STATE OF MAINE
Kennebec, SS

SUPERIOR COURT
Docket No. AP-2024-1

DONALD J. TRUMP,

Petitioner

v.

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

Respondent.

Brief of Respondent Secretary of State Shenna Bellows and Opposition to Motion to Supplement the Record

Pursuant to 21-A M.R.S. § 337(2)(D), and this Court's Procedural Order of January 5, 2024, Respondent Secretary of State submits this brief[1] in response to Mr. Trump's Petition for Review under M.R. Civ. P. 80C, and in opposition to his Motion to Supplement the Record. The Secretary's December 28, 2023 ruling—in which she concluded that Donald J. Trump's primary petition was invalid because his statement that he was qualified for office was false by operation of Section Three of the Fourteenth Amendment of the U.S. Constitution—should be affirmed, and Mr. Trump's Motion to Supplement the Record should be denied.

Statutory Context

Under Section 443 of Title 21-A, the Secretary of State is responsible for preparing ballots for a presidential primary election. The Secretary must "determine if a petition meets the requirements of," as relevant here, Section 336 of Title 21-A, "subject to challenge and appeal under section 337." 21-A M.R.S. § 443.

[1] Despite the Court imploring the parties to be economical in their briefing, Mr. Trump filed a nearly 100-page brief. The Secretary has endeavored to provide a more succinct response.

Undersigned counsel also received what was styled as an amended brief from counsel for Mr. Trump on the afternoon of Wednesday, January 10, 2024. The Secretary's brief responds to the brief that Mr. Trump timely filed on Monday, January 8, 2024. Insofar as the amended brief that Mr. Trump filed on January 10 contains any substantive amendments, the Secretary requests that the Court disregard them.

Section 336 requires that a candidate consent form be filed with the primary petition or at any earlier time during which signatures may be collected. *Id.* § 336. That form, which is prepared by the Secretary of State, "must include a list of the statutory and constitutional requirements of the office sought by the candidate." *Id.* § 336(1). The submitted form must also 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 . . . that the declaration is true." *Id.* § 336(3).

Maine law sets forth a procedure for resolving challenges to a candidate's compliance with these provisions, with timelines that reflect the time-sensitive nature of questions of candidate eligibility. Challenges must be submitted by registered voters, setting forth the reason for the challenge, by 5:00 pm five business days after the final date for filing petitions (in this case, December 8, 2023). *Id.* § 337(2)(A). The Secretary must then hold a public hearing on any properly filed challenge within seven days of the deadline for filing challenges, where the challengers bear the burden of providing sufficient evidence to support their challenge. *Id.* § 337(2)(B); *see also* 21-A M.R.S. § 443 (requiring the Secretary to determine if a petition meets the requirements of Section 336). The Secretary must then rule on the merits of the challenge within five days of the completion of the hearing. *Id.* § 337(2)(C). That ruling is dictated by statute: "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.* § 336(3). If a candidate's consent and petition are void, their name may not be listed on the ballot.

Procedural History

The Secretary of State's office received three timely challenges to the nomination petition of Mr. Trump. Two challenges—one filed by Mary Anne Royal, and one filed by

Kimberly Rosen, Thomas Saviello, and Ethan Strimling (the "Rosen Challengers")—argued that Mr. Trump was not qualified for office under Section Three of the Fourteenth Amendment because he engaged in insurrection, such that his Section 336 declaration was false and his petition was invalid. *See* R 294-308. One challenge, filed by Paul Gordon, contended that Mr. Trump was not qualified for office under the Twenty-Second Amendment because he claims to have won the Presidential election twice. *See* R 309-10.

The Secretary issued a Notice of Hearing to all parties on December 11, 2023, indicating that a consolidated hearing would be held on December 15, 2023. R 311. It directed the parties to exchange exhibit and witness lists by December 13, 2023, a deadline with which the parties complied. R 312.

At the hearing, the Secretary admitted the Rosen Challengers' first five exhibits without objection. R 100-01. She also, without objection to her approach, R 107-08, admitted all other exhibits provisionally pending the resolution of any objections to their admissibility, R 110, 113, and permitted the parties to file briefs to that end by Monday, December 18, 2023. R 108. Mr. Trump was also given until 5:00 pm on Sunday, December 17, 2023, to request cross-examination of a witness—Donald Sherman—who was present at the hearing and whose affidavit authenticating certain documents had been provisionally admitted. R 117. By the close of the in-person portion of the hearing December 15, 2023, all parties had copies of the exhibits, and Mr. Trump did not ultimately seek cross-examination of Mr. Sherman.

Ms. Royal and Attorney Gordon testified under oath. The Rosen Challengers also called one witness, Professor Gerard M. Magliocca, who had also served as an expert witness in *Anderson v. Griswold*, Case No. 23SA300, 2023 CO 63, 2023 WL 8770111 (Dec. 19, 2023). The Secretary overruled Mr. Trump's general objection to Professor Magliocca's testimony, though she upheld some of his specific objections, making clear that she was only interested in

Professor Magliocca's analysis of the legal history of Section Three of the Fourteenth Amendment, and not his opinions on the ultimate legal questions—i.e., whether Mr. Trump engaged in insurrection. R 178-180. Mr. Trump called no witnesses.

Ms. Royal and Mr. Gordon presented oral closings. The Rosen Challengers and Mr. Trump waived oral closings, but the Secretary kept the hearing open to permit the submission of written closing briefs by Tuesday, December 19, 2023. R 290-91.

The Secretary received an evidentiary objection brief from Mr. Trump on Monday, December 18, 2023. R 488-526. She received a responsive brief from the Rosen Challengers, as well as closing briefs from the Rosen Challengers and Mr. Trump, on Tuesday, December 19, 2023. R 527-790. On December 20, 2023, following the Colorado Supreme Court's decision in *Anderson* on December 19, the Secretary invited the parties to submit briefs addressing the significance of the decision, if any, to this matter. Both the Rosen Challengers and Mr. Trump submitted briefs to that end on December 21, 2023. R 791-817.

On Wednesday, December 27—sixteen days after learning definitively that Secretary of State Bellows would preside over the hearing—Mr. Trump filed a request that the Secretary disqualify herself due to bias. R 818-826. He based his motion on social media posts from early 2021 and 2022 in which the Secretary referred to the events of January 6, 2021, as an insurrection and commented on Mr. Trump's impeachment.

On Thursday, December 28, 2023, the Secretary issued her ruling. *See* R 1-34. Initially, she denied Mr. Trump's request that she disqualify herself, noting that the motion was untimely under 5 M.R.S. § 9063(1), and that she could and would preside over this matter without bias. The Secretary then overruled Mr. Trump's objections to the Rosen Challengers' evidence, finding it admissible under 5 M.R.S. § 9057, with the exception of Exhibits 38-48 and 78-79. The Secretary then concluded that (1) she had the authority and obligation to keep unqualified

candidates from the primary ballot under 21-A M.R.S. § 336, including where the qualification at issue is Section Three of the Fourteenth Amendment, (2) Mr. Trump was qualified under the Twenty-Second Amendment, and (3) that Section Three of the Fourteenth Amendment is self-executing and applies to the President. Thereafter, based on the evidence before her, the Secretary found that Mr. Trump had engaged in insurrection within the meaning of those terms under Section Three of the Fourteenth Amendment. Therefore, the Secretary concluded that Mr. Trump's primary petition was invalid by operation of 21-A M.R.S. § 336(3).

Mr. Trump timely filed an appeal in Superior Court on January 2, 2024.

Standard of Review

While Mr. Trump does not cite the applicable standard of review in his brief, it is paramount in Rule 80C proceedings. Judicial review of agency decisions is "deferential and limited," a product of both "constitutional separation of powers and statutes governing administrative appeals." *Friends of Lincoln Lakes v. Bd. of Envtl. Prot.*, 2010 ME 18, ¶ 12, 989 A.2d 1128. A court is not permitted to overturn the Secretary's ruling "unless it: violates the Constitution or statutes; exceeds the agency's authority; is procedurally unlawful; is arbitrary or capricious; constitutes an abuse of direction; is affected by bias or error of law; or is unsupported by evidence in the record." *Kroger v. Dep't of Envtl. Prot.*, 2005 ME 50, ¶ 7, 870 A.2d 566; 5 M.R.S. § 11007(4). Mr. Trump bears the burden of persuasion as to each of these issues. *Doe v. Dep't of Health and Human Servs.*, 2018 ME 164, ¶ 11, 198 A.3d 782; *Anderson v. Me. Pub. Emp. Ret. Sys.*, 2009 ME 134, ¶ 3, 985 A.2d 501.[2]

As to the Secretary's findings of facts, as a general matter, the Law Court has instructed that a court's "primary purpose . . . is to give effect to the intent of the Legislature," guided by

[2] Therefore, contrary to Mr. Trump's contention, the challengers do not "have the burden of proving their case" in this Rule 80C appeal. Trump Br. 11.

the statute's plain meaning, though where statutory provisions are ambiguous courts defer to the Secretary's interpretations so long as they are reasonable. *See Melanson v. Sec'y of State*, 2004 ME 127, ¶ 8, 861 A.2d 641. Further, "[w]hen a dispute involves an agency's interpretation of a statute it administers, 'the agency's interpretation, although not conclusive, is entitled to great deference and will be upheld unless the statute plainly compels a contrary result.'" *Town of Eagle Lake v. Comm'r, Dep't of Educ.*, 2003 ME 37, ¶ 8, 818 A.2d 1034, 1037 (quoting *Wood*, 638 A.2d 67, 70 (Me. 1994)); *accord Dyer v. Superintendent of Ins.*, 2013 ME 61, ¶ 11, 69 A.3d 416.

As to the Secretary's findings of fact, the reviewing court must examine "the entire record to determine whether, on the basis of all the testimony and exhibits before it, the agency could fairly and reasonably find the facts as it did." *Friends of Lincoln Lakes*, 2010 ME 18, ¶ 13, 989 A.2d 1128. The court may not substitute its judgment for that of the agency on questions of fact. 5 M.R.S. § 11007(3). Review is instead "[d]eferential," and the agency's ruling must be upheld if it is "based on 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *S.D. Warren Co. v. Me. Dep't of Envtl. Prot.*, No Civ. A. AP-03-70, 2004 WL 1433675 (Me. Sup. Ct. May 4, 2004) (quoting *In re Me. Clean Fuels, Inc.*, 310 A.2d 736, 741 (Me. 1973)).

Additionally, in a Rule 80C proceeding, "an issue [must have] be[en] raised before the administrative agency in order for it to be preserved on appeal." *New England Whitewater Ctr., Inc. v. Dep't of Inland Fisheries & Wildlife*, 550 A.2d 56, 60 (Me. 1988); *accord Seider v. Bd. of Examiners of Psychologists*, 2000 ME 206, ¶ 39, 762 A.2d 551; *Harold D. Smith & Sons, Inc. v. Fin. Auth. of Me.*, 543 A.2d 814, 817 (Me. 1988). This rule promotes fairness, orderly procedure, and good administration by "ensur[ing] that the agency and not the courts has the first opportunity to pass upon the claims of the litigants," *New England Whitewater*

Ctr., 550 A.2d at 60-61, and to correct any deficiencies, *Harold D. Smith*, 542 A.2d at 817; *accord Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 2014 ME 56, ¶ 20, 90 A.3d 451. It applies to both substantive claims and procedural objections, constitutional or otherwise. *New England Whitewater Ctr.*, 550 A.2d at 61 (dismissing due process claim based on procedural objections that were not raised before the agency); *see also Comm'l Union Ins. Co. v. Workers' Comp. Bd.*, 1997 ME 227, ¶ 6, 704 A.2d 358 ("[C]onstitutional issues are not preserved for appeal unless they are raised in the proceeding below, and . . . this rule applies to appeals from administrative agencies.").

Argument

A. Mr. Trump's Claims of Bias Are Untimely and Entirely Without Merit.

The Maine Administrative Procedure Act ("APA") requires that hearings "be conducted in an impartial manner." 5 M.R.S. § 9063(1). Accordingly, "[u]pon the filing in good faith by a party of a timely charge of bias or of personal or financial interest, direct or indirect, of a presiding officer . . . requesting that that person disqualify h[er]self, that person shall determine the matter as a part of the record." *Id.* The Secretary was not biased, and she conducted an impartial hearing in this matter.

Mr. Trump's first bias claim was raised in a Motion that he filed on December 27, 2023, the day before the Secretary issued her decision. Mr. Trump claims that the Secretary erred as a matter of law in denying his belated request that she disqualify herself. The Secretary's denial of the request was appropriate for two reasons.

First, Mr. Trump's request was plainly untimely under Section 9063(1). Each of the challenges in this case was filed by December 8, 2023—and reported in the press that day[3]—and Section 336 requires that such challenges be adjudicated by the Secretary. *See* 21-A M.R.S. § 336(3) ("If, pursuant to the challenge procedures in section 337, any part of the declaration is found to be false by the Secretary of State . . . ."). Mr. Trump's representatives likewise received the Notice of Hearing identifying the Secretary as the presiding officer on December 11, 2023. R 311. Mr. Trump therefore had ample time to research the Secretary's social media presence, and to locate the three public tweets that form the basis of his request, prior to the December 15, 2023 hearing.

The lateness of Mr. Trump's request is meaningful because, had he raised his concerns prior to or even at the start of the hearing, the Secretary could have addressed them on the record, or taken whatever remedial action may have been necessary. Instead, Mr. Trump waited, at minimum, sixteen days after learning of the Secretary's involvement before seeking her disqualification. At that point, briefing was long complete, and the Secretary's ruling was imminent. Indeed, the Secretary did not wait for a response from any challengers before issuing her ruling the next day.[4]

Second, the Secretary could not have disqualified herself by operation of the rule of necessity. Under Section 336(3), she is the sole public official with authority to decide whether, pursuant to a Section 337 challenge, any part of a Section 336(1) declaration is false. *See*

---

[3] *See, e.g.*, "Maine secretary of state receives 3 challenges to Trump appearing on primary ballot," Portland Press Herald, (Dec. 8, 2023, available at https://www.pressherald.com/2023/12/08/maine-secretary-of-state-receives-three-challenges-to-trump-appearing-on-primary-ballot/

[4] The Secretary has since learned that the Rosen Challengers and Ms. Royal attempted to file responses to Mr. Trump's request. Given that she did not receive those responses prior to issuing her ruling, they are not included in the administrative record.

Northeast Occupational Exch., Inc. v. Bureau of Rehab., 473 A.2d 406, 410-11 (Me. 1984) (where only one agency official was empowered to hear the appeal at issue, he could not disqualify himself due to the "rule of necessity"). Moreover, even assuming the authority to issue a ruling could have been delegated to a member of the Secretary's staff, the untimely nature of Mr. Trump's motion meant that "no competent alternate body [was] available to hear the appeal." *Id.* at 410. It was too late, given the strict deadlines of Section 337 and upcoming ballot deadlines, to hold another hearing with a different presiding officer.

Mr. Trump's second bias claim is his contention that the Secretary's ruling is "[a]ffected by bias." 5 M.R.S. § 11007. This claim is also meritless.

The well-established presumption is that "fact-finders, as state administrators, act[] in good faith." *Friends of Maine's Mtns. v. Bd. of Env. Prot.*, 2013 ME 25, ¶ 23, 61 A.3d 689. A party claiming bias must overcome that presumption by offering "proof to demonstrate an actual risk of bias or prejudgment in the form of a conflict of interest or some other form or partiality." *North Atlantic Secs. v. Off. of Secs.*, 2014 ME 67, ¶ 40, 92 A.3d 335. "A preconceived position on law, policy or legislative facts is not a ground for disqualification." *New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 448 A.2d 272, 280 (Me. 1981). Rather, the risk of bias must be "intolerable" and, in effect, deny a party's right to due process. *See Wolfram v. Town of North Haven*, 2017 ME 114, ¶ 20, 163 A.3d 835. Notably, this is precisely the same high standard used in federal courts, including in the case cited by Mr. Trump. *See Rippo v. Baker*, 580 U.S. 285, 287 (2017) (describing standard as "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable").

Three tweets by the Secretary, the latest from nearly two years ago, do not suggest that the Secretary's ruling here was in any way affected by bias. As to the two tweets in which she used the term "insurrection," it was common parlance at the time. Members of both parties

referred to January 6 as such,[5] and it was how the news media described what transpired. *See* R 826 (tweet from Maine Public). Furthermore, neither of the "insurrection" tweets suggest that the Secretary prejudged the specific issue in this case, namely whether the events of January 6, 2021, constitute an insurrection based on that term's meaning in Section Three of the Fourteenth Amendment.

The Secretary's reference to Mr. Trump's impeachment likewise is not indicative of bias or prejudgment.[6] The impeachment proceedings, which concerned whether Mr. Trump had committed "high crimes or misdemeanors," U.S. Const. art. II § 4, bear no connection to the Secretary's interpretation or application of Section Three of the Fourteenth Amendment. The Secretary's public indication that she believed Mr. Trump should have been impeached is not tantamount to her suggesting that she adjudged him disqualified from office by virtue of having engaged in insurrection. *Cf. Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 483, 493 (1976) (decisionmaker is not disqualified "simply because he has taken a position, even in public, on a policy issue related to the dispute"). Mr. Trump has cited no social media posts, statements, or other evidence that suggests otherwise.

This case is thus decidedly different than those on which Mr. Trump relies. For example, in *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970), while an appeal was pending before him, the Chairman of the Federal Trade Commission made a public speech in which he commented, and appeared to prejudge, the merits of the case. *Id.* at 589-90. Here, by contrast, Mr. Trump hangs his hat on a few social media posts from years before this case was filed, or even contemplated.

---

[5] *See, e.g.*, Sahil Kapur, "McConnell calls Jan. 6 a 'violent insurrection'; breaking with RNC," NBC News, Feb 8, 2022, https://www.nbcnews.com/news/amp/rcna15404.

[6] Mr. Trump also does not fairly characterize this tweet in his brief. The Secretary did not write that "history would not kindly treat those who disagreed with her." *Compare* Trump Br. 28 *with* R 825.

Granted, even if the social media posts were indicative of bias, Mr. Trump has also failed to explain how the proceeding has been "affected by bias." *See Wolfram*, 2017 ME 114, ¶ 21, 163 A.3d 835 (allegations of bias without articulation of effect on decision is insufficient). The Secretary's ruling was careful, considered, and unbiased, and she provided ample legal basis for each of her conclusions, as discussed below. *See* R 5 (noting decision was unbiased and based exclusively on the facts in the record).

The new evidence of alleged "bias" that Mr. Trump has attempted to add to the record under M.R. Civ. P. 80C(e) at the eleventh hour fares no better. Initially, Mr. Trump's Motion to Supplement is improper. Given the tight timelines in this case, and in response to counsel for Mr. Trump referencing the very evidence that Mr. Trump attached to his Motion, on Friday, January 5, 2024, the Court instructed counsel for Mr. Trump to provide any additional evidence of bias that he wished to add to the record to all parties prior to Monday, January 8, 2024. Counsel for Mr. Trump did not do so.

Further, motions under Rule 80C(e) are governed by 5 M.R.S. § 11006, but Mr. Trump makes no effort in his Motion to describe why the evidence should be admitted under that statute, nor is it clear how his "evidence" of alleged bias meets the standards set forth in Section 11006. The Motion should accordingly be denied.

The evidence that Mr. Trump seeks to add to the record is also not even remotely indicative of bias. Mr. Trump's specious claim that the Secretary had a "personal and professional relationship" with two Challengers, Mot. 1-2, consists of no more than an allegation that Secretary Bellows and Challenger Ethan Strimling were professional colleagues in or around 2016, and that Challenger Thomas Saviello stated on TV that he knows the Secretary personally.

Mr. Trump's citations to Wikipedia and a clearly outdated LinkedIn page notwithstanding, Mot. 3, Mr. Strimling and the Secretary were never colleagues at LearningWorks. Rather, the Secretary replaced him, on a temporary basis, in late 2015 when he was elected mayor of Portland.[7] It therefore makes sense that (1) both Mr. Strimling and the Secretary appear on the 2015 LearningWorks IRS Form 990, given that the Secretary took over from Mr. Strimling at the end of that year, and (2) Mr. Strimling's name does not appear on the 2016 LearningWorks IRS Form 990, and the Secretary's replacement, Heather Davis, is listed on it. *See* Mot. Exs. 6-7.

More importantly, the fact that eight years ago the Secretary briefly worked for a company that one of the Challengers had also worked for, and that another challenger made a comment about knowing the Secretary personally when defending her decision, *see* Mot. 4 & n.8, is simply not evidence of bias. Mr. Trump offers neither explanation nor evidence of the nature of the "close relationships" that he alleges, Trump Br. 26, nor even an indication as to the last time—beyond the hearing in this case—that the Secretary and the two Challengers at issue interacted.

As Senator Angus King has frequently observed, "Maine is just one big small town connected by long roads,"[8] and nearly everyone in public life knows, or has worked with, one

---

[7] *See* "Shenna Bellows to take temporary post as director of Learning Works," Portland Press Herald, Dec. 14, 2015, https://www.pressherald.com/2015/12/14/bellows-to-take-temporary-post-as-director-of-learning-works/ (noting the Secretary would temporarily serve as executive director for the "the education nonprofit that Portland Mayor Ethan Strimling led for 18 years" while the nonprofit looked for a permanent replacement); David Harry, "New Council rules will accompany Strimling in transition to Portland Mayor," Portland Forecaster, Nov. 30, 2015, https://www.pressherald.com /2015/11/30/new-council-rules-will-accompany-strimling-in-transition-to-portland-mayor/ ("Incoming Mayor Ethan Strimling on Monday said his imminent departure as executive director of Learning Works will not come easily. 'It is obviously bittersweet . . . . It will be hard to walk out that door and give back the key.'").

[8] Sen. Angus King, "U.S. Sen. Angus King: A congressional session Maine can be proud of," Seacoast online, Dec. 21, 2022, https://www.seacoastonline.com/story/opinion/columns/2022/12/21/u-s-sen-angus-king-a-congressional-session-maine-can-be-proud-of/69744235007/

another. The fact that the Secretary is to some extent familiar with two of the Challengers—a fact that no law requires be disclosed, and that no rule of reason suggests should be—therefore does not indicate that she prejudged the issues in this case, or that bias otherwise affected the proceeding. *See Samsara Mem. Trust v. Kelly, Remmel & Zimmerman*, 2014 ME 107, ¶¶ 23-41, 102 A.3d 757 (rejecting untimely claim that trial judge was biased due to friendship with a former judge who was at the time of decision an attorney at the firm representing one of the parties); *cf. Cutler Co. v. State Purchasing Agent*, 472 A.2d 913, 918 (Me. 1984) (assertion of social relationship does not constitute a sufficient showing of prejudice to entitle taking of additional evidence under Rule 80C).

B. The Proceedings Before the Secretary Afforded Due Process to Mr. Trump.

Mr. Trump's due process claim is a substantial expansion of a generalized objection that he levied before the Secretary. At the hearing, Mr. Trump briefly argued that "to adjudicate in the challengers' favor would be a fundamental due process violation . . .. because the process due is wholly inadequate for the adjudication of these complex factual and constitutional issues." R 68 (transcript). Likewise, in his evidentiary objections brief, Mr. Trump claimed in an opening paragraph that he did not have "meaningful time" to review the evidence in advance of the hearing, and "did not have adequate time to develop and present rebuttal evidence." R. 488.

Under Maine and federal law, procedural due process requires "fundamental fairness," which entails consideration of (1) the private interest affected by the official action; (2) the risk of erroneous deprivation and the probable value of additional or substitute safeguards; and (3) the Government's interest, including the function involved and administrative burdens the additional or substitute requirements would entail. *Alliance for Retired Americans v. Sec'y of State*, 2020 ME 123, ¶ 30, 240 A.3d 45; *accord Matthews v. Eldridge*, 424 U.S. 319, 335

(1976). The APA likewise requires that all parties be granted the opportunity to "present evidence and arguments on all issues, and at any hearing to call and examine witnesses and to make oral cross-examination of any person present and testifying." 5 M.R.S. § 9056(2).

While Mr. Trump no doubt has an interest—although not an absolute one, *see Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997); *see also Casey v. Town of Yarmouth*, 514 F. Supp. 3d 306, 319 (D. Me. 2021) ("It is well-established that [c]andicacy does not rise to the level of a fundamental right'" (quoting *Torres-Torres v. Puerto Rico*, 353 F.3d 79, 83 (1st Cir. 2023) (per curiam)))—in appearing on the primary ballot, the State's interest in expedience is of the utmost importance. As the Law Court has recognized, the Secretary's responsibility "to facilitate an equitable and orderly election," which includes enough time to fulfill her statutory obligations, is significant. *Alliance for Retired Americans*, 2020 ME 123 ¶ 19, 240 A.3d 45; *see also Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."); *Lindsay v. Bowen*, 750 F.3d 1061, 1065 (9th Cir. 2014) (state has a compelling interest in "protecting the integrity of the election process and avoiding voter confusion").

The deadlines set forth in Section 337 serve this purpose, in that they ensure that disputes regarding candidate qualifications are resolved in a timely fashion. The sooner that Mr. Trump's qualification for office is settled, the fewer voters who risk voting for a candidate who is unqualified, or who decide to vote for an alternate candidate given the potential of disqualification. In other words, time is of the essence, and the statute is therefore designed to move quickly by necessity. *See Anderson*, 2023 CO 63, ¶ 81 (noting election challenges move quickly given elections "trigger a cascade of deadlines under both state and federal law that cannot accommodate protracted litigation schedules, particularly when the dispute concerns a

candidate's access to the ballot"); *cf.* 21-A M.R.S. § 7 (making clear that Section 337's timeframes are mandatory).

Mr. Trump's due process claim turns on balancing these competing interests in the context of the protections provided to him—the second due process criterion. It is here where his argument falls short. At no point, prior to the hearing, at the hearing, or in his briefs has Mr. Trump asked for even an iota of additional process. He did not seek a continuance of the hearing, despite the Rosen Challengers noting its availability. *See* R 58 (transcript). He did not request that the record be kept open for the submission of rebuttal evidence. He did not argue that a heightened evidentiary standard should apply to the Secretary's ruling given the interests involved. He did not even seek an extension of the briefing schedule set by the Secretary.

Mr. Trump has also not explained how the expedited nature of the proceedings has had any effect on his defense. He is represented by five attorneys in this matter, but none has identified any document or witness that he would have introduced but for the timeline the case followed.[9] Mr. Trump has failed to do so despite the fact that Mr. Trump's lead counsel in this case is also Mr. Trump's attorney in *Anderson*, which involves a largely similar evidentiary record and overlapping legal issues. Mr. Trump and his legal team accordingly had ample time and opportunity to mount a defense. They simply chose only to argue the law.

Nonetheless, and without prompting from the parties, the Secretary made ample additional accommodations given the timeframes set forth in Section 337. She directed that exhibit and witness lists be shared prior to the hearing. She permitted Mr. Trump to use counsel not licensed in Maine. She ensured that all parties had copies of the evidence by the end of the

[9] Mr. Trump referenced a series of exhibits in his evidentiary objections brief, but he did not ask that they be admitted, did not attach them to the brief, and even numbered them improperly.

in-person hearing and afforded them three days to review that evidence and submit written evidentiary objections. She gave the parties four days to file written closing statements. She permitted the parties to file an additional brief addressing the significance of the Colorado Supreme Court's decision in *Anderson*. And, despite the press of time, the Secretary issued a comprehensive 34-page order addressing the full gamut of legal and factual issues in the case, and suspended the effect of her ruling pending appeal. *See Amsden v. Moran*, 904 F.2d 748, 755 (1st Cir. 1990) (directing consideration of procedural safeguards, including remedies for erroneous deprivations, built into administrative procedures when analyzing due process claims).[10]

In sum, the Secretary's ruling should not be vacated simply because Mr. Trump voluntarily chose not to offer an evidence-based rebuttal case.

C. The Application of Section Three of the Fourteenth Amendment Is Not a Political Question Outside State Authority.

Mr. Trump's "political question doctrine" argument is new before this Court. In his closing brief before the Secretary, Mr. Trump argued that only the Electoral College and Congress have "the power to determine whether a person may serve as president," and noted in passing that two courts had declined to rule on presidential qualifications because they were "non-justiciable political questions," his argument was one of the Secretary's *authority*, not of *justiciability*. *See* R. 570-72.[11] Mr. Trump's political question doctrine claim is, accordingly, waived.

---

[10] While Mr. Trump makes hay of the fact that the Secretary issued her decision thirteen days after the hearing—a period that included the Christmas holiday—it is notable that unlike counsel for Mr. Trump, the Secretary had little familiarity with the facts or legal issues in this case, and received six briefs and a motion to disqualify over those thirteen days. *See* Trump Br. 33-34.

[11] Mr. Trump, for example, did not cite the governing standard for political question doctrine cases in his closing brief before the Secretary, nor did he even mention *Baker v. Carr*, 369 U.S. 186, 217 (1962), the seminal case on the issue.

Additionally, the political question doctrine is traditionally applied in *federal* court. Its application in Maine state courts, never mind to Maine state administrative agencies, where the doctrine's underlying federal separation of powers rationale does not apply, *Baker v. Carr*, 369 U.S. 186, 217 (1962), is not well-established.[12] At the very least, it is unclear how the doctrine limits the scope of administrative agency proceedings, if at all. *See* 5 M.R.S. § 11003; *cf. Wright v. Dep't of Defense & Veterans Servs.*, 623 A.2d 1283, 1284-85 (Me. 1993) (describing political question doctrine as matter of justiciability).

That said, the political question doctrine does not bar the Secretary from adjudicating a candidate's qualification for office under Section Three of the Fourteenth Amendment. Nor does it bar the Court from adjudicating this Rule 80C appeal. Mr. Trump relies on a single basis for asserting non-justiciability, namely that there is a textually demonstrable commitment of the interpretation and enforcement of Section Three of the Fourteenth Amendment to Congress. *Baker*, 369 U.S. at 217.[13] To render a case non-justiciable, the textual commitment—which is distinct from authorization of Congressional action, *see Stillman v. Dep't of Def.*, 209 F. Supp. 2d 185, 202 (D.D.C. 2002), *rev'd on other grounds sub nom. Stillman v. C.I.A.*, 319 F.3d 546 (D.C. Cir. 2003)—must be "[p]rominent on the surface of [the]

---

[12] The Court in *Sawyer v. the Legislative Council*, Case No. CV-04-97, 2005 WL 2723817 (Me. Sup. Ct. Mar. 16, 2005), based on considerations of separation of powers under the Maine Constitution, found the question at issue to be justiciable. *Id.* at *4. The Court in *Maine Senate v. Secretary of State*, 2018 ME 52, 183 A.3d 7429, despite Mr. Trump's representation to the contrary, *see* Trump Br. 36 n. 72, did not reach a reported question concerning the political question doctrine at all. *See Me. Senate*, 2018 ME 52, ¶¶ 13, 32 (concluding question was moot).

[13] Mr. Trump briefly references *Baker* again later in his brief, claiming that the Secretary cannot second guess the President's decision not to call in the National Guard on January 6. *See* Trump Br. 66-67. The Secretary's conclusion in this case, as discussed below, is based primarily on Mr. Trump's affirmative actions and statements. She did not draw a legal conclusion about his failure to act. Rather, his response to the attack was an evidentiary basis for concluding that Mr. Trump acted with knowledge and intent.

case," *Baker*, 369 U.S. at 217. That textual commitment is plainly absent here, just as the Court in *Anderson* concluded. *See Anderson*, 2023 CO 63, ¶¶ 112-21.

As the Secretary made clear in her ruling, it is well-established that states have authority to enforce the qualifications for office set forth in the U.S. Constitution. *See, e.g., Anderson*, 2023 CO 63, ¶¶ 53-56; *see also Lindsay v. Bowen*, 750 F.3d 1061, 1065 (9th Cir. 2022) (excluding age-ineligible candidate for president because "a state has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies" (quoting *Bullock v. Carter*, 405 U.S. 134, 145 (1972))); *Hassan v. Colorado*, 495 F. App'x 947, at *1 (10th Cir. 2012) (Gorsuch, C.J.) ("[A] state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office."); *Socialist Workers Party of Ill. v. Ogilvie*, 357 F. Supp. 109, 113 (N.D. Ill. 1972) (holding state was not obligated to place presidential candidate on the ballot who did not meet age requirement). That authority is evident both in Article I, Section Four, which permits states to regulate the "Times, Places, and Manner" of congressional elections, *see Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[T]he States have evolved comprehensive election codes regulating . . . . [t]he selection and qualification of candidates."), and, more specifically, in Article II, Section One's direction that states regulate the process for selecting presidential electors, *see Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020) (acknowledging states' "far-reaching authority over presidential electors"); *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) ("[T]he appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States."); *accord Anderson*, 2023 CO 63, ¶¶ 50-53.

Mr. Trump's claim that responsibility for enforcing qualifications is textually committed to Congress stands in stark contrast to these provisions, and to the very text of the

Fourteenth Amendment. While Congress can remove the disability imposed by Section Three at its discretion, *see* U.S. Const., amend. XIV, § 3,[14] nowhere does Section Three suggest that only Congress can *enforce* the associated qualification. Likewise, while Section Five of the Fourteenth Amendment authorizes Congress to pass enforcement legislation, *see* U.S. Const. amend. XIV, § 5, it does not purport to limit determinations of candidate qualification to Congress. *See Anderson*, 2023 CO 63, ¶ 118. Consistent with this fact, and as discussed further below, states and the military have, in practice, enforced Section Three. *See* R 185, 197-98 (testimony of Professor Magliocca); *see generally Anderson*, 2023 CO 63; *New Mexico ex rel. White v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at *16 (N.M. Dist. Ct. Sept. 6, 2022); *Worthy v. Barrett*, 63 N.C. 199, 202 (1869); *In re Tate*, 63 N.C. 308, 308 (1869); *Louisiana ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 632 (1869).

The other provisions of the Constitution cited by Mr. Trump do not suggest otherwise. The Twentieth Amendment applies post-election; it provides instruction on how to handle a circumstance in which a President-elect is not qualified. It does not, however, purport to limit who may assess qualifications in the first instance. *See* U.S. Const. amend XX, § 3; *see also Anderson*, 2023 CO 63, ¶ 119. Likewise, neither Article II nor the Twelfth Amendment direct that only Congress may determine the eligibility of candidates, *see* U.S. Const. Art. II, § 1, cl. 5; *id.* amend. XII; *see also Anderson*, 2023 CO 63, ¶¶ 116-17, and the fact that they "prescribe

[14] Section Three does not limit Congress's authority to waive Section Three's bar to the eve of that candidate taking office, either. Rather, a candidate who is not qualified for the office of the president may, by Congressional action, be rendered qualified at any time, and thereby become eligible for the ballot in states like Maine. Similarly, as contemplated in the cases that Mr. Trump cites, *see* Trump Br. 53 & n. 123, if another state, by operation of its laws, permits an unqualified candidate on its ballot, Congress may remove the disability following election, permitting that individual to take office.

a role for Congress" does not render that role exclusive, *see* Trump Br. 37. Indeed, as described above, the Constitution "prescribes a role" for the states, too.[15]

Mr. Trump also cites prudential concerns about the "absurd[ity]" of individual states making their own qualification determinations on a matter of national importance. *See* Trump Br. 40-42. But the fact that the case has political implications is not a basis for deeming the Secretary's ruling *ultra vires*. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195-96 (2012). The Secretary agrees that guidance from the Supreme Court on the meaning and scope of Section Three of the Fourteenth Amendment would be helpful to avoiding divergence between individual states. But the lack of guidance thus far does not somehow strip individual states of their well-established control over their ballots, and authority to keep unqualified candidates—according to the qualifications set forth in the U.S. Constitution—from appearing.

D. Section Three of the Fourteenth Amendment Is Self-Executing, Enforceable By the States, and Applies to the President.

1. The Fourteenth Amendment Is Self-Executing and Enforceable by the States

The Secretary's conclusion that Section Three of the Fourteenth Amendment is self-executing is sound. It reflects a clear-headed consideration of the Constitutional text and contemporaneous legal history.

The Supreme Court has described the Fourteenth Amendment as "undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing set of circumstances." *The Civil Rights Cases*, 109 U.S. 3, 20 (1883). Other courts have likewise

---

[15] The Court in *Anderson* found the set of cases that Mr. Trump cites here, *see* Trump Br. 39 n.82, unpersuasive because they are either based on the same flawed reasoning that Mr. Trump presses in his brief, or on the fact that the cases had political implications, *see Anderson*, 2020 CO 63, ¶ 120. The Michigan decision in *LaBrant v. Benson*, Case No. 23-000137-MZ at 10-20 (Mich. Ct. Cl. Nov. 14, 2023), cited by Mr. Trump, relies on the New Hampshire decision in *Castro v. New Hampshire Secretary of State*, Case No. 23-cv-416-JL (D.N.H. Oct. 27, 2023) *aff'd on other grounds* -- F.4th --, 2023 WL 8078010 (1st Cir. Nov. 21, 2023), which in turn relies on these aforementioned cases. *See* Trump. Br. Ex. B.

assumed or explicitly concluded, both around the time of the amendment's adoption and today, that Section Three is enforceable without authorizing legislation. *See Anderson*, 2023 CO 63, ¶ 88-106; *Griffin*, 2022 WL 4295619, at *16; *Worthy*, 63 N.C. at 202; *In re Tate*, 63 N.C. at 308; *Watkins*, 21 La. Ann. at 632; *State ex rel. Downes v. Towne*, 21 La. Ann. 490 (1869). Section Three thus fits neatly alongside other self-executing provisions of the Constitution, including the similarly-worded Section One of the Fourteenth Amendment, *see City of Boerne v. Flores*, 521 U.S. 507, 524 (1997); *see also* Cong. Globe, 39th Cong. 1st Sess., 1095, 2459, 2498; the Thirteenth Amendment—which, like the Fourteenth Amendment, authorizes Congressional enforcement legislation, *see* U.S. Const. amend XIII, § 2; *The Civil Rights Cases*, 109 U.S. at 20, and the qualifications of Article II.

As Professor Magliocca testified, Section Three was understood to be self-executing by contemporaries at the time, too. Without Congressional action, it was enforced by "various bodies . . . individual Houses of Congress, state officials, state courts, [and] the Union Army." R 197 (testimony of Professor Magliocca); *accord* R 185, 198-99, 232 (discussing common understanding at the time of adoption). Congress, too, began granting amnesties pursuant to its authority under Section Three, which only was necessary because Section Three had, on its own, already taken effect. *See* R 187, 234 (testimony of Professor Magliocca) (noting amnesties were granted widely before federal enforcement legislation was passed). Thus, while Congress did eventually pass enforcement legislation that was in place until the 1940s, *see* Trump Br. 45—legislation that did not purport to strip from the states their ability to enforce Section Three themselves—it does not follow that absent that legislation, the qualification had no legal import, or that states could not enforce it.

Griffin's Case, issued by Chief Justice Chase when sitting as a Circuit Justice, does not modify this clear picture. It is not binding in Maine or nationally, has been widely criticized,

and has not been cited since, at least not with any supporting analysis, for the proposition that Section Three is not self-executing. *See, e.g., Anderson*, 2023 CO 63, ¶ 103; Gerard N. Magliocca, Amnesty and Section Three of the Fourteenth Amendment, 36 Const. Comment. 87, 105-08 (2021).[16]

Mr. Trump's claim that the Fourteenth Amendment only bars individuals from *holding* office, such that it cannot possibly permit state enforcement action, does not change the calculus, either. *See* Trump Br. 52-55. The Article II qualifications are, like Section Three, framed in terms of holding office, rather than running for office. *See* U.S. Const. art. II, § 1, cl. 5. And, as described above, caselaw makes plain that states may keep candidates off the ballot who are constitutionally prohibited from *holding* office. *See Bowen* 750 F.3d at 1065; *Hassan*, 495 F. App'x 947, at *1.[17]

2. Section Three Applies to the Presidency

The Secretary also correctly concluded that Section Three of the Fourteenth Amendment applies to the presidency, i.e., that the presidency is an "office . . . under the United States," and that the President is an "officer of the United States." *See* U.S. Const. amend.

[16] Mr. Trump's repeated references to Section 1983 in this context are entirely beside the point. *See* Trump Br. 43-44. Section 1983 may be the only way of seeking redress for *violations* of the Fourteenth Amendment in *federal* court. But it does not displace state remedies. *See, e.g., Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 177 (2023) (noting Section 1983 is "supplementary to any remedy any State may have" (quoting *Owens v. Okure*, 488 U.S. 235, 248 (1989)). Moreover, this case does not concern a violation of Section Three, nor could it, as Mr. Trump is not currently president. Rather, this case concerns the qualification for office identified in Section Three, which the Maine Legislature has a created a mechanism to enforce.

[17] The Ninth Circuit's decision in *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000), which Mr. Trump cites in this context, *see* Trump Br. 54, concerns an unconstitutional modification to the Qualifications Clause, U.S. Const. art. I, § 2, cl. 2, which specifically only requires that a candidate be an inhabitant of the state when elected. *Id.* at 1034, 1039. It does not address qualifications for *holding* office.

XIV, § 3.[18] When faced with constitutional provisions susceptible of multiple interpretations, it is reasonable to consider "the textual, structural, and historical evidence put forward by the parties." *Zivotofsky*, 566 U.S. at 201. This is precisely the basis on which the Secretary based her reading of Section Three.

The U.S. Constitution repeatedly refers to the presidency as an office. *See* U.S. Const. art. I, § 3, cl. 5 ("Office of President"); *id.* art. II, § 1, cl. 5 ("Office of President" and President will "hold his Office"); *id.* amends. XII, XXII, XXV; *see also Anderson*, 2023 CO 63, ¶ 133 (noting Constitution refers to the presidency as an office 25 times); *cf. Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) (referring to the President as "the chief constitutional officer of the Executive Branch"). Other provisions of the Constitution that refer to officers—including those on which Mr. Trump relies, *see* Trump Br. 49, 51—would likewise make little sense if they excluded the president. *See id.* art. I, § 3, cl. 7 (permitting Congress to disqualify those impeached from holding any office); *id.* art. I, § 6, cl. 2 (barring holders of "any Office under the United States" from also being a Member of Congress).[19] By contrast, the three identified positions in Section Three—Senators, Representatives and Electors—are not referred to in the Constitution, or elsewhere, as officers. *See, e.g., id.* art. I, § 5, cl. 1 (referring to "[m]embers" of Senate and House); *id.* art. I, § 6, cl. 2 (same); *id.* art. II, § 1, cl. 2 (distinguishing Senators and Representatives from those holding office under the United States); *id.* art. I, § 6, cl. 2

[18] While Mr. Trump separates these inquiries, the arguments concerning them are largely the same, such that the Secretary has consolidated them for brevity.

[19] That two provisions of the constitution omit the word "other" when defining the President's powers over officers of the United States, or when making clear that the President is subject to impeachment, does not dictate a conclusion that the President is not, himself, an officer. *See* Trump Br. 50-51. Indeed, the Impeachment Clause itself refers to removal of the President "from Office." U.S. Const. art. II, § 4.

(same);[20] *see also Fitzgerald v. Green*, 134 U.S. 377, 379 (1890) (referring to electors as "no more officers or agents of the United States than are . . . the people of the States when acting as electors of representatives in congress").[21]

Professor Magliocca testified that members of Congress and commentators at the time Section Three was adopted also believed the presidency was an office, particularly given the general desire to keep Jefferson Davis and other leading confederates from ever assuming the presidency. R 192, 195-96 (testimony of Professor Magliocca). Maine's own Lot Morrill, for example, in response to a concern levied in the ratification debates about Section Three not covering the presidency and vice presidency, assured his colleagues that Section Three did not leave such a gaping loophole, but rather that the presidency was an "office, civil or military, under the United States." Cong. Globe, 39th Cong., 1st Sess. 2899 (exchange between Senator Johnson and Senator Morrill); *see also* R 191-92 (testimony of Professor Magliocca). This understanding is likewise reflected in then-U.S. Attorney General Stanbury's description of the term "office" as general and without qualification. *See* 12 U.S. Op. Att'y Gen. 182, 203, 1876

---

[20] While the Constitution refers to leadership positions in the House and Senate as offices, it does not similarly refer to the elected positions of Representative or Senator. *See* U.S. Const. art. I, § 2, cl. 5 ("The House of Representatives shall chuse their Speaker and other Officers . . .").

[21] The drafters of Section Three debated at length whether members of Congress were officers. *See* Cong. Globe, 39th Cong., 1st Sess., 3939-40. At the very least, the existence of doubt explains why they would be identified, in particular, in Section Three.

Additionally, Mr. Trump's citation to *U.S. Term Limits v. Thornton, Inc.*, 514 U.S. 779 (1995), is unpersuasive. While Mr. Trump calls it a matter of "binding precedent," Trump Br. 48, the decision simply indicates, in dicta in a footnote and without explanation, that "the [c]lauses" above the line reflect the idea that the Constitution treats both the President and Members of Congress as federal officers. 514 U.S. at 805 n.17. But neither of the clauses above the line actually use the term "officers" to refer to Members of Congress, nor does *U.S. Term Limits* purport to interpret Section Three of the Fourteenth Amendment.

WL 2127 (1867); 12 U.S. Op. Att'y Gen. 141, 158 (1867); *accord* R 195-96 (testimony of Professor Magliocca).[22]

No other interpretation of Section Three makes contextual sense. Given that it was adopted to keep confederates from taking power in state and federal government, *see* Cong. Globe, 39th Cong., 1st Sess., 2505 (drafter of Section Three noting that his proposal would ensure "the loyal alone shall rule the country which they alone have saved" and that traitors would be "cut[] off . . . from all political power in the nation."); *see also* R 184 (testimony of Professor Magliocca) (describing historical intent of Section Three), exempting the most powerful office from Section Three's reach would be exceedingly illogical. *See* Trump Br. 47 (referring to the presidency as among "the most important Constitutional offices). There is no need to assign such irrational intent to its adopters.

Mr. Trump's citation to an early draft of Section Three that referred to the "office of President or Vice President," Cong. Globe, 39th Cong., 1st Sess. 919, does not suggest that the Secretary's determination is erroneous. Trump Br. 47-48; *see District of Columbia v. Heller*, 554 U.S. 570, 590 (2008) ("[I]t is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process."). If anything, it demonstrates that Section Three's drafters intended it to cover the Presidency. There is no language in the Congressional record suggesting that "President" was omitted after the early draft because of a desire to exempt the presidency, and the catchall language in that early draft—"or any office now held or appointment from the President of the United States, and requiring confirmation

[22] Mr. Trump's response to this extensive history is two citations to amicus briefs filed in *Anderson*. *See* Trump Br. 47 n.107, 50 n. 115. These citations are no substitute for argument, and they should not be considered because (1) the amicus briefs are not part of the administrative record, and (2) they were not submitted as amicus briefs in this case, and if they were, they would have been limited to three pages. *See* Procedural Order (Jan. 5, 2024). Mr. Trump should not be permitted to lengthen his brief by incorporating others by reference.

of the Senate"—was substantially broadened to "any office, civil or military, under the United States" in the adopted version of Section Three. *Compare* Cong. Globe, 39th Cong., 1st Sess. 919 *with* U.S. Const. amend. XIV, § 3.

Mr. Trump's reliance on differences between the President's oath and that of other federal officers is a red herring. *See* Trump Br. 50. The Article II oath requires the President to "preserve, protect and defend the Constitution," U.S. Const. art. II, § 8, while Article VI requires that other officers take a nonspecific oath to "support this Constitution," *id.* art. IV, cl. 3. These requirements are identical. *See, e.g.,* Cong. Globe, 39th Cong., 1st Sess. App'x, 234 (statements of Kentucky Senator Garrett Davis referencing both oaths in listing constitutional protections against insurrection); *accord* R 184, 196-97 (testimony of Professor Magliocca) (noting the oaths were considered equivalent). To preserve, protect, and defend the Constitution is, necessarily, to support it. *See Anderson*, 2023 CO 63, ¶¶ 156-58; *see also* R 333 (Amicus Brief of Mark A. Graber). It is that pledge to the Constitution that is broken when an officeholder engages in insurrection against it, i.e., by preventing core Constitutional processes like the certification of election results.

E. The Secretary Has Authority to Adjudicate Ballot Qualification Challenges Under Section 337, Including Whether Mr. Trump Is Qualified Under Section Three of the Fourteenth Amendment.

One of Mr. Trump's central arguments is that the Secretary lacked authority under state law to issue the ruling under review. Title 21-A provided the Secretary with the requisite authority in this case, as the Secretary explained in her decision in detail. R 11-18.

Preliminarily, Mr. Trump challenges the Secretary's authority on two grounds. *First*, he argues that the Secretary cannot adjudicate candidate qualifications because the "declaration of the candidate's place of residence and party designation" is distinct from the "statement that the candidate meets the qualifications of the office" under Section 336(3). Trump Br. 7-9.

Second, Mr. Trump argues that his candidate consent form listed only the Article II qualifications for office, and the declaration to which he swore referred only to those qualifications, such that it was truthful. Trump Br. 12-22. The Secretary correctly rejected each of these contentions.

As to the first, as noted above, the Secretary is entitled to "great deference" in her interpretation of statutes that she is charged with administering, including Section 336. *Town of Eagle Lake,* 2003 ME 37, ¶¶ 7–8, 818 A.2d 1034. Here, the Secretary rationally concluded that the declaration and statement identified in Section 336(3) are identical in the sense that falsehoods as to either invalidate the corresponding primary petition. *See Carey v. Sec'y of State,* No. CV-2022-09, at 2-3 (Me. Super. Ct., Oxf. Cty., May 10, 2022) (affirming decision to exclude candidate for District Attorney from primary ballot in part because he was not qualified for that position).

The Secretary's interpretation of the statute is correct. Mr. Trump has identified no portion of the legislative history that elucidates a distinction between the declaration and statement, and Section 336(3) on its face treats both the same way, in that both must be "verif[ied] by oath or affirmation." 21-A M.R.S. § 336(3). By requiring a candidate to provide a statement of qualification on the candidate consent form, and to swear to its truthfulness, it stands to reason that the Maine Legislature was interested not simply in an unenforceable statement, but rather in a binding promise that the candidate's qualifications complied with the U.S. Constitution.

Additionally, as the Secretary noted in her ruling, R 14, Section 355, which incorporates analogous requirements for nomination petitions of non-party candidates, supports her interpretation. While Mr. Trump appears to misinterpret the provision, *see* Trump Br. 11-12, Section 355(3) plainly collapses any distinction between a "declaration" and "statement"

entirely, and instead requires a declaration that includes an assurance "that the candidate meets the qualifications of the office the candidate seeks." 21-A M.R.S. § 355(3). There is no principled basis for treating the statement of qualification differently for party candidates and non-party candidates.

That said, even if Section 336(3) were ambiguous, the Secretary's interpretation would be entitled to deference because, for the reasons identified, it is reasonable. *See Reed v. Sec'y of State*, 2020 ME 57, ¶ 18, 232 A.3d 202. That reasonableness is also evidenced by Mr. Trump's own inconsistent positions on the statute's meaning. At the in-person hearing, the Secretary asked whether she had authority "to invalidate a primary petition if the statement that the candidate meets the qualifications of the office that the candidate seeks is untrue." R 84 (transcript). Attorney Gessler, on behalf of Mr. Trump, responded, "[i]f it's admittedly untrue; likely, yes." *Id.* The Secretary then followed up, asking directly whether there was "any difference between the declaration and the statement" and whether "that distinction, if any, affect[s] [her] authority." R 85 (transcript). Attorney Gessler replied that "we don't think there's a distinction." *Id.* Only thereafter did Attorney Lawkowski take a contrary position. R 87 (transcript). Given that Mr. Trump's own attorneys have taken opposing positions on the meaning of Section 336(3), surely the statute is subject to reasonable interpretation by the Secretary.

As to Mr. Trump's second contention, that his declaration was truthful because only the Article II qualifications were listed on his candidate consent form, he misapprehends the scope of the Secretary's authority. Section 336 requires that the candidate consent form list the statutory and constitutional requirements of the office sought by the candidate. 21-A M.R.S. § 336(1). The declaration that is, in turn, required by Section 336(3) refers not to the form itself, but rather to the qualifications: the candidate must "verify by oath or affirmation" that

they "meet the qualifications of the office the candidate seeks." 21-A M.R.S. § 336(3); *accord Carey*, No. CV-2022-09, at 2. The Maine Legislature's principal concern was thus not whether a candidate meets the qualifications listed by the Secretary on the candidate consent form, but rather, more broadly, whether a candidate is qualified for the office sought.

It is entirely reasonable to hold a candidate to these qualifications, as their legal import does not hinge on them being listed on the candidate consent form. Were it otherwise, the Secretary could intentionally, or even accidentally, waive requirements of the U.S. Constitution when deciding whether a candidate has qualified for the ballot in Maine based simply on whether they are listed on the form. She has no authority to do so. *See Doane v. Dep't of Health & Hum. Servs.*, 2017 ME 193, ¶ 13, 170 A.3d 269 ("If a regulation conflicts with an existing statute, the statute controls.").

Mr. Trump cannot hide behind the wording of his declaration, either. *Cf. Forest Ecology Network v. Land Use Regulation Comm'n*, 2012 ME 36, ¶ 28, 39 A.3d 74 (when reviewing an agency's interpretation of its own rules, regulations, or procedures, reviewing courts "give considerable deference to the agency and will not set aside the agency's interpretation unless the regulation or rule compels a contrary interpretation" (quoting *Nelson v. Bayroot, LLC*, 2008 ME 91, ¶ 17, 953 A.2d 378)). The declaration requires that candidates swear that they "meet the qualifications to hold this office as listed above." R 293. As the Secretary reasoned, the phrase "as listed above"—which Section 336 does not require to appear on the candidate consent form—was meant to underscore that the Secretary is required by statute to *list* the qualifications on the form. But that list is not a substantive limitation on the declaration. Put another way, "as listed above" is a reference to parallelism, i.e., that the list on the form reflects the full of set of "statutory and constitutional requirements of the office sought." 21-A M.R.S. § 336(1). While an omission from the form here resulted in a lack of

parallelism—it does not list Section Three of the Fourteenth Amendment, or the Twenty-Second Amendment, both of which contain qualifications for office—that is an issue for a challenge to the sufficiency of the Secretary's candidate consent form under Section 336(1). It does not change the substantive requirements of the Constitution, or those of Section 336(3). And again, if the language of the declaration is ambiguous, the Court should defer to the Secretary's interpretation of her own form.

Beyond these two preliminary questions, and given that, as argued above, Section Three of the Fourteenth Amendment is self-executing, the authority granted by Title 21-A to the Secretary in this case is plain. There is no limitation in Sections 336, 337, or 443, express or implied, that suggests the Secretary's review authority is restricted to straightforward or uncontested questions, despite Mr. Trump's suggestion to the contrary. R 84 (transcript); Trump Br. 8-9. Signature disputes, *see, e.g., Dunn v. Bellows*, 2023 WL 8790421, No. AP-2307 (Me. Super., Ken. Cty., Mar. 7, 2023), allegations of fraud, *see, e.g., Boyer v. Dep't of the Sec'y of State*, Docket No. AP-18-20 (Me. Super., Ken. Cty., Apr. 26, 2018), and even questions of residency can present complex legal questions that are not amenable to easy answers. And there is nothing inherent about the position of the Secretary that forbids her from engaging with difficult legal or factual issues. *See e.g., Jortner v. Sec'y of State*, 2023 ME 25, 293 A.3d 405 (complex dispute involving wording of initiative petition); *Jones v. Sec'y of State*, 2020 ME 113, 238 A.3d 982 (complex dispute involving constitutionality of using out-of-state circulators).

This is likewise not an instance where the Secretary is *creating* a limitation on ballot access that does not otherwise exist. *See* Trump Br. 6 (citing *Arsenault v. Sec'y of State*, 2006 ME 111, 905 A.2d 285); *see also U.S. Term Limits v. Thornton, Inc.*, 514 U.S. 779, 787 n.2 (1997) (distinguishing application of "part of the text of the Constitution" from "adding

qualifications" to it). Rather, the statutes on their face require the Secretary to adjudicate challenges to candidate petitions, and where she finds that the declaration—including the statement of qualification—is false, the primary petition is void. *See* 21-A M.R.S. § 336(2)(D); *see also id.* § 443 ("The Secretary of State shall determine if a petition meets the requirements of section 335, 336, and 442, subject to challenge and appeal under section 337.").

True enough, the Maine Legislature may not have had Section Three of the Fourteenth Amendment at the top of its mind when fashioning the Section 336 and 337 process. But legislative intent cannot, and should not, be assessed on such a granular basis. Unanticipated circumstances frequently raise questions as to the meaning of statutes, and here the Maine Legislature, without restriction, directed the Secretary to adjudicate candidate qualifications when raised in petition validity challenges. She therefore had the requisite authority to issue her ruling.

F. The Secretary's Conclusion that Mr. Trump Engaged in Insurrection Is Amply Supported by the Record.

The factual basis for the Secretary's ruling is not seriously disputed by Mr. Trump. The evidence expressly cited by the Secretary, as well as the wide variety of additional documents and videos in the record, make clear that there was a violent attack on the Capitol on January 6, 2021, designed to prevent the certification of election results, *see* U.S. Const. art. II, § 1; *id.* amend. XII, and the peaceful transfer of power from Mr. Trump to President Biden. There is likewise no disagreement as to the statements that Mr. Trump made, on social media and in person, beginning a few months before the November 2020 election and continuing through the January 6 attack. Mr. Trump's principal defense instead consists of a single, two-pronged argument: that the Secretary did not adopt reasonable definitions of "insurrection" and

"engaged," and that the record does not demonstrate that Mr. Trump "engaged in insurrection" as so defined.

Before diving into the definitions of those terms, Mr. Trump's extensive discussion of the January 6 Report bears mention. The January 6 Report—*Final Report, Select Committee to Investigate the January 6th Attack on the United States Capitol*—is just one of many documents, videos, and other evidence in the record, a small part of the factual tapestry considered by the Secretary in this case. Nonetheless, it is the sole target of Mr. Trump's ire. He details a variety of criticisms over 29 pages, critiquing the composition of the Select Committee and the report's organization, methodology, and particular conclusions.

But it is notable what Mr. Trump fails to do, too.

First, Mr. Trump does not engage with the relevant evidentiary standard. Title 5, Section 9057 dictates the admissibility of evidence in administrative proceedings, a statute that Mr. Trump cites just twice. It sets forth a standard more permissive than the Maine Rules of Evidence, *see* 5 M.R.S. § 9057(1), and directs that "[e]vidence shall be admitted if it is the kind . . . upon which reasonable persons are accustomed to rely in the conduct of serious affairs," *id.* § 9057(2). This "relaxed evidentiary standard," *State v. Renfro*, 2017 ME 49, ¶ 10, 157 A.3d 775, affords the Secretary substantial latitude to decide what evidence to admit, and it generally favors admissibility.

Mr. Trump's arguments as to why the January 6 Report would be inadmissible under the federal and Maine rules of evidence are therefore largely meaningless.[23] Unlike under those rules, hearsay evidence is often admissible before an administrative agency, provided that it meets the relaxed Section 9057(2) standard. Mr. Trump's extensive discussion of the January 6 Report is therefore only relevant to the extent it supports his argument that the report is not "the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs."

Second, Mr. Trump makes no attempt to describe which facts the Secretary found that should be discredited by virtue of her reliance on the January 6 Report. The Secretary, to her credit, offered a nuanced response to Mr. Trump's objection to the report's admissibility. While she admitted the report, she noted that Mr. Trump's concerns were valid, and she expressly noted that those criticisms would influence the weight that she assigned to the report. R. 9.

This is an entirely rational approach. While Mr. Trump's longwinded and colorful attack on the January 6 Report as unduly politicized has a degree of legitimacy, it is based in part on the accounts of politicians and their press releases who had equal political motivation

---

[23] The January 6 Report, or portions thereof, may nevertheless meet the evidentiary standard in a court of law. Under the Federal Rules of Evidence, government investigative reports, including reports of Congress, are presumed admissible even if they contain hearsay, with the party challenging admissibility bearing the burden of showing the report is untrustworthy. *See* Fed. R. Evid. 803(8) & advisory committee's note to 2014 amendments; *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988); *Barry v. Trustees of Int'l Ass'n Full-Time Salaried Officers & Emps. of Outside Loc. Unions & Dist. Counsel's (Iron Workers) Pension Plan*, 467 F. Supp. 2d 91, 96 (D.D.C. 2006). Trustworthiness is assessed according to a non-exhaustive list of four factors: "(1) the timeliness of the investigation; (2) the special skill or expertise of the investigating official; (3) whether a hearing was held and the level at which it was conducted; and (4) possible motivation problems." *Barry*, 467 F. Supp. 2d at 97; *see also Beech Aircraft*, 488 U.S. at 167 n.11. The first three *Barry* factors plainly counsel in favor of admissibility. Mr. Trump's objections focus primarily on the fourth factor, namely the motivation of the authors. Yet assessing all these factors, the *Anderson* Court concluded that the trial court's admission of the January 6 Report did not constitute an abuse of discretion. *Anderson*, 2023 CO 63, ¶ 166-70.

to discredit the report. Further, as observed in *Anderson* and as argued by the Rosen Challengers before the Secretary, the composition of the Select Committee was in part a product of a Republican boycott. It ultimately included two Republicans; was supported by Republican staffers and Republican attorneys; and collected testimony from, largely, Republicans. R 530-33; *see also Anderson*, 2023 CO 63, ¶ 169.

Faced with these conflicting signals about the reliability of the report, the Secretary did what any reasonable person would do "in the conduct of serious affairs": she relied upon the report, but only for limited purposes, and with a healthy amount of skepticism. The Secretary ultimately cited the January 6 report only six times in her decision, and only for a selection of foundational facts. Specifically, she identified it as evidence for the propositions that (1) protestors were present to prevent certification of the election results (paired with other citations), R 26; (2) there were multiple permit requests for rallies, but none for a march to the Capitol, R 29; (3) far right militias interpreted Mr. Trump's tweets as a call to action, R 30; (4) Mr. Trump's Ellipse speech ended as the joint session of Congress began (paired with other citations), R 30; (5) Mr. Trump learned that the Capitol was under attack by 1:21 pm, R 31; and (6) Mr. Trump neither denounced the violence nor intervened to stop it, R 31.

Mr. Trump does not dispute any of these six facts. He has therefore failed to show any prejudice by virtue of the admission of the January 6 Report. And even if this Court rules that the Secretary erred in admitting the January 6 Report, the remaining evidence in the record remains more than adequate to permit the Secretary to conclude that Mr. Trump engaged in insurrection.

Mr. Trump also tries to use the January 6 Report as means of torpedoing much of the administrative record. He boldly claims, without any basis and for the first time, that "*all* documents statements, reports, and videos cited by or derivative of that report" should be

deemed inadmissible. Trump Br. 85. Even if the January 6 Report were entirely unreliable, and even if Mr. Trump's attempt to use this argument in this fashion were not waived, there is no line of reasoning that supports a conclusion that all evidence *cited* by the January 6 Report is unreliable. Nor does the fact that other sources cite the January 6 Report automatically render them unreliable, either. Mr. Trump should not be permitted to fashion a silver bullet from the January 6 Report when he has chosen not to even take aim at the other evidence in the record.

1. "Insurrection"

With respect to the meaning of "engaged in insurrection," there are not, as of this writing, widely-adopted definitions of those terms. The Secretary therefore appropriately relied on the historical evidence and testimony before her in settling on the meaning of each. *See Zivotofsky*, 566 U.S. at 201.

Initially, she concluded—like the district court in Colorado, *see Anderson*, 2023 CO 63, ¶ 182—that an insurrection is a public use of violence by a group to hinder or prevent the execution of the Constitution. R 24. This was the definition espoused by Professor Magliocca at the hearing. *See* R 187, 217, 222. It is likewise, as the Secretary concluded, well-supported by the historical record. *See* R 188-89 (testimony of Professor Magliocca); Noah Webster, An American Dictionary of the English Language 613 (1860) (defining insurrection as distinct from rebellion, and as "[a] rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state").

In his closing brief before the Secretary, as in Colorado, *see Anderson*, 2023 CO 63, ¶ 183, Mr. Trump provided no specific alternative definition, instead gesturing to a vague threshold that must be crossed. *See* R 24. He contended that an insurrection must be "violent enough, potent enough, long enough, and organized enough to be considered a significant step on the way to rebellion." R 583. While it is not clear what quantum of each factor is sufficient

to render an attack an insurrection under Mr. Trump's formulation, such that Mr. Trump's "definition" would be difficult to apply in its own right, the existence of those factors does not somehow render the definition adopted by the Secretary invalid. As the Secretary noted, the caselaw suggests that insurrections need not involve military-style weaponry, *see Case of Fries*, 9 F. Cas. 940 (C.C.D. Pa. 1800), involve bloodshed, *see In re Charge to Grand Jury*, 62 F. 828, 830 (N.D. Ill. 1894), or even be highly organized, *see Home Ins. Co. of N.Y. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954).

Before this Court, Mr. Trump has adopted a new approach, albeit one still hamstrung by the lack of an actual definition. Claiming, without supporting citation, that Section Three was based on the Treason Clause and Second Confiscation Act, he appears to suggest that taking up arms against the government, tantamount to levying war, is necessary for insurrection to have occurred. *See, e.g.,* Trump Br. 57. While this "definition" of insurrection is new, such that the Secretary did not have a chance to address it at the hearing, it is also unsupported by the historical record. The evidence that Mr. Trump cites for his conception of insurrection is, primarily, actions before the House where—in their discretion—they deemed hostile votes in state houses to not constitute insurrection. *See* Trump Br. 56-57. But there is plainly quite a bit of analytical room between legislative votes and levying war. Moreover, as discussed

below, the events of January 6 meet Mr. Trump's definition, in that it was an armed "rebellion of citizens or subjects of a country against its government." *See id.* 56.[24]

The Republican National Committee ("RNC"), in an amicus brief, also takes issue with the Secretary's definition of insurrection. It argues that the definition would justify keeping a variety of public officials off the ballot, particularly when paired with a broad view of "engaged." RNC Amici Br. 1-3. But the RNC offers no alternative definition, and it is unclear how Mr. Trump's "definition" solves the problem that the RNC purports to identify. Moreover, while the RNC cites a variety of instances in which violent rhetoric or actions were allegedly taken in response to government action, it takes substantial liberties with their descriptions (e.g., no evidence suggests that pro-Palestinian protestors "violently stormed" the White House, or "invaded" the Capitol complex). *See* RNC Amici Br. 3. Mr. Trump likewise adopts this line of attack—again, new before this Court—and cites the "Disrupt J20" organization that sought to disrupt Mr. Trump's inauguration, as well as, puzzlingly, the attacks on U.S. Government offices in Benghazi. *See* Trump Br. 58-59, 64.[25]

While courts have rejected these comparisons, *see, e.g.,* R 5005-08 (Br. of Amici Curiae NAACP New Mexico State Conference in *Griffin*); R 5206-12, 5216 (Br. of Amici Curiae Professors Carol Anderson and Ian Farrell in *Anderson*), the instances cited are also, on their

---

[24] Mr. Trump also noted that he has not been found guilty of insurrection under 18 U.S.C. § 2383. Trump Br. 57-68. It is unclear what relevance this fact has to the definition of insurrection itself, but it is worth noting (1) the definitions of insurrection under Section 2383 and Section Three are not necessarily identical; (2) a matter of qualification for office is a civil matter, and not a criminal one, involving a different standard of proof; and (3) the fact that an individual has not been charged, whether by virtue of prosecutorial discretion or otherwise, is not evidence that the crime has not been committed. Further, and perhaps more importantly, neither the text nor history of Section Three suggests that a criminal conviction is necessary to disqualification. In fact, undersigned counsel is unaware of a single instance in which an individual found unqualified under Section Three was charged under Section 2383.

[25] The foreign attack on the Benghazi offices is straightforwardly not an insurrection under the Secretary's definition, nor are isolated scuffles related to Mr. Trump's inauguration.

face, distinct from the January 6 attack in two important ways. *First,* the January 6 attacks were both quite severe and quite focused. Representing the "most significant breach of the Capitol in over 200 years," R 4243 (Senate Staff Report), thousands participating in a targeted attack on the Capitol building at a particular time and with a particular goal, namely preventing the peaceful transfer of power. *Second,* that goal—preventing Congress from carrying out one of the most important Constitutional processes—is categorically different than that of the George Floyd protests, which sought social and economic change; the pro-Palestine demonstrations, which sought a change in policy on Israel; or isolated responses to the *Dobbs* decision, which sought the protection of a woman's right to choose. January 6, in other words, is unique in that it represented an assault on the Constitution itself, an essential part of the definition of "insurrection" that the Secretary adopted.

That said, as both the Secretary and the *Anderson* court concluded, no specific definition is necessary to conclude that the events of January 6 were an insurrection in every sense of that term. *See* 2023 CO 63, ¶ 184. Even were the Secretary to attempt to apply Mr. Trump's standards, the reports, videos, and other evidence in the record—including the Department of Defense report entered into evidence by Mr. Trump himself—permit the Secretary to conclude that the January 6 attack was an insurrection.

First, it was undoubtedly violent. Many of those involved were armed, be it with weapons brought to the Capitol, weapons stolen from Capitol Police, or repurposed items from the Capitol itself. R 4250-51 (Senate Staff Report); R 4423-28, 4431 (videos). The attack also resulted in hundreds of injuries and multiple deaths, and $2.7 billion in costs. R 4063 (Government Accountability Office "GAO" Report). Mr. Trump, in his brief, made sure to note that the Secretary did not "point to a single instance of anyone being shot by the rioters."

Trump Br. 57. It is unclear why the means by which multiple people were harmed has any relevance to whether an insurrection occurred.[26]

Second, the attack was "potent." The Capitol itself was breached, offices were ransacked and vandalized, and members of Congress were functionally sent into hiding, resulting in a multi-hour delay in the certification of the election results. R 4063 (GAO Report); R 4223 (Senate Staff Report).

Third, the attack occurred over an extended period of time. This was not a brief breach of a security barrier, but rather a sustained assault that lasted multiple hours. R 4063 (GAO Report).

Fourth and finally, as evidenced by its timing and context, the attack was united behind a singular aim that Mr. Trump had been trumpeting for weeks: preventing certification of the election results and, thereby, transfer of power to President Biden. R 910, 958-60, 1386 (January 6 Report); R 4037, 4041-42 (tweets). Certainly, therefore, the Secretary's conclusion that the attack on January 6 constituted an insurrection finds sufficient support in the record. *Accord Anderson*, 2023 CO 63, ¶¶ 186-89.

2. "Engaged In"

As to whether the Secretary could reasonably conclude that Mr. Trump engaged in insurrection, the Secretary acknowledged that this was a close call. R. 26. But a close call before the Secretary does not translate to a close call upon Rule 80C review. If "relevant evidence as a reasonable mind might accept as adequate to support a conclusion" could support the Secretary deciding this issue either way—i.e., that Mr. Trump engaged, or did not engage,

[26] And to be clear, it was not merely protestors who died on January 6, a proposition Mr. Trump supports by reference to a single news article. Trump Br. 57. One officer died that day, and two others died soon thereafter. *See* R 4251 (Senate Staff Report). Other officers were assaulted and injured. *See* R 652 (DOD report); R 5476 (GAO Report); *see also* R 4428 (video).

in insurrection—then the Secretary's ruling should be affirmed. *In re Me. Clean Fuels, Inc.*, 310 A.2d at 741. That is the case here.

The Secretary looked again to Professor Magliocca for a definition of engaged in—understandably, given he was the only witness with knowledge of the history of Section Three at the hearing. The Secretary therefore defined "engaged in" as a voluntary act, by word or deed, in furtherance of an insurrection, including incitement. R 27; *see also* R 190 (testimony of Professor Magliocca). A similar definition was adopted by the *Anderson* Court. *See* 2023 CO 63, ¶ 194.

The historical evidence, as recounted by the Secretary, firmly supports this definition and is largely uncontested by Mr. Trump. Briefly: contemporaneous decisions from then-Attorney General Stanbury suggest that engaging in insurrection did not require "having actually levied war or taken arms," but rather included official action "in furtherance of the common unlawful purpose" or "any overt act for the purpose of promoting the rebellion," including "incit[ing] others" to act accordingly "by speech or by writing." 12 Op. Att'y Gen. 141, 161-62 (1867); 12 Op. Att'y Gen. 182, 205 (1867); *see also Anderson*, 2023 CO 63, ¶ 192. Judicial decisions of the time likewise interpreted Section Three as covering "a 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*, 63 N.C. at 203; *Griffin*, 2022 WL 4295619, at *19; *United States v. Burr*, 25 F. Cas. 55, 178 (C.C.D. Va. 1807) ("[I]n treason, all are principals." (quoting 4 Tuck Bl. Comm. Append. 40-47)).

In his closing brief before the Secretary, Mr. Trump simply claimed that to "incite" insurrection was less than "engaging" in insurrection. R 576-77. Here, Mr. Trump goes a step further, contending that to engage involves "active, affirmative involvement." Trump Br. 60. Once again, however, Mr. Trump's definition lacks historical support beyond another

unevidenced assertion that Section Three was modeled on the Treason Clause and Second Confiscation Act. *See id.* Nonetheless, the record contains ample evidence that Mr. Trump did not use "mere words or inaction," Trump Br. 60, but rather played an "active" role in the insurrection, and, in fact, incited it. R 28-31; *see also Anderson*, 2023 CO 63, ¶ 221.

Given that the facts relevant to "engagement" are not seriously in dispute, there is no need to fully recount them. *See* R 27-31. And to be clear, the evidence explicitly cited by the Secretary in her ruling is only the tip of the iceberg. But even that evidence alone permits a conclusion, particularly given the deferential Rule 80C standard, that Mr. Trump engaged in insurrection.

The record was sufficient for the Secretary to conclude the following: (1) over the course of several months, Mr. Trump sowed doubt in the results of the November 2020 election, *see, e.g.*, R 4050, 4052 (videos); (2) Mr. Trump repeatedly attacked the legitimacy of the election thereafter, oftentimes with inflammatory rhetoric, *see, e.g.*, R 592, 607 (Department of Defense ("DOD") Report); R 3972-78, 3987, 3994-95, 3997, 4000-02 (tweets); (3) Mr. Trump was aware of the violence caused by his rhetoric, and was warned directly by a Georgia election official about it, but he justified violence that began occurring at his rallies as self-defense, *see* R 607 (DOD Report); R 3979 (tweet); 4056 (video); R 4161 (GAO Report); (4) Mr. Trump announced a rally in Washington, D.C. on January 6, claiming it would be "wild" and thereafter frequently—again with inflammatory rhetoric—urged his supporters to show up and "fight" for him, which extremists interpreted as a call to action, *see e.g.*, R 1352, 1374 (January 6 Report); R 4003, 4011 (tweets); (5) Mr. Trump repeatedly referenced the January 6 joint session of Congress, and demanded that then-Vice President Pence refuse to certify the election results, *see, e.g.*, R 4009, 4012, 4017, 4222, 4224-25, 4228, 4334, 4336-37, 4042 (tweets); R 4347 (Ellipse speech); (6) Mr. Trump gave a speech on the Ellipse midday on

January 6 during which he urged his supporters to march on the Capitol and "fight like hell," R 1556-57 (January 6 Report); R 4347 (Ellipse speech); (7) thereafter, a large crowd did indeed march on the Capitol and violently forced its way past security barricades and into the building, just as Congress was beginning the process of certifying the election results, *see* R 594, 633 (DOD Report); R 1491, 1556 (January 6 Report); R 4244-46 (Senate Staff Report); (8) after learning of the violent attack, Mr. Trump did little for nearly three hours beyond blaming Mr. Pence for refusing to stand in the way of certification, *see* R 974, 1430, 1561 (January 6 report), R 4045 (tweet); and (9) after finally urging the rioters to return home, Mr. Trump praised their efforts, R 4046 (tweet); R 4432 (video).[27]

In the face of this evidence, the thinness of Mr. Trump's defense is notable. It boils down to two claims. *First*, Mr. Trump points out that on a few occasions, he told those gathered at the Capitol to be peaceful, including in two tweets sent over an hour and nearly two hours after the attack on the Capitol began, respectively. *See* Trump Br. 64; *see also Anderson*, 2020 CO 63, ¶ 217. This claim is accurate. But as both the Secretary and the Court in *Anderson* noted, a few isolated requests that protestors refrain from violence does not immunize months of conduct through which Mr. Trump all but assured that what occurred on January 6 would not be peaceful. *See Anderson*, 2023 CO 63, ¶ 244. Moreover, when Mr. Trump's leadership was most necessary, while the attack on the Capitol was playing out, he did not ask the rioters to leave; did not direct federal authorities to intervene; and did not even condemn those engaged.

---

[27] Mr. Trump continues to carry the flag of the rioters today, floating pardons on the campaign trail. *See, e.g.,* Tom Dreisbach, Noah Caldwell, "The Trump campaign embraces Jan. 6 rioters with money and pardon promises," National Public Radio (Jan. 4, 2024), available at https://www.npr.org/2024/01/04/1218672628/the-trump-campaign-embraces-jan-6-rioters-with-money-and-pardon-promises.

Second, Mr. Trump contends that he cannot be disqualified from office for speech that is protected by the First Amendment. *See, e.g.*, Trump Br. 61. But it is a nonsensical to assume that the First Amendment, passed before Section Three of the Fourteenth Amendment, cabins the effect of the latter to, in essence, only those individuals who engage in violence themselves. *See also Nat'l Rifle Ass'n v. Bondi*, No. 21-12314, 2023 WL 2416683, at *5 (11th Cir. Mar. 9 2023), *reh'g en banc granted, opinion vacated*, 72 F. 4th 1346 (11th Cir. 2023) ("[W]hen a conflict arises between an earlier . . . constitutional provision . . . and a later one . . . 'the later-enacted [provision] controls to the extent it conflicts . . . .'" (quoting *Miccosukee Tribe of Fla. v. U.S. Army Corps of Eng'rs*, 619 F.3d 1289, 1299 (11th Cir. 2020)).[28] To the contrary, "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," *N.Y.S. Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2136 (2022) (quoting *Heller*, 554 U.S. at 634-35), and, as set forth above, the historical record plainly does not contemplate the limitation that Mr. Trump presses. Verbal incitement of insurrection was considered engagement, and no drafter of Section Three suggested that protected speech was an exception to its scope.

Mr. Trump's speech is also not protected by the First Amendment *because* his speech incited an insurrection. It is black letter law that where (1) speech explicitly or implicitly encourages the use of violence or lawless action; (2) the speaker intended that the speech would result in the use of violence or lawless action; and (3) the imminent use of violence or lawless action was the likely result, the speech is unprotected. *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1979); *Nwanguma v. Trump*, 903 F.3d 604, 609-10 (6th Cir. 2018). The record,

[28] The U.S. Supreme Court's decision in *Bond v. Floyd*, 385 U.S. 116 (1966), does not indicate otherwise. That case did not involve a qualification set forth in the U.S. Constitution, but rather a requirement adopted by the Georgia Legislature that the oath of office be taken "with sincerity." *Id.* at 126, 128-30.

particularly given the context, *see Schneck v. United* States, 249 U.S. 47, 52 (1919) ("[T]he character of every act depends on the circumstances in which it is done."); *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"); *accord Anderson*, 2023 CO 63, ¶¶ 232-35, is sufficient to support the Secretary's conclusion that Mr. Trump's speech is unprotected.

As to the first and third *Brandenburg* standards, over several months, Mr. Trump sowed doubt in the 2020 election results; used incendiary rhetoric to describe the same; and with thousands assembled at the Capitol at his behest, Mr. Trump called on them to "fight like hell" for him and march to the Capitol to prevent the peaceful transfer of power. *See Anderson*, 2023 CO 63, ¶¶ 238-44, 251-55; *accord Thompson v. Trump*, 590 F. Supp. 3d 46, 115 (D.D.C. 2022) (Mr. Trump's Ellipse speech "plausibly [contained] words of incitement not protected by the First Amendment"). Accordingly, Mr. Trump encouraged violence or lawless action, and its imminent use was the likely result of his conduct.

As to the second *Brandenburg* standard—intent—it is also met. Mr. Trump repeatedly, over the course of months, called the election "rigged" and demanded that Mr. Pence prevent its results from being certified. *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"). He was aware of the impact of his incendiary rhetoric, in that he saw violence at his rallies and received warnings to that end. And when the attack began, Mr. Trump did little, confirming that what transpired was consistent with his aims. *Accord Anderson*, 2023 CO 63, ¶¶ 245-50.

This is not an instance akin to criticism of the Vietnam War, *see* Trump Br. 61, nor, contrary to Mr. Trump's claim, were his statements a matter of grandstanding on the campaign trail prior to an election, *see id.* Rather, Mr. Trump knowingly incited an attack on the Capitol to prevent the peaceful transfer of power. The record is such that the Secretary—consistent with the deferential standard of review—permissibly concluded that Mr. Trump engaged in insurrection and is accordingly not qualified for the office of the President by operation of Section Three of the Fourteenth Amendment.

Conclusion

The Superior Court should affirm the December 28, 2023 ruling of the Secretary of State and deny Mr. Trump's Motion to Supplement the Record.

Dated: January 10, 2024

AARON M. FREY
Attorney General

/s/ JASON ANTON
Jason Anton
Bar No. 6272
Assistant Attorney General

Thomas A. Knowlton
Bar No. 7907
Deputy Attorney General

Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
Tel. (207) 626-8800
jason.anton@maine.gov