STATE OF MAINE
DEPARTMENT OF THE SECRETARY OF STATE

In re: Challenge to Primary Nomination Petition of Donald J. Trump, Republican Candidate for President of the United States

CHALLENGERS' KIMBERLEY ROSEN, ETHAN STRIMLING, AND THOMAS SAVIELLO CLOSING BRIEF

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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 is charged with abiding and enforcing the United States Constitution and Maine law. Former President Trump and his counsel argue that this proceeding 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 two modern court decisions to reach the merits of a Section 3 challenge found that January 6th was an insurrection under Section 3. Bipartisan votes in the House and the Senate also confirmed that Donald Trump incited the January 6th insurrection. This decision 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. The only court to reach the merits of a Section 3 challenge found that Trump engaged in insurrection.

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.

ARGUMENT

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

A. States Have Broad 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* Ex. 13 to Affidavit of Donald Sherman,[1] *Anderson* 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.

[1] Hereinafter, all citations to exhibits to the Sherman Affidavit will be referred to as "Sherman Ex."

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.*

[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* Sherman Ex. 24-P107, Letter from Colorado Secretary of State to Abdul K. Hassan (Aug. 12, 2011).

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. This procedure allows "a registered voter residing in the electoral division of the candidate concerned" to "challeng[e] the validity of a primary petition." *Id.*[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. § 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:

[3] Challengers here are "registered voters" in the state and may bring such a challenge. *See* Ex. 3-5.

> "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" 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). 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

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

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 Secretary's past practice indicates an expansive interpretation of what constitutes the "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."). This treatment appears consistent with the language of section 336(2) (providing that a consent will remain valid "even

though it may be *part of a primary petition* which is void. . . .", and is confirmed in the 2019 statute authorizing procedures for the presidential primary, which expressly requires that a "petition" must "meet[] the requirements of section[] . . . 336 . . . , subject to challenge and appeal under section 337." 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, and is subject to a challenge.

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 is appropriate.

C. In this challenge, the Secretary must 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.[4] This rule applies equally when state laws charge state 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.[5]

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. 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, or to list Donald Trump in 2028 should he take office in 2024, as he has argued he is entitled to a third term of office.[6] Rather, insofar as the consent form's list of qualifications 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." 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,

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

[5] Trump wrongly claimed at the hearing that Georgia declined to exercise jurisdiction in the *Greene* matter. In reality, the Administrative Law Judge there *did* exercise jurisdiction and adjudicate the merits of a Section 3 challenge to a congressional candidate under a challenge statute similar to Maine's. *See* O.C.G.A. § 21-2-5. And a federal district judge agreed that the exercise of jurisdiction in "an expedited, streamlined administrative review process" posed a justifiable and "relatively minimal burden." *Greene v. Raffensperger*, 599 F. Supp. 3d 1283, 1316 (N.D. Ga. 2022).

[6] See *Trump suggests he would 'negotiate' a 3rd term as president because he is 'probably entitled' to it*, Business Insider (Sep. 13, 2020) ("We're going to win four more years in the White House, then after that we'll negotiate. Based on the way I was treated; we're probably entitled to another four after that."). The Secretary of State could not be forced to list Trump on the 2028 ballot merely because the candidate consent form did not include the requirements of the 22nd Amendment.

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); Sherman Ex. 21, Final Order, *Anderson v. Griswold*, No. 2023CV32577 (Colo. Dist. Ct., Nov. 17, 2023), ¶ 226;[7] *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 this Challenge

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 had any difficulty adjudicating Section 3 cases. *See* Sherman Ex. 19, Order Re: Donald J. Trump's Mot.

[7] Challengers cite the *Anderson* Final Order throughout this brief, both for the court's factual findings and legal conclusions. Insofar as Challengers cite factual findings in the *Anderson* Final Order, they incorporate by reference the underlying trial testimony and other evidence cited in that order, which the Secretary has provisionally admitted here. *See* Sherman Aff. ¶ 3, Exs. 5-10, 24.

to Dismiss Filed Sept. 29, 2023 at p. 9-18, *Anderson v. Griswold*, No. 2023CV32577 (Colo. Dist. Ct., Oct. 25, 2023), 20 n.5 (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 Executive Officials

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 *executive* 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.

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

As the Colorado district 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* Sherman Ex. 19, *Anderson* 10/25/2023 Order, 10-18 (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 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'"); Sherman Ex. 19, *Anderson* 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* FSFP Colorado Amicus 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* Sherman Ex. 19, *Anderson* 10/25/2023 Order, 4-18; FSFP Colorado Amicus 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*

Sherman Ex. 19, *Anderson* 10/25/2023 Order 10; Sherman Ex. 21, *Anderson* 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*. 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* Sherman Ex. 14, Br. of Amicus Curiae Colo. Common Cause and Mary Estill Buchanan in Supp. of Pets. (Nov. 19, 2023), 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*. 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* Graber Maine Amicus Br. 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. *See* 12/15/2023 Hearing, Video Timestamp 5:26:45-5:27:00; 5:52:40-5:52:10 (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." Sherman Ex. 19, *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.

The cases cited by Trump are inapt. 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. Trump Opening Br. 10. 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. Trump Opening Br. 10-11. 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 Challengersdo not assert a cause of action directly under the Fourteenth Amendment; they bring a cause of action 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* Sherman Ex. 19, *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*; Sherman Ex. 19, *Anderson* 10/25/2023 Order at 20 & n.5 (citing cases); Graber Maine Amicus Br. 6-7; 12/15/2023 Hearing 5:46:30-5:49:00 (Magliocca). Trump's own expert in *Anderson* admitted that states could pass laws implementing other provisions of the Fourteenth Amendment. *See* Ex. 29, *Anderson* 11/03/2023 Trial Tr. 234:3-21.

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* 12/15/2023 Hearing 5:27:50-5:28:10 (Magliocca) (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* Ex. 19, *Anderson* 11/01/2023 Trial Tr. 25:1-26:11 (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); Graber Maine Amicus 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." Sherman Ex. 12, Graber Colorado Amicus Br. 3-4, 9. "[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* 12/15/2023 Hearing 6:38:45-6:38:55 (Magliocca) (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* Graber Maine Amicus 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. To begin, Trump disregards that much of the underlying evidence in this case was generated in a week-long bench trial in Colorado in which Trump was a party and had ample opportunity and similar motive to cross-examine adverse witnesses. *See* Letter from Intervenor CREW to Sec'y Bellows, 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.

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"); Sherman Ex. 20, Order re: Donald J. Trump's Br. Re. Standard of Proof in this Proceeding, *Anderson v. Griswold*, No. 2023CV32577 (Colo. Dist. Ct., Oct. 28, 2023), 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).

Furthermore, Trump was afforded sufficient process as required by Maine law. 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 will have the opportunity to appeal any adverse judgment by commencing an action in Maine Superior Court. *Id.* Were Trump's position correct, Maine's longstanding candidate challenge procedure would be unconstitutional. That is absurd and no authority supports it.

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 must consider 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 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.[8]

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.

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

[8] 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.

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 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.[9]

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").

[9] 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)).

Although the Colorado district court in *Anderson* also reasoned that Section 3 presents the disqualified offices "in descending order" of importance, and that it was therefore unlikely the Presidency fell in the "any office" language at the end of the list, that conclusion was in error. Sherman Ex. 21, *Anderson* Final Order ¶ 301. The order simply appears to track the structure of the original Constitution: it begins with Congress (Art. I), then discusses presidential Electors (Art. II), and finally anyone who holds "any office" under the United States (Art. II and III) or under any State (Art. IV). Certainly, presidential electors are not more important than Supreme Court justices, who like the President fall under the catch-all "any office."

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. Ex. 19, *Anderson* 11/01/2023 Trial Tr. 60:22-25; 12/15/2023 Hearing 5:36:30-5:37:40 (Magliocca).

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. Sherman Ex. 21, *Anderson* Final Order ¶ 303. But "[i]t is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process." *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* Ex. 19, *Anderson* 11/01/2023 Trial Tr. 68:12-69:12. 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. 12/15/2023 Hearing 5:37:40-5:41:40 (Magliocca). Professor Magliocca presented a list of thirteen examples of individuals treating it as common knowledge that Section 3 of the Fourteenth Amendment excluded former insurrectionists, including Jefferson Davis, from becoming President. Ex. 83. 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. Ex. 88, Gerard Magliocca, List of Sources - Historical Materials Not Included in the Colorado Expert Reports or in Exhibit 83 (Dec. 15, 2023).

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* 12/15/2023 Hearing 5:25:30-5:26:33 (Magliocca) (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* 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"); Ex. 29, *Anderson* 11/03/23 Trial Tr. 246:18-248:6 (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* Graber Maine Amicus 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* Graber Maine Amicus 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.[10] 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."[11] 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

[10] 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.

[11] 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).

. . . 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 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* Ex. 19, *Anderson* 11/01/23 Trial Tr. 38:13-49:16. 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* Ex. 19, *Anderson* 11/01/23 Trial Tr. 38:13-49:15.

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. Ex.

19, *Anderson* 11/01/2023 Trial Tr. 56:3-59:16. 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. *Id.* at 56:3-57:13; 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. Ex. 19, *Anderson* 11/01/2023 Trial Tr. 69:21-71:21; 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.[12]

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

[12] *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").

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).[13]

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* Ex. 29, *Anderson* 11/03/23 Trial Tr. 252:8-255:16.

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:

[13] *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").

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 need not decide what the term "officer" means in unrelated provisions of the original Constitution to decide this case. Nor does 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 need 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* Graber Maine Amicus Br. 11.

3. 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." Graber Maine 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." Graber Maine Amicus 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 Secretary 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." Sherman Ex. 21, *Anderson* 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. 12/15/2023 Hearing 5:30:30-5:34:15; 5:49:15-5:51:10 (Magliocca); Sherman Ex. 21, *Anderson* Final Order ¶¶ 234-40; Ex. 19, *Anderson* 11/01/2023 Tr. 26:19-35:22. 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." Sherman Ex. 21, *Anderson* 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. Sherman Ex. 21, *Anderson* Final Order ¶¶ 147, 242. The mob breached the Capitol and disrupted the constitutionally mandated peaceful transfer of power. *Id.* ¶¶ 151-52, 177. The mob was armed and violently attacked police officers, injuring over 170 and killing one. *Id.* ¶¶ 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. Sherman Ex. 21, *Anderson* 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. Sherman Ex. 21, *Anderson* Final Order ¶¶ 241-44, 146-68; *see also* 12/15/2023 Hearing 5:49:15-5:51:10 (Magliocca) (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 Frie*s, 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, Trump Opening Br. 15-16, but it was more violent than historical insurrections referenced by Section 3's framers. Ex. 19, *Anderson* 11/01/2023 Trial Tr. 27:3-30:12. 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. Sherman Ex. 21, *Anderson* Final Order ¶ 162-68, 243-44.

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." Sherman Ex. 21, *Anderson* 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. *Id.* ¶¶ 144-45, 169-93, 288-98. Even though the standard of proof is a preponderance of evidence, 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. *Id.* ¶¶ 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." Sherman Ex. 21, *Anderson* 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* 12/15/2023 Hearing 5:34:15-5:35:40 (Magliocca) (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. Sherman Ex. 21, *Anderson* 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. *Id.* ¶¶ 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. Sherman Ex. 21, *Anderson* 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." *Id*. ¶¶ 113-19, 121-22, 127.

Knowing the risk of violence and that the crowd was angry and armed, *id*. ¶¶ 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. *Id*. ¶¶ 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. *Id*. ¶¶ 135, 144. The most inflammatory remarks of his speech were not in his prepared remarks; Trump added that language. *Id*. ¶¶ 136-39. During the speech, listeners shouted, "storm the Capitol!" and "invade the Capitol Building!" *Id.* ¶ 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." *Id*. ¶¶ 144-45.

Trump used this incendiary language knowing and intending that supporters would take his words not "symbolically" but as "literal calls to violence." *Id.* ¶¶ 84-85. Trump knew "the power that he had over his supporters," *id.* ¶ 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," *id.* at ¶ 289; *see*

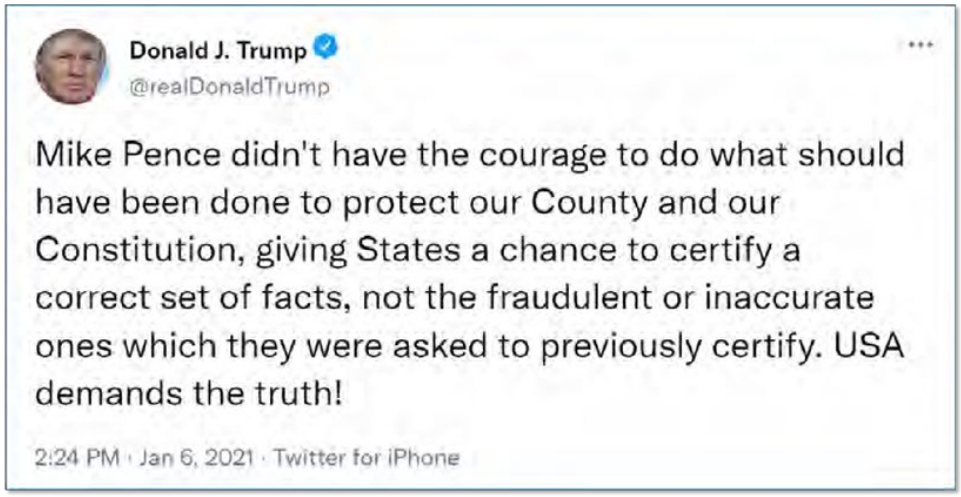
also id. ¶¶ 130-35.

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. *Id.* ¶¶ 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. *Id.* ¶¶ 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. *Id.* ¶¶ 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." *Id*. ¶ 86. While Professor Simi is "not in President Trump's mind," Trump Opening Br. 49, the pattern of behavior he identifies is 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* Sherman Ex. 21, *Anderson* 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. *Id*. ¶ 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." *Id.* ¶ 47; *see also* Ex. 19, *Anderson* 11/01/2023 Trial Tr. 254:20-255:18 (Patel) (Acting Secretary of Defense Chris Miller contradicting Patel's claims); Ex. 29, *Anderson* 11/03/2023 Trial Tr. 165:1-8 (Heaphy) (DOD produced no record documenting such authorization); Ex. 14, *Anderson v. Griswold* 10/31/2023 Trial Tr. 254:6-20 (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." Sherman Ex. 21, *Anderson* Final Order ¶ 180.

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



Ex. 37 at 83; Sherman Ex. 21, *Anderson* 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'." Sherman Ex. 21, *Anderson* Final Order ¶ 172. It "paint[ed] a target on the Capitol," causing the mob to surge violently and forcing lawmakers and Pence to flee. *Id*. ¶¶ 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. *Id*. ¶¶ 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. Sherman Ex. 24-P078 (January 6 Select Committee Finding #331, 392-95); Ex. 24-P022 at 26 (January 6 Senate Report).

Hours later, Trump celebrated the violence again:

Ex. 37 at 84; Sherman Ex. 21, *Anderson* 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*." Sherman Ex. 24-P074 (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." Sherman Ex. 21, *Anderson* 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." Graber Maine Amicus Br. 17.

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* Sherman Ex. 15, Colorado Amicus Br. of First Amendment Scholars in Supp. of Pets (Nov. 29, 2023). The First Amendment does not somehow displace Section 3's narrowly targeted qualification for public office. *Id.* at 6-10. Additionally, Trump's encouragement and organization of insurrection falls within other First Amendment exceptions, including for speech integral to illegal conduct. *Id.* at 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); Sherman Ex. 21, *Anderson* 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. Sherman Ex. 04, *Griffin* Brief of Amicus Curiae NAACP NM State Conference and Ex. 16, *Anderson* Brief for Amici Curiae Profs Carol Anderson and Ian Farrell.

Rather than identifying errors in the Colorado district court's factual findings, here, Trump argues without any evidence, and divorced from any context, that his speech called for peace and patriotism. Trump Opening Br. 20-21. But context is everything in *Brandenburg*. *See* Sherman Ex. 21, *Anderson* 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). Sherman Ex. 21, *Anderson* 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* Sherman Ex. 21, *Anderson* 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" *Id.* ¶ 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 Secretary should refuse to list Donald Trump on the presidential primary ballot based on his constitutional ineligibility to assume the Office of the Presidency.

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