



September 18, 2023

The Honorable Adrian Fontes
Arizona Secretary of State
1700 West Washington Street, Floor 7
Phoenix, Arizona 85007

Sent via email: sosadmin@azsos.gov

Dear Secretary Fontes,

In the months leading up to the January 6, 2021 assault on the United States Capitol, and while his supporters were sacking the Capitol, former President Donald J. Trump incited and facilitated an insurrection against the United States. Mr. Trump has declared his candidacy for president again in 2024. However, under the Fourteenth Amendment to the U.S. Constitution, Mr. Trump is constitutionally ineligible to appear on any future ballot for federal office based on his engagement in insurrection against the United States. We therefore write to request that you exercise your authority and obligation to exclude Mr. Trump from the ballot.

I. The Constitution’s Insurrectionist Disqualification Clause disqualifies Trump from the presidency.

Section 3 of the Fourteenth Amendment, known as the Insurrectionist Disqualification Clause, provides:

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath . . . as an officer of the United States . . . to support the Constitution of the United States, shall have

engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

As set forth in the attached proposed declaration, this clause applies to Donald Trump. Having sworn an oath to support the Constitution as an officer of the United States, then “engaged” in the January 6 insurrection as that term is defined by law and precedent, Trump is now ineligible to hold any “office . . . under the United States,” including the presidency, unless and until he is relieved of that disqualification by two-thirds of both chambers of Congress.¹

II. Secretaries of State may enforce Section 3.

States may enforce Section 3 without any new or special federal legislation. As explained in detail in a recent report by Free Speech For People and Professor Gerard Magliocca of Indiana University Law School, states can enforce Section 3 without any new federal legislation—just as they regularly enforce other constitutional provisions and other sections of the Fourteenth Amendment itself.²

As the report explains, and as confirmed in a recent law review article by Professors William Baude and Michael Stokes Paulsen,³ states do not need permission from Congress to enforce the U.S. Constitution. Nothing in the text, original public meaning, or the Reconstruction-era history of Section 3’s implementation suggests that states need authorization from Congress to implement this part of the

¹ The facts underlying this misconduct are so well-known as not to require repetition here. The attached proposed declaration sets forth the factual and legal basis for Trump’s disqualification; the remainder of this letter focuses on why you, as Secretary of State, have the authority to make that determination.

² Ron Fein et al. & Gerard Magliocca, *States Can Enforce Section Three of the Fourteenth Amendment Without Any New Federal Legislation*, Free Speech For People Issue Report 2023-01 (Mar. 2023), available at <https://freespeechforpeople.org/wp-content/uploads/2023/03/14.3-fsfp-magliocca-report-mar-2023.pdf>.

³ See William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. __ (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751.

Constitution. To the contrary, the history of Reconstruction shows that Congress, state courts, and even ex-Confederate insurrectionists all understood Section 3 to apply without a federal enforcement statute; indeed, during Reconstruction, states repeatedly enforced Section 3 in exactly that circumstance.

In fact, in 2022 two different states (Georgia and New Mexico) heard Section 3 challenges against those involved in the January 6, 2021 insurrection. These challenges did not need any special federal legislation, as they relied on standard state legal procedures for challenging a politician’s constitutional eligibility for office. And, as discussed below in Section III, the Arizona Supreme Court’s decision in *Hansen v. Finchem* is not to the contrary.

Furthermore, states may require presidential candidates to demonstrate that they meet these qualifications—and exclude them if they do not. As Judge (now Justice) Gorsuch “expressly reaffirm[ed]” in 2012 on behalf of a federal appellate court, “a state’s legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office.”⁴ The Ninth Circuit reached an identical conclusion in 2014 when the California Secretary of State excluded a constitutionally ineligible candidate from a presidential primary ballot.⁵

Just as states are permitted (if not required) to exclude from the presidential ballot a candidate who is not a natural born citizen,⁶ or

⁴ *Hassan v. Colorado*, 495 Fed. Appx. 947, 948 (10th Cir. 2012) (Gorsuch, J.) (unpublished), *aff’g* 870 F. Supp. 2d 1192 (D. Colo. 2012) (upholding state requirement that presidential candidates affirm that they meet constitutional qualifications for office, including natural-born citizen requirement).

⁵ See *Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014).

⁶ See Derek T. Muller, “*Natural Born*” *Disputes in the 2016 Presidential Election*, 85 *Fordham L. Rev.* 1097, 1110 (2016) (noting that “[w]hen election administrators heard [such] eligibility challenges, they often asserted jurisdiction,” though they rejected them on the merits).

who is underage,⁷ so too states should exclude from the ballot a candidate who previously swore to support the Constitution, but then engaged in insurrection.

This is not like other cases where courts have rejected state efforts to impose *additional* ballot access qualifications beyond those found in the Constitution.⁸ Here, the eligibility criterion is imposed by the Constitution itself. Section 3 of the Fourteenth Amendment added an additional qualification for presidential eligibility beyond those first imposed in 1787. In other words, since 1868, the qualifications for eligibility for the presidency—in addition to natural born citizenship, age, and residency—have also included *not* having engaged in insurrection against the United States after having taken an oath to support the Constitution.⁹ And Trump does not meet that qualification.

III. As Secretary of State, you enforce Section 3 in Arizona.

You have the authority and responsibility to determine, as part of the state ballot qualification process, whether a candidate for office is ineligible to appear on the Arizona presidential primary ballot because, “having previously taken an oath . . . to support the Constitution of the United States,” he then proceeded to “engage[] in insurrection or rebellion against the same.” In general, your authority to exclude an ineligible candidate from the presidential ballot inheres in the interaction between the roles of Congress and the states in the presidential selection process. The states, including officers such as

⁷ See *Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014) (upholding state officials’ rejection of underage candidate); *Socialist Workers Party of Illinois v. Ogilvie*, 357 F. Supp. 109, 112 (N.D. Ill. 1972) (same).

⁸ See, e.g., *Griffin v. Padilla*, 408 F. Supp. 3d 1169 (E.D. Cal. 2019) (invalidating state ballot access law excluding presidential candidates who had not disclosed past federal tax returns), *appeal dismissed as moot and remanded*, 2019 WL 7557783 (9th Cir. Dec. 16, 2019), *vacated*, 2020 WL 1442091 (E.D. Cal. Jan. 13, 2020).

⁹ See *Powell v. McCormack*, 395 U.S. 486, 521 n.41 (1969) (noting in dictum that section 3 arguably imposes a “qualification” for office).

Secretaries, play a critical role in that process but cannot act inconsistently with the U.S. Constitution.¹⁰

Under Arizona law, after candidates have submitted their candidacy paperwork,¹¹ the onus then shifts to the Secretary. Under Ariz. Rev. Stat. § 16-242(F), the Secretary may only certify “the names of candidates who are *qualified* for the presidential preference election ballot.”¹² Since an insurrectionist is constitutionally unqualified unless and until two-thirds of each house of Congress vote to remove the disability imposed by the Fourteenth Amendment, a declaration by an insurrectionist is inherently defective.

Your authority to remove insurrectionists from the ballot is grounded in state and federal law and is unaffected by the misguided Arizona Supreme Court ruling in *Hansen v. Finchem*.¹³ There, the Court determined that the challenge procedure of Ariz. Rev. Stat. § 16-351(B), which authorizes any voter to “challenge a candidate for any reason relating to qualifications for the office sought as prescribed by law,” does not apply to Section 3 because (the Court held) “the statute's scope is limited to challenges based upon ‘qualifications . . . as prescribed by law’ and does not include the Disqualification Clause, a legal proscription from holding office.”¹⁴ But *your* authority to exclude

¹⁰ See *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); see also *Ex parte Virginia*, 100 U.S. 339, 347 (1879) (“A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.”).

¹¹ Ariz. Rev. Stat. §§ 16-242(A)-(E).

¹² Ariz. Rev. Stat. § 16-242(F) (emphasis added).

¹³ No. CV-22-0099-AP/EL, 2022 WL 1468157, at *1 (Ariz. May 9, 2022).

¹⁴ *Id.* at *1. The Court also considered, but declined to decide, alternate questions involving whether Section 3 requires congressional legislation, or (not present here) whether states can judge the qualifications of *congressional* candidates in light of the Judge-of-Qualifications Clause specific to Congress. See U.S. Const. art. I § 5. After noting the existence of these questions, the Court declined to rule upon them:

However, we need not decide these issues because we hold that A.R.S. § 16-351(B), which authorizes an elector to challenge a candidate “for any reason relating to qualifications for the office sought as prescribed by law, including age, residency, professional requirements or failure to fully pay fines . . .,” is not the proper proceeding to initiate a Disqualification Clause challenge.

an unqualified presidential candidate from the ballot does not stem from § 16-351(B); it stems from § 16-242(F).

Nor is your authority limited by *Ingram v. Shumway*. There, the Arizona Supreme Court ruled that the Secretary of State was not obligated to automatically disqualify an ex-governor who had been impeached and convicted, but the Arizona Senate had not exercised its option to disqualify him.¹⁵ Section Three of the Fourteenth Amendment does not create an *option* for the legislature to disqualify individuals upon affirmative legislative action; it is itself an eligibility criterion imposed by the federal Constitution, and unequivocally excludes candidates for having engaged in insurrection, *unless* the (national) legislature removes this disability.¹⁶

Ultimately, Arizona law leaves you no neutral position. Under your own oath of office to uphold the “supreme Law of the Land,” you may not use your official powers to take any action—including approving a ballot placement—that would facilitate an insurrectionist’s attempt to obtain office.¹⁷ Allowing a known insurrectionist to appear

Id. at *1.

¹⁵ 164 Ariz. 514, 519 (1990).

¹⁶ *See, e.g., Griffin v. Padilla*, 408 F. Supp. 3d 1169 (E.D. Cal. 2019) (invalidating state ballot access law excluding presidential candidates who had not disclosed past federal tax returns), *appeal dismissed as moot and remanded*, 2019 WL 7557783 (9th Cir. Dec. 16, 2019), *vacated*, 2020 WL 1442091 (E.D. Cal. Jan. 13, 2020).

¹⁷ U.S. Const., art. VI, cl. 2-3.

on the ballot is inconsistent with your prior commitments and your oath of office to support the U.S. Constitution.¹⁸

IV. Section 3 does not require that you wait for someone else to adjudicate this question first.

Section 3 does not require that Congress, a court, or anyone else, adjudicate the question of Mr. Trump’s ineligibility before you may decide his eligibility for the ballot. Section 3 of the Fourteenth Amendment disqualifies officials who have engaged in insurrection from holding office without requiring any particular decisionmaker to make that determination, and “[c]onstitutional provisions are presumed to be self-executing.”¹⁹

Moreover, Section 3 does not require a prior criminal conviction. To the contrary, most ex-Confederates—including those disqualified under Section 3—were never charged with any crimes. *See, e.g., Powell*, 65 N.C. at 709 (defendant not charged with any prior crime); *Worthy*, 63 N.C. at 203 (defendant not charged with any crime); *In re Tate*, 63 N.C. 308 (1869) (defendant not charged with any crime); Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 98-99 (2021) (in special congressional action in 1868 to enforce Section Three and remove Georgia legislators, none of whom had been charged criminally).²⁰ In 2022, a Georgia court

¹⁸ In fact, even if state law *did* purport to require you to list Trump’s name, the U.S. Constitution trumps any state law that would ostensibly require you to approve or certify an insurrectionist as a valid candidate for federal office. No state authority, including the state legislature or even the state constitution, could compel a state official to violate the U.S. Constitution. “[A]ny conflicting obligations” of state law “must give way” to federal law when there is a conflict. *Washington v. Wash. State Comm’l Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 691–92 (1979). Any state law that purports to require you to misuse your official powers to aid a constitutionally ineligible insurrectionist in obtaining office must give way to the 14th Amendment. ¹⁹ 16 Am. Jur. 2d Constitutional Law § 103.

²⁰ Rather than require a criminal conviction as a prerequisite to a civil action to disqualify an officeholder, Congress did the reverse and imposed criminal penalties for those who held office in defiance of the Disqualification Clause. *See Act of May 31, 1870, ch. 114, § 15, 16 Stat. 140, 143.*

confirmed that no authority suggests that a criminal conviction was *ever* considered necessary to trigger the Disqualification Clause. *See Rowan*, slip op. at 13-14.

Furthermore, the fact that the Senate failed to convict Mr. Trump in his impeachment trial is irrelevant. Fifty-seven senators voted to convict Mr. Trump of incitement to insurrection. Of the forty-three senators who voted to acquit, twenty-two expressly based their vote on their belief that the Senate lacked jurisdiction to try a former official, and either criticized Mr. Trump or did not state any view on the merits.²¹ Thus, it is almost certainly the case that sixty-seven, if not more, senators agree that Mr. Trump is guilty of incitement to insurrection.

But even if not, nothing in section 3 of the Fourteenth Amendment says that two-thirds of the U.S. Senate must first render a preliminary determination. To the contrary, section 3 provides that two-thirds of the Senate is needed to *remove* the disability. Even if all forty-three senators who voted not to convict Mr. Trump voted to remove the disability under section 3, that would fall well short even of a majority, let alone the two thirds needed to remove the disqualification.

Finally, your determination would not deprive Mr. Trump of due process of law. Just like Mr. Hassan did in 2011, Mr. Trump can challenge an adverse determination in court.

V. Conclusion

Your oath to support the Constitution, and the weighty responsibility entrusted to you by Arizona voters as Secretary of State, impel you to exclude Mr. Trump's name from the list of "qualified candidates" in the presidential primary.

But rather than wait until after he submits his declaration of candidacy, with the urgency of an approaching primary election, we urge you to address this critical issue now. Mr. Trump's conduct

²¹ *See* Ryan Goodman & Josh Asabor, *In Their Own Words: The 43 Republicans' Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JustSecurity (Feb. 15, 2021), <https://bit.ly/3uUZA1A>.

encouraging the “Big Lie” of a stolen election, encouraging and inciting an insurrection, and facilitating that insurrection by refusing to intervene to stop it despite urgent requests that he do so and by supervising subordinates who actively blocked the National Guard from assisting the besieged Capitol Police, renders him ineligible for any federal office, including that of president.

We would be pleased to discuss this with you further and to render any assistance that we may.

Sincerely,

Amira Mattar, Counsel
Courtney Hostetler, Senior Counsel
Ron Fein, Legal Director
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Attachment: proposed declaration

SECRETARY OF STATE DECLARATION THAT DONALD TRUMP IS DISQUALIFIED FROM PUBLIC OFFICE UNDER SECTION THREE OF THE FOURTEENTH AMENDMENT AND WILL BE BARRED FROM APPEARING ON THE STATE BALLOT AS A PRESIDENTIAL CANDIDATE.

Upon review of Section Three of the Fourteenth Amendment to the U.S. Constitution (the Disqualification Clause), relevant precedent thereunder, the facts and circumstances surrounding the insurrection of January 6, 2021, and applicable state law, I have concluded that Donald J. Trump is disqualified from public office under the Disqualification Clause, and therefore is not a candidate qualified for office within the meaning of Ariz. Rev. Stat. § 16-311(D). Consequently, he is ineligible to appear on Arizona ballots as a presidential candidate.

I do not reach this decision lightly. But I have sworn an oath to support and uphold the U.S. Constitution, and I cannot ignore its clear command:

No person shall . . . hold any office, civil or military, under the United States, . . . who, having previously taken an oath, . . . as an officer of the United States, . . .to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.

U.S. Const. art. XIV, § 3.

As set forth in more detail below, Donald J. Trump took an oath as an officer (President) of the United States to support the Constitution of the United States, but then engaged in insurrection within the meaning of the Disqualification Clause, and is therefore ineligible to hold “any office” under the United States—including the presidency. Therefore, consistent with U.S. Supreme Court Justice Neil Gorsuch’s analysis of the role of state election officials regarding the candidacies of constitutionally ineligible candidates, I hereby determine that he is ineligible to appear on the presidential primary ballot in this state.

This decision is subject to judicial review in accordance with applicable state or federal law.

I. The Role of States in Protecting the Ballot

States may require presidential candidates to demonstrate that they meet these qualifications and exclude them if they do not. As then-Judge (now U.S. Supreme Court Justice) Neil Gorsuch “expressly reaffirm[ed]” in 2012, “a state’s legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office.”²²

For this reason, states have excluded from the presidential ballot candidates who were not natural born citizens,²³ or who were underage.²⁴ And just as states may exclude from the presidential ballot a candidate who is not a natural born citizen, who is underage, or who has previously been elected twice as president,²⁵ so too states should exclude from the ballot a candidate who previously swore to support the Constitution, but then engaged in insurrection.

Fundamentally, my authority and responsibility to exclude an ineligible candidate from the presidential ballot inheres in the interaction between the roles of Congress and the states in the presidential selection process. The states play a critical role in that process, but cannot act inconsistently with the U.S. Constitution.²⁶ Even in a state *without* specific legislation addressing ballot access for

²² *Hassan v. Colorado*, 495 Fed. App’x 947, 948 (10th Cir. 2012) (Gorsuch, J.), *aff’g* 870 F. Supp. 2d 1192 (D. Colo. 2012) (upholding state requirement that presidential candidates affirm that they meet constitutional qualifications for office, including natural-born citizen requirement).

²³ *See Hassan*, 495 Fed. App’x at 947; Derek T. Muller, “Natural Born” Disputes in the 2016 Presidential Election, 85 Fordham L. Rev. 1097, 1110 (2016) (noting that “[w]hen election administrators heard [such] eligibility challenges, they often asserted jurisdiction,” though in the 2016 election, administrators rejected those challenges on the merits).

²⁴ *See Peace and Freedom Party v. Bowen*, 750 F.3d 1061 (9th Cir. 2014) (upholding state officials’ rejection of underage candidate); *Socialist Workers Party of Illinois v. Ogilvie*, 357 F. Supp. 109, 112 (N.D. Ill. 1972) (same).

²⁵ *See* U.S. Const. amend. XXII, § 1.

²⁶ *See Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

constitutionally ineligible candidates, officials may not use their official powers to take any action—including approving, certifying, or implementing a ballot placement—to facilitate an insurrectionist’s attempt to obtain office.²⁷ Nor is there any requirement for *federal* legislation empowering state officials to follow the Fourteenth Amendment to the U.S. Constitution.²⁸

Under Arizona law, after candidates have submitted their candidacy paperwork,²⁹ the onus then shifts to the Secretary. Crucially, under Ariz. Rev. Stat. § 16-242(F), the Secretary may only certify “the names of candidates who are *qualified* for the presidential preference election ballot.”³⁰ Since an insurrectionist is constitutionally unqualified unless and until two-thirds of each house of Congress vote to remove the disability imposed by the Fourteenth Amendment, a declaration by an insurrectionist is inherently defective.

While some may question the public interest in excluding a constitutionally ineligible candidate from the ballot, I believe that Justice Gorsuch was correct. Furthermore, the Constitution is “the supreme Law of the Land,” which I have taken an oath to support.³¹ And allowing a known insurrectionist to appear on the ballot would be

²⁷ See *Ex parte Virginia*, 100 U.S. 339, 347 (1879) (“A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.”).

²⁸ See Ron Fein et al. & Gerard Magliocca, *States Can Enforce Section Three of the Fourteenth Amendment Without Any New Federal Legislation*, Free Speech For People Issue Report 2023-01 (Mar. 2023), available at <https://freespeechforpeople.org/wp-content/uploads/2023/03/14.3-fsfp-magliocca-report-mar-2023.pdf>.

²⁹ Ariz. Rev. Stat. §§ 16-242(A)-(E).

³⁰ Ariz. Rev. Stat. § 16-242(F) (emphasis added).

³¹ U.S. Const., art. VI, cl. 2-3.

inconsistent with my obligation and oath of office to support the U.S. Constitution.³²

This situation is not like other cases where courts have rejected state efforts to impose *additional* ballot access qualifications beyond those found in the Constitution.³³ Here, the eligibility criterion is imposed by the Constitution itself. Section Three of the Fourteenth Amendment added an additional qualification for presidential eligibility beyond those first imposed in 1787. In other words, since 1868, the qualifications for eligibility for the presidency—in addition to natural born citizenship, age, and residency—have also included *not* having engaged in insurrection against the United States after having taken an oath to support the Constitution.³⁴

Some authority suggests that “proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable” in reaching a Section Three disqualification decision.³⁵ That may be so, but there is no constitutional requirement that Congress, a court, or anyone else formally adjudicate this question *before* my decision—in

³² In fact, notwithstanding any contrary statement of state law, the U.S. Constitution trumps any state law that would ostensibly require election officials to approve or certify an insurrectionist as a valid candidate for federal office. No state authority, including the state legislature or even the state constitution, could compel a state official to violate the U.S. Constitution. “[A]ny conflicting obligations” of state law “must give way” to federal law when there is a conflict. *Washington v. Wash. State Comm’l Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 691–92 (1979). Any state law that purports to require election officials to misuse their official powers to aid a constitutionally ineligible insurrectionist in obtaining office must give way to the 14th Amendment.

³³ See, e.g., *Griffin v. Padilla*, 408 F. Supp. 3d 1169 (E.D. Cal. 2019) (invalidating state ballot access law excluding presidential candidates who had not disclosed past federal tax returns), *appeal dismissed as moot and remanded*, 2019 WL 7557783 (9th Cir. Dec. 16, 2019), *vacated*, 2020 WL 1442091 (E.D. Cal. Jan. 13, 2020).

³⁴ See *Powell v. McCormack*, 395 U.S. 486, 521 n.41 (1969) (noting in dictum that Section Three arguably imposes a “qualification” for office); *Cawthorn v. Amalfi*, 35 F.4th 245, 275-82 (4th Cir. 2022) (Richardson, J., concurring in the judgment) (arguing that Section Three is a “qualification” for office).

³⁵ *In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869).

other words, and as confirmed in a recent law review article by Professors William Baude and Michael Stokes Paulsen,³⁶ such proceedings may occur in review of, not as a prerequisite to, my decision. Section Three of the Fourteenth Amendment disqualifies officials who have engaged in insurrection from holding office without requiring any particular decisionmaker to make that determination, and “[c]onstitutional provisions are presumed to be self-executing.”³⁷ During Reconstruction, for example, officials denied office to those disqualified by Section Three, subject to the disqualified office-seeker’s right to seek judicial review of that decision.³⁸ For this reason, Trump may challenge my decision in any court with jurisdiction, under applicable state or federal law.

II. Relevant Facts

The facts of the events leading up to and including January 6, 2021 are largely undisputed and need not be repeated in full here. While new evidence continues to emerge, the events took place substantially in public, and my analysis is based solely on generally available information. In reaching my conclusions, I have relied on the following factual sources:

- The federal court decision in *Eastman v. Thompson*, wherein a United States district court found by a preponderance of the evidence that Trump, through his actions leading up to the attack on the Capitol on January 6, 2021, committed the crimes of attempting to obstruct an official proceeding and conspiracy to defraud the United States.³⁹

³⁶ See William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. __ (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751.

³⁷ 16 Am. Jur. 2d Constitutional Law § 103.

³⁸ See, e.g., *Worthy v. Barrett*, 63 N.C. 199, 200 (1869) (individual who won most votes for county sheriff presented himself to county commissioners for his commission, but they refused it; he then sued); see also *In re Tate*, 63 N.C. 308, 308 (1869) (similar).

³⁹ 594 F. Supp. 3d 1156 (C.D. Cal. 2022).

- The materials and evidence presented to the U.S. Senate in Trump’s 2021 impeachment trial for incitement of insurrection.⁴⁰
- The factual findings in *Rowan et al. v. Marjorie Taylor Greene*.⁴¹
- The factual findings in *State of New Mexico ex rel. White v. Couy Griffin*.⁴²
- The televised testimony and other evidence presented to the Select Committee to Investigate the January 6th Attack on the United States Capitol (“January 6 Committee”).⁴³

III. Legal Analysis

A. The Violent Attack on the U.S. Capitol on January 6, 2021 was an “Insurrection” Under the Disqualification Clause

The January 6, 2021 attack on the U.S. Capitol was an “insurrection” under all conceivably applicable definitions of the word.

An “insurrection” is a “combined resistance” to “lawful authority,” with the intent to deny the exercise of that authority. *See Webster’s Dictionary* (1830) (“combined resistance to . . . lawful authority . . . , with

⁴⁰ *See* U.S. Gov’t Pub. Office, *Impeachment Related Publications*, <https://www.govinfo.gov/collection/impeachment-related-publications>. The fact that the Senate failed to convict Mr. Trump in his impeachment trial is irrelevant. Fifty-seven senators voted to convict Mr. Trump of incitement to insurrection. Of the 43 senators who voted to acquit, 22 expressly based their vote on their belief that the Senate lacked jurisdiction to try a former official, and either criticized Mr. Trump or did not state any view on the merits. *See* Ryan Goodman & Josh Asabor, *In Their Own Words: The 43 Republicans’ Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JustSecurity (Feb. 15, 2021), <https://bit.ly/3uUZA1A>. Thus, a clear majority, and a likely two-thirds majority, if not more, of senators agreed that Trump is guilty of incitement to insurrection.

⁴¹ No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Ga. Ofc. of Admin. Hrgs. May 6, 2022), *available at* <https://bit.ly/MTGOSAH>, *aff’d* sub nom. *Rowan v. Raffensperger*, No. S23D0071 (Ga. Sept. 1, 2022).

⁴² 2022 WL 4295619 (N.M. 1st Jud. Dist., Sept. 6, 2022), *available at* <https://bit.ly/GriffinNM>, appeal dismissed, No. S-1-SC-39571 (N.M. Nov. 15, 2022).

⁴³ *See generally* <https://january6th.house.gov/>.

intent to the denial thereof”); *accord, e.g., Allegheny Cty. v. Gibson*, 90 Pa. 397, 417 (1879) (nearly identical definition). To qualify as an insurrection, the resistance must be formidable enough to temporarily defy the authority of the government. See *In re Charge to Grand Jury*, 62 F. 828, 830 (N.D. Ill. 1894) (an uprising “so formidable as *for the time being* to defy the authority of the United States”) (emphasis added). It must be so significant that it cannot be addressed by ordinary law enforcement, *cf. Luther v. Borden*, 48 U.S. (7 How.) 1, 2 (1849); *In re Charge to Grand Jury*, 62 F. at 830, but no minimum threshold of violence is required, *id.* at 830 (“It is not necessary that there should be bloodshed”).

The January 6 insurrection satisfies all these criteria. It was an uprising against the United States that sought to stop the peaceful transfer of power and thereby prevent the government from functioning. It succeeded, temporarily, in defying the authority of the United States by seizing a protected federal building to prevent Congress from fulfilling its constitutional duty to certify the results of a presidential election. The success of the attack may have been short-lived, but even a failed attack with no chance of success can qualify as an insurrection. See *Home Ins. Co. of N.Y. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954) (an insurrection “is no less an insurrection because the chances of success are forlorn.”); *In re Charge to Grand Jury*, 62 F. at 830 (“It is not necessary that its dimensions should be so portentous as to insure probable success.”). In fact, the January 6 insurrection can claim something many past insurrections could not: their violent seizure of the Capitol did, in fact, obstruct and delay an essential constitutional procedure. And it can claim a victory the Confederates never enjoyed: they never attacked the heart of the nation’s capital, prevented a peaceful and orderly presidential transition of power, or took the U.S. Capitol.

The attack was also violent. Multiple people died and 140 law enforcement officers were injured, some severely. The January 6 attack was as violent as at least two previous insurrections against the United States to which the Disqualification Clause was understood to apply:

the Whiskey and Shays’ Insurrections.⁴⁴ The violence was so significant that civil authorities were unable to resist the attack and military and other federal agencies had to be called in.

Immediately after the attack, the U.S. Department of Justice characterized January 6 as an insurrection. More recently, over a dozen people—including some who never entered the Capitol—have been convicted of or pleaded guilty to seditious conspiracy under 18 U.S.C. § 2384, the elements of which track almost exactly the federal criminal offense of insurrection under 18 U.S.C. § 2383.⁴⁵

⁴⁴ See 69 Cong. Globe, 39 Cong. 1st Sess. 2534 (Rep. Eckley) (during debates over clause, arguing that “[b]y following the precedents of our past history will we find the path of safety,” then discussing approvingly the expulsions and investigations of representatives who supported the “small in comparison” Whiskey Rebellion); see also 12 U.S. Op. Atty. Gen. 141, 160 (1867) (opining that, in similarly-worded statute, “[t]he language here comprehends not only the late rebellion, but every past rebellion or insurrection which has happened in the United States”).

⁴⁵ As of this writing, the following individuals have already been convicted by a federal jury of seditious conspiracy, among other serious criminal charges: E. Stewart Rhodes, Kelly Meggs, Roberto Minuta, Joseph Hackett, David Moerschel, and Edward Vallejo. William Todd Wilson and Joshua James pleaded guilty to seditious conspiracy and other charges. Others are awaiting trial. See U.S. Dep’t of Justice, Capitol Breach Cases, available at <https://www.justice.gov/usao-dc/capitol-breach-cases>.

Dozens of court decisions around the country have characterized the January 6 attack as an insurrection.⁴⁶ And in 2022, a court squarely held that January 6 constituted an “insurrection” within the meaning of Section Three of the Fourteenth Amendment. *State of New Mexico ex rel. White v. Couy Griffin*, slip op. at 29-33, 2022 WL 4295619 (N.M. 1st Jud. Dist., Sept. 6, 2022), available at <https://bit.ly/GriffinNM>, appeal dismissed, No. S-1-SC-39571 (N.M. Nov. 15, 2022).

Finally, Congress itself has characterized the January 6 attack as an insurrection. The Senate unanimously characterized the January 6 attackers as “insurrectionists” five times in voting to award a Congressional Gold Medal for Capitol Police Officer Eugene Goodman.⁴⁷ Then, in Public Law 117-32—which the House passed 406-21, and the Senate passed unanimously⁴⁸—Congress voted to award Congressional Gold Medals to Capitol Police for their conduct in the face of “insurrectionists” on January 6, 2021. In doing so, it declared, “On January 6, 2021, a mob of *insurrectionists* forced its way into the U.S. Capitol building and congressional office buildings and engaged in acts of vandalism, looting, and violently attacked Capitol Police officers.” Obviously, “insurrectionists” presuppose an “insurrection.” Similarly, bipartisan majorities of the House and Senate voted for articles of impeachment describing the attack as an “insurrection.”⁴⁹ During the

⁴⁶ *E.g.*, *United States v. Munchel*, 991 F.3d 1273, 1285 (D.C. Cir. 2021); *United States v. Rivera*, No. CR 21-060 (CKK), 2022 WL 2187851 (D.D.C. June 17, 2022) (Kollar-Kotelly, J.) (opinion after bench trial) (*passim*); *United States v. Little*, No. 1:21-CR-315-RCL, 590 F. Supp. 3d 340, 2022 WL 768685, at *2 (D.D.C. Mar. 14, 2022) (Lamberth, J.) (“[T]he riot was not ‘patriotic’ or a legitimate ‘protest,’ . . . it was an insurrection aimed at halting the functioning of our government.”); *United States v. Brockhoff*, No. CR 21-0524 (CKK), 2022 WL 715223 (D.D.C. Mar. 10, 2022) (Kollar-Kotelly, J.) (“This criminal case is one of several hundred arising from the insurrection at the United States Capitol on January 6, 2021.”); *United States v. DeGrave*, 539 F. Supp. 3d 184, 203 (D.D.C. 2021) (Friedman, J.) (*passim*); *United States v. Randolph*, 536 F. Supp. 3d 128, 132 (E.D. Ky. 2021) (Stinnett, M.J.) (*passim*); see also *Budowich v. Pelosi*, No. CV 21-3366 (JEB) 2022 WL 1422823, at *1 (D.D.C. Apr. 14, 2022) (Boasberg, J.) (“attempted insurrection”).

⁴⁷ 167 Cong. Rec. S694-95 (daily ed. Feb. 10, 2021).

⁴⁸ 167 Cong. Rec. H2800 (daily ed. June 15, 2021), S5685 (daily ed. Aug. 3, 2021).

⁴⁹ 167 Cong. Rec. H191 (daily ed. Jan. 13, 2021), S733 (daily ed. Feb. 13, 2021).

impeachment trial, former President Trump’s defense lawyer stated that “the question before us is not whether there was a violent insurrection of [sic] the Capitol. *On that point, everyone agrees.*”⁵⁰

The January 6 attack is no less an insurrection just because some participants envisioned slightly different versions of the day’s events. Plans were fluid and overlapped substantially with what a federal court has found to be a conspiracy to obstruct the Joint Session of Congress on January 6, 2021.⁵¹ Like the Whiskey and Shays’ Insurrections, the January 6 insurrection was loosely organized. But unlike them, it struck at the very heart of our nation’s democracy, and achieved a feat not even the Confederate rebellion managed: seizing the United States Capitol and disrupting the peaceful transfer of power.

B. Trump’s Involvement Constituted “Engagement” in Insurrection.

Two Reconstruction-era judicial opinions considered the meaning of the word “engage” as used in the Disqualification Clause. *See United States v. Powell*, 65 N.C. 709 (C.C.D.N.C. 1871) (defining “engage” as “a voluntary effort to assist the Insurrection . . . and to bring it to a successful [from insurrectionists’ perspective] termination”);⁵² *Worthy v. Barrett*, 63 N.C. 199, 203 (1869) (defining “engage” as “[v]oluntarily aiding the rebellion, by personal service, or by contributions, other than charitable, of any thing that was useful or necessary”). In 2022, judges in Section Three cases in New Mexico and Georgia confirmed and explained the *Worthy-Powell* standard. *See State of New Mexico ex rel. White v. Couy Griffin*, No. D-101-CV-2022-00473, slip op. at 34-38 (N.M. Santa Fe Cty. 1st Jud. Dist. Ct. Sept. 6, 2022), *available at* <https://bit.ly/GriffinNM> (adopting the *Worthy-Powell* standard), appeal dismissed, No. S-1-SC-39571 (N.M. Nov. 15, 2022); *Rowan et al. v. Marjorie Taylor Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot, slip op. at 13-14 (Ga. Ofc. of Admin. Hrgs. May 6, 2022), *available at* <https://bit.ly/MTGOSAH> (adopting the *Worthy-Powell*

⁵⁰ 167 Cong. Rec. S729 (daily ed. Feb. 13, 2021) (emphasis added).

⁵¹ *See Eastman v. Thompson*, 594 F. Supp. 3d 1156 (C.D. Cal. 2022).

⁵² *See also United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D.N.C. 1871).

standard), *aff'd* sub nom. *Rowan v. Raffensperger*, No. S23D0071 (Ga. Sept. 1, 2022).⁵³

An individual need not personally commit an act of violence to have “engaged” in insurrection. *See Powell*, 65 N.C. at 709 (defendant paid to *avoid* serving in Confederate Army); *Worthy*, 63 N.C. at 203 (defendant simply served as county sheriff); *White*, slip op. at 34; *Rowan*, slip op. at 13. Nor does “engagement” require previous conviction of a criminal offense. *See, e.g., Powell*, 65 N.C. at 709 (defendant not charged with any prior crime); *Worthy*, 63 N.C. at 203 (defendant not charged with any crime); *In re Tate*, 63 N.C. 308 (1869) (defendant not charged with any crime); Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 98-99 (2021) (in special congressional action in 1868 to enforce Section Three and remove Georgia legislators, none of whom had been charged criminally).⁵⁴ No authority suggests that a criminal conviction was ever considered necessary to trigger the Disqualification Clause. *See Rowan*, slip op. at 13-14.

“Engage” includes both words and actions. Confederate leaders (from Jefferson Davis down) used words to tell subordinates what to do. Although “merely disloyal *sentiments or expressions*” may not be sufficient, 12 U.S. Op. Atty. Gen. 141, 164 (1867) (emphasis added), “marching orders or instructions to capture a particular objective, or to disrupt or obstruct a particular government proceeding, would appear

⁵³ *See also In re Tate*, 63 N.C. 308 (1869) (applying *Worthy*). In a similarly-worded 1867 statute with more severe consequences (disenfranchisement) than the Disqualification Clause, the Attorney General construed the statute to require “some direct overt act, done with the intent to further the rebellion.” 12 U.S. Op. Atty. Gen. 141, 164 (1867). But this was easily satisfied. Under the nineteenth-century understanding, in the context of a violent insurrection, even “one more voice” encouraging violence constitutes an overt act. *White*, slip op. at 35.

⁵⁴ Rather than require a criminal conviction as a prerequisite to a civil action to disqualify an officeholder, Congress did the reverse and imposed criminal penalties for those who held office in defiance of the Disqualification Clause. *See Act of May 31, 1870, ch. 114, § 15, 16 Stat. 140, 143.*

to constitute ‘engagement’ under the *Worthy-Powell* standard.” *Rowan*, slip op. at 14; *see also White*, slip op. at 34.⁵⁵

Under the *Worthy-Powell* standard, Trump’s actions leading up to and on January 6, 2021 constituted “engagement” in insurrection. He called upon his followers to converge on Washington, D.C., saying that it would be “wild.” As Trump’s personal and campaign lawyer Rudy Giuliani explained to White House Chief of Staff Mark Meadows, Trump’s plan was to lead a march to the Capitol; in Meadows’ words of January 2, “things might get real, real bad on January 6.”

On the morning of January 6, Trump took active steps to ensure that his supporters retained their weapons in preparation for the march to the Capitol. Before Trump’s speech, many of Trump’s assembled followers, heavily armed with AR-15s, Glockes, body armor, spears, and bear spray, were dissuaded from approaching closely by metal detectors and the fear that their weapons would be detected and confiscated by security. When he learned of this, Trump demanded that the metal detectors be removed so that his armed supporters would not fear detection and confiscation of their weapons. As he explained, “I don’t f- -ing care that they have weapons. They’re not here to hurt *me*.” To the contrary, Trump said that security officials should let his heavily armed supporters retain their weapons and then march to the Capitol. In fact, he continued to want to lead the march, and was thwarted only by the Secret Service. He publicly threatened Vice President Pence and instructed his assembled followers—whom he knew were armed—to march to the Capitol, whereupon they violently captured the building, nearly assassinated elected officials, and successfully disrupted and obstructed the certification of presidential votes.

⁵⁵ To the extent (if any) that an “overt act” may be needed, words can constitute an “overt act,” just as words may constitute an “overt act” under the Treason Clause, *e.g.*, *Chandler v. United States*, 171 F.2d 921, 938 (1st Cir. 1948) (enumerating examples, such as conveying military intelligence to the enemy), or for purposes of conspiracy law, *e.g.*, *United States v. Donner*, 497 F.2d 184, 192 (7th Cir. 1974) (even “constitutionally protected speech may nevertheless be an overt act in a conspiracy charge”). *See Rowan*, slip op. at 14.

Finally, even as the insurrection raged and Members of Congress sheltered in secure rooms from the attack, Trump refused, for hours, to intervene in any way to stop the insurrection, despite his own close political allies and family members (all of whom were convinced, correctly, that his remarks could change events) begging him to order a general retreat. In addition, Trump—as the commander in chief—took no action for hours to order any military response as a co-equal branch of the government was overrun. In fact, when he was informed that the mob besieging the Capitol was chanting “hang Mike Pence!,” he said that Vice President deserved death and the insurrectionists weren’t doing anything wrong.

To be sure, Trump did not himself attack the Capitol, or fire a gun. But neither did Jefferson Davis.

IV. Conclusions

As set forth above, I have the authority—subject, of course, to judicial review under applicable state or federal law—to exclude from the ballot any presidential candidate who does not meet the qualifications for office, including a candidate who is non-natural-born, is underage, or has broken an oath to support the Constitution and engaged in insurrection.

On January 20, 2017, Trump swore an oath to support the Constitution as an officer of the United States, i.e., as president.⁵⁶ The events of January 6, 2021 constituted an “insurrection” within the meaning of Section Three of the Fourteenth Amendment, and Trump “engaged” in that insurrection within the meaning of Section Three. Consequently, he is disqualified from holding “any office” under the United States—including the presidency. As a result, he is ineligible to appear on the presidential primary ballot in Arizona.

/s/ _____

Adrian Fontes

Secretary of State

⁵⁶ Trump satisfies Section Three’s jurisdictional clause because he took the oath as an “officer of the United States.” While some have suggested that the President of the United States is not an “officer of the United States,” see Josh Blackman & Seth Barrett Tillman, *Is the President an ‘Officer of the United States’ for Purposes of Section 3 of the Fourteenth Amendment?*, 15 N.Y.U. J. L. & Liberty 1 (2021), this view is not consistent with Reconstruction-era English usage. See Gerard Magliocca, *Section 3 and the Presidency*, Prawfsblawg, <https://prawfsblawg.blogs.com/prawfsblawg/2021/12/section-3-and-the-presidency.html> (Dec. 21, 2021) (enumerating repeated Reconstruction-era public and official references to the president as the “executive officer of the United States”). Thus, in 1866 it was well understood that a reference to “officer of the United States” included the President. The presidency is also a “disqualified-from” position under the rubric of “office . . . under the United States.” This question was settled explicitly during congressional debates. See Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 93 (2021) (quoting colloquy). See also William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. __ (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751.