GESSLER BLUE LAW

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Via Email: SOS.office@maine.gov
Shenna Bellows
Secretary of State
State of Maine
Department of the Secretary of State
148 State House Station
Augusta, ME 04333-0148

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

PRESIDENT DONALD J. TRUMP'S CLOSING ARGUMENT

INTRODUCTION

This challenge under Section Three of the Fourteenth Amendment is identical to dozens of other challenges brought in other states. Every single Section Three challenge, however, has been soundly rejected by courts that have considered the matter, and by state election officials that have been asked to remove President Trump from their respective state ballots. The Secretary should also reject the Challengers' efforts for the same reasons. In addition, Maine law does not create an enforcement action under Section Three, and even if it did federal law prohibits the Secretary from exercising jurisdiction, Section Three does

not apply under its plain language, and the facts show that President Trump did not engage in insurrection.

This *Closing Argument* expressly incorporates argument and authority set forth in President Trump's *Hearing Brief*, submitted to the Secretary on December 14, 2023.

I. There is no basis for a challenge under either section 336 or 337.

There is no reason for the Secretary to spend time considering the constitutional issues presented by these challenges. None is a valid basis for a challenge under 21-A.M.R.S. §§ 336 or 337. As this state's highest court held in *Arsenault v. Secretary of State*, the Secretary may not disqualify a candidate unless authorized by an express grant of power by the Legislature.[1] That Court reversed the Secretary's actions, ruling "[g]iven the fundamental importance of the right to vote and the right to participate in the political process, and given the painstaking detail of the election statutes, if the Legislature had intended to delegate to the Secretary the authority to add restrictions to this process, it would have done so explicitly." The narrow scope of review available under sections 336 and 337, as well as the unambiguous words of the form drafted by the Secretary and executed by President Trump, show that there should be no serious dispute that the Maine Legislature did not authorize the Secretary to consider challenges under either section 336 or 337. The current challenges should therefore be rejected on this threshold issue.

As an initial matter, section 337 itself permits only a challenge to a candidate's

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

petition or the signatures it contains; the Challengers have not brought a challenge on either ground. Accordingly, no cognizable challenge under section 337 has been raised.

Next, Section 336 adopts Section 337's *procedures* to govern challenges to a candidate's consent but authorizes only a single basis for a challenge: if "any part of the declaration is found to be false."[2] As the Secretary suggested during the hearing, this is significant for two reasons.

First, section 336 draws a textual distinction between a candidate's *declaration*, which includes only a candidate's place of residence and party designation, and his or her *statement*, which is "a statement that the candidate meets the qualifications of the office the candidate seeks." 21-A.M.R.S. § 336(3). Grammatically, section 336 treats the "declaration" and the "statement" as two different things. For example, section 336 does not include the contents of the statement in the list of constituent parts of the declaration. If the drafters had wanted to include the contents of the statement as part of the declaration, it would have been a simple change: removing the word "and" from between "candidate's place of residence" and "party designation."

The challenge provision of section 336 refers only to the "declaration." It does not refer to the "statement." Consistent with the *expressio unius est exclusio alterius* canon of statutory construction,[3] the inclusion of the "declaration" and the omission of the

[2] 21-A.M.R.S. § 336(3).

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

"statement" is significant and means that the challenge provisions of section 336 are limited to challenges to the declaration—*i.e.*, residency and party designation. Moreover, this limitation makes sense. The procedures set forth in section 337 require challenges to take place on a highly expedited timeline. Challenges to a candidate's residency or party declaration generally present straightforward questions of fact, where all of the relevant facts are easily known by the respondent and require little in-depth examination of law. As such, they are well suited to resolution on an expedited basis. As this matter illustrates, challenges to a candidates' qualifications for office involve much more complex factual and legal questions that do not lend themselves to expedited adjudication. Thus, section 336 limits section 337 challenges to just the *declaration* portion of a candidate's consent form, not the *statement* of qualifications. Challengers' challenge is thus outside the scope of the section 336 procedures.

Second, review under section 336 is limited to the truth of the statements on the four corners of a candidate's consent form. Thus, the only issue is whether the answers a candidate wrote on the form are true. There is no dispute that the information on President Trump's consent form is true. Instead, the Challengers seek to stretch section 336 beyond its limits by inquiring into a question President Trump was not asked on his consent form, even if the challenge could permissibly go beyond the *declaration* to the *statement*.

The Challengers seek to frame their claims as section 336 falsity challenges, but even

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exclusio alterius est.'").

cursory examination shows that those claims cannot be shoehorned into that statute's narrow scope of review.

The word "false" is not defined in the statute, and thus must be given its common and ordinary meaning. "In considering the plain language of a statute, we construe any undefined words and phrases according to their common meaning."[4] "False" is a commonly used word with a commonly accepted meaning: "either untrue or intentionally untrue."[5]

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

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

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

Wilensky v. Goodyear Tire & Rubber Co., 67 F.2d 389, 390 (1st Cir. 1933), quoting *Gilpin v. Merchants' National Bank*, 165 F. 607, 611 (3d Cir. 1908); *accord, e.g., United States v. Worthington*, 822 F.2d 315, 319 (2d Cir.), *cert. denied*, 484 U.S. 944, 108 S.Ct. 331, 98 L.Ed.2d 358 (1987) ("A false statement is … 'designedly untrue … and made with intention to deceive'"); *United States v. McCallum*, 788 F.2d 1042, 1046 (5th Cir.1985), cert. denied, 476 U.S. 1182, 106 S.Ct.

Thus, absent a showing that President Trump's declaration was false—that is, at a minimum untrue—no challenge under section 336 can succeed. Yet none of the challengers came close even to alleging—much less proving—that any part of his declaration or statement was untrue (much less intentionally untrue). Nor could they. The declaration and statement read as follows:

> I hereby declare my intent to be a candidate for the Office of President of the United States and participate in the Presidential Primary for the party named above to be held on March 5, 2024, in the State of Maine. I further declare that my residence is in the municipality and state listed above; that I am enrolled in the party named on this consent; *that I meet the qualifications to hold this office* ***as listed above*****;** and that this declaration is true.[6]

No challenger has raised any issue with the first sentence relating to President Trump's intent to be a candidate in the Maine Republican Primary. Nor has any challenger contested his residence or his enrollment in the Republican party. Rather, the Challengers focus entirely on other allegations—that he does not meet the qualifications to be President either because of Section 3 of the 14th Amendment or, alternatively, that he cannot run for a

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2915, 91 L.Ed.2d 544, rehearing denied, 478 U.S. 1031, 107 S.Ct. 11, 92 L.Ed.2d 767 (1986) ("a false statement or document [is] one 'made or used if it is untrue and is then known to be untrue'."); *United States v. Federbush*, 625 F.2d 246, 255 (9th Cir.1980) ("false … if known to be untrue or made with reckless indifference as to its truth or falsity"); *United States v. Olson*, 576 F.2d 1267, 1272 (8th Cir.), *cert. denied*, 439 U.S. 896, 99 S.Ct. 256, 58 L.Ed.2d 242 (1978) ("Information is false if it was untrue when furnished and was then known to be untrue by the person furnishing it."). But here, the Secretary need not opine whether the statutory use of the word "false" imports an intent-to-deceive requirement, because the challengers fall short of meeting their burden regardless of President Trump's intent.

[6] Exhibit 1 (emphases added). The form inadvertently introduces some confusion through its use of the words "declare" and "declaration" in the text of the combined declaration and statement. That the Secretary chose that word does not and cannot change or elide the clear distinction between the *declaration* and the *statement* that the Legislature made in section 336.

purportedly third term because he somehow was twice-elected after he contested the validity of the 2020 Presidential election. Setting to one side the lack of substantive merit to these allegations (discussed below) and even assuming for the sake of argument that these claims were true, they would be irrelevant in this Section 336 proceeding because the allegations would not render anything in President Trump's declaration or, even, statement false. Nothing in the words of the qualification portion of the statement—italicized above—can fairly be read to include any representation by President Trump concerning either Fourteenth Amendment disqualification or allegedly twice-elected status.

To the contrary, the qualifications portion of the statement is a narrowly drawn phrase limited to a certification that the candidate meets "the qualifications to hold this office *as listed above*." (Emphasis added). Interpretation of a document "start[s] with the language,"[7] and the one-page consent form could not be clearer about what the words "meet the qualifications to hold this office as listed above" mean. Immediately above the declaration and statement portion of the form is a bulleted list of "Qualifications of President of the United States" which lists the three qualifications specified by Article II, Section 1 of the United States Constitution: 1) "Be a natural born U.S. citizen," 2) "Have been a resident of the United States for at least 14 years," and 3) "Be at least 35 years of age." It is the *only* list on the form. Thus, the "qualifications to hold this office *as listed above"* are the three qualifications contained in that list—and only those three qualifications. And the challengers do not, and cannot, raise any claim that President Trump does not meet

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

those three qualifications.

Thus, President Trump's declaration and statement are not false. The only challenged portion—that he "meet[s] the qualifications to hold this office as listed above"—is undisputedly true, and the Challengers do not contest that he meets each of the Article II qualifications listed on the form. The qualifications "as listed above" do not include—and therefore the declaration and statement does not ask candidates to swear—whether a person has been disqualified under the Fourteenth Amendment or whether they have been elected President of the United States twice before. As a result, regardless of the truth of the challengers' claims regarding those issues, the qualifications portion of President Trump's declaration and statement is true on its face and there is no basis for a challenge under section 336.

Unsurprisingly, given the plain meaning of the word "false" discussed above—"either untrue or intentionally untrue"—it is well-settled that a true certification cannot be "false" as a matter of law. For example, in *United States v. Gatewood*, the government contended that when Gatewood "certified that he had made payments to subcontractors and suppliers from previous payments made under a contract," his certification was false because he "had not made *full* payment to the subcontractors and suppliers from previous payments received from the United States Navy."[8] The Sixth Circuit rejected that claim as a matter of law, holding that because the certification that the defendant had signed was true, "the instant

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

case is 'premised on a statement which on its face is not false.'"[9] The problem with the government's case in *Gatewood*—just like the challengers' case here—is that the language of the certification simply did not require the person certifying it to attest to the facts that the complaining party contended were untrue. Thus, the court reasoned "[h]ere, the root of the problem lies in the certification itself, which could have been more artfully drafted. If the Navy had wanted to be sure that all payments then due the subcontractors had been made, it should have drafted the certification to reflect that desire."[10] By the same token, if the declaration (or statement) at issue here had been meant to be read to encompass either of the issues raised by the challengers it could—and should—have said so. It didn't. And as a result, the merits of the challengers' allegations have no bearing on the falsity *vel non* of President Trump's declaration.

Recognizing this fatal flaw, at the hearing the Challengers half-heartedly asserted that the phrase "the qualifications to hold this office as listed above" is ambiguous, arguing that the words "as listed above" "could" refer not to the only list on the page—the list of Qualifications of President of the United States which appears immediately above the

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[9] *Id.* at 987.

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

declaration and statement portion of the consent form—but rather to the office being sought.[11] This is not a reasonable reading of the language and would impermissibly render other portions of the form's language surplusage. Accordingly, the ambiguity argument must be rejected as a matter of law.

"Document language is ambiguous if it is *reasonably* susceptible to different interpretations."[12] Ambiguity is to be determined from the perspective of "an ordinary or average person."[13] Language is interpreted according to its "generally prevailing meaning,"[14]

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[11] Specifically, between the 29th and 31st minutes of the YouTube video of the hearing, Attorney Gaines stated:

> I am aware that the language on the actual oath that the Secretary put on the form this year first is ambiguous. It could be construed a number of different ways. It could be construed to … "as listed above" could be construed to apply to the office that's being sought as the form clearly requires the candidate to state the office being sought above on the form and the previous word to that is office. The office the candidate seeks as provided above. It could be construed that way.
>
> It could be construed as some kind of informative parenthetical that simply informs the candidate of what the qualifications are but doesn't in any way limit the scope of that oath beyond what the oath is supposed to say under the statute.

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

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

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

and a court should not "strain to find ambiguity."[15] "[C]anons of construction require that a document be construed to give force and effect to all of its provisions."[16] And Maine courts will "avoid an interpretation that renders meaningless any particular provision."[17] Indeed, an interpretation that renders portions of a document redundant or superfluous "is not reasonable."[18]

The Challengers' effort to manufacture ambiguity fail miserably. First, the words "qualifications…as listed above," in conjunction with the fact that the document contains only a single list which is explicitly labeled a list of qualifications, leaves no room for doubt in any "ordinary or average reader" that the phrase "as listed above" refers to the list of qualifications. No ordinary or average reader could find challengers' strained reading of the form anything but absurd.

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

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

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

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

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

> to be "listed" means to be included or incorporated in a list, and a "list" is a series or number of connected names, words, or other items written or printed one after another. *E.g.*, *The American Heritage Dictionary of the English Language* 1024 (5th ed. 2011) (defining the verb "list" as "[t]o make a list of; itemized" and a "list" as a "series of names, words, or other items written, printed, or imagined one after the other"); *New Oxford American Dictionary* 1019 (3d ed. 2010) (defining the verb "list" as "to make a list of" or to "include or enter in a list" and a "list" as "a number of connected items or names written or printed consecutively, typically one below the other"); *Webster's Third New International Dictionary* 1320 (2002) (defining "listed" as "incorporated in a list" and a "list" as "a simple series of words or numerals" or an "index, catalog, checklist").[19]

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

Third, challengers' proposed reading would impermissibly render language redundant or superfluous. If the words "as listed above" refers to the office of President, rather than to the list of qualifications set forth above the declaration and statement, then that language would be entirely redundant, because it would merely repeat: (1) the document's title—

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

"Presidential Primary Candidate's Consent"; (2) the title of the list that appears just above the declaration: "Qualifications of President of the United States"; and (3) the opening words of the declaration and statement, which require the candidate to "declare my intent to be a candidate for the Office of President of the United States and participate in the Presidential Primary." In short, because those words make clear, respectively, that (1) the form itself relates only to candidates for President; (2) the list of qualifications relates only to Presidents; and (3) the declaration and statement relates only to a candidacy for the Presidency, the words "as listed above" would serve no purpose whatsoever if they merely referred to the office of the Presidency.

By contrast, by referring to the only list in the document —a list of qualifications -- President Trump's reading of the words "as listed above" properly assigns those words a unique and sensible function: to refer to the qualifications set forth by the Qualifications Clause by reference to the list on the page. Indeed, listing the qualifications was entirely reasonable, in order to supply a list so that people would know exactly what they were swearing to before submitting a declaration and statement under penalty of perjury.

Finally, challengers' proposed reading is not just redundant, but also senseless. The form itself makes clear multiple times that it applies only to presidential candidates. Functionally, there is no reason to specify yet again the office to which the qualifications apply when the form itself must be completed only by candidates for the Presidency. By contrast President Trump's reading avoids a senseless, redundant interpretation.

The Challengers alternatively suggest that the words "as listed above" could be read to operate as some sort of "informative parenthetical"—even though the text contains no parentheses—that should be treated as if it has no meaning. This approach not only disregards the basic requirement that a document must "be construed to give force and effect to *all* of its provisions,"[20] but would also not be reasonable because it would impermissibly render those words superfluous. And one must remember that the form asks candidates to swear under penalty of perjury to the list of qualifications. It would be neither fair nor reasonable to prepare a misleading oath by pointing to a list of three qualifications, and then reveal as a surprise that the list that all candidates were swearing to was incomplete.

In sum, challengers offer no *reasonable* alternative reading. Nor can they; the language that the Secretary chose is plain and admits of only one reasonable interpretation.

Finally, Challengers contend that the Secretary should have written a different declaration and statement. But that contention is not cognizable in this section 336 proceeding. The Challengers cannot use an expedited administrative proceeding to impose new and heretofore unknown qualifications on candidates for office *after* candidates filed their petitions and consented to appear on the ballot in conformity with state procedures. And in any event that issue simply has nothing to do with the only issue that the Legislature has put within the Secretary's purview in a 336 challenge—the falsity *vel non* of the declaration that the candidate was actually asked to sign.

Moreover, any action to enforce a heretofore unseen version of the candidate consent

[20] *Acadia*, *supra* (emphasis added).

form would violate the animating concerns of the *Purcell* Principle. The U.S. Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election."[21] The purpose of this rule is to prevent confusion that may result in the disenfranchisement of voters. While the Secretary is not a "lower federal court," she is acting in this matter in an adjudicative capacity and the same basic principles apply; one must limit changes to election laws and procedures on the eve of an election. If the Challengers believed the consent form was wrong, they should have raised that concern earlier—not through the challenge process after candidates have already acted in reliance on the current form. And a proceeding under section 336 or 337—which provides no grounds for a challenge to the form itself—is not the proper venue.

The Maine Legislature has not authorized the Secretary to uphold a challenge on any basis other than falsity of the "declaration." It is undisputed that President Trump's "declaration"—the declaration that the Secretary promulgated and required him to sign—is true and therefore cannot be false as a matter of law. This dooms challengers' claims at the outset.

II. The framers excluded the offices of President and Vice-President from Section Three.

A. The President and Vice-President are not "officers … under the United States."

As an initial matter, President Trump incorporates the arguments contained in *Brief of*

[21] *Republican National Committee, et al. v. Democratic National Committee, et al.*, 140 S.Ct. 1205, 1207 (2020) (per curiam) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam); *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 135 S.Ct. 9 (2014)).

Amicus Curiae Professor Kurt T. Lash in support of Respondent-Appellee and Intervenors-Appellees, which was filed in the Colorado Supreme Court and filed with the Secretary.

The Constitution creates five positions: President, Vice-President, Senator, Representative, and Presidential Elector; but the plain text of Section Three excludes the President and Vice-President. This omission is controlling. "The expression of one thing implies the exclusion of others."[22]

Next, Section Three uses the disjunctive "or" to create two distinct, separate prohibitions; one may not "be" a Senator, Representative or Elector. *Or* one may not "hold" any office "under the United States, or a State." The first category identifies specific Constitutional positions. The second refers to offices one "holds." "[N]othing is to be added to what the text states or reasonably implies."[23] The exclusion of the President from the first category cannot imply the opposite—that the most important elected, Constitutional position is implicitly (and silently) included in a generalized, catch-all phrase.

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

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

[23] *Reading Law* at 87-91.

Legislative history demonstrates that drafters rejected inclusion of the Presidency. Courts properly infer legislative intent by comparing committee drafts to the final language.[24] The first draft began: "No person shall be qualified or shall hold the office of *President or Vice-President* of the United States, Senator or Representative in the national congress."[25] Congress consciously removed the office of the President from this list, substituting instead presidential Electors.

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

Other evidence cannot overcome this plain reading. For example, Professor Magliocca cited a three-sentence exchange between two Senators during Congressional debate to finalize Section Three's language. This hardly establishes "clear intent," and courts

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[24] *See Nixon v. United States*, 506 U.S. 224, 231-232 (1993) (rejecting second to last draft and relying on the plain textual language); *Lee v. Weisman*, 505 U.S. 577, 613 (1992) (Souter, J., concurring)(looking to sequence of amendments); *Utah v. Evans*, 536 U.S. 452, 474 (2002) (reviewing previous drafts); *District of Columbia v. Heller*, 554 U.S. 570, 604 (2008) (analysis of precursors to amendment); *Id.* at 590n. 12 (Stevens, J. dissenting)(relying on previous draft); *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2180-2181 (2023) (analyzing Thaddeus Stevens' introduced version of the Fourteenth Amendment); *Evenwel v. Abbott*, 578 U.S. 54, 66 (2016) (same).

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

are loath to rely on isolated statements to infer the intent of an entire Congress.[26] And the exchange instead shows that that the Secretary should follow Section Three's plain meaning. Senator Johnson, one of the preeminent constitutional lawyers in Congress,[27] read Section Three to exclude the President. His conciliatory and collegial response does not negate his correct assessment that Section Three excluded the President.

Second, to interpret "office under the United States" to include any generic "officer" would mean that the phrase "office under the United States" would also swallow Senators and Representatives. Both are considered generic "officers" in the generic sense, as a matter of binding precedent,[28] as referenced by the Constitution,[29] and as the term is commonly used.[30] Indeed, people commonly refer to Senators and Representatives as "officeholders"

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[26] *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982); *Garcia v. United States*, 469 U.S. 70, 78 (1984).

[27] *E.g.,* Phillip Shaw Paludan, A PEOPLE'S CONTEST: THE UNION & CIVIL WAR 1861-1865, at 29 (1996).

[28] *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 804-805 n.17 (1995) ("Constitution treats both the President and Members of Congress as federal officers").

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

[30] *Roudebush v. Hartke*, 405 U.S. 15, 28 (1972) (Senators take an "oath of office"); *Powell v. McCormack*, 395 U.S. 486, 570 (1969) (Stewart, J. dissenting)(Representatives take an "oath of office"); *McGrain v Daugherty*, 273 U.S. 135, 156 (1927) (congressional members protected by "oath of office"); *Shaffer v. Jordan*, 213 F.2d 393, 394 (9th Cir. 1954) ("office of Representative in Congress").

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

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

Fourth, the amount of evidence treating Section Three as applying to the presidency is limited, consisting of one newspaper article. For example, an article in the *Gallipolis Journal* did not even refer to the final version of Section Three; it lamented that the proposed amendment would not bar southern leaders from *any* federal office, not just the presidency.[31] And a single sentence in a Milwaukee newspaper claiming that Section Three would disqualify Jefferson Davis from the presidency stands as the sole direct evidence. This one sentence cannot demonstrate electoral knowledge or intent.

Fifth, the Amnesty Act debates, which took place after Section Three's ratification, do not apply. But even so, those debates do not show a concern that Section Three applied

[31] Gallipolis Journal, February 21, 1867.

to the Presidency. And one sentence from the *Pulaski Citizen* that referred to the presidency did not even discuss the Amnesty Act but rather considered a different bill.

Sixth, the above arguments are reasonable and not absurd.

> "[T]o justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense. And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail."[32]

Absurdity is a high hurdle whereby no reasonable person can intend the outcome, and the absurdity must stem from an obvious technical or ministerial error.[33] Section Three responded to the Civil War. Purposeful removal of the Presidency was not an error, but entirely rational. The framers had little concern that a former confederate could become President, based on the restrictions on Presidential Electors, the large Northern population base, and the expected voting strength of emancipated slaves. History proves their views correct, not absurd.

B. The President is not an "officer of the United States," and President Trump took the Presidential Oath, not an oath to "support the Constitution of the United States."

As an initial matter, President Trump incorporates the arguments set forth in *Brief submitted by Professor Seth Barrett Tillman as Amicus Curiae in support of Intervenor-Appellant/Cross-Appellee Donald J. Trump.*

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[32] *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

[33] *Reading Law* at 191.

First, Section Three's plain language again includes Senators and Representatives but excludes the President and Vice-President. Once again, it excludes both the President and Vice-President.

Second, the catch-all phrase "officer of the United States" does not include the President. To be sure, the President is an "officer" in the generic sense of the term. But not an "officer of the United States." Despite the many citations that treat the President as an "officer" not one authority holds that the President is an "officer of the United States"—no case, no statute, no record of Congressional debate, no common usage, no attorney general opinion. Nothing. And indeed, Professor Magliocca admitted this point in his testimony.

By contrast, three Constitutional provisions—the Appointments Clause, Impeachment Clause, and Commissions Clause in Article II—*all* distinguish the President from "officers of the United States." And "officers of the United States" in Article VI take an oath different from the Presidential oath in Article II. This precise use of "officer of the United States" remains today, as demonstrated by multiple authorities; pre-ratification, immediately after ratification, and very recent, all of which explicitly state that the President is *not* an "officer of the United States."[34]

Third, Section Three disqualifies only those who have "previously taken an oath … to support the Constitution of the United States," the exact same oath in Article VI. But

[34] 2 Joseph Story, *Commentaries on the Constitution of the United States* § 791 (1833) (President not a civil officer of the United States); David A. McKnight, The Electoral System of the United States 346 (1878) (President not an officer of, or under, the United States); *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 497-98 (2010).

President Trump took a different oath, to "preserve, protect, and defend" the Constitution.[35] The different oaths are not mere linguistic variants. The original framers of the Constitution purposely created two oaths, and the Section Three drafters chose the Article VI oath—not the Article II oath. Importantly, Section Three's use of the Article VI oath precisely matches the plain language that includes Senators, Representatives, and offices "under" or officers "of" the United States, while also respecting the omission of President.

Fourth, there is no contradiction among Section Three's provisions—all support the same conclusion that Section Three was carefully drafted not to apply to the President.

III. Section Three does not give administrative agencies or courts authority to disqualify a federal officer holder.

A. Section Three may not be enforced by anyone other than Congress, absent Congressional legislation providing for such enforcement, of which there is none relevant here.

As an initial matter, President Trump incorporates the arguments set forth in Professor Lash's and Professor Tillman's Amicus Briefs, as noted above.

Section Three is not self-executing and thus provides for no private right of action, because there is no congressional enforcement legislation currently in existence. The Supreme Court has repeatedly held that Section Five of the Fourteenth Amendment confers exclusive power on Congress to determine "whether and what legislation is needed to" enforce it.[36] "Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some

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[35] U.S. Const, art. II, cl. 8.

[36] *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 33 (1991) (Scalia, J., concurring) ("It cannot rightly be said that the Fourteenth

legislation is contemplated to make the amendments fully effective."[37] Thus, absent enforcement legislation—none of which is currently in effect—Section 3 allows no private right of action.

And it is well-established that the states do not have this same authority to enforce the Fourteenth Amendment. Federal courts have long held that Congress creates exclusive constitutional remedies: The Fifth Circuit held that 42 U.S.C. §1983 is the appropriate vehicle for asserting violations of constitutional rights;[38] the Sixth Circuit ruled "we have long held that § 1983 provides the exclusive remedy for constitutional violations;"[39] the Eighth Circuit stated that Congress intended 42 U.S.C. §1983 as an exclusive remedy for municipal constitutional violations and "no reason exists to imply a direct cause of action (for such violations) under the fourteenth amendment,"[40] and the Ninth Circuit has found ruled that "a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. §1983."[41]

Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform.").

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

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

[39] *Foster v. Michigan*, 573 F. App'x. 377, 391 (6thCir. 2014).

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

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

Section Three's history confirms that enforcement legislation was required before any disqualification could be enforced. In *Griffin's Case*, issued only one year after the passage of the Fourteenth Amendment, Chief Justice Salmon Chase, sitting as circuit judge for Virginia, held that only Congress can provide the means to enforce Section Three.[42] He cogently explained why federal legislation was required to implement section 3's disqualification provision:

> For, in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate. To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable; *and these can only be provided for by congress*.
>
> Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that 'congress shall have power to enforce, by appropriate legislation, the provision of this article.'
>
> There are, indeed, other sections than the third, to the enforcement of which legislation is necessary; but *there is no one which more clearly requires legislation in order to give effect to it*. The fifth section qualifies the third to the same extent as it would if the whole amendment consisted of these two sections. *And the final clause of the third section itself is significant. It gives to congress absolute control of the whole operation of the amendment*. These are its words: 'But congress may, by a vote of two-thirds of each house, remove such disability.' Taking the third section then, in its completeness with this final clause, it seems to put beyond reasonable question the conclusion that the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, and to be made operative in other cases by the legislation of congress in its ordinary course.[43]

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

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

That case has never been overruled. And it has been affirmed repeatedly.[44]

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

There is no authorization statute currently in force. The Enforcement Act was codified as 13 Judiciary ch. 3, sec. 563 and later recodified into 28 Judicial Code 41, but in 1948, Congress repealed 28 U.S.C. § 41 in its entirety.[45] In 2021, legislation to create a cause of action to enforce Section Three, failed.[46] Thus, Congress has not enacted any method for enforcing Section Three.

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

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

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

B. Whether Section Three disqualifies President Trump from serving is a question reserved for Congress.

The Constitution reserves exclusively to the Electoral College and Congress the power to determine whether a person may serve as President. The Challengers effectively ask the Secretary to strip those institutions' power to resolve Section Three issues, including Congress's right to waive the disqualification by a two-thirds vote. Federal and state courts have uniformly ruled that disputed challenges to the qualifications of presidential candidates are non-justiciable, taking into account considerations of comity and the deference due federal law under the Constitution's Supremacy Clause.[47] And as a general matter, the U.S.

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[47] *See Castro v. N.H. Sec'y of State*, Case No. 23-cv-416-JL at 10-11 (D.N.H. Oct. 27, 2023); *Berg v. Obama,* 586 F.3d 234, 238 (3d Cir. 2009); *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008)(Questioning whether John McCain was a natural-born citizen); *Grinols v. Electoral College*, No. 2:12-cv-02997-MCE-DAD, 2013 WL 2294885, at *5-7 (E.D. Cal. May 23, 2013) ("the Constitution assigns to Congress, and not to federal courts, the responsibility of determining whether a person is qualified to serve as President"); *Kerchner v. Obama*, 669 F. Supp. 2d 477, 483 n.5 (D.N.J. 2009); *Taitz v. Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373 (S.D. Miss. Mar. 31, 2015); *Strunk v. New York State Bd. Of Elections*, No. 6500/11, 2012 WL 1205117, *12 (Sup.Ct. Kings County NY, Apr. 11, 2012), *Keyes v. Bowen*, 189 Cal.App.4th 647, 660 (2010), and *Jordan v. Secretary of State Sam Reed,* No. 12-2-01763-5, 2012 WL 4739216, at *1.

Lindsay v. Bowen, 750 F.3d 1061 (9th Cir. 2014), is not to the contrary; the Ninth Circuit repeatedly emphasized that its approval of the California Secretary of State's exclusion of 27-year-old Lindsay Bowen from the ballot turned on the *undisputed* nature of her disqualification. *Id.* at 1063 (""Distinctions based on *undisputed* ineligibility due to age do not 'limit political participation by an identifiable political group whose members share a particular viewpoint, associational preference or economic status.'") (emphasis added)); 1064 (""Nor is this a case where a candidate's qualifications were disputed. Everyone agrees that Lindsay couldn't hold the office for which she was trying to run." and ""Holding that Secretary Bowen couldn't exclude Lindsay from the ballot, *despite her admission that she was underage*, would mean that anyone, regardless of age…would be entitled to clutter and confuse our electoral ballot.") (emphasis added); 1065 ("Lindsay points to 2008 presidential candidate John McCain, who some considered to be ineligible to hold office because he was

Supreme Court has recognized that a state "has a less important interest in regulating Presidential elections than statewide or local elections."[48]

The holdings in these cases apply with equal force to a candidate for president; they are universal and unqualified, and the Challengers provide no rationale as to why a candidacy differs from holding office. The cases that arose during the 2008 and 2012 presidential election cycles challenging Barack Obama or John McCain's qualifications failed, oftentimes because the issue of presidential qualifications was a non-justiciable political question outside the province of the judiciary.[49] In *Robinson,* Judge Alsup explained that whether John McCain was a natural-born citizen was left to Congress based on the Twelfth Amendment and 3 U.S.C. § 15:

> Issues regarding qualifications for president are quintessentially suited to the foregoing process. Arguments concerning qualifications or lack thereof can be laid before the voting public before the election and, once the election is over, can be raised as objections as the electoral votes are counted in Congress.[50]

This analysis applied regardless of whether the challenged individual was a candidate (Senator McCain) or sitting president (President Obama).

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born outside the United States. But, at worst, McCain's eligibility was disputed. He never *conceded* that he was ineligible to serve….") (emphasis in original) (citing with approval *Robinson v. Bowen,* 567 F.Supp.2d 1144, 1146–47 (N.D.Cal.2008); *Keyes v. Bowen,* 189 Cal.App.4th 647, 117 Cal.Rptr.3d 207, 214–16 (2010), both of which held the natural born citizen issue to be a nonjusticiable political question).).

[48] *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983)

[49] *See supra.* fn. 42.

[50] *Robinson*, 567 F. Supp. 2d at 1147.

The Constitution repeatedly puts authority regarding the election of the President in Congress (or a house thereof):

- Article II, Section 1 authorizes Congress to set the time for choosing electors and the date for counting their votes;
- The Twelfth Amendment assigns the President of the Senate to oversee counting the electoral votes;
- The Twelfth Amendment empowers the House of Representatives to choose the president if no one obtains a majority of electoral votes;
- Section 5 of the Fourteenth Amendment authorizes Congress to pass legislation enforcing the Fourteenth Amendment; and,
- The Twentieth Amendment empowers Congress to create procedures to identify a president if neither the president or vice-president qualify.[51]

In short, this Constitutional structure empowers Congress, not the judiciary or state officials.[52]

Finally, recent changes to the Electoral Count Act do not change this analysis. Those changes did not alter how challenges to a presidential candidate's qualifications are to be addressed. They changed only the process regarding objections to *electoral* votes, and how the electoral votes may be counted.[53] They did not address procedures for resolving presidential qualifications.

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[51] *Grinols*, No. 2:12-cv-02997-MCE-DAD, 2013 WL 2294885, at *5-7.

[52] *Strunk*, No. 6500/11, 2012 WL 1205117, *12), *Keyes*, 189 Cal.App.4th at 660, *Jordan,* No. 12-2-01763-5, 2012 WL 4739216, at *1.

[53] 3 U.S.C. § 15; Ex. D. to Defendant Donald J. Trump's Brief Regarding 3 U.S.C. § 15 (tracking 2022 amendments).

Congress may choose not to exercise authority granted to it. But declination does not suddenly vest that authority in another branch of government, and certainly not in the states.

C. States cannot create and enforce additional qualifications for being elected President of the United States.

The Constitution identifies the qualifications to be President.[54] It does not set forth qualifications to run for President, nor may the states create them. The Fourteenth Amendment prohibits individuals from *being* an elected official or *holding* various offices; it does not prohibit individuals from *seeking election*. Thus, the Secretary has no authority to investigate or adjudicate President Trump's eligibility under Section Three.

"'[T]he states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them.'"[55] Otherwise, states could add their own qualifications to individuals running for President, creating a chaotic environment of conflicting qualifications.[56]

While states are delegated some power to impose procedural requirements, such as requiring candidates to "muster a preliminary showing of support" before appearing on the ballot, they cannot add new substantive requirements,[57] even if recast as procedural ballot

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[54] U.S. Const., art. II, § 1, cl.5.

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

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

[57] *Schaefer v. Townsend*, 215 F.3d 1031, 1038 (9thCir. 2000).

access conditions.[58] Yet, that is precisely what Challengers seek, and doing so requires adjudication of a qualification for President not found in the Constitution. The Fourteenth Amendment does not prohibit individuals from appearing on the ballot, receiving a party nomination, or being elected to office. Instead, it prohibits them from *holding* office.[59]

This distinction makes sense. Even if there is a "disability" under Section Three, it may be lifted by a two-thirds vote of each House.[60] Thus, a putatively disqualified candidate may still appear on the ballot and win election. Indeed, indisputably disqualified candidates have been selected for office. For example, Challengers' witness, Professor Magliocca, referenced Zebulon Vance, who was appointed to be a United States Senator by the North Carolina legislature but prohibited from *serving* in the Senate. The Fourteenth Amendment did not enjoin or prohibit the North Carolina legislature from selecting Mr. Vance; it merely prohibited him from holding the office of United States Senator.

Similarly, "[u]nder [Section 3 Congress has admitted] persons … who were ineligible at the date of the election, but whose disabilities had been subsequently removed." *Smith v. Moore*, 90 Ind. 294, 303 (1883).[61] Moreover, this distinction is reinforced by the 20th

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

[59] U.S. Const., amend. XIV, § 3. This distinction raises a ripeness issue. Because President Trump has not yet been elected, Cross-Applicants' suit is not ripe.

[60] *Id.*

[61] *See also Privett v. Bickford*, 26 Kan. 52, 58 (1881) (analogizing to Section Three, concluding that voters can vote for ineligible candidates who can only take office once the disability is removed); *Sublett v. Bedwell*, 47 Miss. 266, 274 (1872) ("The practical

Amendment, which provides the procedures to identify the President if that disability is not removed.

Schaefer illustrates this point. The court evaluated California law requiring Congressional candidates to reside in California when filing nomination papers[62] and declared that provision unconstitutional because it added qualifications not found in the Constitution. Namely, that an individual must be an inhabitant of the state "when elected,"[63] which differs from "when nominated" because nonresident candidates can "inhabit" a state after nomination, but before election.[64]

Just like the manner of counting electoral college votes is dictated by federal statute and the Constitution, so too with presidential qualifications. Federal law must reign supreme; states may not add additional qualifications beyond those listed in the Constitution.[65] No precedent permits a lone state to adjudicate the qualifications of a presidential candidate or a president-elect. That is Congress's role.

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interpretation put upon [Section Three] has been, that it is a personal disability to 'hold office,' and if that be removed before the term begins… the person may take the office.").

[62] *Schaefer*, 215 F.3d at 1032-34 (citing U.S. Const., art. I, § 2, cl. 2).

[63] *Id.* at 1034.

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

[65] *Term Limits*, 514 U.S. at 805.

IV. President Trump did not "engage" in an "insurrection."

As an initial matter, President Trump incorporates the arguments set forth in *Brief of Amici Curiae states of Indiana, West Virginia, and 17 other states in support of intervenors Colorado Republican State Central Committee and Donald J. Trump.*

A. President Trump did not engage in an insurrection on January 6, 2021.

1. *"Engaged" does not include "incited" under Section Three.*

"Engage" and "incite" describe two different activities. "Engage" means "to do or take part in something,"[66] whereas incite means to "to move to action."[67] No court has ever equated the two terms. Only two other sources directly confront this issue.

Professor Magliocca relied upon an Attorney General Stanbury opinion that stated, "where a person has by speech or by writing, incited others to engage in rebellion, he must come under the disqualification."[68] This citation faces several problems. First, this portion of Stanbery's opinion referred to confederate officeholders using their official positions to "incite others to engage." Thus, it referred to *official, governmental* action. Second, Stanbury used the formulation "incite to engage" which demonstrates causation—thus, an official caused people to engage. Third, Stanbery referred to a "rebellion"—a more concrete and

[66] "Engage." Merriam-Webster.com Dictionary, Merriam-Webster, webster.com/dictionary/engage (last visited Nov. 27, 2023).

[67] "Incite." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/incite (last visited Nov. 27, 2023).

[68] The Reconstruction Acts, 12 Op. Att'y Gen. 182, 205 (1867).

serious activity than "insurrection." In short, Stanbery's opinion was limited to official, government action that caused Southerners to engage in the Civil War.

Second, Congress has taken a different approach, treating "incite" as distinctly separate from "engage," both before and after ratification of Section Three. The Second Confiscation Act of 1862 made it a crime to "incite, set on foot, assist, or engage in any rebellion or insurrection."[69] Thus, Congress knew at the time it passed Section Three that to "incite" insurrection was a different activity than to "engage" in insurrection, and courts "presume that Congress is knowledgeable about exiting law pertinent to the legislation it enacts.[70] This is dispositive.

Finally, federal law continues to treat "incite" and "engage" as different actions, for the crime of inciting or engaging in an insurrection.[71] To the extent any conflict exists between federal statute and Stanbery's opinion, Federal statute controls, because Stanbery's opinion was limited to official actions taken by Confederate officers.

2. *President Trump's statements receive First Amendment protection.*

Courts must harmonize constitutional provisions.[72] Even if "engage" includes "incite," Section Three can and must be harmonized with First Amendment rights

[69] 12 Stat. 589 & 627 (1862).

[70] *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-185 (1988).

[71] 18 U.S.C. § 2383.

[72] *Zaner v. City of Brighton,* 917 P.2d 280, 283 (Colo. 1996); *People ex rel. Livesay v. Wright*, 6 Colo. 92, 95 (1881).

protecting political speech under the *Brandenburg* standards.

Speech cannot be punished as incitement unless it (1) "advoca[tes] the use of force or of law violation," (2) is "directed to inciting or producing imminent lawless action," and (3) is "likely to incite or produce such action."[73] All three elements must be met: "the speaker's intent to encourage violence (second factor) and the tendency of his statement to result in violence (third factor) are not enough to forfeit First Amendment protection *unless the words used specifically advocated the use of violence*…."[74]

Thus, one must evaluate the content, form, and context of speech."[75] Foremost is the objective content of the speech— where speech is protected, "its setting, or context, [can] not render it unprotected."[76] Intent is important, but only as an additional hurdle,[77] not as a substitute for the required focus on the words themselves; tests focusing on a speaker's intent or the effect on listeners—rather than the speaker's words—are prohibited.[78]

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

[74] *Nwanguma v. Trump,* 903 F.3d 604, 611 (2018) (emphases added); *accord Hess v. Indiana,* 414 U.S. 105, 107-109 (1973).

[75] *Snyder v. Phelps,* 562 U.S. 443, 453-54 (2011).

[76] *Nwanguma*, 903 F.3d at 612.

[77] *Counterman v. Colorado*, 600 U.S. 66, 76-78 (2023).

[78] *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468-69 (2007) ("A test focused on the speaker's intent could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another."); *accord* 551 U.S. at 492-495 (the "fundamental and inescapable problem" with a test that is "tied to…a court's perception of the import, the intent, or the

President Trump's words were not incendiary, and certainly not as incendiary as language the Supreme Court has already held protected as a matter of law.[79] As a D.C. Circuit judge remarked last year, "you just print out the [President's January 6] speech…and read the words…it doesn't look like it would satisfy the [*Brandenburg*] standard."[80]

On January 6th, President Trump called for protesting "peacefully and patriotically,"[81] to "support our Capitol Police and law enforcement,"[82] to "[s]tay peaceful,"[83] and to "remain peaceful."[84] This patently fails to meet the first element of *Brandenburg*.

Many, many politicians and elected officeholders routinely call on supporters to 'fight' and 'fight like hell,'" as Trump has. Their language has never been construed to ask supports to violently engage in insurrection, and as a matter of equal application of the First Amendment, this same standard must apply to President Trump.

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effect of the [speech]" is "that these tests fall short of the clarity that the First Amendment demands") (Scalia, J., concurring).

[79] *See Claiborne* 458 U.S. at 902 ("We're gonna break your damn neck."); *Hess*, 414 U.S. at 107 ("We'll take the f[***]ing street again.").

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

[81] Transcription of President Trump's January 6, 2021, speech at the Ellipse, Exhibit 1029 at 4.

[82] Exhibit 148 at 83.

[83] *Id.*

[84] *Id.* at 84.

Instead, however, the Challengers rely on past rally speeches to different audiences—many going back years—which had nothing to do with the events of January 6th, and essentially ask the Secretary to concoct a radical new legal rule: in determining whether President Trump had the specific intent required by *Brandenburg*, the Secretary may consider *any speech ever uttered* by President Trump, including to different audiences and on different topics. Under this radical departure from established law, the Challengers ask the Secretary to hold that for President Trump, one may examine a curated compilation of speech going back years to decipher a hidden meaning. This runs counter to *Wisconsin Right to Life's* injunction against an inquiry that leads to the "bizarre result" that what is "protected speech for one speaker" can lead to "criminal penalties for another."[85] Simply put, President Trump's past speeches did not "incite" anything, under *Brandenburg* standards.

B. President Trump did not have the Specific Intent cause a riot and launch an attack on the Capitol.

Section Three requires specific intent—that one intended to cause "the specific result" at issue—namely the prevention of the counting of the electoral votes by a riot.[86] But the evidence falls far short of this standard.

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[85] 551 U.S. at 468-69.

[86] "INTENT", Black's Law Dictionary (11th ed. 2019); CJI-CRIM, F:185, "Intentionally (and with intent)."

President Trump never advocated violence or an attack on the Capitol. Neither in his January 6th speech nor in any of his pre-January 6th speeches. Indeed, the pre-January 6th speeches bore no relation to the violence on January 6th.

Direct evidence shows President Trump intended to prevent violence, not incite it. According to evidence in the Colorado proceeding, President Trump requested National Guard presence on January 6, 2021, telling staff that he wanted 10,000-20,000 National Guard troops to be available.[87] This testimony came from the official charged with coordinating with the Department of Defense, and it was corroborated by two witnesses at a different meeting with the President,[88] as well as an official Department of Defense timeline showing the President wanted the Department of Defense to be prepared to deal with the protests on January 6th.[89] Multiple witnesses testified that President Trump intended to deploy the National Guard to *prevent* violence, showing his intent to prevent violence, not cause it.

C. The events on January 6, 2021, did not constitute insurrection.

Professor Magliocca has wrongly defined insurrection as "(1) a public use of force or threat of force (2) by a group of people (3) to hinder or prevent execution of the

[87] TR. 11/1/2023, pp. 212:17-20, 294:5-295:17.

[88] TR. 11/01/2023, p. 216:5-17

[89] Ex. A, (Ex. 1031 from Colorado proceedings), p. 16, (4th line identifying January 3 White House meeting).

Constitution of the United States."[90]

First, this definition lacks support. It patches together weak and irrelevant authorities; one dictionary definition from 1828,[91] two jury instructions long predating the Civil War,[92] and dicta from a state court dissenting opinion.[93] Meanwhile, amicus Mark Graber argues that a consensus regarding the definition of "insurrection" existed at the time of Section Three's ratification. He relies on a case from 1795, and an unreported grand jury instruction.[94] This is not credible. Two isolated, weak authorities – 80 years apart – do not a "consensus" make.

The Civil War is the unignorable context for understanding "insurrection," which was understood as a type of treason, alongside rebellion,[95] or requiring uniformed troops led into battle against the United States,[96] or "levying war" against the United States,[97] or "taking up

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[90] Order ¶ 240.

[91] *Insurrection*, NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

[92] *See Case of Fries*, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800); *United States v. Hanway*, 26 F. Cas. 105, 127–28 (C.C.E.D. Pa. 1851).

[93] *Chancely v. Bailey*, 37 Ga. 532, 548–49 (1868) (J. Harris, dissenting).

[94] Brief of Mark Graber, 19-20.

[95] 37 Cong. Globe 2173, 2189, 2190-91, 2164-2167 (1862); *United States v. Greathouse*, 26 F. Cas. 18, 21 (C.C.N.D. Cal. 1863).

[96] 41 Cong. Globe 5445-46.

[97] *Greathouse*, 26 F. Cas. at 25.

arms traitorously against the government."[98] The weight of relevant authorities indicates an "insurrection" must be violent enough, potent enough, long enough, and organized enough to be considered a significant step on the way to rebellion.

Second, the Challenger's proposed definition is overbroad; it has no threshold for the scope, potency, or severity required to constitute insurrection, and no limiting principle reflected in any relevant legal authority. Indeed, the definition could apply to a group of people forcefully hindering a mailman on his route.[99] Any generic riot or violent protest would be an "insurrection" if it somehow hindered the execution of a function under the Constitution. This ignores the difference between insurrection and obstruction and goes far beyond Section Three's purpose and text.

The events of January 6th did not constitute an insurrection, for several reasons. First, there is no evidence the crowd was armed with deadly weapons and attacked police in a manner consistent with a violent insurrection. Even the Colorado trial court found evidence of *one* gun, which was never used and was lost in a scuffle.[100] The *only* evidence regarding a knife at the Capitol was that police took one off of the belt of a man who never used or brandished it.[101] There is no testimony or evidence police were attacked with guns or knives.

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

[99] Order ¶ 237, n.16.

[100] Order ¶ 155; Ex. 78, p. 103.

[101] Ex. 16; TR. 10/30/2023, p. 106:19-24.

The only weapons used were makeshift, improvised, or items taken from police.[102] Hand-to-hand fighting[103] reflects that no weapons were used, and there was little (if any) deadly force consistent with "taking up arms against the United States."

Second, there is no evidence the crowd was organized with a singular purpose. Even the Colorado district court acknowledged mixed motivations: some participants were violent, many more were nonviolent. Some skipped President Trump's speech yet started violence; many went nonviolently to the Capitol after the speech.[104] At most, the Challengers can point to some in the crowd shouting slogans, waving flags, and at times worked together by yelling "heave ho" in unison as they attempted to forcibly enter the Capitol. But there is no evidence regarding what they meant by the slogans and symbols, what percentage of the crowd shouted or agreed with the slogans, or whether cooperation in the crowd was planned or spontaneous. And the crowd's voluntary dispersal after an order from the Mayor and President Trump's "go home" video, reflects a lack of purpose and organization.

Third, even assuming a single purpose, no evidence shows a purpose to hinder or prevent execution of the Constitution itself rather than to (at most) delay the vote-certification proceeding as set forth in 3 U.S.C. § 5. No evidence showed a purpose to nullify

[102] TR. 10/30/2023, pp. 75:15-76:4.

[103] Order ¶ 242.

[104] *Id.* ¶¶ 146-50, 159-61.

or negate the government's authority to execute any provision of the Constitution generally, such as Congress's power to certify votes.

CONCLUSION

The Challengers' arguments fail as a matter of state law, as a matter of federal law, and on the facts. It is for good reason that every court and every statewide election official confronted with a Section Three challenge has rejected it. Even if the Challengers could overcome the insurmountable hurdle posed by the lack of Congressional authorization for consideration of Section Three challenges could be surmounted, the consistent rejection of Section Three challenges is persuasive authority that the Secretary should decline the Challenger's efforts to disqualify President Trump on theories which have been thoroughly rejected throughout the nation.

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Certificate of Service

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