STATE OF MAINE
KENNEBEC, ss

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

DONALD J. TRUMP,

Petitioner,

v.

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

Respondent,

KIMBERLEY ROSEN, THOMAS SAVIELLO, and ETHAN STRIMLING,

Parties-in-Interest.

REPLY BRIEF OF DONALD J. TRUMP

INTRODUCTION

President Trump respectfully submits this Reply in Support of his Opening Brief. As a preliminary matter, President Trump notes that, due to the nature of this matter and the accompanying briefing schedule, President Trump had approximately 24-hours to respond to over 130 pages of briefing from two separate groups, the Challengers and the Secretary. This merely serves to highlight that the section 336/337 process was never designed for a case of this nature and is not the appropriate vehicle for resolving a question of disputed qualifications under section 3. Moreover, in light of this briefing schedule, President Trump

emphasizes that to the extent this Reply Brief does not directly address a point raised by either the Secretary or the Challengers, it is a function of the limited time to proceed in this matter. It should not be understood to concede or accept any such points. Rather, at most, it indicates that on such points, President Trump stands by the arguments presented in his opening brief.

STANDARD OF REVIEW

The Secretary's discussion of the appropriate standard of review elides the basic reality that most of the contested issues in this matter are questions of law. Decisions by administrative agencies are reviewed for "errors of law, abuse of discretion, or findings of fact not supported by the record." *Friends of Lincoln Lakes v. Bd. of Envtl. Prot.*, 2010 ME 18, ¶ 12, 989 A.2d 1128 (2010) (quoting *Save Our Sebasticook, Inc. v. Bd. of Envtl. Prot.*, 2007 ME 102, ¶ 13, 928 A.2d 736, 740 (2007)). While "[t]he [C]ourt shall not substitute its judgment for that of the agency on questions of fact," 5 M.R.S. § 11007(3) (2009), [s]tatutory interpretation is a question of law that we review de novo." *SAD 3 Educational Association v. RSU 3 Board of Directors*, 2018 ME 29, ¶ 14, 180 A.3d 125 (2018). This is particularly true for questions of law regarding statutes and constitutional provisions that are not administered by the Secretary, such as the federal questions raised in this appeal.[1]

[1] Contrary to the Secretary's Brief at 5 n.2, President Trump did not misapprehend the burden of proof in this matter. The contention regarding burden of proof in President Trump's Opening Brief refers to the burden *before the Secretary*, which rests with the Challengers. The point of this reference is to observe that the Secretary appears to have misapplied the burden of proof in at least one instance—an error of law—by claiming that President Trump did not sufficiently prove a matter *before the Secretary*.

ARGUMENT

I. The Secretary Lacks Authority Under Maine Law to Adjudicate Challenges to a Presidential Candidate's Qualifications Under Section 3.

The Secretary's Brief makes a fundamental error: it presumes that section 336 is ambiguous. "Deference" to the Secretary or competing views on "legislative history" only matter if the text of the statute is ambiguous. And section 336 is not ambiguous. First, the plain text of section 336(3) references a "*statement* that the candidate meets the qualifications of the office the candidate seeks" and a "*declaration* of the candidate's place of residence and party designation" (emphasis added). These are plainly two different things.[2] Section 336(3) further provides that the challenge procedures at section 337 can be used to question the veracity of the *declaration.* It does not permit challenges based on the statement. Second, the challenge procedures can only be used to challenge whether the declaration is "false." By its plain terms, it is not a freestanding invitation to challenge any aspect of candidacy. And there is no question that the consent provided by President Trump—which does not reference section 3—is true. Thus, the Secretary's focus on "deference" or a purported lack of "legislative history" is a red herring. The text of section 336 is unambiguous and dispositive.

Similarly, the Secretary claims that the language of the consent form is ambiguous and asks the Court to defer to her interpretation thereof. But the language of the consent

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[2] In this way, the Challengers' Brief misstates President Trump's argument concerning the presumption of consistent use. Challenger's Brief at 12. The statement is different from the declaration. When the statute says "statement," it means "statement." When it says "declaration," it means "declaration."

form is plain as day. It lists three qualifications for office and asks a candidate to certify the qualifications "as listed above." Since there is only one list of qualifications, there is only one way to read that phrase: as referring back to the list of qualifications on the form. There is no ambiguity.

With respect to section 336, the Secretary claims that ambiguity is "evidenced by Mr. Trump's own inconsistent positions on the statute's meaning." Secretary's Brief at 28. But this claim is disingenuous, particularly since the Secretary's Brief selectively edits Mr. Gessler's comments in a way that is unbecoming of a government official. What Mr. Gessler actually said was "So we don't think there's a distinction but I'm going to defer to Mr. Lawkowski." R85. Mr. Gessler's statement was not intended to be a considered, final view on the matter. Rather, President Trump's position was subsequently stated by Mr. Lawkowski and reiterated in President Trump's closing brief. Thus, this exchange is not a matter of President Trump adopting contrary positions. It is a function of multiple attorneys speaking on different aspects of the matter with less than two days to attempt to coordinate their pieces.

The Secretary claims that President Trump's Opening Brief "appears to misinterpret" section 355. Not so. Contrary to the Secretary's claim, section 355 does not "collapse any distinction between a 'declaration' and 'statement' entirely." Secretary's Brief at 27-28. Instead, it defines "statement" and "declaration" differently.

The Secretary claims that President Trump "misapprehends the scope of the Secretary's authority" because section 336 requires a "declaration" that a candidate meets the qualifications for office and notes that "[t]he Maine Legislature's principle concern was thus

not whether a candidate meets the qualifications listed by the Secretary on the candidate's consent form, but rather, more broadly whether a candidate is qualified for the office sought." Secretary's Brief at 28-29. Similarly, the Challengers claim that section 336 "is not ambiguous" and refers to all qualifications for office. Challenger's Brief at 10. This may well have been the legislature's intent. But it is irrelevant for these proceedings because it conflates the question of what section 336 is broadly intended to do with the limited scope of a challenge permitted under section 336. Even if section 336 was intended to include a statement of all qualifications broadly, the scope of a 336 challenge is narrow: the falsity of the declaration. This makes sense given the expedited nature of section 336 and 337 challenges. Thus, even if the Challengers are correct that the statutory text "preempts the Secretary's form," Challengers' Brief at 15, it does not follow that the section 336/337 process is the correct procedure for raising this claim. If the Challengers' want to make that argument, they should have brought it in court, with all of the attendant due process protections for President Trump, not in an administrative challenge under section 336.

Moreover, this does not mean that "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." Secretary's Brief at 29. It merely means that the section 336 process is the wrong procedure for raising this sort of question. For example, if one believes the Secretary has failed to comply with a nondiscretionary duty by issuing a deficient consent form, one could have brought a mandamus action against the Secretary to correct it. *See generally* 14 M.R.S.A. § 5301. But that is not what has happened here. President Trump may not be excluded from

the ballot through an expedited and deficient section 336 process to rectify an error on the part of the Secretary.

II. President Trump's Due Process Rights were Violated by the Lack of an Impartial Administrative Adjudicator.

A. The Secretary's timeframe did not afford President Trump due process.

The Secretary at length defends the notice she provided and the processes she implemented. But a review of the *actual* timeline is in order:

- *Monday, December 11, 2023.* The Secretary confirms that a challenge has been filed. To be sure, the Secretary believes that news stories in local media over the previous weekend should have provided President Trump notice. But even crediting this claim, candidates should not be forced to closely monitor local news reports to see if there is a deeply impactful challenge filed against their candidacy.

- *Wednesday, December 13, 2023.* President Trump retains Maine counsel. The legal team first confers, learns the full detail of the challenges, and makes travel arrangements and initial strategy to appear in person. Challengers produce an initial list of evidence, and the Secretary's deadline for the submission of evidence expires before President Trump's legal team can fully analyze the several challenges, analyze state law, and begin a search for rebuttal evidence. Challengers do not provide the actual evidence they plan to use – only a list.

- *Thursday, December 14, 2023.* President Trump's legal team seeks to obtain *pro hac vice* admission before the Secretary, which over the course of an hour she denies. Counsel must spend precious time seeking emergency admission before the Maine Law

Court, after which the Secretary relents and allows *pro hac vice* admission. Out-of-state counsel spends nearly the entire day travelling and familiarizing themselves with the case, arriving in Augusta late in the evening. Earlier in the afternoon (at 3:00 pm, Eastern time), a party seeks to intervene for the purpose of submitting hundreds of additional pages of evidence. The Secretary allows intervention, partly on the basis that President Trump does not object in the *two-hour* window between 3:00 and 5:00 Eastern time.

- *Friday, December 15, 2023.* The hearing commences. President Trump has not had time to review or confirm any of the evidence, for the simple reason that he does not receive it until the end of the hearing. President Trump receives no expert report underlying the scope of Professors Magliocca's testimony (which substantially exceeds the breadth of his opinion in Colorado). President Trump has had no time to develop rebuttal evidence.

In short, President Trump effectively had less than a week from receiving notice to having attorneys appear before the Secretary. One of those days was spent identifying local counsel and making contact with out-of-state counsel. One day was spent travelling. The Secretary provided deadlines that were impossible to meet, and the evidentiary deadline expired well before President Trump could even view the evidence arrayed against him. To be sure, the Secretary faults President Trump for not more vigorously objecting or demanding that the Secretary modify her unreasonable deadlines. Such a posture is absurd, particularly in light of the Secretary's initial rejection of President Trump's efforts to admit out-of-state counsel – a rejection that required an emergency motion before the Law Court.

B. The challenge to Secretary Bellows was timely.

The Secretary's principal argument is that President Trump did not raise the bias issue in a timely fashion. This argument fails for the following reasons.

First, the Secretary relies upon 5 M.R.S. § 9063(1) as the basis of her timeliness argument. The statute in question, however, simply dictates that a timely charge of bias shall be determined and made part of the record. The statute does not state that the Secretary is insulated from having to be unbiased if the charge is not made within seven days of the challenges. Indeed, whether a charge of bias is part of the record or not does not obfuscate the requirements of impartiality under the due process clause. The Secretary's contention in her response omits and overlooks the fact that regardless of when President Trump raises the issue of bias, President Trump still has a constitutional right to an impartial hearing and part and parcel to that requirement, an impartial adjudicator.

Second, the Court should be mindful of the extremely compressed deadlines in this case. As described above, on December 11, 2023, President Trump was given notice that there would be a hearing on December 15, 2023. R. 311. On December 13, 2023, President Trump retained Maine counsel. The hearing was held on December 15, 2023. The request to disqualify was filed with the Secretary on December 27, 2023. R. 818. It is plainly unreasonable for the State to argue that the request on December 27 was untimely. Moreover, the State has failed to cite any case requiring that President Trump to make the request for disqualification by December 15, 2023, just four days after getting notice of the hearing and two days after retaining Maine attorneys. Under these circumstances, the Secretary's suggestion that President Trump should have spent the precious little time his counsel had to prepare for the merits of the hearing combing through the Secretary's X

(Twitter) page is absurd. In light of the extremely fast deadlines and the lack of any cases to support her argument that the request needed to be made within four days, the Secretary's argument on timeliness is unpersuasive.

Third, the Secretary is arguing that the request to disqualify needed to be made by December 15, 2023 – four days after notice of the public hearing was issued on December 11, 2023 (R. 311) – and since it was not made by then, President Trump's right to due process evaporates and he no longer has the right to an unbiased adjudicator or to bring a motion to disqualify. However, the Secretary fails to cite case law supporting this position. Rather, the Law Court decisions simply require that the request to disqualify be made before a decision is rendered. For example, in *Samsara Mem. Trust v. Kelly, Remmel & Zimmerman*, 2014 ME 107, ¶ 25, the Law Court stated that a motion for recusal would be timely when made before the entry of judgment. Similarly, in *In Re Kaitlyn P.*, 2011 ME 19, ¶ 8, the Law Court stated that a motion for recusal must be made before judgment is entered. The Secretary has failed to cite any cases that support an argument that a claim of bias is untimely when made before she issues her decision. Indeed, such an argument would be unreasonable as the right to due process should not simply expire after four days of receiving notice of the hearing.

C. The doctrine of necessity is not applicable here.

The Secretary attempts to make an argument that the rule of necessity allows the Secretary to preside over this matter even though she has bias. This argument is meritless for the following reasons.

First, the rule of necessity is an obscure rule that has never been used in the manner in which the Secretary now contends. Indeed, the only case cited by the Secretary is *Northeast Occupational Exch., Inc. v. Bureau of Rehab.*, 473 A.2d 406 (Me. 1984), and that is a case regarding the exhaustion of administrative remedies in which the Law Court concluded that the administrative remedies needed to be exhausted even where the Plaintiff had a strained relationship with the administrative decision-maker. The Law Court further stated in that case that an adjudicator may be disqualified when there was prejudgment of the specific facts in that case (which was not present in that case) to protect the due process rights ensuring an impartial hearing. *Id.* at 410 (citations omitted).

Second, contrary to the Secretary's contention, there were alternatives in this case. The Secretary has multiple deputies and one of those deputies could serve as the decision maker in this case.

Third, the Secretary's argument about having tight deadlines here is really a better argument for why the Secretary should disclose her issues of bias and recuse herself without waiting for a motion by the Petitioner. Similarly, it shows why the Secretary should not be deciding such a weighty issue on tight deadlines without providing notice to the parties of her possible issues of bias. It is troubling for the Secretary to try to use the tight deadlines and an old doctrine of necessity for attempting to justify having a biased adjudicator.

Fourth, the Secretary fails to cite any cases concluding that a litigant's right to due process and right to an impartial adjudicator is suspended under the so-called doctrine of necessity. Indeed, such a holding would not make sense as the right to due process is a constitutionally protected right.

D. The Secretary's Tweets Show Bias

The Secretary argues that her Tweets about impeachment and identifying Petitioner as an "insurrectionist" are insufficient to demonstrate a showing of bias. This argument fails for the following reasons.

First, the Secretary is using the wrong standard. The Secretary alleges that her decision was not biased and was based on the record. The correct legal standard articulated by the Supreme Court of the United States is "whether, as an objective matter, the average [adjudicator] in [her] position is likely to be neutral, or whether there is an unconstitutional *potential* for bias." *Rippio v. Baker*, 580 U.S. 285, 287 (2017) (emphasis added).

Second, when applying the correct standard, the Petitioner need only show that the Secretary's statements had the potential for bias and/or that she prejudged the issues before her. Key issues before the Secretary were the definition of "insurrection" and whether President Trump engaged in an insurrection. The Secretary made multiple tweets expressing her opinions on these exact issues. For example, on February 13, 2021, Secretary Bellows stated:

> The Jan 6 insurrection was an unlawful attempt to overthrow the results of a free and fair election. Today 57 Senators including King & Collins found Trump guilty. That's short of impeachment but nevertheless an indictment. The insurrectionists failed, and democracy prevailed. R. 824.

There are two times in this tweet where the Secretary is concluding that what happened on January 6, 2021 was an insurrection. That is a key issue in this matter that the Secretary had clearly prejudged showing an impermissible bias.

Third, on February 13, 2021, Secretary Bellows tweeted:

> Not saying not disappointed. He should have been impeached. But history will not treat him or those who voted against impeachment kindly. R. 825.

It is important to note that the impeachment proceeding was for the "Incitement of Insurrection." H.R. 24, 117th Cong., 1st Sess. Art. I (2021) (Article of Impeachment failed to gather the necessary votes). Accordingly, when Secretary Bellows stated, "He should have been impeached," she is clearly voicing her opinion that President Trump should have been found to be guilty of having incited an insurrection – which was a key issue for her to decide in this case. It is hard to interpret the Secretary's tweet in any other way than that she had prejudged the issue of insurrection.

Fourth, perhaps even more troubling is when Secretary Bellows states that history will not treat President Trump – and those who voted against finding an insurrection – kindly. Again, this shows her very strong opinion that the article of impeachment finding insurrection should have passed, and it further shows a personal animosity toward President Trump, who she believes should be treated unkindly by history. This statement certainly shows bias against President Trump and a prejudgment that there was an insurrection.

Fifth, on January 6, 2022, Secretary Bellows stated: "One year after the violent insurrection, it's important to do all we can to safeguard our elections." R. 824. Again, this is another example of where she is concluding that there was a "violent insurrection" – the definition of which was a central issue in the case before her. This certainly shows bias and prejudgment.

Sixth, in her decision on December 28, 2023, Secretary Bellows stated: "I have little trouble concluding that the events of January 6, 2021 were an insurrection within the meaning

of Section Three of the Fourteenth Amendment," R. 24. and "Mr. Trump, over the course of several months culminating on January 6, 2021, used a false narrative of election fraud to inflame his supporters and direct them to the to the Capitol to prevent certification of the 2020 election and the peaceful transfer of power." R. 31. Of course, she had little trouble concluding that there was an insurrection as she had already made several tweets showing her strident opinion that President Trump had incited an insurrection and stating history would not treat him well. This shows a direct connection between her earlier tweets and her decision demonstrating the probability of actual bias and a deprivation of the right of due process.[3]

E. In Accepting the January 6th Report, The Secretary Piled Bias on Top of Bias.

Despite her claim that President Trump's arguments were "long winded," the Secretary admits problems with the January 6th Report. But she misses the main point: *every* single member of that Committee had pre-judged President Trump as liable for "inciting" "insurrection." It does not matter that two of the biased members of the January 6th

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[3] While the Secretary relies on *Wolfram v. Town of New Haven*, 2017 ME 114, ¶ 21, to argue that there is no showing that proceeding was affected by bias, by looking at the Secretary's tweets next to the Secretary's decision, there is a very strong appearance of bias as the Secretary had made definitive statements prejudging the very issues before her. Moreover, the Secretary has the wrong legal standard, as President Trump need not show that the proceeding was actually affected by bias. Rather, it is sufficient, under United States Supreme Court cases, to vacate the decision when there is the probability of bias or probability of unfairness. *See, e.g, Rippio v. Baker*, 580 U.S. 285, 287 (2017) (the due process clause protects when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."); *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias."); *Withrow v. Larkin*, 421 U.S. 35 (1975 ("not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'").

Committee were Republicans. It does not matter whether Republicans in the House of Representatives "boycotted" the January 6th selection process, regardless if the Secretary considers (without evidence) Congressional leadership to be President Trump's political "allies." Every single member of the Committee was biased, in the same way the Secretary was biased – they all were firmly convinced of President Trump's guilt, *before* hearing any evidence or argument. President Trump respectfully asks this Court to put a stop to this ongoing bias and restore confidence in the legal process.

III. Congress—Not the Secretary—Is the Appropriate Body to Resolve Disputes Over Presidential Qualifications.

The Challengers are dead wrong when they claim "[t]he states' interest in policing their ballots is at its apex in presidential elections." Challengers' Brief at 9. The United States Supreme Court has stated, in no uncertain terms, "the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983). Particularly with respect to the President, there is a need for a single national decision, which can only come from Congress.

The Secretary claims that President Trump failed to raise his "political question" argument at the hearing before the Secretary and thus waived it. Secretary's Brief at 16. This is also blatantly false. President Trump's closing brief before the Secretary spends more than three pages arguing that "[w]hether Section Three disqualifies President Trump from serving is a question reserved for Congress," including citing a litany of cases concerning the application of the political question doctrine. Closing Brief at 26-29. As even the Secretary's Brief acknowledges, President Trump noted that "two courts had declined to rule on

presidential qualifications because they were 'non-justiciable political questions'" at the hearing. Whether doctrinally it is viewed as a matter of being a non-justiciable political question or a lack of proper authority misses the forest for the trees: President Trump properly raised the argument that the Secretary is not the appropriate authority to sit in judgment over Presidential qualifications.

Similarly, the Challenger's claim that "Trump does not make, and thus forfeits, any argument about judicially manageable standards" is wrong. Challenger's Brief at 21. At the hearing, Mr. Lawkowski referenced a "prudential reason" for questions of presidential disqualification to be assigned to Congress: "an alternative finding would lead to potentially chaos. You could have 50 different standards, you could have 50 different outcomes, you could have cases where a presidential candidate is qualified in some states, not others, and that would very bad for our democracy and that's something that the Constitution does not permit and does not require." R88.

Both the Secretary and the Challengers make the same pedantic mistake, presuming that President Trump must utter the specific Shibboleth that they are seeking to preserve an argument. But this is not so. President Trump made the substantive arguments that relate to the political question doctrine, regardless of whether it was couched in those terms or in terms of the Secretary's authority.

Moreover, the Secretary offers nothing that refutes "the vast weight of authority [that] has held that the Constitution commits to Congress and the electors the responsibility

of determining matters of presidential candidates' qualifications,"[4] including multiple federal[5] and state courts.[6] On this score, the Challengers rely heavily on a few state-level decisions

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[4] *Castro v. N.H. Sec'y of State*, Case No. 23-cv-416-JL at 19 (D.N.H. Oct. 27, 2023) (footnote omitted).

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

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

that purport to adjudicate contested qualifications. Challengers' Brief at 22-23. But they fail to note that these cases are in the distinct minority and that one of them is currently pending on appeal before the United States Supreme Court (*Trump v. Anderson, et al*).

Similarly, cases like *Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014), are not to the contrary. In *Lindsay*, the Ninth Circuit repeatedly emphasized that its approval of the California Secretary of State's exclusion of 27-year-old Lindsay Bowen from the ballot turned on the *undisputed* nature of her disqualification.[7] This matter is different: President Trump emphatically disputes the Secretary's Ruling regarding his qualifications.

Contrary to their cursory analysis, there is a textually demonstrated commitment to Congress to address questions of Presidential disqualification. To wit, the Constitution provides a role for Congress in resolving disputed presidential elections, assigns Congress

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

[7] *Id.* at 1063 (""Distinctions based on *undisputed* ineligibility due to age do not 'limit political participation by an identifiable political group whose members share a particular viewpoint, associational preference or economic status.'") (emphasis added)); 1064 (""Nor is this a case where a candidate's qualifications were disputed. Everyone agrees that Lindsay couldn't hold the office for which she was trying to run." and ""Holding that Secretary Bowen couldn't exclude Lindsay from the ballot, *despite her admission that she was underage*, would mean that anyone, regardless of age...would be entitled to clutter and confuse our electoral ballot.") (emphasis added); 1065 ("Lindsay points to 2008 presidential candidate John McCain, who some considered to be ineligible to hold office because he was born outside the United States. But, at worst, McCain's eligibility was disputed. He never *conceded* that he was ineligible to serve....") (emphasis in original) (citing with approval *Robinson v. Bowen,* 567 F.Supp.2d 1144, 1146–47 (N.D.Cal.2008); *Keyes v. Bowen,* 189 Cal.App.4th 647, 117 Cal.Rptr.3d 207, 214–16 (2010), both of which held the natural born citizen issue to be a nonjusticiable political question).).

the exclusive authority to determine how to enforce section 3, and gives Congress—and only Congress—authority to disqualify President from holding federal office or to remove such disability. For example, the Constitution expressly provides that:

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

U.S. Const. amend. XX § 3. Similarly, both Article II and the Twelfth Amendment prescribe a role for Congress in Presidential elections. U.S. Const. art. II, cl. 3; U.S. Const. amend. XII.

The Constitution also explicitly grants Congress—and only Congress—authority to both impose a disqualification to hold federal office through the impeachment process and remove a disqualification under section 3. *See* U.S. Const. art. I, § 2, cl. 5 (the House of Representatives has "the sole Power of Impeachment"); *Id.* at art. 1, § 2, cl. 6 ("[t]he Senate shall have the sole Power to try all Impeachments") *Id.* at art. I, § 2, cl. 7 (providing for "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States" as a consequence of impeachment); *Id.* at amend. XIV, § 3.

Perhaps most importantly, section 5 of the Fourteenth Amendment expressly commits authority to Congress—and only Congress—to "enforce by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, §§ 3, 5. There is no similar commitment of questions concerning presidential eligibility to Secretaries of State, particularly in the absence of a duly enacted federal enforcement statute.

Acting pursuant to section 5, Congress *could* delegate authority to the states to resolve disputed questions of presidential disqualification. It previously assigned a role to other

actors when it enacted the Enforcement Act, granting federal prosecutors (but not state election officials) authority to enforce Section Three by seeking writs of *quo warranto* from federal (not state) courts. But that act was repealed in 1948.[8] Congress proposed similar legislation to create a cause of action to enforce section 3 in 2021, but that bill failed. H.R. 1405, 117th Cong. (2021). Thus, authority to enforce section 3 remains with Congress—and only Congress.

Moreover, in the absence of specific enforcement legislation, section 3 is silent on whether a jury, judge, or lone state election official makes factual determinations concerning disqualification and the appropriate standard of review for doing so, creating the prospect of some courts adopting a preponderance of the evidence standard, others a clear and convincing evidence standard, while still others requiring a criminal conviction. Similarly, states have different approaches to voter standing. As a result, a voter in one state may be able to challenge a presidential candidate's qualifications, while similarly situated voters in another state cannot. Substantively, the terms "engage" and "insurrection" are unclear and subject to wildly varying standards. The result is that 51 different jurisdictions may (and have) adopted divergent rulings based on different standards on the same set of operative facts.

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

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[8] The Enforcement Act was codified as 13 Judiciary ch. 3, sec. 563 and later recodified into 28 Judicial Code 41. In 1948, Congress repealed 28 U.S.C. § 41 in its entirety. *See* Act of June 25, 1948, ch. 646, §39, 62 Stat. 869, 993; Act of June 25, 1948, ch. 645, §2383, 62 Stat. 683, 808.

The open, legislative nature of these choices makes contradictory pronouncements by various jurisdictions inevitable. Indeed, this is already happening with respect to President Trump. The Secretary of State of Maine claimed authority to assess President Trump's qualifications and purported to disqualify him from the primary ballot, while the Secretaries of State of California, New Hampshire, and Oregon determined they lacked authority to do so. The Colorado Supreme Court claimed authority to disqualify President Trump from the primary ballot, while the Supreme Courts of Minnesota and Michigan declined to do so. The chaos that results from divergent standards and determinations is particularly problematic in presidential elections, which are necessarily national affairs.

Finally, the Secretary's Ruling expresses a profound lack of respect for Congress in general and the United States Senate in particular. First, Congress considered legislation to specify how to enforce section 3. It declined to adopt it. Having done so, the Secretary cannot now claim she had the authority all along without expressing disrespect for the choices made by Congress.

Second, the House of Representatives impeached President Trump, citing section 3 and claiming that President Trump "incit[ed] [] insurrection" on January 6, 2021. *See See* Impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors, H. 24, 117th Cong. (2021). The House Resolution explicitly asked to disqualify President Trump from holding office under the United States. Indeed, since President Trump had already left office by the time the House adopted its impeachment resolution, the *only* tangible consequence of impeachment could be the disqualification from holding office in the future. The Senate declined to do so, acquitting President Trump.

https://www.senate.gov/legislative/LIS/roll_call_votes/vote1171/vote_117_1_00059.htm. The only way to disqualify President Trump is to effectively overrule the considered judgment of the United States Senate on the very question, a process that expresses a deep disrespect for the Senate as an institution.

By purporting to develop a procedure to enforce section 3 and impose a disqualification upon President Trump, the Secretary usurped Congress' authority. The Secretary purports to act pursuant to a state law that it claimed provided a procedure to challenge candidate qualifications. But this authority was not the state's to give. *See generally Cook v. Gralike,* 531 U.S. 510, 552 (2001) ("It is no original prerogative of state power to appoint a representative, a senator, or a president for the union."). Under section 5, Congress—and only Congress—can adopted enforcement legislation.

Determinations of presidential disqualification present questions that are properly resolved by Congress, not individual Secretaries of State, particularly where, as here, Congress has acted on the precise question at issue.

IV. Section Three of the Fourteenth Amendment is Not Self-Enforcing.

A. Professor Magliocca's testimony was not evidence, but rather legal opinion similar to any other academic researcher.

The Secretary relies heavily on testimony from Professor Magliocca, but it should be emphasized that nothing he stated constitutes evidence. It is all legal opinion. Furthermore, the scope of his opinion was frankly a surprise to President Trump (in part because the Challengers produced no expert report). And due to the compressed timeframes and inadequate notice, whereby President Trump had only two days to retain counsel and

prepare for the hearing), President Trump had no opportunity to himself retain an expert to testify before the Secretary.

"It is emphatically the province and duty of the judicial department to say what the law is."[9] That duty is a nondelegable one. This duty applies to a state official acting in an adjudicatory capacity. An agency has the ability and, in fact, the responsibility, to review the constitutional text and the cases and materials provided by the parties and determine what the law is. For a law professor to serve as an "expert" would interfere with that duty, because it would allow opinions about the law to come into the case as if they were the law. It is not the role of any expert to supersede the role of the Secretary and hold forth concerning the nature of the law or the legislative history behind the law.

Professor Magliocca's testimony is essentially an oral amicus brief, trying to convince the Secretary of a particular outsider's view of the law. There is, of course, nothing wrong with amicus briefs. But the interpretation of Section Three involves questions of *law*, not fact.

B. *Griffin* properly controls this case, the Secretary should not have been so dismissive of this well-established authority.

The Secretary dismisses the holding of *In re Griffin*, arguing that it is "absurd" to argue that Section Three is not self-executing. Let us compare authorities. On one hand is Representative Thaddeus Stevens, considered the "father of Reconstruction."[10] He was the

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[9] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[10] United States v. Florida, 363 U.S. 121, 126-127 (1960) ("Mr. Stevens was Chairman of the all-important Joint Committee on Reconstruction, and, because of his leading role as

most influential vice in the drafting of the Fourteenth Amendment and one of the most – perhaps the most – important leaders of the Radical Republicans who sought to abolish slavery once and for all and prevent leaders of the Confederacy from frustrating political participation by freed slaves. And during Congressional debate on Section Three, he stated:

> I say if this amendment prevails you must legislate to carry out many parts of it. You must legislate for the purpose of ascertaining the basis of representation. You must legislate for registry such as they have in Maryland. It will not execute itself, but as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have the right to do.[11]

And on June 13, 1866, as the final speaker called before the vote on the Fourteenth Amendment, Congressman Stevens concluded his argument in support of Section Three by arguing "let us no longer delay; take what we can get now, and hope for better things in further legislation; in enabling acts or other provisions."[12]

This was not an isolated opinion. "As far as enabling legislation was concerned, no one disagreed with Thaddeus Stevens that such legislation would be required.[13] Those involved in the ratification discussion and debate all understood that Section Three was *not*

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architect of the reconstruction plan finally adopted and carried out by Congress, has appropriately been called "the Father of the Reconstruction.").

[11] 39 Cong. Globe, 1st Sess., 2544 (1866).

[12] 39 Cong. Globe, 1st Sess., 3149 (1866).

[13] Lash, Kurt, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment* (Oct. 3, 2023), at 28. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591838

self-executing at the time of its ratification. No court or scholar has ever produced evidence to the contrary.

And in Congressman Stevens' corner is Chief Justice Salmon P. Chase. Not "merely" the Chief Justice of the United States Supreme Court, he also was a national Republican leader, the only political leader among Republicans with the stature to challenge President Abraham Lincoln, a staunch abolitionist, and the Treasury Secretary responsible for financing the Union victory over the Confederacy. He staunchly believed in a muscular, expansive Fourteenth Amendment, as evidenced in party by his joinder in the dissent in the Slaughterhouse Cases.[14] And he had lived through – and closely observed – the Congressional and ratification debates over the Fourteenth Amendment.

One year after ratification of the Fourteenth Amendment, Chief Justice Chase ruled that Section Three was not self-executing and that it could only be enforced through specific procedures prescribed by Congress or the United States Constitution.[15] He reasoned that a different conclusion would have created an immediate and intractable national crisis.

More specifically, in ruling that the Section Three was not self-executing, Justice Chase focused on Section Three's text and America's due process tradition:

> The object of the amendment is to exclude from certain offices a certain class of persons. Now, it is obviously impossible to do this by a simple declaration, whether in the constitution or in an act of congress, that all persons included within a particular description shall not hold office. For, in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate. To accomplish this ascertainment and ensure effective results, proceedings,

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[14] *Slaughter-House Cases,* 83 U.S. 36, 62, 21 L. Ed. 394 (1872).

[15] *See In re Griffin*, 11 F.Cas. 7 (C.C.Va 1869).

> evidence, decisions, and enforcements of decisions, more or less formal, are indispensable; and *these can only be provided for by congress.*[16]

Chief Justice Chase listed three other reasons: first, under Section Five "congress shall have power to enforce, by appropriate legislation, the provision of this article," explicitly vests in Congress the power to enforce it. Second, the final clause of Section Three "gives to congress absolute control of the whole operation of the amendment." And finally, he recognized that existing officeholders are not automatically removed by Section Three, but that "legislation by congress is necessary to give effect to the prohibition, by providing for such removal."[17]

And finally agreeing with Congressman Stevens and Chief Justice Chase are multiple federal courts that have endorsed Chief Justice Chase's conclusions.[18]

On the other hand is Secretary Bellows, a handful of professors (whose conclusions have been hotly contested in the scholarly community), and a bare 4-3 majority of the Colorado Supreme Court. All have weighed in on the matter a century and a half after the Fourteenth Amendment was ratified, while citing to a dearth of authority from the Reconstruction Era to support their positions. None cites any case law that has ever

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[16] *In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (emphasis added).

[17] *Id.*

[18] *Ex parte Ward*, 173 U.S. 452, 454–55 (1899) (Chief Justice Fuller, for a unanimous Court, cited *Griffin's Case* favorably, on-point, and as good law); *Cale v. Covington* 586 F.2d 311, 216 (4th 1978) (recognizing Griffin as good law); *Mich. Corr. Or. V. Mich Dep't of Corr*, 774 f.3d. 895, 906 (6th 2014)(endorsing Chase's sword and shield framework supporting that Section Three is not self-executing).

criticized *Griffin*. And all have waded into this debate not in dispassionate setting to elucidate broad constitutional principles, but in a hotly contested and polarized political contest that has direct – and draconian – consequences for our presidential election. Indeed, not until President Trump was accused of "inciting" "insurrection" did anyone ever question the Stevens/Chase authority on self-execution. Section Three is not self-executing.

V. The Presidency is Not an Office Under the United States

Section Three lists a number of positions to which it applies, such as Senators or Representatives and presidential electors. It does not list the presidency. Textually, it makes no sense that the most visible national position—the presidency of the United States—would be buried in a catch-all term like "any office . . .under the United States." If Section Three was meant to include the presidency, it would have said as much. Nothing in the Secretary's or the Challengers' brief refutes this basic textual assessment.

VI. The Drafters Chose to Exclude the Article II Presidential Oath.

Section Three only applies to those who took an oath to "support" the Constitution, but the Secretary labels President Trump's textual argument as a "red herring" – no doubt to the surprise of scholars and textualists who have recognized the correctness of this very approach.[19] But the drafter's use of the Article VI oath was perfectly sensible. First and foremost, the drafters of Section Three limited it to former officials who had taken an oath. Although perhaps misunderstood according to modern sensibilities, this approach was well

[19] Michael Mukasey, "Was Trump and Officer of the United States, Wall Street Journal, September 7, 2023. Available at https://www.wsj.com/articles/was-trump-an-officer-of-the-united-states-constitution-14th-amendment-50b7d26?mod=article_inline

rooted in the Civil War. There, federal and state officials throughout the South – the very ones who led the country into civil war – threatened to once again assume power throughout the region. Section Three was designed to prevent those very leaders from re-establishing the same conditions that led to the outbreak of civil war. Accordingly, Section Three did not bar a person who participated in the rebellion – as a leader, general, soldier – provided that person did not hold state or federal office before the outbreak of war. Section Three was targeted at those who had led the South into rebellion.

Additionally, the Secretary ignores two critical facts that existed at the time Section Three was drafted and passed. First, no former U.S. President was still living. Accordingly, the drafters had no concern that a former president who supported the Confederacy, such as President John Tyler, could possibly assume office. And further, the drafters had no concern that a former rebel could win the Presidency, in light of (1) application of Section Three to Presidential Electors, (2) the northern electoral strength, and (3) the voting strength of emancipated slaves. In short, the drafters made a conscious choice to rely on the general Article VI oath, and not the Article II oath taken by the president. Indeed, the drafters could have easily included both oaths, but they did not. And despite the Secretary's modern viewpoint, the drafters' wisdom was proven correct; no southerner was elected President of the United States for a full century after ratification of the Fourteenth Amendment.

VII. The Secretary Misunderstands the Import of *U.S. Term Limits* and *Schaefer* with Respect to "Holding" Versus Running for Election.

The Secretary addresses the argument that a restriction on *holding* office is different from a restriction on *being elected* to office in a single conclusory paragraph. Worse, this single paragraph misunderstands the import of the Ninth Circuit's opinion in *Schaefer v. Townsend*,

215 F.3d 1031 (9th Cir. 2000). The whole point of *Schaefer* is that timing matters. *Schaefer* concerned an effort to exclude candidates from the ballot who were not inhabitants of the state at the time they filed their nominating petition. The court concluded that this was an extra-Constitutional qualification for office that the state was prohibited from adding under *U.S. Term Limits* because the Constitution only requires an individual to be an inhabitant of the state "when elected." U.S. Const. art. I, § 2, cl. 2. Per the court, "[t]his specific time at which the Constitution mandates residency bars the states from requiring residency before the election." *Schaefer*, 215 F.3d at 1036.

The same principle governs this case. Section 3 only prohibits a disqualified person from *holding* office. It says nothing about *being elected* to office. Thus, barring candidates from the ballot based on section 3 creates an extra-constitutional qualification of the sort the state is prohibited from adding. This is particularly true since, as with residency, a candidate's status under section 3 may change between the time a candidate appears on the ballot and the time they would otherwise hold office because Congress could lift a disqualification.[20]

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

As for the issue of whether the events of January 6 constituted an "insurrection," Section VIII A of President Trump's opening brief demonstrated that based on historical usage and understanding it did not. The Secretary and the Challengers essentially state that

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[20] *Schaefer* also rejected an argument that has appeared in briefing in this case, concluding "California's residency requirement falls outside the scope of Elections Clause cases because it neither regulates the procedural aspects of the election nor requires some initial showing of support." *Id* at 1038.

they prefer their interpretation of the term, but that is a matter for this Court to decide on *de novo* review.

Furthermore, in their brief, the Challengers misunderstand what is required to "engage" in insurrection. To wit, the Challengers claim "[i]t is not necessary that an individual act with the intent to engage in insurrection. Instead, it is sufficient that an individual acted with the intent of 'aiding and furthering the common unlawful purpose.'" Challengers' Brief at 80. But this ignores the plain text of section 3. Section 3 restricts individuals who have "given aid or comfort" to enemies of the United States or "engaged" in insurrection. Providing "aid" and "engaging" are treated as two separate concepts. Engaging requires a much more active level of participation.

Next, the Secretary and the Challengers fundamentally misunderstand the relationship between the First and the Fourteenth Amendment. As a preliminary matter, the Secretary invites this Court to err when she contends that her factfinding—such as it was—on the First Amendment issue is entitled to deference. To the contrary, when it comes to review of constitutional facts of this sort, appellate courts must engage in "*de novo* review even when answering a mixed question primarily involves plunging into a factual record." *U.S. Bank National Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC*, 138 S.Ct. 960, 967 n.4 (2018).

The Challengers claim "Trump has no First Amendment right to engage in insurrection in violation of the Fourteenth Amendment." Challengers' Brief at 85. But this formulation begs the question of what it means to engage in insurrection. Similarly, the Secretary claims "it is a nonsensical to assume that the First Amendment, passed before

Section Three of the Fourteenth Amendment, cabins the effect of the later to, in essence, only those individuals who engaged in violence themselves." Secretary's Brief at 43. Implicit in this statement is an assumption that there is a conflict between the First and Fourteenth Amendments. But there is not. They can and should both be read *in pari materia* to give full effect to both. "The imperative of harmony among provisions is more categorial than most of the other canons of construction because it is invariably true that that intelligent drafters do not contradict themselves (in the absence of duress). Hence there can be no justification for needlessly rendering provisions in conflict if they can be read interpreted harmoniously." Bryan A. Garner & Antonin Scalia, READING LAW at 180 (West 2012). There is nothing in the text of the Fourteenth Amendment that compels a conflict. Statements that are protected by the First Amendment may not qualify as "engaging" in insurrection.

As part of her analysis, the Secretary relies on many statements that are protected by the First Amendment to form part of President Trump's supposedly disqualifying conduct. For example, the Secretary looks to President Trump's statements "over several months" that "sowed doubt in the 2020 election." Secretary's Brief at 44. But even the D.C. District Court in *Thompson v. Trump*, 590 F.Supp.3d 46 (D.D.C. 2022)—which the Secretary selectively cites in the same paragraph—strongly suggested that pre-January 6 activities were protected by the First Amendment. Specifically, Judge Mehta began his analysis of the conspiracy claim by stating:

> Before assessing the sufficiency of Plaintiffs' pleadings, it is important to bear in mind what the alleged conspiracy is and what it is not. *It is not that Defendants conspired to sow doubt and mistrust about the legitimacy of the electoral process and the results of the 2020 presidential election.* Nor is it that Defendants worked together to influence, pressure, or coerce local officials, members of Congress, and the Vice President to overturn a lawful election. *Though many Americans*

might view such conduct to be undemocratic or far worse, neither example is an actionable conspiracy under § 1985(1).

Id. at 97 (emphasis added).

Next, by referencing President Trump's pre-January 6 statements as part of his alleged "incitement," the Secretary butchers the *Brandenberg* standard. *Brandenberg* requires that the *imminent use of violence or lawless action* is the likely result of the speech. If the violence comes days, weeks, months, or even years later, it is in no possible way "imminent."

Moreover, while the Secretary mocks President Trump's citation to the events in Benghazi, *see* Secretary's Brief at 37,[21] she continues to treat alleged *inaction* as "engaging." Even when cited as evidence of purported intent, this is contrary to the text of section 3—which requires active engagement—and would intrude upon the discretion of the President to react appropriately to developing events.

Next, the Secretary appears to place great weight on the phrase "fight like hell" in President Trump's January 6 speech. However, that ignores the broader context and use of the word "fight" in President Trump's speech, which was focused on *political*—not *physical* "fight." For example, President Trump praised Rudy Guiliani, stating "He's got guts. You know what? He's got guts, unlike a lot of people in the Republican Party. He's got guts. He fights, he fights." Rudy Guiliani was over 70 years old on January 6, 2021—no one

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[21] The Secretary claims this refence is "puzzling" because "[t]he foreign attack on the Benghazi offices is straightforwardly not an insurrection." Secretary's Brief at 37. This willfully ignores the context for which it is cited. The claim is not that the Benghazi attack was an "insurrection." Instead, it is offered to illustrate that Presidential inaction cannot be the basis for disqualification, even under the looser standard of providing aid and comfort to an enemy, without opening the door to disqualify all manner of officials who do not act with the alacrity critics would prefer.

reasonably believes President Trump meant that Guiliani engaged in physical altercations. Likewise, President Trump referenced members of the House of Representatives fighting: "Jim Jordan and some of these guys, they're out there fighting. The House guys are fighting." No one reasonably believes that Jim Jordan was acting as a modern-day Preston Brooks,[22] physically clashing with his fellow representatives. The reference to "fighting" was to political fights, not physical ones, and does not serve to transform President Trump's speech into "incitement."

CONCLUSION

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

Respectfully submitted this 11th day of January 2024.

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[22] In 1856, Representative Brooks physically beat Senator Charles Sumner in the Senate Chamber. *See The Caning of Senator Charles Sumner*, United States Senate, https://www.senate.gov/artandhistory/history/minute/The_Caning_of_Senator_Charles_Sumner.htm.

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