

STATE OF MAINE  
SECRETARY OF STATE

In re: Challenges of Kimberley Rosen,  
Thomas Saviello, and Ethan Strimling; Paul  
Gordon; and Mary Ann Royal to Primary  
Nomination Petition of Donald J. Trump,  
Republican Candidate for President of the  
United States

**RULING OF THE SECRETARY  
OF STATE**

On December 15, 2023, I held a hearing under 21-A M.R.S. § 337 on three challenges to the nomination petition of Donald J. Trump, for the Republican primary for President of the United States. The first two challenges—one filed by Mary Ann Royal (the “Royal Challenge”) and one (the “Rosen Challenge”) filed by Kimberley Rosen, Thomas Saviello, and Ethan Strimling (the “Rosen Challengers”)—contest Mr. Trump’s qualification for office under Section Three of the Fourteenth Amendment to the U.S. Constitution. The third challenge, filed by Paul Gordon (the “Gordon Challenge”), contests Mr. Trump’s qualification under the Twenty-Second Amendment. For the reasons set forth below, I conclude that Mr. Trump’s primary petition is invalid. Specifically, I find that the declaration on his candidate consent form is false because he is not qualified to hold the office of the President under Section Three of the Fourteenth Amendment.

**Procedural History**

The Secretary of State’s Office received three challenges to the nomination petition of Donald J. Trump, each filed under 21-A M.R.S. §§ 336 and 337. The deadline for filing those challenges was 5:00 pm on Friday, December 8, 2023. *See* 21-A M.R.S. § 337(2)(A). Each challenge was timely.

In the first challenge, Mary Ann Royal, a registered voter of Winterport, alleged that Mr. Trump violated his oath of office because he engaged in insurrection or rebellion against the United

States, or has given aid or comfort to the enemies thereof. While Ms. Royal did not explicitly identify Section Three of the Fourteenth Amendment as the basis of her challenge, it clearly underpins the disqualification argument she set forth.

In the second challenge, Attorney Paul Gordon, a registered voter of Portland, argued that because Mr. Trump has expressly stated that he won the 2020 election, he is barred from office under the Twenty-Second Amendment to the U.S. Constitution, which sets a two-term limit on Presidents.

In the third challenge, Kimberley Rosen, a registered voter of Bucksport and former Republican State Senator; Thomas Saviello, a registered voter of Wilton and former Republican State Senator; and Ethan Strimling, a registered voter of Portland and former Democratic State Senator, collectively contended that Mr. Trump is barred from office because he engaged in insurrection as defined by Section Three of the Fourteenth Amendment.

On Monday, December 11, 2023, I issued a Notice of Hearing to all parties, indicating that a consolidated hearing would be held at 10:00 am on December 15, 2023, in Augusta. The Notice informed the parties that the hearing would be conducted in accordance with 21-A M.R.S. § 337 and the Maine Administrative Procedure Act (“APA”). The parties exchanged exhibit and witness lists during the afternoon of December 13, 2023, and the Secretary of State’s Office received timely applications to intervene from the Citizens for Responsibility and Ethics in Washington (“CREW”); John Fitzgerald of Sedgwick; State Representative Mike Soboleski; Professor Mark A. Graber; and Michael Lake of Belgrade.

At the start of the hearing, I denied the intervention petitions of Mr. Fitzgerald and Mr. Lake because they were not present for the hearing. However, without objection from the parties, I ultimately accepted their submissions as amicus briefs. I also granted, without timely objection,

the intervention requests of CREW and Representative Soboleski, who were present for the hearing, and the intervention request of Professor Graber, who intervened solely for the purpose of submitting an amicus brief.

At the start of the hearing, I noted for the parties that the following were already part of the administrative record:

- Mr. Trump's original petition
- Mr. Trump's candidate consent form, dated October 20, 2023
- The challenge of Mary Anne Royal, dated December 6, 2023
- The challenge of Paul Gordon, dated December 8, 2023
- The challenge of Kimberley Rosen, Thomas Saviello, and Ethan Strimling, dated December 8, 2023
- The Notice of Hearing sent by email and U.S. mail to the challengers and the candidate, dated December 11, 2023

Without objection from the parties, I admitted the Rosen Challengers' first five exhibits. They consist of Mr. Trump's signed consent form (identical to Mr. Trump's first and only exhibit<sup>1</sup>); the Rosen Challenge; and voter registration records for each Rosen challenger.<sup>2</sup> I provisionally admitted the Rosen Challengers' remaining exhibits, exhibits 6 through 112,<sup>3</sup> at the hearing pending resolution of any objections. I also provisionally admitted Attorney Gordon's three exhibits, all articles pertaining to Mr. Trump's claims regarding the 2020 election, as well as

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<sup>1</sup> Mr. Trump attached additional exhibits to a brief he submitted after the hearing, which I have addressed below.

<sup>2</sup> No party has challenged the voter registration status of any challenger, and I therefore find that each challenge complies with 21-A M.R.S. § 337(2)(A).

<sup>3</sup> Exhibit 111 is a file folder containing a series of additional exhibits. For ease of reference, I have renumbered those exhibits as Rosen Ex. 111-1 through Ex. 111-56.

Representative Soboleski's single exhibit, a YouTube video concerning Mr. Trump's role in the events of January 6, 2021.

At the hearing, Ms. Royal and Attorney Gordon testified under oath. The Rosen Challengers called one witness, Professor Gerard M. Magliocca, a law professor at the Indiana University School of Law. Mr. Trump called no witnesses. I also heard argument on the scope of my authority under state and federal law.

Without objection of the parties, I set a deadline of 5:00 pm on Monday, December 18, for articulation and briefing of objections to any provisionally admitted exhibits, and I therefore held the hearing record open. Mr. Trump timely filed a brief articulating objections, and the Rosen Challengers timely responded by the deadline I set at the hearing: 5:00 pm on Tuesday, December 19. No other party filed objections.

I likewise permitted the parties to submit final legal briefs regarding the merits of the challenges by Tuesday, December 19, at 5:00 pm. The Rosen Challengers and Mr. Trump chose to waive closing statements at the hearing, deferring instead to their legal briefs. I received timely closing briefs from the Rosen Challengers and Mr. Trump.

Following the Colorado Supreme Court's decision in *Anderson v. Griswold*, Case No. 23SA300, 2023 CO 63, 2023 WL 8770111 (Dec. 19, 2023), I invited additional briefing from the parties regarding the significance of that decision, if any, to this case by 8:00 pm on Thursday, December 21, 2023. The Rosen Challengers and Mr. Trump filed briefs by the deadline.

On Wednesday, December 27, sixteen days after he learned that I would preside over the hearing in this matter and shortly before issuance of my decision, Mr. Trump filed a Motion requesting that I disqualify myself due to alleged bias. That Motion is denied as untimely. *See* 5 M.R.S. § 9063(1) (requiring "timely charge of bias"). Moreover, had the Motion been timely, I

would have determined that I could preside over this matter impartially and without bias. My decision is based exclusively on the record before me, and it has in no way been influenced by my political affiliation or personal views about the events of January 6, 2021.

### **Legal Requirements**

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.

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).

“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.* To prevail on a challenge to a candidate’s nomination petition, “the challenger has the burden of providing sufficient evidence to invalidate the petitions or any names upon the petitions.” *Id.* § 337(2)(B).

### **Findings of Fact and Conclusions of Law**

I have reviewed the exhibits submitted in this case. I also have carefully considered the arguments proffered by the parties. I take my role in this proceeding extremely seriously, given

both the stakes and the novel constitutional questions at issue. For the reasons that follow, I conclude that Mr. Trump's primary petition is invalid.

**A. Most of the Evidence Submitted by the Rosen Challengers, and Objected to by Mr. Trump, Is Admissible Under 5 M.R.S. § 9057.**

Title 5, Section 9057 sets forth the governing standard for admissibility of evidence in Section 337 proceedings. It is more permissive than the Maine Rules of Evidence, *see* 21-A M.R.S. § 9057(1), and directs that “[e]vidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs,” *id.* § 9057(2). I “may,” though by no means must, “exclude irrelevant or unduly repetitious evidence.” *Id.* This “relaxed evidentiary standard,” *State v. Renfro*, 2017 ME 49, ¶ 10, 157 A.3d 775, affords me substantial latitude to decide what evidence to admit, though it generally favors admissibility.

Mr. Trump first makes a blanket objection, on Due Process grounds, to the fact that he was unable to review the Rosen Challengers' exhibits before the hearing. As discussed on the record, due to a technical difficulty suffered by the Rosen Challengers, a Dropbox link provided to the parties before the hearing and containing many of the Rosen Exhibits was inoperative. With assistance from my office, copies of the evidence were provided to counsel during the hearing.

This delay does not amount to a Due Process violation. There is no requirement under the APA that evidence be shared prior to an administrative hearing. The APA mandates that parties be permitted 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). Mr. Trump was afforded those opportunities at the hearing.

Further, at my instruction, the Rosen Challengers circulated an exhibit list before 5:00 pm on Wednesday, December 13, that identified Rosen Exhibits 1 through 87. Additional exhibits that the Rosen Challengers entered into evidence at the hearing were identified by Intervenor

CREW by email during the afternoon of Thursday, December 14. Therefore, by early evening on December 14, Mr. Trump was fully aware of all of the exhibits that would be offered against him at the hearing.

This was ample notice, in part because the majority of the evidence that the Rosen Challengers offered at the hearing had already been presented and litigated in *Anderson v. Griswold*. Scott Gessler, Mr. Trump's lead counsel here, is lead counsel for Mr. Trump in that case, too. *See generally Anderson*, 2023 CO 63. I also afforded all parties three additional days after the hearing to organize and file their objections to any exhibits, minimizing any disadvantage that may have resulted from the delay in the exhibits being shared. Mr. Trump's Due Process objection to the Rosen Challengers' exhibits is therefore overruled.

The notice the Rosen Challengers provided stands in stark contrast to how Mr. Trump has handled 25 exhibits,<sup>4</sup> never before referenced in this proceeding, that he cites in footnotes to his evidentiary objections brief. Mr. Trump has not requested that I enter these exhibits into evidence, nor would it be fair to do so over an objection three days after the hearing. Mr. Trump submitted an exhibit list prior to the hearing containing only one exhibit, and he could have supplemented the record with additional exhibits at the hearing. He chose not to do so, and I accordingly sustain the objection of the Rosen Challengers, as articulated in their response brief, to those exhibits. They will not be admitted.<sup>5</sup>

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<sup>4</sup> The exhibits are numbered 26-51. Mr. Trump has never identified exhibits 1-25.

<sup>5</sup> Mr. Trump also attached a single exhibit to his closing brief, namely a report of the Inspector General of the U.S. Department of Defense on the events of January 6, 2021. Mr. Trump does not cite the exhibit in his brief, nor has its admission been objected to by the Rosen Challengers. I find that the exhibit is relevant and reliable and, without objection, will admit it into evidence as Trump Exhibit 2.

Mr. Trump also makes a blanket challenge to the relevance of the Rosen Challengers' evidence, claiming that none pertains to the truth or falsity of Mr. Trump's declaration under Section 336(3). As discussed further below, I conclude that the evidence is relevant. *See* 5 M.R.S. § 9057(2). I accordingly overrule the objection.

The meat of Mr. Trump's objection brief is focused on the Rosen Challengers' Exhibit 7, the Final Report of the Select Committee to Investigate the January 6 Attack on the United States Capitol (the "January 6 Report"). Mr. Trump's objections to the admissibility of the report are overruled.

As an initial matter, Mr. Trump's objections hinge largely on rules of evidence that do not govern this proceeding. The fact that a report includes hearsay, contains irrelevant facts, or lacks foundation does not automatically render it inadmissible under the APA. Rather, the central question is whether, under Section 9057(2), it is the type of evidence on which reasonable persons are accustomed to rely in serious affairs.

I rule that that the January 6 Report meets this standard. Under the Federal Rules of Evidence, government investigative reports, including reports of Congress, are presumed admissible, with the party challenging admissibility bearing the burden of showing the report is untrustworthy. *See 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. Similarly, in Maine, "factual findings from a legally



authorized investigation” are admissible under the Maine Rules of Evidence unless “sources of information or other circumstances indicate lack of trustworthiness. *See* Me. R. Evid. 803(8)(a).

I am not bound by either the federal or Maine rules of evidence because this is an APA proceeding. However, the four factors outlined above provide a useful framework for assessing the trustworthiness of the January 6 Report. The first three factors plainly counsel in favor of admissibility. Mr. Trump’s objections focus primarily on the fourth factor, namely the motivation of the authors. But all Congressional reports are to some degree political, and many of the facts contained in the Report are corroborated by other documentary and video evidence in the record. I accordingly see no reason to exclude the January 6 Report in its entirety under 5 M.R.S. § 9057(2). That said, Mr. Trump’s concerns are valid insofar as the Report reflects a curated view of the evidence and contains characterizations of that evidence. These limitations influence the weight that I assign to the Report.

Mr. Trump also objects to the records and evidence that the Rosen Challengers seek to admit from the proceedings in *Anderson*.<sup>6</sup> Mr. Trump’s reliance on *Cabral v. L’Hereux*, 2017 ME 50, 157 A.3d 795, to support his objection is misplaced. In that case, the Law Court instructed that courts cannot of their own accord take *judicial notice* of testimony and exhibits from separate proceedings. *See id.*, 2017 ME 50, ¶ 11, 157 A.3d 795. But that is not what the Rosen Challengers have requested here. They have sought to admit each and every exhibit individually, and have provided a copy of each to me and to the parties.<sup>7</sup> The fact that the exhibits are associated with *Anderson* is, in other words, beside the point, as it is the evidence itself that the Rosen Challengers

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<sup>6</sup> Mr. Trump likewise objects to inclusion of the final order issued in *New Mexico ex rel. White v. Griffin*. *See* Rosen Ex. 36. The objection is overruled. I may properly consider the legal analysis of a court on relevant legal issues to the extent the analysis is persuasive.

<sup>7</sup> Moreover, as noted above, testimony included in those exhibits was subject to cross-examination by Mr. Trump during the *Anderson* proceedings.

have identified as exhibits. That is sufficient under 5 M.R.S. § 9057(2), and the objection is overruled.<sup>8</sup>

Mr. Trump also levies a number of individual objections to particular exhibits proffered by the Rosen Challengers.<sup>9</sup> I sustain these objections in part. Specifically, while I am not obligated to exclude irrelevant evidence, *see* 5 M.R.S. § 9057(2), I conclude that Rosen Exhibits 38-48, videos of speeches, town halls, and conferences from 2015-2019 and 2023, are too remote in time from the events of January 6, 2021, to be relevant, and I therefore will exclude them. I likewise sustain Mr. Trump's objection as to Rosen Exhibits 78 and 79—my predecessor's November 2017 press release, and letter of August 2018—for the same reason.

Otherwise, Mr. Trump's objections are overruled. Insofar as he has concerns about authenticity, foundation, completeness, hearsay, or improper legal argument, they do not render the challenged exhibits automatically inadmissible under the APA, and I find them reliable given they themselves contain sufficient indicia of reliability and are corroborated by other evidence in the record. I will consider Mr. Trump's concerns when assigning weight to these exhibits.<sup>10</sup>

In sum, I sustain Mr. Trump's objections as to Rosen Exhibits 38-48 and 78-79. I likewise sustain the Rosen Challengers' objection to the exhibits attached to Mr. Trump's evidentiary objections brief. Otherwise, Rosen Exhibits 6-112, which I admitted provisionally at the hearing,

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<sup>8</sup> Mr. Trump also makes a puzzling *res judicata* argument, suggesting that because he prevailed in a lower Colorado court, the Rosen Challengers cannot introduce evidence from that case against him. Putting aside the lack of any legal basis for this argument, I will assume that Mr. Trump no longer wishes to press it given the subsequent decision of the Colorado Supreme Court.

<sup>9</sup> The First Amendment argument that Mr. Trump included in his objections brief, and which has no bearing on the admissibility of evidence, is addressed in Part D.4, below.

<sup>10</sup> As to the legal briefs objected to—e.g., Rosen Exhibit 81, the amicus brief of Professor Magliocca in *Grove v. Simon*—I agree that they are not evidence of any fact and I admit them solely to consider their analysis of the applicable law.

are admitted. All other exhibits that were provisionally admitted at the hearing are now admitted given no party filed an objection to their admission. With this ruling, the hearing record is now closed.

**B. As a General Matter, the Secretary of State Has Authority to Keep Unqualified Candidates Off the Primary Election Ballot.**

As a general matter, states have inherent authority over their ballots. Consistent with state authority to regulate the “Times, Places and Manner” of congressional elections under Article I, Section 4 of the U.S. Constitution, and to manage the selection process for presidential electors, *see* U.S. Const. art. II, § 1 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of 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.”), “the States have evolved comprehensive . . . election codes regulating . . . . [the] selection and qualification of candidates.” *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The inevitable result of States managing their own elections is that each has different requirements and procedures for ballot access, even with respect to presidential candidates. President Biden, for example, will not appear on New Hampshire’s 2024 Democratic presidential primary ballot, even though he has qualified for Maine’s 2024 Democratic presidential primary ballot. At the same time, Mr. Chris Christie will not appear on the Maine’s 2024 Republican presidential primary ballot, even though he will appear on New Hampshire’s 2024 Republican presidential primary ballot.

Similarly, while state legislatures cannot create new qualifications for holding presidential office, they can choose to establish a process to exclude candidates who fail to meet the qualifications set forth in the U.S. Constitution. *See, e.g., Anderson*, 2023 CO 63, ¶¶ 53-56. As

now-Justice Gorsuch observed in *Hassan v. Colorado*, 495 F. App'x 947 (10th Cir. 2012), “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.” *Id.* at 948; *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))); *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).

It is that authority that the Maine Legislature has delegated to me. As the Rosen Challengers note, under Section 443 of Title 21-A, the Secretary of State is statutorily obligated to determine if a nomination petition meets the requirements of Section 336. *See, e.g., Christie v. Bellows*, No. AP-23-42 (Me. Super. Ct., Ken. Cnty., Dec. 21, 2023) (affirming Secretary’s decision to reject candidate petition of presidential candidate for lacking sufficient certified signatures). Section 336, in turn, requires all candidates, including presidential candidates, to submit a written consent containing a declaration of residency and party designation, and a statement that the candidate “meets the qualifications of the office the candidate seeks.” 21-A M.R.S. § 336(3). Section 336 also renders any primary petition void where I find, pursuant to a challenge like those filed in this case, that “any part of the declaration is . . . false.” *Id.*

Maine’s election laws thus contemplate that I review the accuracy of a candidate’s declaration that they meet the qualifications of the office they seek. I therefore disagree with Mr. Trump’s contention that only Congress can adjudicate the qualifications of a Presidential candidate. The State’s authority, and that delegated by the Legislature, require me to limit access

to the primary ballot to qualified candidates *See, e.g., Christie*, No. AP-23-42; *Carey v. Sec’y of State*, No. CV-2022-09 (Me. Super. Ct., Oxford Cnty., May 10, 2022) (affirming decision to exclude candidate for District Attorney from primary ballot because “Maine election law required that [the candidate] certify . . . that he was qualified to serve as a District attorney” but he failed to so certify because by statute he was not qualified).

Two further aspects of my authority to exclude unqualified candidates from the primary ballot warrant mention. *First*, that authority is not limited to the specific qualifications set forth on a given year’s candidate consent form. While Section 336 requires that the consent form list the statutory and constitutional requirements of the office sought by the candidate, 21-A M.R.S. § 336(1), the declaration refers not to the form, but 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. The statute reflects that the Legislature’s principal concern was not whether a candidate is truthful on the form, but more fundamentally whether the candidate is *qualified for office*.

For this reason, the declaration on the 2024 consent form, which asks candidates to confirm that they “meet the qualifications to hold this office as listed above,” Rosen Ex. 1 (signed consent), is not, as Mr. Trump claims, limited to the qualifications listed on that form. The word “as” in the declaration is significant. Absent the word “as,” the phrase “meet the qualifications to hold this office listed above” would limit the scope of the declaration as Mr. Trump claims. Its presence, however, underscores that the qualifications are listed on the consent form as a convenience—the qualifications “as listed above”—consistent with my obligation to print them under Section 336(1).

Any alternative interpretation would suggest that I can pick and choose which qualifications are applicable in designing a candidate consent form, which I straightforwardly

cannot do. *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.”). The form, for example, omits reference to the Twenty-Second Amendment prohibition of serving as President for more than two terms, but that qualification plainly still applies. Similarly, if my office did not list the Article II qualifications on the form, I would not consequently be required to place a teenager on the presidential primary ballot. The declaration is instead applicable to *all* qualifications of the office sought, and there is nothing unfair about holding a candidate to them, as Section 336(3) contemplates.

*Second*, the fact that Section 336(3) separately refers to 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” is of no moment. Counsel for Mr. Trump—who, before his co-counsel said the opposite, admitted at the hearing that the declaration and statement were legally indistinguishable—points to no aspect of the legislative history of Section 336 suggesting that the distinction is meaningful. Section 336(3) requires that both the declaration and statement be verified by oath or affirmation, and Section 355, which incorporates analogous requirements for nomination petitions of non-party candidates, collapses the distinction entirely and directly requires a declaration “that the candidate meets the qualifications of the office the candidate seeks.” 21-A M.R.S. § 355(3).

That said, even if there were a distinction between the declaration and statement identified in Section 336(3), that would not meaningfully limit my obligation to keep unqualified candidates off the ballot. The Rosen Challenge, for example, cites both Section 336 and Section 337. While Section 336(3) addresses the declaration—and directs that the petition is invalid should I find that declaration false in any way—Section 337(2) authorizes challenges to the validity of primary

petitions more broadly, underscoring my authority as Secretary of State to keep clearly unqualified candidates off the primary ballot. *Cf. Arsenault v. Sec'y of State*, 2006 ME 11, 905 A.2d 285 (reviewing whether Secretary properly interpreted relevant statute in disqualifying replacement candidate without questioning Secretary's authority to disqualify unqualified candidates).

**C. Mr. Trump's False Claims Regarding the 2020 Election Do Not Disqualify Him Under the Twenty-Second Amendment.**

The Twenty-Second Amendment provides that “[n]o person shall be elected to the office of the President more than twice.” U.S. Const. amend. XXII, § 1. Attorney Gordon claims that given Mr. Trump won the 2016 election, and has repeatedly claimed to have won the 2020 election, he is disqualified. *See* Gordon Challenge 2 (“When a candidate makes a factual representation that disqualifies him from the office he seeks, he cannot appear on the ballot.”); *see also* Gordon Exs. 1-3 (newspaper articles quoting Mr. Trump making these claims).

Attorney Gordon cites no authority for his interpretation of the Twenty-Second Amendment, which is contrary to the Amendment's plain meaning. Application of the term limit turns on whether an individual has *actually been elected President twice*, not on beliefs or assertions about that fact. *Cf. Nader v. Butz*, 398 F. Supp. 390, 397 (D.D.C. 1975) (“Having been elected to [the presidency] twice, [Richard Nixon] is precluded from serving again.”). That Mr. Trump has falsely asserted that he won the 2020 election is no more disqualifying than it would be for him to proclaim that he is not a United States citizen. In other words, political grandstanding does not trigger the bar of the Twenty-Second Amendment.

When questioned at the hearing, Attorney Gordon admitted that, as a factual matter, Mr. Trump did not win the 2020 election. In fact, there appears to be no dispute between any of the parties that President Biden prevailed over Mr. Trump. Therefore, given Mr. Trump has only won

a single election for President, he is not barred from being elected to the same office again under the Twenty-Second Amendment.

**D. Mr. Trump Engaged in Insurrection Against the United States Such that He Is Not Qualified to Hold the Office of President.**

1. Section 337 is an appropriate process by which to adjudicate a candidate qualification challenge based on Section Three of the Fourteenth Amendment.

The exercise of state authority to keep unqualified candidates off the ballot is contingent on the state creating a process by which to do so. *See Anderson*, 2023 CO 63, ¶¶ 53-56. Sections 336, 337, and 443 of Title 21-A describe that process in Maine. There is no other mechanism of which I am aware by which a Maine voter can challenge the qualifications of a candidate for office. It is the means by which I am authorized, and indeed duty-bound under the terms of the oath of office to which I swore, *see Me. Const. art. IX, § 1*, to enforce Maine's election laws.

The question of whether a petition is valid under Title 21-A is typically straightforward. If there is a dispute about the validity of signatures, or a candidate is underage or not a resident of the correct jurisdiction, the taking of extensive evidence may be unnecessary. Discharge of my duty in such cases requires little interpretation of governing law or the corresponding record. Rather, I am tasked with determining whether a statutory or constitutional requirement is met according to well-established standards.

As the Rosen Challengers have pointed out, however, my role in determining whether a candidate has qualified for the ballot is not always so simple. The Secretary of State has, for example, wrestled with complex evidentiary records regarding potential fraud of petition circulators. *See Boyer v. Dep't of the Sec'y of State*, Docket No. AP-18-20 (Me. Super., Ken. Cty., Apr. 26, 2018). The Secretary has also had to consider novel and difficult questions of state and federal constitutional law. *See, e.g., Jones v. Sec'y of State*, 2020 ME 113, 238 A.3d 982.



This case presents similar hurdles. *See Anderson*, 2023 CO 63, ¶ 7 (recognizing that a challenge under Section Three of the Fourteenth Amendment is “uncharted territory” and presents “several issues of first impression”). But complexity is not a limitation on my authority under Sections 336, 337, or 443. These statutes do not suggest that I am restricted to adjudicating straightforward questions of law or fact. Nor do I have the discretion to decline to rule in ballot qualification cases simply because they present difficult issues. The statutes instead reflect that Maine has joined other states in choosing to enforce Section Three of the Fourteenth Amendment, and in doing so the Maine Legislature has delegated that authority to me. *See, e.g., Anderson*, 2023 CO 36, ¶ 56; *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).

Mr. Trump’s concerns about the adequacy of this proceeding are therefore without merit. He has had the opportunity to present evidence; to call witnesses; to cross-examine; and to argue at length both the legal and factual issues germane to my decision. And while the timeline of the proceedings has, by necessity, been compressed, this is hardly the first time that Mr. Trump—or Attorney Gessler—has confronted the applicability of Section Three of the Fourteenth Amendment to a presidential candidate. It likewise is not the first time that Mr. Trump has had to grapple with whether the evidence presented here, which almost directly mirrors that which was offered in *Anderson*, demonstrates that he engaged in insurrection.<sup>11</sup> And Mr. Trump has the opportunity to appeal my decision, providing him with additional process in both the Superior Court and the Law Court. *See* M.R. Civ. P. 80C; 21-A M.R.S. § 337(D)-(E); *Amsden v. Moran*, 904 F.2d 748, 755

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<sup>11</sup> In *Anderson*, Trump had the opportunity to engage in discovery, litigate dispositive motions, and present his full case at a five-day trial, obviating any concern that the speed of this proceeding is unfair. *Anderson*, 2023 CO 63, ¶¶ 79-86. In fact, both Mr. Trump and the Rosen Challengers heavily rely on the arguments and evidence from the *Anderson* proceeding.

(1st Cir. 1990) (recognizing that the “existence of state remedies” is “highly relevant” to claims of due process violations).

While I am cognizant of the fact that my decision could soon be rendered a nullity by a decision of the United States Supreme Court in *Anderson*, that possibility does not relieve me of my responsibility to act. Nor do the deadlines set forth in Section 337 give me the option to delay my decision until the Supreme Court has ruled. I therefore conclude that I have the authority to adjudicate the Rosen and Royal Challenges, and that this Section 337 proceeding is appropriate for doing so.

2. Section Three of the Fourteenth Amendment Is Self-Executing Without Congressional Action and Applies to the President.

Section Three of the Fourteenth Amendment, ratified in 1868, provides, in relevant part, that:

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States . . . who, having previously taken an oath, as a member of congress, or as an officer of the United States . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. Const. amend XIV, § 3.

As a threshold matter, the fact that Section Three refers to *holding* office, rather than *running for* office, is not noteworthy. Article II’s qualifications do not refer to running for office, either, but rather are phrased in terms of eligibility “to the office.” *See* U.S. Const. art. II, § 1, cl.

5. My obligation, here triggered by the Rosen and Royal Challenges, is to keep candidates unqualified to *take* office from Maine’s presidential primary ballot. *See* 21-A M.R.S. § 336(3); *see also Lindsay*, 750 F.3d at 1065; *Hassan*, 495 F. App’x at 948; *Ogilvie*, 357 F. Supp. at 113.

Turning then to the principal question of whether Section Three of the Fourteenth Amendment applies to candidates for president, I conclude that it does, for the following reasons.

*First*, no Congressional action is necessary to render effective the qualification set forth in Section Three. 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.” *Civil Rights Cases*, 109 U.S. 3, 20 (1883). Contemporary evidence suggests the same is true, specifically, of Section Three. *See, e.g.*, Dec. 15, 2023 Hearing 5:46:50-5:48:52 (Magliocca). Both the military and states themselves, for example, began enforcing Section Three soon after adoption without any Congressional authorization. *See* Dec. 15, 2023 Hearing 5:26:50-5:27:20, 5:46:55-5:47-10 (Magliocca); *see also* *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). Congress also began granting amnesties pursuant to its ability to “remove [the] disability” imposed by Section Three, which only would be necessary if Section Three had taken effect. *See* Dec. 15, 2023 Hearing 5:29:56-5:30:18, 5:47:35-5:47:58 (Magliocca).

I recognize that Section Five of the Fourteenth Amendment provides that “[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.” U.S. Const. amend. XIV, § 5. But that does not mean that action pursuant to Section Five is a prerequisite to the substantive provisions of the Fourteenth Amendment having any legal force. Indeed, champions of the Section Three enforcement mechanism that Congress briefly authorized questioned whether it was necessary at all. *See Cong. Globe*, 41st Cong., 1st Sess., p. 626-28. It stands to reason that, like Section One of the Fourteenth Amendment, which the Supreme Court has recognized is self-executing, *see City of Boerne v. Flores*, 521 U.S. 507, 524 (1997); *see also* *Cong. Globe*, 39th Cong. 1st Sess., pp. 1095, 2459, 2498 (highlighting desire to ensure Section

One could not functionally be repealed by a future Congress); the Thirteenth Amendment, which also contains an enforcement provision and is self-executing, *see* U.S. Const. amend. XIII; *see The Civil Rights Cases*, 109 U.S. at 20; and the qualifications of Article II, which are not contingent on enforcement legislation, Section Three requires no Congressional action in order to become effective. *See Anderson*, 2023 CO 63, ¶¶ 88-106.

On this point, I find *Griffin's Case*, 11 F. Cas. 7 (C.C.D. Va. 1869), to be unpersuasive. It is not binding in Maine, does not assess whether states can enforce Section Three without Congressional authorization, and has been discredited. *See, e.g., Anderson*, 2023 CO 63, ¶ 103; Amicus Br. of Constitutional Law Professor Mark A. Graber 7-8 (Dec. 14, 2023).<sup>12</sup>

*Second*, the presidency is covered by Section Three. It is an “office, civil or military, under the United States,” and the President is an “officer of the United States.” U.S. Const. amend. XIV, § 3.

The U.S. Constitution repeatedly refers to the presidency as an office. *See* U.S. Const. art. I, § 3; art. II, §§ 1, 4; U.S. Const. amends. XII, XXII, XXV; *see also Anderson*, 2023 CO 63, ¶ 133 (noting Constitution refers to the presidency as an office 25 times). At first blush, it would seem odd to interpret the text of Section Three to incorporate the President through a catchall provision that follows the enumeration of Senators, Representatives, and presidential and vice-presidential electors. But none of those enumerated positions are “offices” under the Constitution. The Constitution does not refer to Senators and Representatives as such, *see, e.g.,* U.S. Const. art. I, § 5, cl. 1 (referring to “[m]embers” of Senate and House); *id.* art. I, § 6, cl. 2 (same); *id.* art. II, § 1,

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<sup>12</sup> Dicta from *Robinson v. Bowen*, 567 F. Supp. 2d 1144 (N.D. Cal 2008), cited by Mr. Trump, is likewise unpersuasive. That case involved an attempt to obtain an order from a federal court barring John McCain from the ballot, rather than the enforcement of state laws designed to keep individuals unqualified for the office they seek off the ballot.

cl. 2 (distinguishing Senators and Representatives from those holding office under the United States),<sup>13</sup> and electors are “no more officers or agents of the United States than are . . . the people of the States when acting as electors of representatives in congress,” *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890).

The history of Section Three firmly supports the idea that it covers the presidency. Professor Magliocca testified that Members of Congress believed the presidency to constitute an office when debating the language of Section Three,<sup>14</sup> as did contemporaries outside of Congress, including those who sought to keep Jefferson Davis from the presidency. *See* Dec. 15, 2013 Hearing 5:36:16-5:41:40; *see also Anderson*, 2023 CO 63, ¶ 140 (highlighting this understanding in debates around adopting the Fourteenth Amendment); *cf. District of Columbia v. Heller*, 554 U.S. 570, 577 (2008) (prioritizing normal and ordinary usage of words over “secret or technical meanings that would not have been known to ordinary citizens in the founding generation”). Opinions issued by then–U.S. Attorney General Stanbury echoed this understanding, confirming the breadth of Section Three’s reference to “officer under the United States.” *See* 12 U.S. Op. Att’y Gen. 182, 203, 1876 WL 2127 (1867); 12 U.S. Op. Att’y Gen. 141, 158 (1867); *see also* Dec. 15, 2013 Hearing 5:42:50-5:44:00 (Magliocca).

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<sup>13</sup> While the Court in *U.S. Terms Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), referred to both the President and Members of Congress as “federal officers,” *see id.* at 805 n.17, that offhand statement in a footnote is hardly authoritative, never mind more persuasive than contemporaneous accounts of the meaning of Section Three. Additionally, references in the Constitution to offices in the House and Senate that Mr. Trump cites only support the Rosen Challengers’ view, in that they distinguish offices like Speaker from the elected position of Representative or Senator. *See* U.S. Const. art. I, § 2, cl. 5 (“The House of Representatives shall chuse their Speaker and other Officers . . .”).

<sup>14</sup> Members of Congress likewise did not distinguish between officers “of” and officers “under” the United States. *See, e.g.,* Cong. Globe, 39th Cong., 1st Sess., p. 3939.

Mr. Trump cites an early draft of Section Three that referred to the “office of President or Vice President,” Cong. Globe, 39th Cong., 1st Sess. 919 (1866), as evidence that the adopted language was not intended to be as expansive. But the Rosen Challengers persuasively argue that (1) the early draft confirms that the drafters both intended the presidency to be covered by Section Three and considered the presidency an office; and (2) the adopted language of Section Three contains a much broader catchall than that which was included in the draft Mr. Trump cites, suggesting it was broadened to incorporate the office of the presidency. This makes good sense; it is implausible that the drafters of Section Three chose to exempt the highest office in our government from an amendment designed to keep confederates from positions of power. *See* Cong. Globe, 39th Cong., 1st Sess. 2505 (1866) (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* Dec. 15 Hearing 5:23:10-5:23:55 (Magliocca).

The uniqueness of the president’s oath does not change the calculus, either.<sup>15</sup> While the Article II oath requires the President to “preserve, protect and defend the Constitution,” U.S. Const. art. II, § 8, which is technically different than Article VI’s command that officers take an oath to “support this Constitution,” *id.* art. IV, cl. 3, that is a distinction without a difference. *See, e.g.,* Cong. Globe 39th Cong., 1st Sess. App’x, p. 234 (statements of Kentucky Senator Garrett Davis referencing both oaths in listing constitutional protections against insurrection); *accord* Dec. 15, 2023 Hearing 5:25:41-5:26:33, 5:44:14-5:46:28 (Magliocca). To preserve, protect, and defend the Constitution is, necessarily, to support it. *See Anderson*, 2023 CO 63, ¶¶ 156-58.

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<sup>15</sup> The parties do not contest that Mr. Trump took the presidential oath. *See Rosen Ex. 6.*

In sum, the text, history, and context of Section Three of the Fourteenth Amendment make clear that it covers the President, and that it is a qualification enforceable by the states.

3. The record demonstrates that the events of January 6, 2021 were an insurrection.

The parties do not meaningfully dispute the events of January 6, 2021. Multiple government reports that the Rosen Challengers entered into evidence confirm that a large group of people violently attacked the Capitol with the intent of preventing the certification of the presidential election. This resulted in a lockdown of the Capitol complex, an evacuation of the Vice President and congressional leaders, an interruption of official House and Senate proceedings, and multiple deaths and injuries. As described in a United States Government Accountability Report:

Over the course of about 7 hours, more than 2,000 protestors entered the U.S. Capitol on January 6, disrupting the peaceful transfer of power and threatening the safety of the Vice President and members of Congress. The attack resulted in assaults on at least 174 police officers, including 114 Capitol Police and 60 D.C. Metropolitan Police Department officers. These events led to at least seven deaths and caused about \$2.7 billion in estimated costs.

Rosen Ex. 60 (GAO, Report to Congressional Requestors, Capitol Attack: Federal Agencies Identified Some Threats, but Did not Fully Process and Share Information Prior to January 6, 2021 (GAO-23-106625) (Feb. 2023) (“GAO Report”)), at 1.

In making their case that the events of January 6, 2021 constitute an insurrection, the Rosen Challengers rely heavily on the proceedings in—and evidence from—the *Anderson* case. Much of that evidence is in the record here, and I find the reasoning of the Colorado Supreme Court

compelling.<sup>16</sup> That said, even without the benefit of the *Anderson* decision, 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.

Professor Magliocca defined an insurrection as a public use of violence by a group of people to hinder or prevent the execution of the Constitution. *See* Dec. 15, 2023 Hearing 5:30:30-5:31:08 (Magliocca). This definition is well supported by the historical record. *See id.* 5:31:12-5:33:04 (Magliocca); *see also* 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”).

Mr. Trump criticizes Professor Magliocca’s definition as based on sources too “weak” and disparate in time, but he offers no workable alternative definition. *See* President Donald J. Trump’s Closing Argument (Dec. 19, 2023) at 38. Specifically, Mr. Trump’s claim that insurrection must be “violent enough, potent enough, long enough, and organized enough to be considered a significant step on the way to rebellion,” *id.* at 39, is both ambiguous as a standard and poorly supported by the evidence he cites. *Accord Anderson*, 2023 CO 63, ¶ 183. An insurrection need not involve military-style weaponry, *see Case of Fries*, 9 F. Cas. 940 (C.C.D. Pa. 1800) (“[M]ilitary weapons” like “guns and swords” “are not necessary to make such insurrection or rising amount to levying of war”), involve bloodshed, *see In re Charge to Grand Jury*, 62 F. 828,

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<sup>16</sup> In their supplemental brief, the Rosen Challengers go even further, arguing that the doctrine of collateral estoppel mandates that I accept the *Anderson* Court’s factual determinations. But as the Challengers also recognize, non-mutual collateral estoppel is not mandatory in this case. *See Van Houten v. Harco Constr.*, 655 A.2d 331, 333 (Me. 1995) (nonmutual collateral estoppel is permissible only on a case-by-case basis where it serves the interests of justice) (Me. 1995); *State Mut. Ins. Co. v. Bragg*, 589 A.2d 35, 37 (Me. 1991). I conclude that it would be antithetical to the interests of justice to prohibit Mr. Trump, in this proceeding, from arguing that the Rosen Challengers did not demonstrate that Mr. Trump engaged in insurrection.



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).

Nonetheless, even if insurrection under Section Three were so limited, the evidence here shows that the events of January 6, 2021 meet that standard. As demonstrated by videos and documentary evidence in the record, a large and angry crowd entered the U.S. Capitol near midday on January 6 and assaulted the capitol police officers charged with defending it, vandalized and stole property, and ransacked offices. *See* Rosen Ex. 62 (Staff Report, Examining the U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on January 6, Committee on Homeland Security and Government Affairs & Committee on Rules and Administration (“Senate Staff Report”)), at 1; Rosen Exs. 67-72, 75 (video of attack on Capitol). Many of those involved were armed with weapons—some brought to the Capitol, some wrested from police officers, and some repurposed items looted from inside the Capitol itself—and over a few hours they used them to breach barriers and attack those who resisted. *See* Rosen Ex. 62 (Senate Staff Report) at 28-29; *see also* Rosen Exs. 67-72, 75 (video of attack on Capitol). The crowd ultimately entered the Capitol as Members of Congress were meeting to certify the Electoral College vote count. *See* Trump Ex. 2 (Review of the DOD’s Role, Responsibilities, and Actions to Prepare for and Respond to the Protest and Its Aftermath at the U.S. Capitol Campus on January 6, 2021, Inspector General, U.S. Dep’t of Defense, Report No. DODIG-2022-039 (“DOD Report”)), at 5. In other words, the attack was violent enough, potent enough, and long enough to constitute an insurrection.

It also cannot reasonably be disputed that the rioters were organized behind a common purpose. That purpose is evident not only from the context, discussed in more detail below, but also from the very chants and recitations of the rioters themselves. They were present to “stop the steal,” i.e., prevent by force the certification of the results of the 2020 presidential election that

was scheduled to occur in the halls of Congress that afternoon. *See, e.g.*, Rosen Ex. 7 (Final Report, Select Committee to Investigate the January 6th Attack on the United States Capitol, (Dec. 22, 2022), 117th Cong., 2d Sess., H. Rep. 117-663) (“Jan. 6 Report”) at 57, 105-07, 533; Rosen Ex. 37 at 75, 80 (tweets claiming then–Vice President Pence could reject electors).

This violent disruption of Congress’s duty, through a transparently public use of force, meets both Professor Magliocca’s historically accurate definition of an insurrection, and Mr. Trump’s alternative definition. *See* Dec. 15, 2023 Hearing 5:49:18-5:51:08 (Magliocca); *accord Anderson*, 2023 CO 63, ¶¶ 186-89. I therefore conclude that the events of January 6, 2021, the “most significant breach of the Capitol in over 200 years,” Rosen Ex. 62 (Senate Staff Report) at 21, constituted an insurrection.

4. The record demonstrates that Mr. Trump engaged in the insurrection of January 6, 2021.

The question of whether Mr. Trump *engaged* in insurrection is a closer one. It would not be difficult to answer had Mr. Trump had been found guilty—or not guilty—of insurrection in a court of law pursuant to 18 U.S.C. § 2383 (criminalizing insurrection). The applicability of Section Three of the Fourteenth Amendment does not turn on whether an office-seeker has been convicted of a crime, however. Instead, under Sections 336 and 337, I am obligated to assess the record before me and make a determination based on the preponderance of the evidence, just as my predecessors have in other ballot access cases. *See Douglas v. Bd. of Trustees of Me. State Retirement Sys.*, 669 A.2d 177, 179 (Me. 1996) (applying preponderance standard in APA proceeding).<sup>17</sup>

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<sup>17</sup> The usual standard in an APA proceeding is preponderance of the evidence, and the parties have not argued that any other standard should apply.

Professor Magliocca defined “engaged in” as a voluntary act, by word or deed, in furtherance of an insurrection, including words of incitement. Dec. 15 2023 Hearing 5:34:30-5:34:44 (Magliocca). The support for this interpretation is robust, as succinctly summarized by Professor Magliocca himself at the hearing. *Id.* 5:35:02-5:35:37 (Magliocca). Contemporaneous decisions from Attorney General Stanbury suggest that engaging in insurrection did not require “having actually levied war or taken arms,” but rather was understood broadly to include 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.<sup>18</sup> 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)), and even defined “levying war” as including “inciting and encouraging others” to commit treason, *In re Charge to Grand Jury*, 30 F. Cas. 1032, 1034 (C.C.S.D. N.Y. 1861); *accord In re Charge to Grand Jury-Treason*, 30 F. Cas. 1047, 1048-49 (C.C.E.D. Pa. 1851); *Ex parte Bollman*, 8 U.S. 75, 126 (1807) (Marshall, C.J.).

On this basis, I adopt the definition outlined by Professor Magliocca and concur that “engaged in insurrection” under Section Three of the Fourteenth Amendment includes “incitement.” *Accord Anderson*, 2023 CO 63, ¶ 194. The central question, then, is whether Mr.

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<sup>18</sup> Mr. Trump’s interpretation of these sources as suggesting that engagement is limited to official action that causes something more serious than an insurrection is unsupported by the record.

Trump’s statements and other conduct leading up to and including January 6, 2021—the essential facts of which are once again not in dispute—constitute incitement of insurrection.

Before the 2020 presidential election, Mr. Trump sowed doubt in its legitimacy. He declared, for example, at a campaign rally in Wisconsin that the only way he would lose “is if the election is rigged.” *See* Rosen Ex. 53. A month later, at a White House Press Briefing on September 23, 2020, he refused to commit to a peaceful transfer of power, instead demurring that he would “have to see.” *See* Rosen Ex. 55.

Consistent with this characterization, on Election Day and thereafter, and most prominently on social media, Mr. Trump repeatedly claimed that there had been widespread election fraud and that the presidency was being stolen from him. *See, e.g.*, Rosen Ex. 37 (tweets) at 10-16, 32-33, 38-40; Trump Ex. 2 (DOD Report) at 3, 18. He attacked the election’s validity and pressured Republicans, in Georgia and elsewhere, to overturn its results. *See* Rosen Ex. 37 (tweets) at 2, 23, 29-31, 49. Mr. Trump simultaneously implored his supporters to “SAVE AMERICA” and “fight on!” *See* Rosen Ex. 37 (tweets) at 25, 35.

In response to Mr. Trump’s inflammatory rhetoric, Gabriel Sterling, a Republican election official in the state of Georgia, publicly warned President Trump to “stop inspiring people to commit potential acts of violence” or “[s]omeone’s going to get killed.” *See* Rosen Ex. 59 (video) at 1:50. Mr. Trump responded by retweeting a video of the press conference, proclaiming “Rigged Election” and “Expose the massive voter fraud in Georgia.” *See* Rosen Ex. 37 (tweets) at 27. And when a November 14, 2020 rally in Washington, D.C. inspired by his continued attempts to “stop the steal” turned violent—there was a stabbing, numerous injuries, and multiple arrests—Mr. Trump justified the violence as self-defense against “ANTIFA SCUM.” Rosen Ex. 37 (tweets) at 17; Ex. 60 (GAO Report) at 88-91; Trump Ex. 2 (DOD Report) at 18.

On December 19, 2020, fully aware of how his words and deeds had bred violence and threatened more, Mr. Trump announced a rally in Washington on January 6, 2021, to protest certification of the election results. *See* Trump Ex. 2 (DOD Report) at 3. He tweeted:

Peter Navarro releases 36-page report alleging election fraud ‘more than sufficient’ to swing victory to Trump <https://washex.am/3nwaBCe>. A great report by Peter. Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6th. Be there, will be wild!

*See* Rosen Ex. 37 (tweets) at 41. Multiple permit requests for rallies on January 5th and 6th followed, though none permitted a march from the Ellipse to the Capitol. *See* Rosen Ex. 7 (Jan. 6 Report) at 703-04. Mr. Trump apparently intended to call for such a march spontaneously. *Id.* at 704.

As the election machinery marched toward certification of the presidential election results on January 6, 2021, as required by the U.S. Constitution, *see* U.S. Const. art. II, § 1; *id.* amend. XII, Mr. Trump continued to press his case that the election was illegitimate. *See, e.g.,* Rosen Ex. 37 (tweets) at 47-48, 50. He repeatedly referenced the January 6, 2021 joint session of Congress at which the Electoral Votes would be counted on social media, and he reminded his supporters of the rally he had planned at the same time in Washington. *See, e.g., id.* at 47, 50, 55, 60, 62-63, 66, 72, 74-75; Rosen Ex. 62 (Senate Staff Report) at 22; Trump Ex. 2 (DOD Report) at 19.

The language Mr. Trump used was oftentimes inflammatory, too. On December 26, 2020, for example, Mr. Trump tweeted:

If a Democrat Presidential Candidate had an Election Rigged & Stolen, with proof of such acts at a level never seen before, the Democrat Senators would consider it an act of war, and fight to the death. Mitch [McConnell] & the Republicans do NOTHING, just want to let it pass. NO FIGHT!

Rosen Ex. 37 (tweets) at 49. That same day, Mr. Trump characterized the election as “the biggest SCAM in our nation’s history” and told his reporters “History will remember. Never give up. *See*

everyone in D.C. on January 6<sup>th</sup>.” Rosen Ex. 37 (tweets) at 50. Far right militias interpreted Mr. Trump’s tweets as a call to arms. *See* Rosen Ex. 7 (January 6 Report) at 499, 521.

A week later, on January 1, 2021, Mr. Trump retweeted a post from an organizer of the January 6 March for Trump stating “the calvary [sic] is coming, Mr. President!” calling it “[a] great honor!” *See* Rosen Ex. 37 (tweets) at 64. And as his supporters arrived in Washington on January 5, Mr. Trump again tweeted that the election had been “stolen,” that the country “won’t take it anymore!”, and that “the thousands of people pouring into D.C. . . . won’t stand for a landslide election victory to be stolen!” *See* Rosen Ex. 37 (Tweets) at 76.

On the morning of January 6, 2021, Mr. Trump implored then–Vice President Pence to block certification of the election. *See* Rosen Ex. 37 (tweets) at 80. A few hours later, in a speech that began at about noon following a variety of other speakers, *see id.* at 78; Trump Ex. 2 (DOD Report) at 5, 44, Mr. Trump in no uncertain terms urged Mr. Pence to “do the right thing,” and asked his supporters to go to the Capitol; “show strength”; and demand that Congress not certify the election for President Biden. *See* Rosen Ex. 63 (speech) at 16:15-16:30; *see also* Rosen Ex. 62 (Senate Staff Report) at 22. The crowd chanted “fight for Trump.” Rosen Ex. 63 (speech).

At the conclusion of his speech around 1:10 pm, minutes after the joint session of Congress to certify the election results had begun, *see* Rosen Ex. 7 (January 6 Report) at 461, 577; Rosen Ex. 62 (Senate Staff Report) at 23-24, Mr. Trump implored his supporters to

[F]ight like hell. And if you don’t fight like hell, you’re not going to have a country anymore . . . So we’re going to, we’re going to walk down Pennsylvania Avenue. I love Pennsylvania Avenue. And we’re going to the Capitol, and we’re going to try and give . . . We’re going to try and give them the kind of pride and boldness that they need to take back our country. So let’s walk down Pennsylvania Avenue.

Rosen Ex. 63 (speech) at 1:09:30-1:11:19. As the President concluded his speech, a large crowd marched toward the Capitol and forced their way past security barricades. *See* Rosen Ex. 7 (Jan. 6 Report) at 638; Rosen Ex. 62 (Senate Staff Report) at 22; Trump Ex. 2 (DOD Report) at 5, 44.

Mr. Trump learned that the Capitol was under attack by 1:21 pm. *See* Rosen Ex. 7 (Jan. 6 Report) at 577. Yet Mr. Trump made no effort to mobilize federal law enforcement or the National Guard, nor for hours did he ask his supporters to leave the area. *See id.* Instead, an hour later, and minutes after the Capitol building itself had been breached, *see id.* at 708, Mr. Trump tweeted that “Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a correct set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!” *See* Rosen Ex. 37 (tweets) at 83. Thereafter, on social media, Mr. Trump asked those at the Capitol to support law enforcement and stay peaceful, *see* Rosen Ex. 37 (tweets) at 83-84, but he neither denounced the violence nor intervened to stop it, *see* Rosen Ex. 7 (Jan. 6 Report) at 110.

Finally, at 4:17 pm, Mr. Trump released a video telling the assembled rioters to go home, but rather than condemning them or their actions he noted his sympathy, calling them “very special.” *See* Rosen Ex. 76. Thereafter, Mr. Trump tweeted:

These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!

*See* Rosen Ex. 37 (tweets) at 84.

This is a compelling narrative, the facts of which are not in serious dispute. I conclude, as did the Colorado Supreme Court, *see Anderson*, 2023 CO 63, ¶ 221, that the record establishes that Mr. Trump, over the course of several months and culminating on January 6, 2021, used a false narrative of election fraud to inflame his supporters and direct them to the Capitol to prevent

certification of the 2020 election and the peaceful transfer of power. I likewise conclude that Mr. Trump was aware of the likelihood for violence and at least initially supported its use given he both encouraged it with incendiary rhetoric and took no timely action to stop it.

Mr. Trump's occasional requests that rioters be peaceful and support law enforcement do not immunize his actions. A brief call to obey the law does not erase conduct over the course of months, culminating in his speech on the Ellipse. The weight of the evidence makes clear that Mr. Trump was aware of the tinder laid by his multi-month effort to delegitimize a democratic election, and then chose to light a match.

The events of January 6, 2021 notwithstanding, Mr. Trump also claims that he cannot be disqualified from the presidency for his conduct because his public statements and speeches are protected by the First Amendment. But Mr. Trump cites no precedent—and I am unaware of any—that permits the First Amendment to override a qualification for public office. Section Three of the Fourteenth Amendment is not a criminal penalty, as in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468-69 (2007), nor is it a punishment, *cf.* Dec. 15, 2023 Hearing 5:24:08-5:24:30 (Magliocca) (describing historical understanding of Section Three). It is simply a qualification for office.

Additionally, because I conclude that Mr. Trump intended to incite lawless action, his speech is unprotected by the First Amendment. *See Anderson*, 2023 CO 63, ¶¶ 230-56; *accord Thompson v. Trump*, 590 F. Supp. 3d 46, 115 (D.D.C. 2022) (Ellipse speech “plausibly [contained] words of incitement not protected by the First Amendment”); *see also Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1979) (incitement of lawless action unprotected by the First Amendment). Principles of free speech do not override the clear command of Section Three of the Fourteenth



Amendment, namely that those who orchestrate violence against our government may not wield the levers of its power.

### **Conclusion**

I do not reach this conclusion lightly. Democracy is sacred, and the highest court of this State has repeatedly recognized that “no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” *Melanson v. Sec’y of State*, 2004 ME 127, ¶ 14, 861 A.2d 641 (quoting *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (cleaned up)). I am mindful that no Secretary of State has ever deprived a presidential candidate of ballot access based on Section Three of the Fourteenth Amendment. I am also mindful, however, that no presidential candidate has ever before engaged in insurrection. The oath I swore to uphold the Constitution comes first above all, and my duty under Maine’s election laws, when presented with a Section 336 challenge, is to ensure that candidates who appear on the primary ballot are qualified for the office they seek.

The events of January 6, 2021 were unprecedented and tragic. They were an attack not only upon the Capitol and government officials, but also an attack on the rule of law. The evidence here demonstrates that they occurred at the behest of, and with the knowledge and support of, the outgoing President. The U.S. Constitution does not tolerate an assault on the foundations of our government, and Section 336 requires me to act in response.

I conclude that the Rosen and Royal Challengers have met their burden under 21-A M.R.S. § 337(2)(B). They have provided sufficient evidence to demonstrate the falsity of Mr. Trump’s declaration that he meets the qualifications of the office of the presidency. Therefore, as required by 21-A M.R.S. § 336(3), I find that the primary petition of Mr. Trump is invalid.

Given the compressed timeframe, the novel constitutional questions involved, the importance of this case, and impending ballot preparation deadlines, I will suspend the effect of my decision until the Superior Court rules on any appeal, or the time to appeal under 21-A, Section 337 has expired. *Cf. In re Maine Clean Fuels, Inc.*, 310 A.2d 736, 744 (Me. 1973) (noting administrative agencies are free to fashion their own rules of procedure).

Dated: December 28, 2023



Shenna Bellows  
Secretary of State

#### **NOTICE OF APPEAL RIGHTS**

The challenger or candidate may appeal this decision by commencing an action in the Superior Court within 5 days of this date, pursuant to 21-A MRSA section 337, subsection 2, paragraph D.