporters would take his words not "symbolically" but as "literal calls to violence." (R. 1703, ¶¶ 84-85.) Trump knew "the power that he had over his supporters," (R. 1717, ¶ 143), and that "his supporters were willing to engage in political violence and that they would respond to his calls for them to do so." (R. 1762-63, ¶ 289); *see also* (1712-15, ¶¶ 130-35).

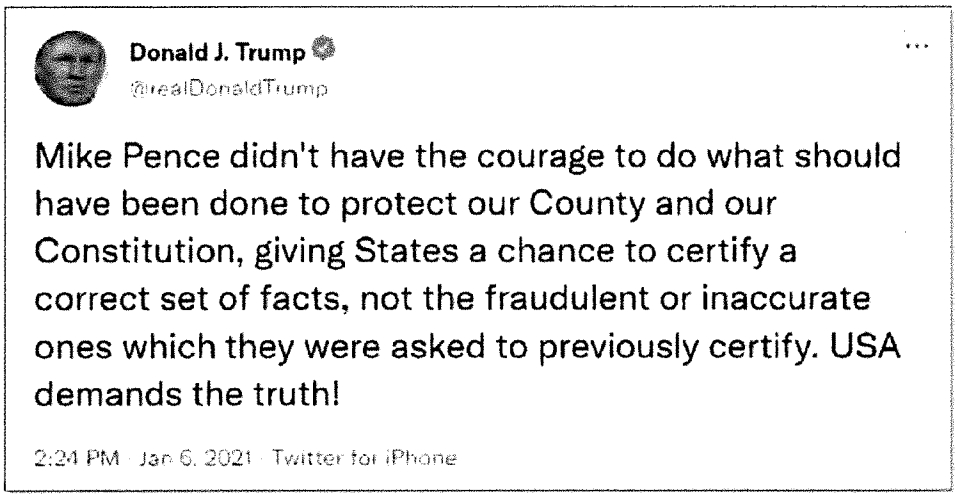
In reaching this finding, the Colorado district court relied on an extensive record, including Trump's own words, testimony of his own witnesses, and the

testimony of political extremism expert Professor Peter Simi. (R. 1689-90, 1698-1703, 1717, ¶¶ 42, 61-86, 143.) Professor Simi identified repeated episodes where Trump called for violence using similar language, his supporters then engaged in violence, and Trump then praised that violence. (R. 1689-90, 1698-1703, ¶¶ 42, 61-86.) By January 6, Trump knew how some of his supporters would respond to his rhetoric, and used that language deliberately to cause violence. (R. 1703, 1717-20, ¶¶ 85, 142-45.) The court "note[d] that Trump did not put forth any credible evidence or expert testimony to rebut Professor Simi's conclusions or to rebut the argument that Trump intended to incite violence." (R. 1703, ¶ 86.) While Professor Simi was "not in President Trump's mind," (R. 2353) the pattern of behavior he identified was powerful evidence of Trump's intent. The only person who *is* in Trump's mind refused to testify and defend his conduct.

Trump did nothing to stop the mob for nearly three hours, instead pouring fuel on the fire. *See* (R. 1724-27) (*Anderson* District Court Final Order, ¶¶ 169-86). He knew by 1:21 pm the Capitol was under siege, but made no effort to mobilize federal law enforcement or the National Guard. (R. 1724, 1726-27) (same, ¶¶ 169, 181-85). Trump relies on testimony by Kash Patel claiming that, before January 6, Trump authorized activation of 10,000 National Guard troops. But the Colorado district court found that testimony not credible, "illogical," and "completely devoid of any evidence in the record." (R. 1693) (same, ¶ 47); *see also* (R. 2770-71) (Patel) (Acting Secretary of Defense Chris Miller contradicting Patel's claims); (R. 3537) (Heaphy) (DOD produced no record documenting such authorization); (R. 2402)

(Banks) (similar). In any event, it is undisputed that the day of January 6, Trump refused to take action. "Trump ignored pleas to intervene and instead called Senators urging them to help delay the electoral count," telling Rep. Kevin McCarthy, "I guess these people are more upset about the election than you are." (R. 1725-26) (*Anderson* District Court Final Order, ¶ 180).

Most damning, at 2:24 pm, while Trump knew the Capitol was under violent attack, he tweeted:



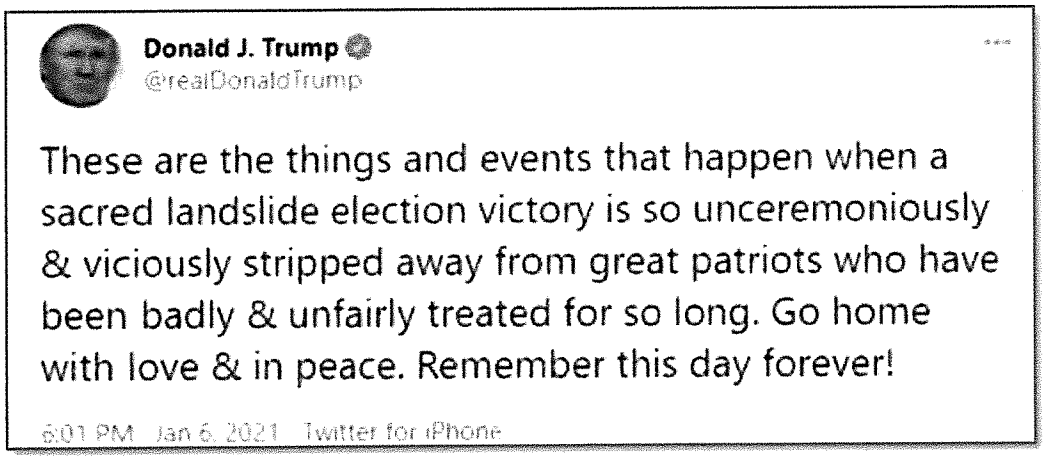
(R. 4044); (R. 1724) (*Anderson* District Court Final Order, ¶ 170). Incredibly, at no point at trial or in his appellate brief in Colorado, or in briefing or argument before the Secretary of State, did Trump mention this tweet, let alone try to explain why, in context, it represents anything other than an intentional attempt to incite the mob and direct their anger at Pence as he carried out his constitutional duty.

This tweet "encouraged imminent lawless violence by singling out Vice President Pence and suggesting that the attacking mob was 'demand[ing] the truth'." (R. 1724) (*Anderson* District Court Final Order, ¶ 172). It "paint[ed] a target on the Capitol," causing the mob to surge violently and forcing lawmakers and

Pence to flee. (R. 1724-25) (same, ¶¶ 172-77).

Trump finally told the mob to leave at 4:17 p.m., in a message that praised the attackers and justified their actions. (R. 17227-28) (same, ¶¶ 186-90). By that time it was clear that reinforcements had arrived at the Capitol, that Pence and members of Congress had reached safety, and that the mob had delayed but would not stop the certification. (R. 4456) (January 6 Select Committee Finding #331); (R. 1459) (same); (R. 4248) (January 6 Senate Report).

Hours later, Trump celebrated the violence again:



(R. 4045); (R. 1728) (*Anderson* District Court Final Order, ¶ 189). Even years later, Trump continued to insist that alleged 2020 election fraud justified "termination of all rules, regulations, and articles, *even those found in the Constitution.*"(R. 5607) (emphasis added).

Considering the totality of the evidence, the Colorado district court in *Anderson* correctly found that "Trump endorsed and intended the actions of the mob on January 6, 2021." (R. 1698-1718) (*Anderson* District Court Final Order, ¶¶ 61-145, 191-93. Importantly, Professor Graber noted that historical evidence indicates

that the citizens of Maine who ratified the Fourteenth Amendment "believed Section Three was self-executing, that Section Three applied to all past and present federal officers and disqualified those officers who participated in insurrections from all offices, and that persons who incited insurrections were insurrectionists under constitutional law." (R. 341); *see also* (R. 341-344) (Graber Br. 17-20).

Finally, it is no defense that Trump was not convicted by the Senate in his second impeachment. (Pet. Br. 57-58.) Trump points to no doctrine, nor are Parties-in-Interest aware of any, that indicates a failure to convict in an impeachment proceeding precludes a future Section 3 disqualification which, notably, is not a penalty or punishment. If anything, the fact that bipartisan majorities in the House of Representatives and Senate voted that Trump had incited an insurrection demonstrates the broad consensus that he did, in fact, engage in insurrection. This includes 57 Senators who voted to convict Trump and an additional 22 Republican Senators who indicated their decision to acquit was based on a belief that they could not convict a *former* official. *See* Goodman & Asabor, *In Their Own Words: The 43 Republicans Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JustSecurity (February 15, 2021).

V. Trump has no First Amendment Right to Engage in Insurrection in Violation of the Fourteenth Amendment

Trump argues that the First Amendment's *Brandenburg* test protects him from disqualification even if he "engaged in insurrection" in violation of the Fourteenth Amendment. That is wrong on many levels. *See* (R. 5167-97) (Colorado Amicus Br. from First Amendment scholars (Nov. 29, 2023)). The First Amendment

does not somehow displace Section 3's narrowly targeted qualification for public office. (R. 5180-84) (same at 6-10). Trump's argument to the contrary proves too much. He admonishes the Court to follow Thomas Cooley's admonition that "one [part of a text] should be allowed to defeat another," but that is precisely what Trump's position does. (Pet. Br. 62.) Simply put, Trump's position would immunize from Section 3 leaders of insurrections who, like Trump, used their significant public influence to incite others to violence on their behalf. As described *supra*, such leaders were the primary concerns of Section 3's framers.

Additionally, Trump's encouragement and organization of insurrection falls within other First Amendment exceptions, including for speech integral to illegal conduct. (R. 5188-91) (First Amendment scholars br. 14-17). But regardless, given the Colorado district court's finding that Trump's words were intended to, and did, incite an imminent insurrection, his speech is unprotected by the First Amendment under *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969); (R. 1765-66) (*Anderson* District Court Final Order, ¶¶ 294, 295); *see also Thompson v. Trump*, 590 F. Supp. 3d 46, 115 (D.D.C. 2022) (finding, without the benefit of this evidentiary record, that Trump's January 6th speech "plausibly [contains] words of incitement not protected by the First Amendment"). Courts have also repeatedly rejected attempts to conflate the January 6, 2021, attack on the Capitol with protests for racial justice and other First Amendment demonstrations, even those where some violence occurred. (R. 4994-5013) (*Griffin* Brief of Amicus Curiae NAACP NM State Conference); (R. 5199-5228) (*Anderson* Brief if Amici Curiae Profs Carol Anderson

and Ian Farrell).

Rather than identifying errors in the Secretary's factual findings, here, Trump argues without any evidence, and divorced from any context, that his speech called for peace and patriotism. (Pet. Br. 64.) But context is everything in *Brandenburg*. *See* (R. 1753-56, 1760) (*Anderson* District Court Final Order, ¶¶ 268-276, 283); *Nwanguma v. Trump*, 903 F.3d 604, 611 (6th Cir. 2018) ("[I]n addition to the content and form of the words, we are obliged to consider the context, based on the whole record."); *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (looking to "evidence or rational inference from the import of the language" to see if "words were intended to produce, and likely to produce, imminent disorder"). The same words that would be protected if uttered in a sterile conference room can be unprotected if proclaimed in fiery terms to an agitated and armed crowd gathered near the target of the speech's ire.

It is true that "the subjective reaction of any particular listener cannot dictate whether the speaker's words enjoy constitutional protection." *Nwanguma*, 903 F.3d at 613. That is not what happened here. Trump riled up an already angry and armed crowd that he summoned, commanding them to imminent violence explicitly ("fight" and "fight like hell") and implicitly (urging the crowd to march to the Capitol and "go by a very different set of rules," and declaring "we are not going to let" the election results be certified). (R. 1713-16) (*Anderson* District Court Final Order, ¶¶ 135, 137-38). He did so less than a mile from the Capitol, where Congress was certifying the election. And he knew, based on a long history of prior

interaction, that extremist supporters would take these words as a literal call to arms. *Id.* Courts may consider the context of past statements in determining a speaker's intent to incite lawlessness. *See NAACP v. Claiborne*, 458 U.S. 886, 929 (1982) (noting that while Evers' statements about breaking necks lacked sufficient temporal connection to violence to satisfy imminence requirement, his earlier "references to discipline in the speeches could be used to corroborate" the intent behind later statements sufficiently close to the violence).

The First Amendment does not protect those who deliberately incite violence through barely veiled language they know their audience will understand. *See United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010); *see also United States v. Hale*, 448 F.3d 971, 983-84 (7th Cir. 2006) (gang leader's suggestion to member to do "whatever you wanna do," in context, supported charge of solicitation to violence).

Nor does one stray reference to "peacefully" in the Ellipse speech (or in two tepid tweets telling the already violent mob to "remain" peaceful without demanding they disperse) insulate the violent rhetoric under the First Amendment. Trump said "peaceful" robotically a single time and urged his supporters to fight 20 times in that speech. *See* (R. 1713-17) (*Anderson* District Court Final Order, ¶¶ 135-37, 142). The Colorado district court credited Professor Simi's testimony that such statements negating his calls to violence "were insincere and existed to obfuscate and create plausible deniability." (R. 1703) (same, ¶ 84). Indeed, Trump's effort to place so much emphasis on that one word in the speech–while ignoring the

numerous calls to fight and the 2:24 tweet that day–confirms Professor Simi's conclusions. *Bongo Prods., LLC v. Lawrence*, 548 F. Supp. 3d 666, 682 (M.D. Tenn.2021) (courts should "exercise ordinary common sense to evaluate the content of a message in context to consider its full meaning, rather than simply robotically reading the message's text for plausible deniability").

Trump incited insurrection on January 6, and the First Amendment does not protect that incitement.

CONCLUSION

For the foregoing reasons, the Court should affirm the Secretary's Ruling that Donald Trump is disqualified from the Office of the Presidency, and therefore must be removed from the Republican presidential primary ballot.

Dated at Brunswick, Maine this January 10, 2024.

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