COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

STATE BALLOT LAW COMMISSION
SBLC Docket Nos. 24-1, 24-2

BRUCE CHAFEE, KIM JANEY, MARK BRODIN, ELIZABETH BARTHOLET, and AUGUSTA MCKUSICK,

Objectors

v.

DONALD JOHN TRUMP,

Respondent

MICHAEL S. ROBERTSON, JR., KEVIN BATT, THERESA MASON, and STEPHANIE SANCHEZ,

Objectors

v.

DONALD JOHN TRUMP,

Respondent

OBJECTORS' OPPOSITION TO RESPONDENT'S AND MASSACHUSETTS REPUBLICAN PARTY'S MOTIONS TO DISMISS[1]

I. INTRODUCTION

In their motions to dismiss, Donald Trump and the Massachusetts Republican Party ("MassGOP") offer a whole host of partially-developed and legally erroneous reasons for why this Commission should dismiss Objectors' objections. They begin by offering procedural reasons premised on lack of jurisdiction and purported failures by the Objectors to follow the Commission's regulations. But in so doing, they clearly misread the governing laws and draw mistaken conclusions as a result. When untangled, it becomes crystal clear that these Objections are ripe and properly before the Commission at this juncture, that Massachusetts law not only grants the Commission jurisdiction to hear these Objections but also mandates it do so, and that Objectors have scrupulously followed the Commission's regulations.

Trump's merit-based arguments — which, in any event, must be explored during a hearing and not via a motion to dismiss — fare no better. The questions at hand are not non-justiciable political questions but rather questions over candidates' qualifications of the sort this Commission hears virtually every election, albeit amplified in the public square by Trump's megaphone. Likewise, as its text and history make clear, enforcement of Section 3 of the Fourteenth Amendment depends on no Congressional action. Trump's

[1] Because the Massachusetts Republican Party's motion to dismiss is, in all substantive respects, entirely identical to portions of Respondent's motion (both of which were submitted by the same counsel), Objectors oppose and respond in opposition to both motions together in this memorandum.

rather far-fetched claims that the President of the United States is somehow not "any office, civil or military, under the United States, or under any State" is preposterous and reflects his distorted view of the presidency as somehow existing above the Constitution, much like his view that the Commander-in-Chief's presidential oath — manifestly broken by him — to "preserve, protect and defend the Constitution of the United States" is not "an oath [taken]… as an officer of the United States…to support the Constitution of the United States." And finally, his arguments that Massachusetts cannot bar constitutionally ineligible candidates from appearing on its ballot is flatly refuted by a healthy litany of judicial precedent — as well as an unbroken history of this Commission's own precedents.

In short, Trump asks this Commission to do one of two things: either throw out all of the laws and rules and decisions that have long governed Massachusetts elections by overruling its deeply rooted precedents and rendering this Commission's jurisdiction narrowly circumscribed to signature verifications and general elections, or create a special exception for him because he is Donald Trump. The rule of law allows for neither scenario, and accordingly, this Commission must deny these motions.

II. RESPONDENT'S (AND MASSACHUSETTS REPUBLICAN PARTY'S) CLAIMS OF ALLEGED PROCEDURAL DEFECTS ARE MERITLESS

A. <u>These Objections are legally ripe, as the Commission has jurisdiction to adjudicate primary election candidates' statutory and constitutional qualifications</u>

The parties are in apparent agreement — which is unsurprising, given the statute is explicit — that this "Commission has jurisdiction over any matter referred to it 'pertaining to the statutory and constitutional qualifications of any nominee for state,

national or county office,'" as well as "'the certificates of nomination or nomination papers filed in any presidential state primary, state election, or special state primary or election…'" Trump's Mot. at 3 (quoting M.G.L. ch. 55B § 4).

Yet in his motion, Trump first argues that "the case is not ripe for adjudication because President Trump has not yet been 'nominated' within the meaning of G.L. ch. 55B sec. 4." Mot. at 2. He explains his position thus:

> Here, President Trump seeks the Republican nomination for President of the United States at the Republican State Primary to be held on March 5, 2024. Since President Trump has not yet qualified to have his name printed on the General Election ballot, this matter is not ripe for adjudication, and consequently, the Commission does not have jurisdiction to conduct a hearing on the merits.

Trump Mot. at 3. While his arguments are a bit difficult to follow on this point, he seems to be arguing that the Commission does not have jurisdiction to adjudicate the "statutory and constitutional qualifications" for *any* primary election candidates, as such candidates are not "nominee[s] for state, national or county office" until they have been chosen by primary voters to advance to the general election.[2] But even setting aside for the moment that additional statutory provisions separately empower and require this Commission to act upon the Objections at issue, *see infra*, Trump's argument on this point is flatly rejected by the plain language of the statutes and contrary to scores of precedents from this Commission.

First, the notion that this Commission cannot adjudicate objections to nominations for candidates to appear on a primary ballot is disputed by the statutory text itself and runs contrary to the legislature's intent. In two different places, the statutes expressly

[2] But this Commission's precedent suggests that even then, Trump's eligibility might not be subject to challenge. *See Reade v. Harris*, SBLC 29-08 (Sept. 21, 2020).

contemplate objections to "certificates of nomination or nomination papers" filed in a "presidential . . . primary." M.G.L. ch. 55B, §§ 4-5. Moreover, the plain meaning of the phrase "nominees" encompasses candidates in primary elections. The Supreme Judicial Court has instructed that "[s]tatutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." *Commonwealth v. Rossetti*, 489 Mass. 589, 593 (Mass. 2022) (quoting *Randolph v. Commonwealth*, 488 Mass. 1, 5 (Mass. 2021)). Here, the plain meaning of the term "nominee" in its context is clear: one who has been nominated (by parties, voters' signatures, or otherwise) to stand as a candidate in primary election.

Yet even if this was not so clear — indeed, even if the plain meaning of the term "nominee" would generally *exclude* primary candidates — the term *as used in the statute* necessarily includes them. This is because, when interpreting statutory terms, the Supreme Judicial Court has instructed:

> Our primary duty in interpreting a statute is 'to effectuate the intent of the Legislature in enacting it. Ordinarily, where the language of a statute is plain and unambiguous, it is conclusive as to legislative intent. That said, we do not adhere blindly to a literal reading of a statute if doing so would yield an absurd or illogical result. See *Attorney Gen. v. School Comm. of Essex,* 387 Mass. 326, 336, 439 N.E.2d 770 (1982) ("We will not adopt a literal construction of a statute if the consequences of such construction are absurd or unreasonable"); 2A N.J. Singer & S. Singer, Statutes and Statutory Construction § 46:7 (7th ed. rev. 2014) ("if the literal text of an act is inconsistent with legislative meaning or intent, or leads to an absurd result, a statute is construed to agree with the legislative intention").

Com. v. Peterson, 476 Mass. 163, 167–68 (Mass. 2017) (internal quotations and citations omitted).

Here, it is indisputable that interpreting "nominee" to exclude all primary election candidates would indeed lead to absurd and illogical results as well as frustrate the

legislature's purpose in passing the statute. It would be flatly irrational to refuse the Commission jurisdiction to adjudicate qualifications at the *primary* stage, when voters have many more choices and could pivot to support a primary candidate that more closely aligns with their preferences if there top choice is disqualified, while simultaneously *providing* jurisdiction for the Commission to disqualify candidates at the *general election* stage, which — for most elections — would require essentially a new primary election if time permits. *See* M.G.L. ch. 53 § 14. And, if time does not permit, such a scheme has the effect of curbing democratic choice by removing the choice of a replacement general election candidate from the primary voters. *See id.* Moreover, given the extreme time constraints inherent to elections and the chaos that late-stage disqualifications can cause, this high potential for uncertainty further renders Trump's reading of the statute absurd, illogical, and contrary to its legislative purpose. In contrast, Objectors' interpretation avoids this absurdity and allows the Commission to fulfill the statute's intended purpose: keeping ineligible candidates off the ballot.

Second, Trump's view that primary election candidates' statutory and constitutional qualifications are outside this Commission's jurisdiction is directly in conflict with this Commission's well established precedents. For example, in *Thomson v. Romney*, SBLC 02-05 (June 25, 2002), voters filed objections challenging Mitt Romney's eligibility to stand as a candidate in the Republican *primary* election for Governor, arguing that he failed to meet the constitutional residency qualifications.[3] Despite the

[3] The relevant language of the Massachusetts Constitution describes one's ability to become Governor and does not explicitly speak to their ability to stand as a candidate for Governor. *See* MASS. CONST. Pt. 2, C. 2, § 1, Art. 2 ("[N]o person shall be eligible to this office, unless at the time of his election, he shall have been an inhabitant of this commonwealth for seven years…"). *Cf.* U.S. CONST. Amend. XIV § 3 ("No person shall

objection challenging a *primary* election candidate *on the basis that he lacked the "statutory and constitutional qualifications" to hold the office* for which he sought the Republican general election nomination, this Commission held, "The State Ballot Law Commission (Commission) has jurisdiction to hear such objections pursuant to General Laws chapter 55B, section 4." *Accord Cote v. Meas*, SBLC 18-01 (June 22, 2018) (as to candidate in primary election, "The State Ballot Law Commission (Commission) has jurisdiction to determine whether he meets that [constitutional] qualification.") (citing G. L. c. 55B, § 4 (2016 ed.)); *Bean v. Uyterhoeven*, SBLC 20-04 (June 16, 2020) (as to candidate in primary election, "The State Ballot Law Commission (Commission) has jurisdiction to determine whether she meets that [constitutional] qualification.") (citing G. L. c. 55B, § 4 (2018 ed.)); *Dwyer v. Sarnowski*, SLBC 22-01 (June 23, 2022) (as to candidate in primary election, "The State Ballot Law Commission (Commission) has jurisdiction to determine whether the Respondent meets that [constitutional] qualification.") (citing G. L. c. 55B, § 4 (2020 ed.)); *see also Swig v. State Ballot Law Commission*, 265 Mass. 19, 21 (Mass. 1928) (noting single justice held Commission had "jurisdiction to consider and determine the objections to the nomination of" petitioner who was disqualified from primary ballot).[4]

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be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office…"). But because M.G.L. ch. 55B § 4 provides that the State Ballot Law Commission is tasked with adjudicating the "statutory and constitutional qualifications" of candidates for office, the Commission determined it had jurisdiction over the objection.

[4] Trump cites *Collins v. Gorman*, SBLC 06-01, for the erroneous proposition that objections challenging a primary candidate's qualifications for office are "premature, and not ripe for adjudication" like they were in that case. Trump's Mot. at 3–4. But this case is entirely inapposite and stands for the uncontroversial position that where only one candidate may be elected from the same town to a multi-member body, it is premature and unripe to contest one's candidacy if two members from the same town have not yet

To adopt Trump's position that this Commission lacks jurisdiction to adjudicate his constitutional qualifications in this primary election would, inherently, require overturning an unbroken history of this Commission's decisions. And there would be only one rationality for it: the fact that this case concerns Donald Trump, and as such, animates considerable passions across the political spectrum. But this Commission, when interpreting the Commonwealth's election statutes, has a solemn obligation to remain faithful to the law, irrespective of political repercussions. In this respect, the Commission must adhere to the same principles of impartiality that our courts do:

> The judiciary's independence from the other branches of government and from outside influences and extraneous concerns has been one of the cornerstones of our constitutional democracy, intended to ensure that judges will be free to decide cases on the law and the facts as their best judgment dictates, without fear or favor.
>
> The writings of John Adams preceding the drafting and adoption of the Massachusetts Constitution developed and articulated the essential linkage between judicial independence and impartial decision-making:
>
> > "[Judges'] minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men…"
>
> Thoughts on Government (1776), in 4 Works of John Adams 198 (C.F. Adams ed. 1851). In 1780, the right to be judged by an independent and impartial tribunal was incorporated into the Massachusetts Declaration of Rights:
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> > "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the right of the people, and of every citizen, that the judges of the supreme judicial court

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been elected. In contrast, here, Trump's eligibility is not dependent on some future event occurring; he is already ineligible to hold the office he seeks.

> should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws."
>
> Art. 29 of the Massachusetts Declaration of Rights.
>
> Accordingly, "[t]he great responsibility of a judge is to exercise his best judgment in applying his interpretation of the law to the facts. No judge should ever be concerned with whether his decision will be popular or unpopular. He does his job always with complete awareness that political considerations of the day, contemporary public emotions (no matter what their motivation), and personal philosophies are completely foreign and irrelevant to the exercise of his judicial power." *Commonwealth v. O'Neal,* 369 Mass. 242, 273, 339 N.E.2d 676 (1975) (Tauro, C.J., concurring). "Independence means freedom from every form of compulsion or pressure.... The moment a decision is controlled or affected by the opinions of others or by any form of external influence or pressure, that moment the judge ceases to exist." H.T. Lummus, The Trial Judge 9–10 (1937).

In re Enforcement of Subpoena, 463 Mass. 162, 169–71 (Mass. 2012) (footnotes omitted).

As this Commission has found time and time again, M.G.L. ch. 55B § 4 confers upon it "jurisdiction over and [the power to] render a decision on any matter referred to it, pertaining to the statutory and constitutional qualifications of" primary election candidates. This includes Donald Trump, and as such, this Commission must adjudicate these objections to his constitutional qualifications to hold the office he seeks.

B. <u>This Commission plainly has statutory jurisdiction to adjudicate these Objections</u>

Given the Commission's authority and jurisdiction over challenges to primary candidates' "statutory and constitutional qualifications," *see supra*, there is sufficient statutory jurisdiction for the Commission to hear this challenge. However, in the event

the Commission decides to overrule its longstanding precedent on this issue, there are further bases for the Commission's jurisdiction over these objections.

Despite ample statutory bases for jurisdiction, Trump next argues that "[h]e was placed on the primary ballot at the request of the State Party pursuant to M.G.L. c 53 sec. 70E, and as such there is no 'nomination' or 'nomination papers' subject to objection under M.G.L. c 55B sec. 5." Trump's Mot. at 3. But the portion of M.G.L. ch. 55B § 5 that Trump cites only provides timelines for objections; it does not provide the bases for such objections.[5] Those are contained in the preceding section, M.G.L. ch. 55B § 4.[6] Accordingly, the *most* Trump's arguments that "there is no 'nomination' or 'nomination papers'" could hope to establish with respect to § 5 is that there is *no* statutory deadline

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[5] "Objections to certificates of nomination and nomination papers for candidates at a presidential primary, state primary, or state election shall be filed with the state secretary within seventy-two hours succeeding five o'clock post meridian of the last day fixed for filing nomination papers." M.G.L. ch. 55B § 5.

[6] This section provides:

> The commission may investigate upon objection made in accordance with the provisions of this chapter the legality, validity, completeness and accuracy of all nomination papers and actions required by law to give candidates access to a state ballot or to place an initiative or referendum on a state ballot.
>
> The commission shall have jurisdiction over and render a decision on any matter referred to it, pertaining to the statutory and constitutional qualifications of any nominee for state, national or county office [or] the certificates of nomination or nomination papers filed in any presidential or state primary….

M.G.L. ch. 55B § 4. Objectors incorporate by reference all arguments made herein, as well as in their Objections, motion for summary decision, and memorandum of law in support of the State Ballot Law Commission's jurisdiction, as to why these provisions — read together and in their separate component parts — clearly establish the Commission's jurisdiction.

for such challenges, which are indisputable authorized by § 4. But this contention only bolsters Objectors' arguments: it is far more likely that the terms "certificates of nomination and nomination papers" encompass all vehicles by which a candidate can gain access to the "presidential primary" ballot. M.G.L. ch. 55B § 5. Otherwise, there exists this class of presidential primary candidates whose eligibility to appear on the ballot can be challenged at *any* time.[7]

Moreover, further down, § 5 provides that "objections shall contain in detail each ground for protest with respect to said *nomination papers*, initiative and referendum petitions *or primary nominations*." *Id.* (emphasis added). Including both of these phrases indicates that challenges are not limited to just the "nomination papers" of primary candidates, but also their "primary nominations." This framework reflects the legislature's understanding that in § 4, it created broad jurisdiction for the Commission to hear challenges to a candidate's eligibility that extend beyond just the nomination papers — otherwise, inclusion of the phrase "or primary nominations" would be surplusage. *See City Electric Supply Company v. Arch Insurance Company*, 481 Mass. 784, 790 (Mass. 2019) (quoting *Marx v. General Revenue Corp.*, 568 U.S. 371, 386, (2013)) (alteration

[7] Accordingly, if this Commission adopts Trump's arguments that his candidacy is simply invincible from constitutional challenge while other candidates who secure ballot access by obtaining signatures are not, the Commission will have almost certainly rendered the entire statutory scheme facially unconstitutional as "[b]allot access restrictions that fall unequally on similarly situated candidates or parties may threaten the right to equal protection of the laws guaranteed by the Fourteenth Amendment." *Barr v. Galvin*, 626 F.3d 99, 109 (1st Cir. 2010) (citing *Libertarian Party of Me. v. Diamond*, 992 F.2d 365, 370 (1st Cir.1993) (collecting Supreme Court cases) ("Where ballot access restrictions fall unequally on similarly situated parties or candidates, the Fourteenth Amendment right to 'equal protection of the laws' may be threatened…")).

omitted) ("The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

The legislative history of M.G.L. ch. 55B § 4 further reflects its intended breadth. Prior to its revision in 1980, the statute read:

> The commission shall be responsible for all matters relating to ballot access, including but not limited to, the constitutional qualifications of any nominee for state, national or county office [and] the certificates of nomination or nomination papers filed in any presidential primary….

St.1980, c. 134, § 8. But in 1980, the legislature amended this section to now read:

> The commission shall have jurisdiction over and render a decision on any matter referred to it, pertaining to the statutory and constitutional qualifications of any nominee for state, national or county office [and] the certificates of nomination or nomination papers filed in any presidential or state primary, state election, or special state primary or election

M.G.L. ch. 55B § 4. In so doing, the General Court expanded the Commission's powers beyond just "ballot access," cemented its jurisdiction over challenges like the ones at issue, and affirmatively required it to "render a decision" on these matters. In line with its statutory obligations, the Commission therefore must decide these objections on their merits.

C. Objectors meticulously followed the statutes and regulations in serving their Objections, and Respondent's and Massachusetts Republican Party's arguments to the contrary are premised on a misreading of the regulations

Both Trump and the Massachusetts Republican Party (MassGOP) assert one final argument for why this Commission lacks jurisdiction to hear this appeal: their misguided view that these Objections "must be dismissed for insufficiency of service of process" because "Objectors failed to serve all necessary parties." Trump's Mot. at 4–5;

MassGOP's Mot. at 2–3. Simply put, they misunderstand the regulations and are wrong. Objectors complied scrupulously with all applicable requirements.

Pursuant to the statute:

> Anyone filing an objection under this section shall not later than the day after which it is filed, mail by registered or certified mail, return receipt requested, a copy of such objection as filed with the commission to the candidate against whose nomination papers, initiative and referendum petition or primary nomination, such objection is made. Failure to do so shall invalidate any objection filed with the commission.

M.G.L. ch. 55B § 5. This was done, and neither Trump nor the MassGOP refute this. Instead, they suggest that the Objectors needed to also serve their Objections upon the MassGOP and all other candidates. *See* Trump's Mot. at 4–5 (quoting 950 CMR 59.02(10)); MassGOP's Mot. at 2–3 (same). Indeed, they both seem to suggest that Objectors were required to serve their Objections upon the party and other candidates simultaneously with filing it with the Commission — even before they were required to send it to the Respondent himself. *Compare* Trump's Mot. at 4-5 (quoting 950 CMR 59.02(10) ("Simultaneously with the filing of any and all paper with the Commission, the party filing such papers shall send a copy thereof to all other parties to the proceedings.")); *and* MassGOP's Mot. at 2–3 (same); *with* M.G.L. ch. 55B § 5 (emphasis added) ("Anyone filing an objection under this section shall not later than *the day after which it is filed*, mail by registered or certified mail, return receipt requested, a copy of such objection as filed with the commission to the candidate against whose nomination papers, initiative and referendum petition or primary nomination, such objection is made.").

But while it is undoubtedly true that any papers filed with the Commission *after* the proceedings are initiated must be sent to all "parties to the proceedings" (or their

authorized representatives) pursuant to 950 CMR 59.02(10), the proper notice procedure for the initial filing of Objections is spelled out in detail in the regulations:

> (a) Not later than the day after an objection is filed, the objector shall mail a copy of the objection to the by registered or certified mail, return receipt requested.
> (b) The Secretary shall give written notice to all parties by registered or certified mail, return receipt requested. The notice shall contain a copy of the objection, the date, time, and place of the hearing, and a summary of commission procedures. In addition, the Secretary shall make a reasonable effort to notify all parties by telephone or email at once. The written notice must be given not later than 5:00 p.m. of:
> 1. The Wednesday after the last day to file objections to nomination papers or certificates of nomination for regular elections, or state initiative or referendum petitions;
> 2. The Friday after the last day to file objections to supplemental signatures necessary to place a state initiative question on the ballot after rejection by the general court;
> 3. The Tuesday after the last day to file objections to nominations made by regular state primaries.
> (c) Any person that does not file an appearance at or before the first hearing in the proceeding shall not become a party until that person files an appearance.
> (d) The date of the hearing contained in the Secretary's notice may be the dated of an assignment session, at which the Commission may dispose of preliminary matters and continue the hearing to a later date.

950 CMR 59.02(4). Thus, for the filing of the Objection, which "initiates the adjudicatory proceeding," 950 CMR 59.01(3)(f), it is the Secretary who is tasked with noticing those parties other than the Respondent.

When Objectors filed their Objections, the non-Respondent parties were not "parties to the proceeding," 950 CMR 59.02(10), for two separate reasons. First, until the Objection is filed to initiate the proceedings, there are no proceedings, as an objector "initiates the adjudicatory proceeding by filing an objection." 950 CMR 59.01(3)(f). Second, the regulations are clear: "Any person that does not file an appearance at or before the first hearing in the proceeding shall not become a party until that person files

an appearance." 950 CMR 59.02(4)(c). The MassGOP did not file an appearance before Objectors filed their Objection (and could not have), and thus, they were most certainly not "parties to the proceedings."

Even if the regulations Trump and MassGOP cites for its argument that Objectors' entire case should be dismissed because they did not send copies to parties who were going to be notified later by the Secretary via both certified mail and phone or email, that would *still* not result in automatic dismissal of these Objections for two additional reasons. First, the regulations are permissive and merely state that failure to send copies to parties to the proceedings is a "*ground* for refusal the Commission to accept papers for filing." 950 CMR 59.02(10) (emphasis added). It does not require the Commission to refuse to accept the filings, and indeed, the Commission has already accepted the filing of these Objections.[8] *See* Notice of Objections (Jan 10, 2024) ("Notice is hereby given on behalf of the STATE BALLOT LAW COMMISSION by the Secretary of the Commonwealth's Elections Division pursuant to 950 CMR §§ 59.01(5) and 59.02(4) that the above captioned Objections have been received.").

Second, even if — despite all of the aforementioned authorities — the Commission was nevertheless inclined to agree with Trump's and MassGOP's erroneous reading of the regulatory requirements, it still could not, in accordance with the regulations, automatically dismiss the Objections on this basis without first issuing an

[8] In other words, such dismissal would be discretionary, and such discretion should not be exercised given that Objectors followed a reasonable interpretation of the regulations that required them to serve only the Respondent himself initially and then other parties (who were not joined to this matter until after the initial filing) in later filings (which Objectors have done).

order to show cause and providing the Objectors the opportunity to be heard. 950 CMR 59.03(2)(d)(2); 59.03(2)(a)(1)(d).[9]

Thus, Objectors have meticulously complied with all filing, service, and notice requirements, and it would be reversible error for this Commission to rescind its prior receipt of these filings and grant these motions on this procedural ground.[10]

[9] If the Commission plans to grant Trump's and MassGOP's motions on this basis, Objectors request a hearing pursuant to these regulations.

[10] Objectors note that a hyper-technical reading of the regulations would require this Commission to reject Trump's and the MassGOP's motions to dismiss, as these documents' left-hand margins fail to comply with 950 CMR 59.02(9)(c)(1).

III. RESPONDENT'S FOURTEENTH AMENDMENT-BASED ARGUMENTS ARE MERITLESS[11]

A. Respondent's argument that enforcing Section 3 is a "nonjusticiable political question" is legally erroneous and reflects his desire to again sow chaos in an effort to seize power regardless of this coming election's outcome

Neither Section 3 nor any other provision of the United States Constitution assign exclusive authority to Congress to decide the constitutional eligibility of presidential candidates and thereby displace all state authority. It is a basic premise of our federalist system that states share responsibility with Congress for administering, and maintaining the integrity of, federal elections. *See, e.g.*, *Ex parte Siebold*, 100 U.S. 371, 391 (1879) ("[I]n the regulation of elections for representatives the national and State governments . . . are mutually concerned."). In both primary and general elections, states can restrict the ballot access of presidential candidates who do not meet the criteria established by the U.S. Constitution. As a general matter, "a State has an interest, if not a duty, to protect

[11] Objectors are entitled to a hearing on these issues and accordingly would request such a hearing to address the issues raised by Respondent's motion, should the Commission entertain dismissing these matters. 950 CMR 59.03(2)(a)(1)(d) ("After a written motion is filed with the Commission or presiding officer, any party may file written objections to the allowance of the motion and shall, if desired, request a hearing within the time as determined by the Commission."); 950 CMR 59.05(1)(f) ("All Parties shall have the right to present evidence, cross-examine, make objections, bring motions and make oral arguments."); *In re Guardianship of V.V.*, 470 Mass. 590, 592 (Mass. 2015) (quotations omitted) ("Due process includes the right to be heard at a meaningful time and in a meaningful manner."). Furthermore, given the short 31-hour window to respond to all outstanding motions as well as issues related to statutory jurisdiction as raised by the Commission, Objectors further request an opportunity to supplement their arguments, and address any further concerns the Commission may have, if the Commission is inclined to grant Trump's motion on any of these grounds.

the integrity of its political processes from frivolous or fraudulent candidacies." *Bullock v. Carter*, 405 U.S. 134 (1972).

There is no "textually demonstrable constitutional commitment of the issue" to Congress that would displace this general principle. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Indeed, Section 3 does the opposite: it assigns Congress the exclusive authority to "*remove* such disability" as would render an insurrectionist candidate ineligible for the presidency, without specifying which entities are responsible for *imposing* such disability in the first place. U.S. Const. Amend. XIV, sec. 3 (emphasis added). Absent a clear textual commitment to Congress of the responsibility for assessing eligibility under Section 3, the background principle of concurrent authority controls. *See, e.g.*, *Sears v. Secretary of the Com.*, 369 Mass. 392, 401 (1975) ("Although the Legislature may not select delegates to a national political convention, it has the right to prescribe procedures to be followed in the selection of delegates."); *Opinion of the Justices*, 368 Mass. 819, 823, 333 N.E.2d 380 (1975) ("The preservation of the integrity of the various routes to the ballot is a proper State objective.").

Nor does the Twentieth Amendment displace state authority. That amendment creates a *post-election* contingency plan enabling Congress to act if neither the "President elect" nor the "Vice President elect" is eligible to hold office. U.S. Const. amend. XX, § 3 ("Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified."). "President elect" refers to one who has been "[c]hosen, but not installed in office." *See The Shorter Oxford English Dictionary on Historical Principles* (1933). The contingency plan comes into effect *only once an election has occurred*. The Twentieth Amendment does not preclude states from

preemptively excluding a constitutionally ineligible presidential candidate from ballots. *Lindsay*, 750 F.3d at 1065 ("Nothing in [the] text or history [of the Twentieth Amendment] suggests that it precludes state authorities from excluding a candidate with a known ineligibility from the presidential ballot."); *see also Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (upholding the exclusion of a constitutionally ineligible presidential candidate from state primary election ballots); *accord Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014) (same); *Hassan v. Iowa*, No. 4-11-CV-00574, 2012 WL 12974068, at *1 (S.D. Iowa Apr. 26, 2012), *aff'd*, 493 F. App'x 813 (8th Cir. 2012) (same); *Socialist Workers Party v. Ogilvie*, 357 F. Supp. 109 (N.D. Ill. 1972) (same). Any contrary reading would turn the Constitution into a recipe for brinksmanship and, perhaps, another insurrection. A reading of the Twelfth or Twentieth Amendments that holds that only Congress can adjudicate presidential candidate qualifications after the election, on either January 6 (in the case of electoral certification) or worse yet January 20 (under the Twentieth Amendment), would be designed to maximize chaos and disruption. To preserve democratic stability, states must be able to adjudicate these issues under normal candidate eligibility challenge procedures, subject to judicial appeals in the ordinary course of election processes.

B. <u>Enforcement of Section 3 is not dependent on Congressional legislation</u>

The Supremacy Clause of the U.S. Constitution states, in part: "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const., art. VI, § 2. Nothing here or anywhere else in the text supports the idea that state authorities may apply the Constitution only if Congress says that they can. To the contrary, the Supreme Court established fifty years before the enactment of the

Fourteenth Amendment that states are generally competent to adjudicate questions arising under the U.S. Constitution. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 339-42 (1816) (Story, J.); *see also Robb v. Connolly*, 111 U.S. 624, 637 (1884) (Harlan, J.) (emphasizing that obligation to enforce U.S. Constitution lies "[u]pon the state courts, equally with the courts of the Union").

To be sure, Congress might give federal courts exclusive jurisdiction over specific constitutional claims. But this option only confirms that, in the absence of legislation specifically establishing exclusive federal jurisdiction, state officials remain authorized and obligated to apply and enforce federal constitutional provisions. As the Supreme Court has explained:

> The general principle of state-court jurisdiction over cases arising under federal laws is straightforward: state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication.

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981).

Section Three of the Fourteenth Amendment is no exception to the baseline principle that state authorities may adjudicate claims under the Constitution (including the Fourteenth Amendment itself) without congressional permission. Two aspects of the text of Section Three make this point clear. First, Section Three imposes a disqualification upon any officials who engage in insurrection against the United States and thereby break their constitutional oath of office. *Cf.* U.S. Const., art. VI, § 3 (stating that all state legislators and "executive and judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution"). The enforcement of that obligation by states is not conditioned on congressional enforcement. Second, Section Three gives Congress

an exclusive role only for *waiving* disqualifications. In fact, this is the only specific role that Section Three confers upon Congress. This textual distinction reinforces the conclusion that Section Three does not give Congress an exclusive role for enforcing disqualifications.

Furthermore, Section Five's authorization of congressional legislation to enforce the Fourteenth Amendment does not mean that the amendment is unenforceable without such legislation. Indeed, this argument proves too much. Section Five applies to the entire Fourteenth Amendment, including Section One's Due Process and Equal Protection Clauses. If Section Five meant that states could not adjudicate questions under Section Three without congressional legislation authorizing them to do so, then it would also mean that states could not adjudicate Due Process or Equal Protection Clause questions without congressional legislation authorizing them to do so. Yet, as noted above, courts and administrative bodies in every state routinely adjudicate such questions without any specific congressional authorization. Since Section Five applies the same to Section Three as it does to Section One, state-level adjudication of federal due process and equal protection questions refutes any argument that Section Five somehow means specific legislation is needed before states can enforce Section Three.

Moreover, nothing in the original public meaning of Section Three supports the argument that congressional action is required for enforcement. To the contrary, history — including the period between 1868, when the amendment was ratified, and 1870, when the first federal enforcement legislation was passed—confirms that virtually everyone involved understood that Section Three applied and was enforceable even without special federal legislation. Congress began exercising its power to remove disqualifications

before any applicable federal enforcement legislation was enacted. The Fourteenth Amendment was ratified in July 1868, but the first federal enforcement statute for Section Three was not enacted until May 1870. *See* Act of May 31, 1870, ch. 114, § 14, 16 Stat. 140, 143 (repealed 1948). But private bills enacted by the required two-thirds majority in each House from 1868 to March 1870.[12] If federal legislation were necessary to disqualify candidates for office under Section 3, these private bills—enacted by the very same Congress that ratified the Fourteenth Amendment—would be unnecessary and nonsensical. During this time period, state courts adjudicated Section Three eligibility questions without reference to any (nonexistent) federal enabling legislation. *See, e.g.*, *Worthy v. Barrett*, 63 N.C. 199, 200 (1869) (relying on a state statute barring persons disqualified under Section Three from holding state office); *State ex rel. Downes v. Towne*, 21 La. Ann. 490, 492 (1869) (adjudicating Section Three eligibility question without reference to federal statutes).

In his motion, Trump largely ignores these arguments but, relying almost exclusively on *Griffin's Case*, 11 F. Cas. 7 (C.C.D.Va. 1869), insists that Section 3 has no force absent Congressional authorization. But *Griffin's Case* is neither persuasive nor credible and is inconsistent with the text, history, and purpose of the Fourteenth Amendment. *See, e.g.*, *Cawthorn v. Amalfi*, 35 F.4th 245, 278 n.16 (4th Cir.

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[12] *See* "An Act to relieve certain Persons therein from the legal and political disabilities imposed by the fourteenth amendment of the Constitution of the United States, and for other Purposes," ch. 1, 16 Stat. 614-630 (1870); "An Act to relieve certain Persons therein from the legal and political disabilities imposed by the fourteenth amendment of the Constitution of the United States, and for other Purposes," ch. 1, 16 Stat. 607-613 (1869); "An Act to relieve Certain Persons of All Political Disabilities imposed by the Fourteenth Article of the Amendments to the Constitution of the United States," ch. 5, 15 Stat. 436 (1868) (removing Section Three disability of DeWitt C. Senter of Tennessee).

2022) (Richardson, J., concurring in the judgment) (describing *Griffin's Case* as "confused and confusing"); *see also* Gerard N. Magliocca*, Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 100-108 (2021). Further, Trump's argument that Section 3 is unenforceable except by Congress has recently been thoroughly analyzed and thoroughly rejected by the Colorado Supreme Court. *Anderson*, at 49-60:

> In summary, based on Section 3's plain language; Supreme Court decisions declaring its neighboring, parallel Reconstruction Amendments self-executing; and the absurd results that would flow from Intervenors' reading, we conclude that Section Three is self-executing in the sense that its disqualification provision attaches without congressional action.

Id. at 60. This Commission should adopt the compelling reasoning of the Colorado Supreme Court and reject Trump's absurd argument here.

C. <u>The Office of President of the United States is unquestionably an office unavailable to insurrectionists like Trump under Section 3</u>

Trump also argues that the presidency is not an office under the United States from which oath-breaking insurrectionists are disqualified by Section 3. This argument, which would disqualify disloyal insurrectionists from every public office, from meat inspector, to Governor, to Supreme Court Justice, *except the presidency*, flies in the face of the history and purpose of Section 3. And in the context of a Constitution that refers to the presidency as an "office," no less than 25 times, it defies "normal and ordinary meaning." *See Heller*, 554 US at 576.

The fact that an early draft of Section 3 included the phrase "office of the President or Vice President," CONG. GLOBE, 39th Cong., 1st Sess. 919 (1866), does not, as Trump

claims, suggest that the drafters intentionally *omitted* the office of the President or Vice President from Section 3. Instead, the drafters chose to include a "much broader catchall," one that still included but was not limited to the office of the Presidency and Vice Presidency. *Anderson*, 2023 CO 63, ¶ 140-141. During amendment debates, Senator Reverdy Johnson specifically expressed concern that rebels might be elected President or Vice President; his colleague Senator Lot Morrill specifically drew his attention to the catchall phrase: "Let me call the Senator's attention to the words `or hold any office, civil or military, under the United States.'" Senator Johnson was satisfied with this answer. CONG. GLOBE, 39th Cong., 1st Sess. 2899 (1866).

Nor does the fact that Section 3 lists senators, representatives, and electors, but not the presidency, provide any evidence that the office of the presidency was not included among the "offices under the United States," to which Section 3 applies. Instead, "the Presidency is not specifically included because it is so evidently an `office,'" while senators, representatives, and electors are not considered "offices" under the Constitution. *Anderson*, at 71.

D. Trump clearly satisfies Section 3's oath requirement, upon which Respondent impermissibly seeks to graft the extratextual limitation that such oaths be "Article VI" oaths

Trump's argument that the Article II oath sworn by the President to "preserve, protect, and defend the Constitution" is not an oath to "support" the Constitution strays equally far from common meaning. By definition, an oath to "preserve, protect and defend" the Constitution *is* an oath to "support" the Constitution. *Anderson,* at 86 ("Modern dictionaries define `support' to include `defend' and vice versa. So did dictionaries from the time of Section Three's drafting.") (citations omitted).

Further, the fact that Article VI provides that "all executive and judicial Officers . . . of the United States . . . shall be bound by Oath or affirmation, to support this Constitution," does nothing to advance Trump's argument, because "the President is an `executive . . . Officer[]' of the United States under Article VI, albeit one for whom a more specific oath is prescribed." *Anderson,* at 85. Article II's presidential oath to support the Constitution is more specific; so too is the oath prescribed by statute for all other executive officers. *Anderson*, at 86 ("The specific language of the presidential oath does not make it anything other than an oath to support the Constitution.").[13]

E. Under Massachusetts law, Section 3's disqualification of Trump renders his inclusion on the state's ballot unlawful

In Massachusetts, the Supreme Judicial Court has already instructed that candidates appearing on the Massachusetts primary ballot — including those nominated by a party — must be qualified to hold the offices they seek in order to appear on the ballot:

> The general purpose of the Legislature in enacting the statutes regulating primaries and elections was to make a reasonably consistent and harmonious body of law which should afford to qualified citizens an opportunity to cast votes efficient to express their preferences **and which**

[13] Trump's argument contradicts his federal court brief filed just six months ago. There, Trump argued that he *is* a former "officer of the United States"; distinguished the Appointments Clause cases upon which he now relies; and noted that *amicus* Professor Tollman's views—which he now espouses—are "idiosyncratic . . . and of limited use." *See* Trump Memo in Opp. to Mot to Remand, pp 2–9, available at https://bit.4ly/5TrumpRemandOpp. The court agreed with Trump that the president *is* an "officer of the United States." *New York v Trump*, ___ FSupp3d ___ (S.D. N.Y. 2023) (remanding on other grounds). The Commission should reject Trump's opportunistic turnabout.

> **should have the final result of filling the offices required by law**….
>
> The provisions of G. L. c. 53, §§ 1, 24, must be read in the light of that dominant requirement. We interpret all of these provisions to mean as applied to the facts of the case at bar that at a primary of any political party for the nomination of candidates where two or more persons are to be elected to an office, such political party may nominate as many candidates with such qualifications as to residence or otherwise as may be elected to such office. **The party nominations must be effective to the end of an election so that any party may nominate as many such candidates only as may be elected under the law**. **More narrowly stated the word 'candidates' in the first sentence of G. L. c. 53, § 1, signifies 'candidates capable under the law of being elected.**'

Thacher v. Cook, 250 Mass. 188, 190–91 (Mass. 1924) (emphasis added).

Trump's final argument is that the Fourteenth Amendment's "Section Three bars individuals from *holding* office, not from being *elected* to office." Trump's Mot. at 21 (first emphasis in original; second emphasis added). But, as explained in *Thacher* and *supra*, this contention is incorrect as a matter of Massachusetts law. While states certainly cannot "prohibit[] the name of an otherwise-eligible candidate…. [by] add[ing] to or alter[ing] the qualifications specifically enumerated in the Constitution," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 (1995), they can ensure that only constitutionally eligible candidates appear on their ballots as "[t]he preservation of the integrity of the various routes to the ballot is a proper State objective" under the federal constitution, *Opinion of the Justices*, 368 Mass. 819, 823 (1975). This requirement includes ensuring that primary elections, which "are the creatures of [state] statute and are an integral part of the election process," comport with "the Federal and State Constitutions." *Langone v. Secretary of Com.*, 388 Mass. 185, 195 (Mass. 1983); *accord*

Sears, 369 Mass. at 401 ("Although the Legislature may not select delegates to a national political convention, it has the right to prescribe procedures to be followed in the selection of delegates."). Indeed, the United States Supreme Court has held that states have a constitutionally cognizable "interest in screening out frivolous candidates." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185–86 (1979). Donald Trump is one such candidate. Massachusetts law prevents those ineligible to hold the offices they seek from standing as candidates for those offices, *see supra*, and as such, it can — and must — order the Secretary to remove him from the Massachusetts ballot.

IV. CONCLUSION

For the forgoing reasons, the Commission should deny Trump's and the MassGOP's motions to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY under the pains and penalty of perjury that a copy of this motion will be sent by electronic mail on January 19, 2024, to Counsel for Respondent Donald J. Trump: Marc R. Salinas, marc@silvasalinas.com. Further, a true and correct copy of the foregoing has been sent by United States Postal Service first class mail, postage prepaid, to:

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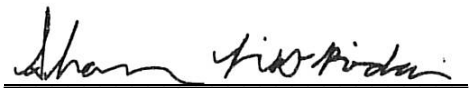

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