BEFORE THE ILLLINOIS STATE BOARD OF ELECTIONS
SITTING *EX-OFFICIO* AS THE STATE OFFICERS ELECTORAL BOARD

STEVEN DANIEL ANDERSON, CHARLES J. HOLLEY, JACK L. HICKMAN, RALPH E. CINTRON, AND DARRYL P. BAKER,	)	No. 24 SOEB GP 517
Petitioners-Objectors,	)	
v.	)	
DONALD J. TRUMP,	)	Hearing Officer Clark Erickson
Respondent-Candidate.	)	

MOTION TO DISMISS OBJECTORS' PETITION

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Pursuant to the Rules of Procedure adopted by the State Officers Electoral Board on January 17, 2024 (the "SOEB Rules"), including SOEB Rule 7, the Illinois Code of Civil Procedure, and Illinois Supreme Court Rules, Respondent-Candidate Donald J. Trump hereby moves to dismiss the petition filed by Steven Daniel Anderson, Charles J. Holley, Jack L. Hickman, Ralph E. Cintron, and Darryl P. Baker (the "Objectors"), and in support, states as follows:

INTRODUCTION

The Objectors want the Illinois State Board of Elections sitting *ex-officio* as the State Officers Electoral Board (the "SOEB") to wade into Presidential politics, declare Donald J. Trump ineligible to serve a second term as President of the United States, and remove his name from the Illinois Republican primary ballot. The Objections, however, lack legal and factual merit and should be dismissed.

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First, Illinois law does not authorize the SOEB to resolve complex factual issues of federal constitutional law like those presented by the Objections. The Board can and does resolve disputes about nominations and qualifications on records that are undisputed or (in the Board's estimation) not materially disputed. It does not and cannot hold lengthy and complex evidentiary proceedings of the kind that would be needed to assess objections like these. Moreover, it would be imprudent for the SOEB to address these issues when the United States Supreme Court is considering—on an expedited basis with oral argument set for February 8, 2024—an appeal that will likely either resolve or provide significant guidance on applicable issues.

Second, a wealth of authority from around the nation holds that disputes over presidential qualifications are political questions to be decided by Congress and the electoral process—not courts or administrative agencies.

Third, long-settled law under the U.S. Constitution holds that whether someone is disqualified under Section Three of the Fourteenth Amendment, in particular, is a question that can be addressed only in procedures prescribed by Congress—in other words, not here.

Fourth, even if the Board were to consider Section Three, it does not apply here, for multiple reasons. As a matter of federal constitutional law, Section Three bars *holding* office, not *running for* office—and states cannot constitutionally move that disqualification to an earlier point in time. Moreover, Section Three was intentionally drafted not to apply to the President—it refers to an "officer of the United States," but our consistent and well recognized constitutional tradition is that these words *exclude* the President. And Section Three was drafted not to disqualify people from the Presidency, but instead to protect the Presidency by ensuring that members of the Electoral College are loyal to the United States.

Fifth and finally, even if Section Three applied here and the Board was empowered to apply it, Objectors have not alleged that President Trump "engaged in insurrection." The riot on January 6 was deplorable, but the facts alleged by Objectors cannot establish that it was an attempt to overthrow or break away from the government—so it was not an "insurrection." Moreover, Objectors' allegations that President Trump (1) contested an election outcome, (2) gave a speech to protesters asking them to act "peacefully," and then (3) monitored the situation at the Capitol before repeatedly calling for peace and asking protesters to "go home," cannot possibly establish that he "engaged in" an insurrection for purposes of Section Three.

For all these reasons, the Objections should be dismissed.

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I. Illinois Law Generally Defers to Political Parties with Respect to Party Nominations and Does Not Authorize State Officials to Inquire into the Constitutional Elibilibity of Presidential Primary Candidates.

The SOEB lacks authority to exclude a candidate for nomination by a political party to the office of U.S. President from a primary ballot based on disputed facts about the candidate's alleged ineligibility under the U.S. Constitution. Instead, Illinois law grants substantial deference to political parties to nominate candidates chosen by primary voters. *See, e.g.*, 10 ILCS 5/7-9 (authorizing state parties to choose and select delegates and alternate delegates to national nominating conventions); 10 ILCS 5/7-11 (via written notice, national political party rules concerning the nomination of candidate for U.S. President override Election Code provisions re: primary ballot); 10 ILCS 5/7-14.1 (providing alternative methods for national parties to select delegates to nominating conventions, some of which are selected by congressional district and some of which are selected at large).

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Here, the primary vote is not for the purpose of selecting the Presidential nominee; instead, the vote is for the purpose of selecting delegates to the Republican National Convention. 10 ILCS 5/7-11. Thus, although the names of presidential candidates may appear on the primary ballot, the vote for presidential candidates "shall be for the sole purpose of securing an expression of the sentiment and will of the party voters with respect to candidates for nomination." *Id.* Ultimately, the proposed delegates "receiving the highest number of votes of their party" either "at large" or by "congressional districts" shall be the delegates to the party's national convention. 10 ILCS 5/7-59. Notably, no one has objected to the nominating petitions for President Trump's delegates from each congressional district. (*See, e.g.,* Nominating Papers for Trump Delegates (1st Cong. Dist.) (attached hereto).) Thus, even if President Trump were stricken from the primary ballot, any of President Trump's electors that receive the highest vote totals in their congressional districts will

be Trump delegates to the Republican National Convention.

"As a creature of statute, the Election Board possesses only those powers conferred upon it by law" and "[a]ny power or authority [the Election Board] exercises must find its source within the law pursuant to which it was created." *Delgado v. Bd. of Election Comm'rs*, 224 Ill. 2d 481, 485 (Ill. 2007). Section 10-10 (and relevant caselaw) makes clear the SBOE's role is to evaluate the form, timeliness and genuineness of the nominating papers and that the SBOE is not authorized to conduct a broad-ranging inquiry into a candidate's qualifications under the U.S. Constitution.

> The electoral board shall take up the question as to whether or not the . . . nomination papers . . . are in proper form, and whether or not they were filed within the time and under the conditions required by law, and whether or not they are the genuine certificate of nomination or nomination papers or petitions which they purport to be . . . , and in general shall decide whether or not the certificate of nomination or nominating papers or petitions on file are valid or whether the objections thereto should be sustained . . . .

10 ILCS 5/10-10.[1] *Goodman v. Ward*, 241 Ill. 2d 398, 411 (Ill. 2011) ("the scope of an election board's inquiry with respect to nominating papers [is] ascertaining whether those papers comply with the governing provisions of the Election Code"); *Delgado*, 224 Ill. 2d at 485 (Under Section 10-10, "an election board's scope of inquiry with respect to objections to nomination papers is limited to ascertaining whether those papers comply with the provisions of the Election Code governing such papers;" The Election Board has "no authority to declare a statute unconstitutional or even to question its validity).

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Thus, Section 10-10 simply does not authorize the SOEB to resolve complicated factual disputes concerning the qualifications for a candidate for federal office. To be sure, caselaw demonstrates that the SOEB can evaluate a candidate's qualifications under state law. *See, e.g.,*

[1] Article 7 of the Election Code, 10 ILCS 5/7-1 *et seq.*, applies to nominations by political parties and incorporates the objection provisions of Article 10 (Sections 10-8 through 10.10.1) to objections to nominations of candidates by political parties. 10 ILCS 7-12.1.

Goodman v. Ward, 241 Ill. 2d 398, 414-15 (Ill. 2011) (affirming removal of state judicial candidate from ballot because Illinois constitution required candidate to be a resident of the judicial district at the time their nominating petitions were filed). But even in these cases, the SOEB is authorized to assess qualifications where the facts are undisputed or, in the SOEB's estimation, not materially disputed. *See, e.g., Goodman,* 241 Ill. 2d at 410 (candidate admitted he was not a resident of the judicial district); *Cinkus v. Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 206, 215-16 (Ill. 2008) (candidate did not dispute debt was owed).

Moreover, although the SOEB has, at times, overruled objections to a U.S. presidential candidate's qualifications, in those cases, the SOEB's authority to consider those objections was never addressed. *See, e.g., Freeman v Obama*, No. 12 SOEB GP 103, 2/2/2012 Decision (attached hereto); *Jackson v Obama*, No. 12 SOEB GP 104, 2/2/2012 Decision (attached hereto). In any event, each such objection was overruled based on a simple and undisputed record. *See id.*

This case is the opposite. The Objections here depend in large part on a long list of factual allegations concerning what President Trump did or said in private both before and after January 6. They also depend in very large part on allegations about what President Trump knew, believed, or intended at various times or in taking various actions. Many of these facts will be vigorously disputed. In particular, President Trump adamantly denies that he intended or knew that any alleged "insurrection" would occur. That deeply disputed and complex set of factual allegations lie at the heart of the Objections. The Board lacks statutory authority to address or resolve them.

That is only confirmed by the fact that the Legislature has not provided the Board with the practical tools needed to address or resolve complex factual allegations like these. The procedures that the Board is required by statute to follow are well suited to addressing disputes over the form and genuineness of nomination papers, or of signatures on a petition. They are wholly inadequate

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for the kind of full-scale trial litigation and complex evidentiary presentation—involving witnesses and evidence well outside the jurisdiction of the Board to compel—that substantiating the Objections here would require. Plainly, then, Illinois law does not expect the Board to take up objections of this sort.

In summary, Illinois law does not require, or even permit, the SOEB to resolve disputed issues concerning January 6, including whether President Trump participated in an insurrection within the meaning of the Fourteenth Amendment.

II. Presidential Qualification Disputes Are Non-Justiciable Political Questions.

Even if the Election Code allowed these objections, the U.S. Constitution does not. Under the federal Constitution, "political questions" are "beyond the courts' jurisdiction"—and likewise beyond the jurisdiction of state election boards—if they are "entrusted to one of the political branches or involve[] no judicially enforceable rights." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019).

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When other plaintiffs have challenged President Trump's ballot access in other states, courts have observed that "the vast weight of authority has held that the Constitution commits to Congress and the electors the responsibility of determining matters of presidential candidates' qualifications." *Castro v Scanlan*, 2023 WL 7110390 at *9 (D. N.H. Oct 27, 2023); *accord LaBrant v. Benson*, 2023 WL 7347743, at *10-20 (Mich. Ct. Cl. Oct. 25, 2023). In previous Presidential election cycles, there were many other similar decisions involving John McCain, Barack Obama, Ted Cruz, and Kamala Harris: "the Constitution assigns to Congress, and not to … courts, the responsibility of determining whether a person is qualified to serve as President," so "whether [a candidate] may legitimately run for office … is a political question that the Court may not answer." *Grinols v. Electoral Coll.*, 2013 WL 2294885, at *6 (E.D. Cal. May 23, 2013). As one court explained:

> If a state court were to involve itself in the eligibility of a candidate to hold the office of President … it may involve itself in national political matters for which it is institutionally ill-suited and interfere with the constitutional authority of the Electoral College and Congress. Accordingly, the political question doctrine instructs this Court and other courts to refrain from superseding the judgments of the nation's voters and those federal government entities the Constitution designates as the proper forums to determine the eligibility of presidential candidates.

Strunk v. N.Y. State Bd. of Elections, 950 N.Y.S.2d 722 (NY Sup Ct 2012) *aff'd,* 126 AD3d 777 (NY App Div 2015). Many other courts agreed.[2] As these courts have observed, the Constitution contains a host of provisions specifying how electors for President are appointed (Art. II, Sec. 1), how the electoral votes are cast and counted (Amend. XII, *see* 3 U.S.C. 15(d)(B)(ii) (Electoral Count Act), what happens if the result is an un-qualified President-elect (Amend. XX), and how Congress may respond if the voters choose someone who may be disqualified under Section Three of the Fourteenth Amendment. Disputes about Presidential qualifications belong in these fora, not state election or judicial proceedings.

On top of that, presidential qualification disputes are not properly decided in state and local proceedings because of "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 US at 217. As the California Court of Appeal held, it would be

> truly absurd … to require each state's election official to investigate and determine whether the proffered candidate met eligibility criteria of the United States Constitution, giving each [state official] the power to override a party's selection

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[2] *Taitz*, 2015 WL 11017373, at *20 (S.D. Miss. Mar 31, 2015) (presidential qualification questions "are entrusted to the care of the United States Congress, not this court"); *Robinson v. Bowen*, 567 F Supp 2d 1144, 1147 (N.D. Cal. 2008) ("Issues regarding qualifications for president are" political questions "committed under the Constitution to the electors and the legislative branch, at least in the first instance"); *Jordan v. Reed*, 2012 WL 4739216, at *2 (Wash. Super. Ct. Aug 29, 2012) ("The primacy of congress to resolve issues of a candidate's qualifications to serve as president is established in the U.S. Constitution."); *Kerchner v. Obama*, 669 F Supp 2d 477, 483 n. 5, (D. N.J. 2009) ("The Constitution commits the selection of the President to [specific and elaborate procedures] …. None of these provisions evidence an intention for judicial reviewability of these political choices.").

> of a presidential candidate. The presidential nominating process is not subject to each of the 50 states' election officials independently deciding whether a presidential nominee is qualified, as this could lead to chaotic results…. [T]he result could be conflicting rulings and delayed transition of power in derogation of statutory and constitutional deadlines.

Keyes v. Bowen, 189 Cal App 4th 647, 660 (Cal. Ct. App. 2010)

Finally, a dispute may be rendered non-justiciable by "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government" or "an unusual need for unquestioning adherence to a political decision already made." *Baker*, 369 US at 217. Here, Objectors are asking the SOEB to revisit a decision already expressly made by the United States Senate. The Articles of Impeachment brought against President Trump by the House of Representatives specifically and prominent invoked Section Three of the Fourteenth Amendment, 167 Cong. Rec. H165, and President Trump's alleged "incitement of insurrection" on January 6.[3] And the House trial managers specifically asked the Senate to "disqualify [President Trump] from future federal officeholding," *id.*—indeed, because President Trumps term in office had ended by that time, disqualification would have been the *only* consequence of a conviction.[4] But the Senate declined and acquitted President Trump. Now, Objectors ask the Board to second-guess and undo that decision—to consider the same factual and legal theories as the Senate, but to reach the opposite conclusion. That cannot be done without "expressing lack of the respect due coordinate branches of government." *Baker*, 369 US at 217.

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For all these reasons, the courts are right that presidential qualification disputes are political questions that belong in Congress and other constitutionally-prescribed processes—not here. On the other side, there are only two decisions from anywhere holding that a genuine dispute over a

[3] House Trial Br. at 1, https://democrats-judiciary.house.gov/uploadedfiles/house_trial_brief_final.pdf.

[4] This was widely recognized at the time. *E.g.,* Bertrand, "Legal scholars, including at Federalist Society, say Trump can be convicted," Politico, Jan. 21, 2021, available at https://www.politico.com/news/2021/01/21/legal-scholars-federalist-society-trump-convict-461089.

qualification was *not* a political question. *Elliot v Cruz*, 137 A.3d 646 (Pa. Comm. Ct. 2016); *Anderson v. Griswold*, 2023 CO 63. These opinions are decisively outweighed by the numerous authorities to the contrary.

In sum, as the *Castro* court put it, the vast weight of authority *does* find this to be a non-justiciable political question. This Board should follow the same approach.

III. Section Three Of The Fourteenth Amendment Can Be Enforced Only As Prescribed By Congress.

Objectors ask the SOEB to determine that someone (President Trump) is disqualified from holding office under Section Three of the Fourteenth Amendment, by virtue of having engaged in insurrection against the United States. But just months after the Fourteenth Amendment was enacted, the Chief Justice of the United States held that this determination can be made only in proceedings prescribed by Congress. That holding was uniformly followed for the next century and a half. There is no warrant for departing from it here.

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Just months after the Fourteenth Amendment was enacted, Chief Justice Salmon P. Chase construed it while riding circuit in Virginia. A man convicted in Virginia state court sought a writ of habeas corpus on the ground that the state judge had been disqualified from holding office by Section Three. *In re Griffin*, 11 F Cas 7 (C.C.D. Va. 1869) (Chase, C.J.). He argued that Section Three "acts *proprio vigore*, and without the aid of additional legislation to carry it into effect." *Id.* at 12. On appeal, Chief Justice Chase rejected that argument. He noted that Section Three "clearly requires legislation in order to give effect to it," because "it must be ascertained what particular individuals are embraced by" Section Three's disability, and "these [procedures] can only be provided for by congress." *Id.* at 26. Therefore, "the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability … to be made operative … by the legislation of congress in the ordinary course." *Id.*

And for 150 years after Section Three's enactment, that is exactly how it was enforced—

only as prescribed by Congress. Even before Chief Justice Chase decided *Griffin*, Congress had expressly ordered six other southern States, as a condition of re-admission to the Union, to adopt the substantive provisions of Section Three and then enforce those provisions against candidates for state office. 15 Stat 74 (June 26, 1868) ("[N]o person prohibited from holding office … by section three … shall be deemed eligible to any office in [the readmitted] states."). Shortly after *Griffin*, Congress passed other implementing legislation that applied nationwide. One federal statute authorized U.S. Attorneys to bring expedited proceedings in federal district courts to remove from office anyone who was disqualified by Section Three. 16 Stat. Ch. 114, 143 (1870). Another provided for separate federal criminal prosecution of anyone who assumed office in violation of Section Three. *Id.* at 143-44. U.S. Attorneys used these prosecutorial powers widely (including against several members of the Tennessee Supreme Court[5]) until 1872, when Congress passed an Amnesty Act removing the section Three disability for most ex-Confederate officials. 17 Stat. 142 (1872). The Section Three enforcement statutes then went largely unused, until Congress finally repealed them in 1948. 62 Stat. 869, 993; 62 Stat. 683, 808.

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After January 6, 2021, Congress expressly considered whether—but declined—to revive federal Section Three enforcement procedures. A bill was introduced in the House of Representatives "[t]o provide a cause of action to remove and bar from holding office certain individuals who engage in insurrection or rebellion against the United States." HR 1405 (117th Cong. 1st Sess.). Its procedures would have been similar to the old *quo warranto* proceedings: an expedited civil suit by the Attorney General in a three-judge U.S. District Court. *Id.* §§ 1(b), (d). But Congress has not enacted this proposal.

In sum: months after the Fourteenth Amendment was enacted, the Chief Justice of the United States held, "[a]fter the most careful consideration," that it could be enforced only as

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[5] Sam D. Elliott, *When the United States Attorney Sued to Remove Half the Tennessee Supreme Court: The Quo Warranto Cases of 1870,* 49 TENN B.J. 20, at 24-26 (2013).

prescribed by Congress. *Griffin*, 11 F. Cas. at 27. From the Fourteenth Amendment's enactment until January 6, 2021, there is no record of it ever being enforced any other way. But Congress has said nothing to require or authorize the SOEB to investigate whether anyone is disqualified under Section Three. Pursuant to long-settled law and practice, then, these objections must be dismissed as outside the Board's authority.

IV. Section Three Does Not Apply Here.

If the Court were to reach the merits of the Objections—despite all the dispositive obstacles just described—it should nevertheless conclude they fail. As an initial matter, Section Three simply does not apply here. First, Section Three bars *holding* office, not *running* for office on a primary preference ballot. Second, Section Three by its terms does not apply to Presidents or the Presidency.

A. Section Three does Not Bar Running for Office.

By its plain language, a disqualification under Section Three of the Fourteenth Amendment prohibits an individual only from *holding office*—not from appearing on a ballot or being elected. To be sure, this distinction might not matter if Section Three created a disqualification from office that was permanent and unchangeable, so that a candidate who was disqualified at the time the votes were cast would certainly be unable ever to take office. But Section Three does not do that; instead, it expressly provides that any disability may be removed by Congress. In fact, immediately after the Fourteenth Amendment was adopted, disqualified individuals frequently ran for office, were elected, and ***afterwards*** asked Congress to remove the disability—and the courts expressly approved this practice.[6] No authority appears to have concluded that allowing such candidates to

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[6] *Smith v. Moore*, 90 Ind. 294, 303 (1883) ("Under [Section Three] . . . it has been the constant practice of the Congress of the United States since the Rebellion, to admit persons to seats in that body who were ineligible at the date of the election, but whose disabilities had been subsequently removed."); *Privett v Bickford*, 26 Kan. 52, 58 (1881) (analogizing to Section Three and concluding that voters can vote for an ineligible candidate who can only take office once his disability is legally removed); *Sublett v Bedwell*, 47 Miss. 266, 274 (1872) ("The practical

run, or placing their names on a ballot, was illegal.

Indeed, the Constitution *prohibits* States from accelerating qualifications for elected office to an earlier time than the Constitution specifies. For instance, California once tried to require congressional candidates to be residents of the state at the time when they were issued their nomination papers—rather than "when elected," as the Constitution says. 215 F3d 1031, 1038 (9th Cir. 2000). But the Ninth Circuit held that this was an unconstitutional attempt by California to change the Constitutionally-prescribed qualification. *Id.* at 1038–39; *see US Term Limits, Inc v Thornton*, 514 US 779, 827, 115 S Ct 1842, 1866 (1995) (States do not "possess the power to supplement the exclusive qualifications set forth in the text of the Constitution.").

The same logic applies to Section Three. Both the text of the Constitution and historical practice show that Section Three (when it applies) bars a person from *holding* office, not *running for* or *being elected to* office. Therefore, the SOEB is not authorized to investigate matters under Section Three for purposes of ballot placement in a presidential primary election.

B. Section Three does Not Apply to the President.

As relevant here, Section Three of the Fourteenth Amendment applies only to someone who has "previously taken an oath … as an officer of the United States … to support the Constitution." Therefore, Relators' claim that President Trump is disqualified depends upon him coming with the meaning of those terms. But reading this phrase in harmony with the rest of the Constitution makes quite clear that he does not.

1. The constitutional phrase "officers of the United States" excludes the President.

First, when it is used in the Constitution, the phrase "Officers of the United States" clearly and consistently ***excludes*** the President. Section Three lists many elected figures to whom it

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

applies, such as members of Congress and state legislators. It does not similarly name the most prominent elected official in the entire country: the President. This suggests that Presidents are not included. It is not linguistically likely that the framers would have specifically named other elected positions, but then referred to the Presidency in Section Three's catch-all generic reference to "officers of the United States." Indeed, the Constitutional text strongly indicates that they did *not* do that.

The phrase "Officers of the United States" appears three times in the original Constitution—in three consecutive sections of Article II, dealing with the Executive Branch.[7] Each of these provisions clearly excludes the President. Article II, Section Two empowers the President to "appoint [various listed officials] and all other Officers of the United States." Similarly, Article II, Section Three requires that the President "shall Commission all the Officers of the United States." But Presidents do not appoint or commission themselves or their successors, so these phrases "Officers of the United States" cannot include the President. Finally, Article II, Section 4 provides requirements for the impeachment of "[t]he President, Vice President and all civil Officers of the United States." Of course, if the President were one of the "Officers of the United States," this would be redundant.

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Throughout our Nation's history, prominent commentators have noted that the constitutional term "officers of the United States" excludes the President. In the 1830s, Justice Story explained this at length in his magisterial *Commentaries on the Constitution of the United States*.[8] Less than twenty years after the Fourteenth Amendment was adopted, the U.S. Supreme Court observed that the "well established definition" of "an officer of the United States" requires

[7]Article II uses the plural phrase "Officers of the United States," whereas Section Three includes the singular "officer of the United States." But neither Relators nor any authority has ever suggested that this difference is material.

[8] Story, *Commentaries* (Lonang Inst. 2005) Sec. 791 (the Appointments Clause "does not even affect to consider [the President and Vice President] officers of the United States").

that a person "hold[] his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments." *United States v. Mouat*, 124 US 303, 306, 8 S Ct 505, 506 (1888). In the 1870s a Senator stated that "the President is not an officer of the United States," and an influential treatise stated that "[i]t is obvious that … the President is not regarded as 'an officer of, or under, the United States.'"[9] And in more modern times, this same rule has been noted in three memoranda for the White House Office of Legal Counsel[10]—including by future Justices Rehnquist[11] and Scalia[12]—and the Supreme Court itself has noted that "[t]he people do not vote for the 'Officers of the United States.' They instead look to the President." *Free Enterprise Fund v. PCAOB*, 561 US 477, 498 (2010).

Like other parties in other ballot challenges to President Trump, Objectors no doubt will cite various *non*-constitutional sources (historical and modern) describing the President as an "officer," or even occasionally as an "officer of the United States." But that shows little about whether the phrase has a particular legal meaning when it appears in the Constitution. As just explained, it does—and that meaning excludes the President.

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2. Section Three's requirement of an "oath to support the Constitution" also excludes the President.

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[9] Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28(2) Tex. Rev. L. & Pol. 350 (forthcoming 2024) (manuscript at 535), https://ssrn.com/abstract=4568771 (quoting *Congressional Record Containing the Proceedings of the Senate Sitting for the Trial of William W. Belknap*, at 145 (1876), and David A. McKnight, *The Electoral System of the United States* at 346 (1878)).

[10] *Officers of the United States Within the Meaning of the Appointments Clause*, at 116 (Apr. 16, 2007), https://www.justice.gov/file/451191/download#:~:text=The%20Appointments%20Clause%20provides%3A%20%5BThe%20President%5D%20shall%20nominate%2C,of%20Law%2C%20or%20in%20the%20Heads%20of%20Departments.

[11] *Closing of Government Offices in Memory of Former President Eisenhower*, at 3, https://perma.cc/P229-BAKL

[12] *Applicability of 3 C.FR. Pt. 100 to the President and Vice President*, at 2, https://perma.cc/GQA4-PJNN

Section Three uses yet another phrase that, in the constitutional context, clearly excludes the President. It requires that the officer of the United States have taken an "oath … to support the Constitution of the United States." This is a direct reference to the oath "to support this Constitution" that Article VI requires many government officials to take. A noted constitutional treatise published the same year as the Fourteenth Amendment's adoption explained at length that Section Three refers to the Article VI oath.[13]

But the President *does not take the Article VI oath.* Article II, Section 1 of the Constitution prescribes, word-for-word, a *different* oath for the President—which does not refer to "support" for the Constitution, but instead promises to "preserve, protect, and defend the Constitution." The President in inaugurated with that oath, not the Article VI oath.

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So the Framers of the Fourteenth Amendment copied not one but *two* quite specific constitutional phrases—"officers of the United States" and "oath to support the Constitution"—that, elsewhere in the Constitution, clearly *exclude* the President. The textual evidence, then, is quite plain that Section Three also excludes the President. Since President Trump has never held any government office other than the Presidency, Section Three simply does not apply here.

C. Section Three does Not Bar Anyone from the Presidency.

Section Three prohibits only holding an office "under … the United States." So the Objections also depend on the Presidency coming within that definition. It does not.

Section Three includes a list of positions that disqualified persons may not hold. The list starts with Senators and proceeds, in decreasing level of importance, down to "office[s] … under

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[13] George Washington Paschal, *The Constitution of the United States Defined and Carefully Annotated* xxxviii (1868) (the Article VI oath and Section 3 apply to "precisely the same class of officers"); *id.* at 250 n.242 (Section 3 is "based upon the higher obligation to obey th[e Article VI] oath"); *id.* at 494 (the "persons included in this [Section 3] disability are the same who had taken an official oath under clause 3 of Article VI").

the United States, or under any State." The list expressly includes three of the five offices created by the Constitution: Senator, Representative, and Presidential Elector. It does not expressly include the President or Vice President. The first draft of Section Three *did* include the President and Vice President at the beginning of the list—but Congress removed that language. *See* 39 Cong. Globe 919 (1866). In both of these ways, the text of Section Three shows that it can bar people from holding many offices, but not the Presidency or Vice Presidency.

Other constitutional references to an office "under the" United States exclude the Presidency. For instance, Article I, Section 6 prohibits sitting Senators and Representatives from being "appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased" during his or her term. Since the Presidency is not an appointed position, this clause obviously does not include it. Similarly, Article I, Section 9 restricts the acceptance of foreign gifts by any "Person holding any Office … under" the United States, but this has not been understood to cover the President: George Washington personally accepted a key to the Bastille and a portrait of Louis XVI from the French government, which remain in Mount Vernon to this day.

Moreover, excluding the Presidency from the Section Three bar makes practical and political sense. Section Three separately applies to presidential electors. Its framers reasonably chose to ensure loyalty in the Presidency in that way, rather than risking the constitutional crisis of a President-elect being chosen by loyal electors in a nationwide election, and then having his or her qualifications challenged.

V. Objectors Have Not Alleged That President Trump Engaged In Insurrection.

Finally, the Objections must be dismissed because their core contention is wrong: President Trump did not engage in insurrection within the meaning of Section Three. Again, there are two reasons for this. First, although the riot at the Capitol on January 6, 2021 was awful and should

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never have happened, it did not reach the scale or scope of being an "insurrection." And second, President Trump himself did nothing to "engage in" the rioters' actions at the Capitol.

A. The Riot of January 6 was Not an "Insurrection or Rebellion."

Section Three can be violated only if there was an "insurrection or rebellion." The Objections do not allege one here.

The text and history of the Constitution confirm that "insurrection or rebellion" refer to warfare. Indeed, one of the primary models for Section Three's language appears to have been the original Constitution's Treason Clause, which defines "[t]reason against the United States" as "levying War against them, or … adhering to their Enemies, giving them Aid and Comfort." The other source was Section 2 of the Second Confiscation Act, enacted a few years before the Fourteenth Amendment, which punished anyone who "shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States … or give aid or comfort thereto. 12 Stat 589, 627 (1862); *see* 18 USC § 2383. The year after the Act became law, a prominent court decision explained that "engaging in a rebellion and giving it aid and comfort[] amounts to a levying of war." *United States v. Greathouse*, 2 F. Cas. 18, 21 (C.C.N.D. Cal. 1863). Dictionaries of the time confirm that "insurrection" meant a "rebellion of citizens or subjects of a country against its government," and "rebellion" as "taking up arm*s* traitorously against the government."[14] Because Section Three was enacted to deal with the fallout of the Civil War, this definition only makes sense.

This means that there is a crucial difference between insurrections and political riots—even riots that disrupt government processes. To be sure, an "insurrection," for purposes of Section Three, may be more localized or less organized than a full-scale military campaign with organized opposing armies. But it must involve more than an attempt (even an organized, violent attempt) to

[14] *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* (12th ed 1868).

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disrupt government processes in protest at how they are being carried out. It must instead involve an effort to break away from or overthrow the government's very authority.

The Objectors plead events at the Capitol on January 6, 2021, that included serious crimes and violence, with some level of organization. Rioters entered the Capitol, clashed with law enforcement, invaded restricted areas, damaged property, and interrupted Congress' proceedings. But after a few hours, they left, and Congress counted the electoral votes early the next morning. Objectors plead no facts even suggesting that the rioters were attempting to actually overthrow or break away from the government. Indeed, insurrection is a federal crime defined by statute, *see* 18 USC § 2383—but no one, including President Trump, has even been *charged* with that crime, let alone convicted of it, in connection with January 6. In the impeachment proceedings, the Senate found President Trump *not guilty* of insurrection.

To be sure, Objectors may have pleaded that the January 6 rioters were trying to violently obstruct Congressional proceedings, or to take physical control (temporarily) of an important government building. But there is no authority to suggest that these criteria by themselves can transform a political riot into an insurrection. Rioting in order to disrupt government proceedings or to occupy government buildings may be a crime—and the January 6 riots may have involved serious crimes of that kind. But this does not make them attempts to break away from or overthrow the government. Even a serious riot of this kind remains a riot, not an insurrection or rebellion. That is all that Objectors have alleged here, so their arguments under Section Three must be dismissed.

Objectors no doubt will rely on the Colorado Supreme Court's outlying opinion to the contrary. But the Colorado Supreme Court could reach conclusion only by adopting a definition of insurrection that is impossibly broad: (1) a public use or threat of force (2) by a group of people (3) to hinder execution of the Constitution. *Anderson*, 2023 CO 63, ¶¶ 179-184**.** This would include

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almost any public, joint effort to obstruct federal law—transforming thousands of Americans, if not more, into "insurrectionists," and threatening to make future Section Three lawsuits a regular and toxic part of American politics. The SOEB should not adopt that definition.

B. President Trump did Not "Engage in" the January 6 Riot.

Whether or not the January 6 riot was an "insurrection" (it was not), Objectors do not plausibly allege that President Trump "engaged in" it. The only conduct that Objectors point to by President Trump is (i) unsuccessfully arguing that the announced result of the election was incorrect and should be changed, (ii) giving a speech on January 6 that repeated those arguments and asked the gathered crowd to "peacefully and patriotically make your voices heard," and (iii) watching television reports of the events at the Capitol before repeatedly asking the crowds for "peace" and to "go home." Both legally and factually, this does not amount to "engaging in" the January 6 riot.

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1. Section Three does not prohibit pure speech.

Objectors contend primarily that President Trump "engaged in" the January 6 riot by giving a speech, and engaging in other communication, before the riot began. This contention fails as a matter of law. Section Three has never been interpreted to apply broadly to anyone who was claimed to be associated in any way with an alleged insurrection. It refers to active assistance to an ongoing insurrection—not speech about an alleged future insurrection.

As explained above, Section Three was modeled partly on the Second Confiscation Act, which provided penalties for anyone who "shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection." But the framers of the Fourteenth Amendment, enacted six years later, omitted any reference to inciting or setting on foot an insurrection. Instead, they limited Section Three to "engag[ing] in" insurrection—indicating that allegedly promoting a future insurrection is not covered.

Contemporaneous practice confirms that the framing generation understood Section Three that way. In the years immediately after enacting Section Three, the House of Representatives considered qualifications challenges to multiple Members-elect who, before the Civil War began, had given speeches or voted for resolutions in state legislatures advocating violence against the North. Congress rejected those challenges and found that Section Three disqualification did not apply.[15] By contrast, at nearly the same time, the House *did* disqualify a former member of a rebel government and army.[16]

Finally, even if "engaging" under Section Three could include allegedly inciting a purported future insurrection, that legal standard would still be quite high. Courts have consistently and clearly defined incitement in the First Amendment context—and it would be very strange if speech that fell short of *inciting* insurrection under the First Amendment could still qualify as *engaging in* insurrection under the Fourteenth. Among other things, incitement under the First Amendment requires that a speaker "specifically advocate[] for listeners to take unlawful action," *Nwanguma v. Trump*, 903 F3d 604, 610, (6th Cir 2018), with "specific intent … equivalent to purpose or knowledge." *Counterman v. Colorado*, 600 U.S. 66, 81 (2023).

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[15] 41 Cong. Globe at 5443 (member voted for a pre-War resolution to "resist [any] invasion of the soil of the South at all hazards"); *Hinds' Precedents of the House of Representatives* at 477 (1907) (member gave a speech saying that Virginia should "if necessary, fight").
[16] *Hinds' Precedents* at 481, 486.

2. Under any legal standard, nothing President Trump did qualifies as "engaging in" the January 6 riot.

Whether or not Section 3 "engag[ing]" can include incitement or other speech, Objectors do not and cannot plead that President Trump engaged in or incited the January 6 riot. Objectors' allegations about President Trump's activities come under three broad heading: disputing an election outcome, giving a speech on January 6, and monitoring and Tweeting about the events at the Capitol as they occurred. None of these comes close to engaging in the riot.

First, disputes over election outcomes are not new in our democracy. Most such disputes are contentious, and every one has a winner and a loser. But it is not in our constitutional tradition to treat the losers of those disputes as insurrectionists. That is the case with President Trump. After now-President Biden was announced as the winner of the 2020, Objectors allege, President Trump made a series of public statements, and took a series of public actions, challenging the correctness of that outcome and advocating remedial actions. In particular, President Trump argued that Vice President Pence had authority under the Constitution to take certain actions that would result in President Trump being certified as the winner of the election. Those arguments and efforts were unsuccessful, and Congress certified now-President Biden as the winner. Although President Trump continued to disagree with that result, he promptly promised—and delivered—an "orderly transition" of power.[17] This by itself cannot possibly implicate Section Three. Whatever else might qualify as "engag[ing] in insurrection," contesting an election outcome certainly does not.

Second, Objectors allege that, on January 6, President Trump gave an impassioned speech to a large crowd gathered in Washington in support of his arguments that he should be certified the election winner. Objectors apparently want to argue that this speech amounted to some sort of

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[17] Statement of President Donald Trump, https://x.com/DanScavino/status/1347103015493361664?s=20; *see Trump agrees to 'orderly transition' of power*, Politico, Jan. 7, 2021, *available at* https://www.politico.com/news/2021/01/07/trump-transition-of-power-455721#:~:text=%E2%80%9CEven%20though%20I%20totally%20disagree,Trump%20said%20in%20a%20statement.

instruction to engage in violence or crimes. But there is nothing to support that contention. The transcript of the speech speaks for itself and does not support the Objectors' claims.[18] The core of the President's speech did give instructions to the crowd—but they expressly told the crowd ***to be peaceful***:

> [W]e're going to walk down to the Capitol, and we're going to cheer on our brave senators and congressmen and -women, and we're probably not going to be cheering so much for some of them because you'll never take back our country with weakness. You have to show strength and you have to be strong. We have come to demand that Congress do the right thing and only count the electors who have been lawfully slated, lawfully slated. I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard.

And at the conclusion of his speech, President Trump instructed the crowd similarly:

> [W]e'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—the Democrats are hopeless. They're never voting for anything, not even one vote. But we're going to try and give our Republicans, the weak ones, because the strong ones don't need any of our help, 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. I want to thank you all. God bless you and God bless America. Thank you all for being here. This is incredible. Thank you very much. Thank you.

Not only did these remarks expressly call for the crowd to protest "peacefully," they also contradict any argument that President Trump intended or instructed any disruption to Congress' proceedings: he expressly contemplated Congress "voting" and "count[ing] the electors." As a D.C. Circuit judge remarked at argument in a recent case, "the President didn't say break in, didn't say assault members of Congress, assault Capitol Police, or anything like that." *Blassingame v. Trump*, No. 22-5069 (DC Cir Dec. 7, 2022) Arg. Tr. at 74:21-25 (Rogers, J.). This cannot possibly have been "engagement in" any violence.

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[18] *E.g.,* https://www.rev.com/blog/transcripts/donald-trump-speech-save-america-rally-transcript-january-6.

Third, President Trump's alleged conduct *during* the January 6 riot cannot possibly amount to "engaging" in it. While rioters were in the Capitol, Objectors do not allege that President Trump did anything affirmative to help them. Objectors obviously wish that President Trump had managed to *stop* the riot sooner, but that cannot somehow be transformed into his *engaging in* it. Claims that the President has failed properly to execute the law are to be policed by Congress and the electorate, not the courts or state agencies. *United States v. Texas*, 599 US 670, 678–81, 685 (2023). That is especially true to the extent Objectors seek to ground their claims in President Trump's discretionary decision-making regarding the National Guard—which is *emphatically* outside the boundaries of legal review, *Martin v. Mott*, 25 US 19, 31–32 (1827), even in situations where an insurrection is undoubtedly occurring, *Luther v. Borden*, 48 US 1, 44–45 (1849). So in accord with ordinary English, Objectors' allegations about President Trump's supposed *inaction* while rioters were in the Capitol certainly cannot qualify as allegations that he "engaged in" anything.

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And the President's alleged affirmative actions did not remotely constitute engagement in the events at the Capitol. For a short while after the riot began, President Trump continued to articulate his criticisms of the announced election result and his arguments for changing it. But within minutes of Congress going into recess, President Trump tweeted that protesters should "support our Capitol Police and Law Enforcement" and "Stay peaceful!"[19] From that moment on, the President's public statements were exclusively calls for peace and an end to the riot. Shortly thereafter, the President tweeted again, "asking for everyone at the U.S. Capitol to remain peaceful" and to "respect the Law" and calling for "No violence!"[20] The President released a

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[19]@realDonaldTrump, TWITTER, (Jan. 6, 2021, 2:38pm), https://twitter.com/realDonaldTrump/status/1346904110969315332.

[20]@realDonaldTrump, TWITTER (Jan. 6, 2021, 3:13pm), https://twitter.com/realDonaldTrump/status/1346912780700577792.

minute-long video, which repeated his position that the announced election result was wrong but repeatedly told the rioters to "go home" and "[w]e have to have peace."[21] The President then tweeted again that the rioters should "[g]o home with love & in peace."[22] About two hours after that, Congress re-convened to certify now-President Biden as the winner of the election.

At best, then, Objectors allege that President Trump could have been quicker in pivoting from calling for a change in the announced election result to calling for a stop to the crimes being committed at the Capitol. But that does not satisfy any plausible definition of "engaging in" those crimes.

*

Objectors allege that President Trump unsuccessfully contested an election outcome. He gave an impassioned speech to a crowd, repeating his arguments and calling for peaceful protest in support of them. And after the protest turned violent, he repeatedly called for it to stop. This course of conduct met with the deep disapproval of many Americans. But neither the whole of it nor any part is included within any reasonable interpretation of the phrase "engag[ing] in insurrection." Objectors therefore have failed to state any claim.

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[21] *President Trump Video Statement on Capitol Protesters*, https://www.c-span.org/video/?507774-1/president-trump-video-statement-capitol-protesters. A transcript can be found at: https://www.presi-dency.ucsb.edu/documents/videotaped-remarks-during-the-insurrection-the-united-states-capitol.

[22] Brooke Singman, *Trump says election was 'stolen' and 'these are the things and events that happen' tells people to 'go home,'* Fox News (Jan. 6, 2021, 6:44 PM EST) https://www.foxnews.com/politics/trump-tells-protesters-to-go-home-maintaining-that-the-election-was-stolen-amid-violence-at-the-capitol.

CONCLUSION

WHEREFORE, because neither Illinois law nor the U.S. Constitution authorizes the SOEB to remove President Trump from the Illinois Republican primary ballot, the Candidate, Donald J. Trump, prays this Honorable Electoral Board dismiss the Objectors' Petition.

Dated: January 19, 2024

Respectfully submitted,

CANDIDATE DONALD J. TRUMP

By: /s/ Adam P. Merrill
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<u>**CERTIFICATE OF SERVICE**</u>

I, Adam P. Merrill, hereby certify that before 5:00 p.m. on January 19, 2024, I caused a true and correct copy of the foregoing MOTION TO STRIKE PETITIONERS' OBJECTION to be served via email as follows:

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