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.	)	

REPLY IN SUPPORT OF MOTION TO DISMISS

Scott E. Gessler
GESSLER BLUE LLC
7350 E. Progress Place, Ste. 100
Greenwood Village, CO 80111
720.839.6637
sgessler@gesslerblue.com

Adam P. Merrill (6229850)
WATERSHED LAW LLC
55 W. Monroe, Suite 3200
Chicago, Illinois 60603
312.368.5932
AMerrill@Watershed-Law.com

Nicholas J. Nelson (pro hac vice forthcoming)
CROSS CASTLE PLLC
333 Washington Ave. N., STE 300-9078
Minneapolis, MN 55401
612.429.8100
nicholas.nelson@crosscastle.com

Counsel for Respondent-Candidate

I. The Board Lacks Statutory Authorization To Address The Objection.

President Trump's motion explained that Election Code Section 10-10 does not authorize the Board to delve into whether (under federal Constitutional law) a U.S. presidential candidate is qualified to hold office. (Mtn. Pt. I (citing *Delgado v. Bd. of Election Comm'rs*, 224 Ill. 2d 481, 485 (Ill. 2007) ("Any power or authority [the Election Board] exercises must find its source within the law pursuant to which it was created").) Nor has the Board ever in fact decided a dispute like this before, *i.e.*, it has never waded into the type of factual disputes Objectors allege to determine whether a presidential candidate satisfies eligibility criteria created by the federal Constitution. (*Id.*) Notably, the expedited schedule and streamlined procedures concerning objections to nominating papers reinforce that Section 10-10 was never meant to apply to broad-ranging factual disputes involving federal Constitutional eligibility criteria.[1]

In response, the Objectors selectively quote from Section 10-10 and omit the four specific bases for the Board's authority to hear and resolve objections. (Opp. Br. at 6.) In its entirety, the relevant portion of Section 10-10 reads as follows:

> The electoral board shall take up the question as to whether or not the certificate of nomination or nomination papers or petitions are in *proper form*, and whether or not they were f*iled 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 whether or not in the case of the certificate of nomination in question it r*epresents accurately the decision of the caucus or convention issuing it*, 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 . . . .

[1] Here, for example, Petitioners' Objection was called (and a hearing officer assigned) on January 17, 2024, and the Board is to rule on the Objections on January 30, 2024.

10 ILCS 5/10-10 (emphasis added). As with any statute, the four specifically enumerated areas of inquiry, *i.e.*, the form, timing, genuineness and accuracy of nomination papers, all of which involve questions of state law, are instructive as to the scope of the Board's authority to resolve the objections at issue here. *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"). When read holistically, the general language at the end of the authorization on which Objectors rely (*i.e.*, "in general shall decide whether or not the certificate of nomination or nominating papers or petitions on file are *valid*) cannot reasonably be construed to grant authority to resolve wholly different topics like eligibility that arise under federal Constitutional law. *Cinkus v. Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 216-17 (Ill. 2008) ("The statute should be evaluated as a whole, with each provision construed in connection with every other").

None of Objectors' cases constitute binding authority authorizing a broad-ranging, fact-intensive inquiry into the federal Constitutional qualifications of a U.S. presidential candidate. Indeed, Objectors' authority involves the assessment of Illinois qualifications of

a candidate for state office,[2] whether a referendum was authorized under state law,[3] or whether the refusal of Illinois election authorities to place someone who admitted they were under 35 years old violated federal Constitutional rights.[4] Although two of Objectors' cases involved presidential candidates or delegates to a national nominating convention, both cases involved the compliance with Illinois Election Code requirements. Neither involved whether qualifications under the U.S. Constitution. *See, e.g., Nader v. Illinois State Board of Elections*, 354 Ill. App. 3d 335, 343 (2004) (examination of petition signatures); *Totten v. State Board of Elections*, 79 Ill. 2d 288, 293-94 (1980) (whether the preference of delegates was required to be listed on primary ballot).

The only cases Objectors identify that involved challenges to presidential candidate qualifications are Board of Elections decisions involving challenges to Barack Obama and Marco Rubio's citizenship. (Resp. at 9-10.) But in those cases, the Candidates never challenged the Board's authority, presumably because the Candidates believed it was easier to secure dismissal of these actions. In any event, those decisions could never serve as precedent supporting Objectors' arguments here, as those cases never reached either the

[2] *See, e.g., Goodman v. Ward*, 241 Ill. 2d 398, 414-15 (Ill. 2011) (challenge to residency of state judicial candidate); *Maksym v. Bd. of Election Comm'rs of City of Chicago*, 242 Ill. 2d 303, 306 (2011) (challenge to Illinois residency of candidate for Mayor of Chicago).

[3] *Harned v. Evanston Mun. Officers Electoral Bd.*, 2020 IL App (1st) 200314, ¶ 23; *Zurek v. Petersen*, 2015 IL App (1st) 150456, ¶¶ 33-35 (unpublished).

[4] *Socialist Workers Party of Illinois v. Ogilvie*, 357 F. Supp. 109, 112-13 (N.D. Ill. 1972) (U.S. Constitution does not require the State of Illinois to place someone admittedly unqualified on the ballot as a presidential candidate).

Court of Appeals or Supreme Court. *See, e.g., Delgado*, 224 Ill. 2d at 488 (rejecting application of a Circuit Court decision because "[u]nder Illinois law, [even] the decisions of circuit courts have no precedential value").

None of these cases justify the expansion of the scope of objections Objectors seek. Critically, factual disputes about federal eligibility criteria are unique, especially when they involve a nationwide office like the Presidency. As this case demonstrates, such disputes typically sprawl across the nation, implicating many witnesses and many pieces of documentary evidence that the Board lacks the ability to subpoena or otherwise compel. Moreover, resolving such disputes requires time and other evidentiary tools that are inconsistent with the statutory scheme and Board practice leading up to the March 19, 2024 primary election. And it would be imprudent for the SOEB to address these issues when the United States Supreme Court is considering an appeal that will likely either resolve or provide significant guidance on applicable issues.

II. The U.S. Constitution Requires Presidential Qualification Disputes To Be Decided Elsewhere.

As President Trump's motion explained, the Board lacks power to decide the Objection because disputes over Presidential qualifications are political questions that the U.S. Constitution commits to other decisionmakers. A long line of state and federal decisions have held this. And Objectors do not contest that, if the political question doctrine applies here, it divests the Board of jurisdiction. Objectors contend that the doctrine does not apply, but their arguments are inconsistent with precedent and unpersuasive.

Objectors note that some of these cases cited by President Trump involved "other jurisdictional defects" in addition to being political questions, and they therefore state that

the political-question analyses were "dictum." (Opp. Br. at 43.) But as the Board is well aware, when a court reaches two alternative holdings that both support its decision, neither can be dismissed as dictum. Similarly unpersuasive is Objectors' observation that a few of these decisions were affirmed on appeal based on the other jurisdictional defects. (*Id.* at 44.) No appellate court suggested that these decisions' political-question analysis was wrong. That hardly undermines this strong consensus.

Objectors next complain that a small portion of the decisions cited by President Trump do not specifically use the words "political question" (Opp. Br. at 44), but that is irrelevant in light of what the decisions actually hold: that "[t]he presidential nominating process is not subject to each of the 50 states' election officials independently deciding whether a presidential nominee is qualified," *Keyes v. Bowen*, 189 Cal. App. 4th 647, 660 (2010); "that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance;" *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008); and "that the court lacks subject matter jurisdiction" because "[t]he primacy of congress to resolve issues of a candidate's qualifications to serve as president is established in the U.S. Constitution." *Jordan v. Reed*, 2012 WL 4739216, at *2 (Wash. Super. Ct. Aug 29, 2012). Each of those conclusions plainly supports President Trump's contention here.

Objectors also incorrectly claim that the Ninth and Tenth Circuits have reached a different conclusion. (*See* Opp. Br. at 42.) The decisions Objectors cite do not address the relevant question at all. In these decisions, the courts found it obvious that states can exclude from the ballot candidates who ***admit*** they are ineligible for the Presidency. *Lindsay v. Bowen*, 750 F3d 1061, 10640 (9th Cir 2014) ("Nor is this a case where a candidate's qualifications were disputed. Everyone agrees that Lindsay couldn't hold the

office for which she was trying to run."); *Hassan v. Colorado*, 495 F App'x 947, 948 (10th Cir 2012) (candidate concededly was not a natural-born citizen; the court noted its opinion was non-precedential). These decisions do not even purport to consider whether states can decide a dispute about ***whether*** someone is eligible for the Presidency. That is the issue the President Trump's cases hold is a political question—and it is the issue here.[5]

Objectors contend that the Constitution's assignment of this responsibility is not as "explicit[]" as Objectors would prefer. (Opp. Br. at 40-41.) But they cite nothing suggesting that the assignment needs to be explicit. As the courts have repeatedly found, the text of the Constitution creates many processes for choosing who may be President, and for dealing with an ineligible President-elect. None of those processes involve state agencies or courts barring candidates from running as ineligible. The assignment of authority can be discerned from the Constitution's creation of those processes.

Objectors themselves highlight this by pointing out that the Constitution assigns states the job of appointing presidential electors. (Opp. Br. at 41-42.) That is true—but appointing electors is not the same as enforcing Section Three or making legally binding decisions about who is qualified to be President. In fact, the Constitutional structure recognizes this quite specifically: the whole purpose of the Twentieth Amendment is to recognize that the state-appointed electors may choose a President-elect who is not eligible, and to specify what happens if they do.

In summary, Objectors want this Court to decide a raging political dispute over whether a candidate is qualified to be President. But in arguing that this qualification dispute is not a political question, Objectors cite almost exclusively to cases where *there*

[5] The *Linsay* and *Hassan* decisions do show that Objectors are obviously wrong to suggest that President Trump's rule would allow undisputedly disqualified candidates to run for President. (*See* Br. at 42.) That possibility is foreclosed by this line of precedent.

was no qualification dispute. When there *is* a dispute—when, as here, the candidate's qualification is the very issue being presented for determination—decisionmakers nationwide overwhelmingly hold that courts and agencies lack power to decide it. The Board should join that strong majority approach.

III. Section Three Does Not Apply Here.

A. Section Three Can Be Enforced Only as Prescribed by Congress.

As President Trump's moving brief explained, ten months after the Fourteenth Amendment was enacted, the sitting Chief Justice of the United States expressly held that Section Three can be enforced only as authorized by Congress—and that was the universal practice, unbroken until after January 6, 2021. Objectors do not deny any of this. Objectors also do not (and could not) point to any Congressional authorization for this Board to decide issues of Section Three disqualification.

Instead, Objectors invite this Court to ignore Chief Justice Chase's *Griffin* decision, and the continuous constitutional tradition that followed it, with a smattering of meritless arguments. Their contention that *Griffin* conflicts with "Section 3's plain language" (Opp. Br. at 48) is insubstantial. The plain language of Section 3 bars certain individuals from holding office, and Chief Justice Chase did not question that—he simply held that Congress must supply procedures for determining who those individuals are. *Griffin,* 11 F.Cas. 7, 26 (C.C.D. Va. 1869). Although Objectors argue that Section Three must be enforceable by every government official in the country, nothing in Section Three itself suggests that. To give a rather direct analogy, in light of Griffin's claimed disqualification of a judge, consider Article III of the Constitution's provision that federal judges hold office "during good Behaviour." It certainly does not contradict "Article III's plain language" to conclude that this requirement is enforceable only by Congress in impeachment proceedings.

Indeed, Chief Justice Chase was obviously correct that Section Three requires a procedure for determining whether someone "engaged in insurrection." Objectors assert that the Chief Justice "never explained why *state* courts [or state law] could not provide such proceedings." (Opp. Br. at 53 (cleaned up).) But to a Circuit Justice sitting in Richmond, Virginia in 1869, the reason would have been crystal clear. As Chief Justice Chase described at length in *Griffin*, in the post-war southern state governments, "[v]ery many, if not a majority of the[] officers, had … taken an oath to support the constitution, and had afterwards engaged in the late Rebellion." 11 F.Cas. 7, 25 (C.C.D. Va. 1869). It would have been extraordinarily problematic to allow those state officials to judge each other's qualifications for federal office, under Section Three, without Congress' approval.

Objectors next contend that Chief Justice Chase's opinion in *Griffin* "contradict[s]" statements he made about Section Three in the separate prosecution of Jefferson Davis. (Opp. Br. at 53 (citing *In re Davis*, 7 F. Cas. 63, 90, 102, (C.C.D. Va. 1871)).) But they mischaracterize Chief Justice Chase's statements in *Davis.* Objectors' citation to page 90 of *Davis* as representing Chief Justice Chase's thinking is incorrect; that page recounts arguments by Davis's attorney. The Chief Justice's actual remark was that Section Three might preempt any other penalties (beyond disqualification from office) for former government officials who had supported the Confederacy. 7 F Cas at 102. In other words, the Chief Justice addressed in *Griffin* what procedures may be used to enforce Section Three, and made a remark in *Davis* about what the penalties for insurrection might be. These two statements simply address different topics and present no conflict at all.

In addition, the Chief Justice's remark in *Davis* would at most have allowed Section Three to be invoked as a defense against an independent cause of action. That is perfectly compatible with the holding of *Griffin* that an affirmative Section-Three cause of action to

disqualify someone from office must be authorized by Congress. As the U.S. Court of Appeals for the Fourth Circuit has explained it, the original understanding of Section Three was that "affirmative relief under the amendment should come from Congress," but "the Fourteenth Amendment provided of its own force … a shield" that could be invoked defensively. *Cale v. City of Covington, Va.*, 586 F.2d 311, 316 (4th Cir. 1978). Those two principles are not in conflict.

In sum, for 150 years after Section Three was enacted, the uniform rule and practice was that it could be enforced only as authorized by Congress. Congress has not authorized its enforcement here. So the Objection should be dismissed.

B. Section Three Does Not Bar Running for Office.

As President Trump's moving brief explained, Section Three prohibits people from *holding* office—but there is a well-established constitutional tradition of allegedly-disqualified people *running for* and *being elected to* office, and then having their disability removed by Congress before *assuming* office. Moreover, the U.S. Constitution does not allow states to enforce eligibility criteria for federal office at an earlier time than the Constitution specifies. Objectors do not dispute any of that. The arguments they do make are inapposite, unpersuasive, or both.

Objectors point to cases in which presidential candidates were excluded from the ballot because they would not be 35 years old by Inauguration Day, *Lindsay*, 750 F.3d at 1063; *Socialist Workers Party v. Ogilvie*, 357 F. Supp. 109, 112 (N.D. Ill. 1972), or because they had not been born U.S. citizens, *Hassan*, 495 F. App'x at 948. But those are obviously inapposite because it was ***impossible*** for those candidates to become eligible to serve the terms in office they were running for. By contrast, Objectors concede that a candidate allegedly disqualified by Section Three ***can*** become eligible while running for office or

after being elected (Opp. Br. at 29)—and indeed, Objectors do not dispute that numerous candidates ***have*** become eligible in that way.

Objectors suggest that Section Three disqualification should be treated like an "impossibility" disqualification—rather than like other removable disqualifications such as residency—because residency-based disqualifications can be removed by the candidate's own actions, while "[o]nly Congress" can remove an alleged Section Three disqualification. (Opp. Br. at 29-30.) But the generation that adopted Section Three settled this question the other way. As President Trump's moving brief explained, that generation uniformly seated Members of Congress whose alleged Section Three disqualifications were removed after they were elected—and no one suggested that the Fourteenth Amendment should or could have prevented those individuals from running.

With no viable legal arguments to defend, Objectors fall back on a contention that the Constitution cannot possibly require Section Three determinations to wait until after a candidate is elected, because that would be a "recipe for chaos." (Opp. Br. at 29.) This practical argument does not work either, because the Constitution *does* authorize Congress to create enforcement mechanisms for Section Three that can be used at any time. Congress simply has chosen, currently, not to do so. If Objectors think that choice is imprudent or impractical, their remedy is to ask Congress to make a different choice—not to try to change the settled meaning of the Constitution to circumvent Congress' decision.

C. Section Three Does Not Apply to the President.

President Trump's motion explained that Section Three uses two very specific key phrases—"officer of the United States" and "oath … to support the Constitution"—that appear elsewhere in the Constitution ***only*** in contexts that clearly exclude the President. Objectors do not dispute this. The arguments that they do offer are unpersuasive.

Objectors contend, incorrectly, that President Trump is trying to ascribe these phrases "secret or technical meanings that would not have been known to ordinary citizens." (Opp. Br. at 34.) To the contrary, the meanings of these phrases as excluding the President are obvious from the face of the Constitution—and as President Trump's motion explained, the most famous legal thinkers throughout American history have repeatedly noted these meanings. There is nothing secret or obscure about them.

So it does Objectors no good to catalog times when the President has been called an "officer," or even an "officer of the United States," *outside* this specific constitutional context. (*See* Br. at 35-38.)[6] Aside from Section Three, Objectors concede that this phrase excludes the President ***every time*** it appears in the Constitution. The framers of the Fourteenth Amendment plainly made a deliberate decision to copy this phrase from the original Constitution. Under any reasonable rule of interpretation, that also copies the undisputed meaning of that phrase.

For the same reasons, it is not plausible for Objectors to argue (Opp. Br. at 38-39) that Section Three's specific language "an oath … to support the Constitution" is actually a generic reference both to Article VI's non-presidential "Oath … to support this Constitution" and to Article II's differently-worded presidential oath. To be sure, the Article II and Article VI oaths likely have similar *meanings*. But the framers of the Fourteenth Amendment deliberately used the unique language of Article VI, *not* Article II. As President Trump's motion pointed out, a leading constitutional scholar noted the parallel between Section Three and Article VI immediately after the Fourteenth Amendment's enactment, and expressly stated that the two provisions apply to "precisely the same class of officers." G.W. Paschal, *The Constitution of the United States Defined*

[6] The legal brief filed on behalf of President Trump that Objectors refer to was in a case involving a federal statute, not the Constitution.

and Carefully Annotated xxxviii (1868). By contrast, Objectors cite nothing to suggest that anyone thought, or should have thought, that Section Three's specific reference to Article VI somehow embraced Article II's different language as well.

In the face of this overwhelming textual evidence, Objectors are left to protest that it would be "absurd" to exclude former Presidents from Section Three. (Br. at 38.) Not so. The generation that adopted the Fourteenth Amendment had no need to provide for an insurrectionist ex-President, since by the time of its proposal there were no living ex-Presidents who had joined the Confederacy. And they could easily have concluded that a hypothetical future controversy about whether a former President had "engaged in insurrection" would be exceptionally controversial and troublesome for the nation—as, indeed, is illustrated by the current controversy over President Trump. Therefore, it would have been entirely reasonable for them to have limited the Fourteenth Amendment to the historical circumstances they faced.

In sum, the text of Section Three very clearly forecloses its application to a former President.

D. Section Three Does Not Apply to the Presidency or Vice Presidency.

As President Trump's motion explained, Section Three applies only to an "office … under the United States," and there is no indication that this includes the Presidency.

Objectors concede that the original proposal for Section Three expressly included the President and Vice President, and that Congress amended the proposal to remove this provision. (Br. at 32.) Objectors protest that a different amendment broadened Section Three's "catchall" provision to include "office … under the Constitution," but any contention that this broadening was intended to include the Presidency is implausible. The previous draft of Section Three referred to "any office now held under appointment from

the President of the United States, requiring the confirmation of the Senate." Cong. Globe, 39th Cong., 1st Sess., at 919. The obvious effect of broadening this to include any "office … under the United States" was to include ***lesser*** offices—federal offices subject to Senate confirmation, and possibly state-level offices. There is nothing to suggest that it also was meant to include the highest elected position in the land.

Objectors also contend that the Foreign Emoluments Clause and the Incompatibility Clause must embrace the Presidency, but they cite little to suggest that this must be so. With respect to the Emoluments Clause, Objectors point to a passing reference in 2022 decision (Opp. Br. at 33), but they do not dispute that George Washington and his generation plainly did not understand the Clause to cover the Presidency. And as to the Incompatibility Clause, Objectors cite no authority at all.

IV. Objectors Have Failed To Plead That President Trump "Engaged In Insurrection."

A. Objectors Have Pleaded a Violent Political Protest, Not an Insurrection.

As President Trump's motion explained, Objectors have not alleged that any "insurrection" occurred because they have pleaded only violent disruption of a government function (albeit an important function). Objectors have not pleaded any broader attempt to overthrow or break away from the government's very authority.

Objectors' response merely confirms the point. They insist that an "insurrection" includes any violent group effort "to prevent the execution of the law." (Opp. Br. at 18.) But that obviously cannot be literally true—it would mean that an "insurrection" is occurring any time two or more people resist arrest, or engage in any sort of physical protest with the goal of impeding any government function.

Objectors' own authorities reveal their mistake. To qualify as treason or insurrection, "it is not enough that the purpose of the combination is to oppose the

execution of a law ***in some particular case***." *Charge to Grand Jury—Neutrality Laws & Treason*, 30 F.Cas. 1024, 1025 (C.C.D. Mass. 1851) (emphasis added). Rather, the group violence must be oriented toward preventing the law's execution "*in **any case** which may occur*." *Id.* (emphasis added.) This is the crucial distinction between a political riot and an insurrection. A riot may seek to illegally impede some particular instance of a government function. An insurrection, by contrast, seeks to break away in a more general fashion from some or all of the government's authority.

Under this standard, Objectors have pleaded only a riot, not an insurrection—a very serious riot, certainly, but a riot nonetheless. Objectors have pleaded that the January 6 rioters sought to impede Congress' execution of the Electoral Count Act, and of its constitutional duty to count electoral votes for President, because the rioters opposed the way that Congress was likely to perform that duty in one particular case. But Objectors have not alleged—and cannot allege—that the rioters opposed Congress' ability *ever* to count *any* electoral votes.

Objectors appear to recognize this weakness, for they insist that a "violent effort to prevent the peaceful transfer of power" must in any case qualify as an insurrection. (Opp. Br. at 19-20.) This just re-frames the same problem. Although Objectors have pleaded that the January 6 rioters supported President Trump and engaged in violence, Objectors have pleaded nothing to suggest that the rioters had any plan for how the violence would keep President Trump in office. The violence did illegally disrupt and delay the electoral count. But Objectors have pleaded nothing suggesting that any of the rioters had any plan for choosing or installing a President in some way that circumvented the interrupted proceedings. That is another crucial distinction between a violent political protest and an insurrection—and Objectors' allegations leave them squarely on the "protest" side of it.

B. Objectors Have Not Remotely Pleaded That President Trump "Engaged in" the January 6 Riot.

1. "Engaging" does not include incitement.

President Trump's motion explains that, although Objectors have not alleged that he "engaged in insurrection" under any standard, "engagement" for these purposes cannot include incitement. Objectors offer no persuasive contrary argument.

Objectors concede that Section Three is modeled on the Second Confiscation Act—and that the framers of the Fourteenth Amendment chose to omit the Act's specific prohibition on inciting insurrection. (Opp. Br. at 23.) Objectors try to argue that this is "irrelevant" because "[n]o historical evidence suggests that Congress[] … meant to *exclude* incitement." (*Id.*) But Congress' deliberate choice to omit ***the word incitement itself*** is obvious evidence of an intent to exclude incitement.

For the same reason, it does Objectors no good to cite an 1894 grand-jury charge about a statute that expressly prohibited incitement of insurrection. *Charge to Grand Jury*, 62 F 828, 829–30 (N.D. Ill 1894). That obviously sheds no light on whether incitement is covered by a provision that, like Section Three, omits that word.

Objectors do not dispute that the House of Representatives, in the Reconstruction era, found no engagement in insurrection by members-elect who, before the Civil War, had advocated rather stridently for violence. (Opp. Br. at 23-24.) Objectors contend that this did not qualify as incitement because the members-elect had later changed their minds and opposed the Confederacy. (*Id.* at 24.) That does not make sense. If engaging in insurrection could include incitement, then these individuals would have incurred a Section Three disqualification as soon as they committed incitement—and later good deeds could not change that. By contrast, if Objectors are saying that engaging in insurrection requires incitement *plus something else*, then they are conceding that incitement alone does not

qualify.

The same is true of Objectors' incomplete quotation of Attorney General Stanbery's statement that "incit[ing] others to engage in rebellion" is disqualifying. (*See* Opp. Br. at 24.) Objectors' vitriol accusing President Trump's motion of "misrepresenting the authority it cites" and "excluding critical passages" (Opp. Br. at 2) is ironic, because that is ***exactly*** what Objectors do here. The previous sentence of the Attorney General's opinion—which Objectors omit—makes absolutely clear that it is addressing only incitement *by Rebel government officials*:

> [O]fficers who, during the rebellion, discharged official duties not incident to war, but only such duties as belong to a state of peace, and were necessary to the preservation of order and the administration of law, are not to be considered as thereby engaging in rebellion or disqualified. Disloyal sentiments, opinions, or sympathies would not disqualify; but when a person has, by speech or by writing, incited others to engage in rebellion he must come under the disqualification.[7]

In short, all the textual and historical evidence shows that speaking about an alleged future insurrection—even if the speech is allegedly positive—is not "engaging in" it for purposes of Section Three. Objectors offer no meaningful argument to the contrary.

2. Objectors allege no action by President Trump that could qualify as "engagement."

President Trump's motion explained that Objectors allege only that he (1) unsuccessfully contested an election outcome, (2) gave a speech before the January 6 riot expressly calling for peaceful conduct and using commonplace political metaphors about fighting, and (3) during the riot, repeatedly called for peace and for rioters to go home. Objectors' opposition does not meaningfully dispute this—it simply seeks to describe these

[7] 12 Op Att'y Gen at 205, https://www.google.com/books/edition/Official_Opinions_of_the_Attorneys_Gener/FGVJAQAAMAAJ?hl=en&gbpv=0.

same categories in terms that are more strident in tone but no different in substance.

Objectors contend, for instance, that the *manner* in which President Trump contested the election involved factual claims that were allegedly dishonest (in Objectors' word, lies) and legal arguments about the Vice President's powers that were allegedly wrong (in Objectors' words, "an unlawful plan"). But disputing an election result does not become "engaging in insurrection" simply because the dispute is allegedly dishonest or legally incorrect. Objectors make no coherent argument to the contrary.

With respect to President Trump's speech, Objectors are forced to concede that it expressly called for peace, and that its references to fighting were obviously metaphorical. Stuck with this, Objectors artfully argue that President Trump instructed the crowd to protest against "the electoral vote count and peaceful transfer of power." (Opp. Br. at 25.) But all this means is that President Trump was asking the protestors to support his election-dispute strategy: returning the electoral votes to the states in the hope that he would later be declared the winner. As noted, Objectors have alleged that this was factually dishonest and legally incorrect. But that does remotely mean that asking for peaceful protest in support of this strategy—as President Trump's January 6 speech did—can qualify as engaging in insurrection.[8]

[8] Objectors emphasize President Trump's alleged order to remove "magnetometers that were preventing armed people from joining the assembly" to which he was speaking. (Opp. Br. at 25, 27.) But even if Objectors contend that President Trump should have done more to have these weapons confiscated, they allege no facts suggesting that he did anything to facilitate their use at the Capitol, or had any intention to do so. According to Objectors' allegations, President Trump ordered the magnetometers removed not because armed members of the crowd were being caught by them, but because armed members of the crowd were *avoiding* them, and President Trump wanted these people to be able to enter the areas would be visible on TV. In other words, Objectors have not pleaded that President Trump's magnetometer instructions made any difference, or were intended to make any difference, in whether crowd member would have their weapons confiscated or would be

And with respect to President Trump's conduct *during* the riot, all that Objectors point to is a single Tweet that said nothing about violence or any action at all, but simply criticized Vice President Pence. (Opp. Br. at 26-27.) Desperate to point to something else, Objectors contend that President Trump gave "material support" to the rioters by *inaction* in not calling out the national guard. (*Id.*) But as President Trump's motion explained, the President has absolute and unreviewable discretion in decisions regarding troop deployment, including specifically to put down insurrections. Objectors make no response. In any event, there is no sensible construction of the phrase "engaging in" an incident that can be stretched to include *not stopping* the incident more quickly.

In sum, neither individually nor together do these allegations amount to President Trump "engaging in" the crimes or violence at the Capitol on January 6.

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A final note: in their attempt to define "insurrection" and "engagement" so as to capture President Trump, Objectors have created definitions that—especially when combined—are untenably and troublingly broad. Objectors claim that engaging in insurrection includes any voluntary action—even just speech—in support of any violent effort by two or more people to resist execution of the laws. Under that standard, every politician who speaks in support of the objectives of any violent protest could be credibly accused of "engaging in insurrection." Indeed, any politician who speaks in support of a group or movement that *later* engages in violence could be so accused. Objectors may argue that violence at the Capitol in connection with a presidential election is worse than other forms of political violence. But that is a difference in degree rather than kind—all

able to bring them to the Capitol. Objectors have alleged only that it made a difference, and was intended to make a difference, in whether those crowd members were visible to TV cameras.

forms of political violence (or at least most of them) would suffice under this definition of "insurrection."

So if the Board were to adopt Objectors' definitions, the outcome would be all but certain: the Board would be inundated every single election cycle with objections that a myriad of candidates had "engaged in insurrection"—and in order to resolve many, if not most, of these objections, the Board would have to engage in fact-intensive examinations of the candidates' state of mind and its precise degree of connection to the violence. That cannot be right.

CONCLUSION

The Objection should be dismissed.

Dated: January 25, 2024

Respectfully submitted,

CANDIDATE DONALD J. TRUMP

By: /s/ Adam P. Merrill
One of his attorneys

Scott E. Gessler
GESSLER BLUE LLC
7350 E. Progress Place, Ste. 100
Greenwood Village, CO 80111
720.839.6637
sgessler@gesslerblue.com

Adam P. Merrill (6229850)
WATERSHED LAW LLC
55 W. Monroe, Suite 3200
Chicago, Illinois 60603
312.368.5932
AMerrill@Watershed-Law.com

Nicholas J. Nelson (pro hac vice forthcoming)
CROSS CASTLE PLLC
333 Washington Ave. N., STE 300-9078
Minneapolis, MN 55401
612.429.8100
nicholas.nelson@crosscastle.com

CERTIFICATE OF SERVICE

I, Adam P. Merrill, hereby certify that before 7:30 p.m. on January 25, 2024, I caused a true and correct copy of the foregoing REPLY IN SUPPORT OF MOTION TO DISMISS o be served via email as follows:

Justice (Ret.) Clark Erickson
Hearing Officer
ceead48@icloud.com

Alex Michael
amichaellaw1@gmail.com

Matthew J. Piers
Caryn C. Lederer
Justin Tresnowski
Margaret Truesdale
HUGHES SOCOL PIERS RESNICK & DYM, LTD.
70 W. Madison St., Suite 4000
Chicago, IL 60602
MPiers@HSPLEGAL.COM
clederer@HSPLEGAL.COM
jtresnowski@HSPLEGAL.COM
mtruesdale@HSPLEGAL.COM

Ronald Fein
Amira Mattar
John Bonifaz
Ben Clements
FREE SPEECH FOR PEOPLE
1320 Centre St. #405
Newton, MA 02459
rfein@freespeechforpeople.org
amira@freespeechforpeople.org
jbonifaz@freespeechforpeople.org
bclements@freespeechforpeople.org

Ed Mullen
MULLEN LAW FIRM
1505 W. Morse Ave.
Chicago, IL 60626
ed_mullen@mac.com

Marni M. Malowitz
General Counsel
ILLINOIS STATE BOARD OF ELECTIONS
generalcounsel@elections.il.gov

/s/ Adam P. Merrill
Adam P. Merrill