COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJ-2024-0032

BRUCE CHAFEE, KIM JANEY, MARK BRODIN, ELIZABETH BARTHOLET, AUGUSTA MCKUSICK, MICHAEL S. ROBERTSON, JR., KEVIN BATT, THERESA MASON, and STEPHANIE SANCHEZ,

Petitioners,

v.

MASSACHUSETTS STATE BALLOT LAW COMMISSION; DONALD JOHN TRUMP; WILLIAM FRANCIS GALVIN, in his official capacity as Secretary of the Commonwealth of Massachusetts; and the MASSACHUSETTS REPUBLICAN PARTY ("MASS GOP"),

Respondents.

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Respondent Donald John Trump is ineligible to serve as President of the United States under Section 3 of the Fourteenth Amendment because he engaged in an insurrection against the U.S. Constitution. Neither Trump nor the State Ballot Law Commission and Secretary of the Commonwealth seriously dispute that Trump violated his oath of office by fomenting a violent effort to prevent the peaceful transfer of power after he lost the 2020 election. Instead, Respondents ask this Court to hold that political parties have unreviewable discretion to place individuals who are ineligible to serve as President of the United States on the primary ballot, including individuals like Trump whose past and promised conduct undermines the very foundations of our constitutional order. This argument is contrary to the text, purpose, and history of Massachusetts election laws and the U.S. Constitution and should be rejected.

This Court undoubtedly possesses the jurisdiction and authority to protect the integrity of Massachusetts' electoral process by ordering the removal of Trump from the presidential primary ballot. Massachusetts law expressly provides both the SBLC and this Court with jurisdiction to adjudicate objections like this one which assert that a candidate was not (and could not be) lawfully placed on a ballot. This Court's precedents firmly establish that candidates who are ineligible to hold an office are ineligible to appear on a primary ballot in connection with seeking that office. Federal law is clear that states possess a sovereign interest in maintaining the integrity of their ballots, including presidential primary ballots, which permits them to exclude ineligible candidates. And, by design and consistent with historical practice, Section 3

challenges can be adjudicated in the first instance by state courts and state officials. There is simply no barrier to this Court's adjudication of Trump's eligibility under Section 3 of the Fourteenth Amendment.

Respondents recognize, as they must, that the SBLC and this Court generally possess expansive authority to adjudicate challenges to the legality of a candidate's placement on the ballot, including a presidential primary ballot. They contend that this case is different because it was the Republican Party which nominated Trump to appear on the ballot. Yet a political party may not use a state's election machinery to undermine constitutional rights or requirements. *See, e.g.*, *Nixon v. Herndon*, 273 U.S. 536 (1927) (concluding that state statute barring African-Americans from participating in primary violated the Equal Protection Clause of the Fourteenth Amendment). Respondents' proposed interpretation of Massachusetts election laws, which would provide for a review of the qualifications of all candidates who appear on a presidential primary ballot except those selected by a political party, ignores the constitutional significance of party primaries and would raise serious equal protection concerns. Neither the Constitution nor Massachusetts election laws requires this Court to grant the Republican Party the absolute right to have ineligible candidates listed on the presidential primary ballot.

The SBLC and this Court have jurisdiction over Petitioners' Objections and the legal and factual issues pertaining to Trump's eligibility have already been litigated. Moreover, given the time constraints under which primary elections are conducted, time is of the essence. If the U.S. Supreme Court decides in *Anderson v. Trump* that states can adjudicate Section 3 eligibility questions consistent with their

own election laws, there will likely be little to no time to resolve the merits of Petitioners' objections prior to the primary election on March 5, 2024. This Court cannot defer this question until after the Supreme Court rules in another case that may or may not resolve the urgent and constitutionally critical questions presented here. Instead, this Court should reject Respondents' strained, atextual, and ahistorical arguments and hold that Trump cannot appear on the presidential primary ballot because he is ineligible to hold office under Section 3 or, in the alternative, remand to the SBLC for immediate adjudication on the merits.

ARGUMENT

I. The first sentence of G.L. c. 55B, § 4 explicitly grants the SBLC jurisdiction to adjudicate objections to the "legality" and "validity" of all "actions required by law to give candidates access to a state ballot," including the actions required under M.G.L. c. 53, § 70E

Pursuant to M.G.L. c. 55B, § 4 — titled "Powers and duties of commission" — the SBLC is explicitly vested with the jurisdiction and duty to "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." Because Petitioners have challenged the "legality" and "validity" of the "actions required by" the Republican party chair and the Secretary under G.L. c. 53, § 70E "to give" a constitutionally ineligible candidate — Trump — "access to a state ballot," the SBLC properly has jurisdiction over these Objections.

A. Despite Respondents' contentions, Petitioners have clearly and properly challenged the actions taken under G.L. c. 53, § 70E to place Trump's name on the primary ballot

In their response brief, the Secretary and SBLC contend that Petitioners "make no challenge to the Massachusetts Republican Committee's inclusion of Trump's name on a written list signed by its chairperson," and that they "do not challenge the Secretary's performance… under § 70E to place Trump's name on the presidential primary ballot." Att'y Gen. Resp. at 21. But this is exactly what Petitioners have challenged: they object that these actions lack legality and validity because the nomination and placement of an ineligible candidate on the Massachusetts ballot is unlawful and invalid. *See* Ex. 1 at ¶¶ 1–4, 48–56; Ex. 2 at ¶¶ 1–4; 47–55. Indeed, Petitioners explicitly state that they are asking the SBLC to adjudicate "the legality and validity of all 'actions required by law to give candidates access to a state ballot,' *id.*, made pursuant to M.G.L.ch. 53, §§ 1, 70E, whereby party nominees must be eligible to be elected." Ex. 1 at ¶49; Ex. 2 at ¶ 48. Accordingly, the SBLC has jurisdiction to hear these Objections.

B. Respondents misread M.G.L. c. 53, § 70E, which does not prohibit the removal of ineligible candidates' names from the primary ballot

In their response, the Secretary and SBLC repeatedly quote M.G.L. c. 53 § 70E for the proposition that "Massachusetts law requires that [Trump's] name remain" on the primary ballot and that the Secretary has a "mandatory duty to place Trump's name on the ballot" because "Trump has not filed an affidavit requesting removal from the presidential preference portion of the primary ballot." Att'y Gen. Resp. at 12–14. They base this erroneous contention on a misreading of the following phrase in § 70E: "No name shall be removed from said lists, nor from the ballot,

unless such candidate shall file with the state secretary an affidavit stating that he does not desire his name printed upon said ballot at the forthcoming presidential primary." G.L. c. 53, § 70E. Yet the legislative history and the employment of fundamental canons of construction make clear that this phrase forbids a *party chair or candidate* from subsequently removing a name previously submitted for placement on the primary ballot by the chair and not self-removed by the candidate before the statutory deadlines for these actions. In other words, this language is a clear statement to party chairs and candidates: finalize your intentions by the time the statutory deadlines hit, or you'll be stuck with the names as submitted.

From a purely logical standpoint, § 70E does not, and *cannot*, require the Secretary, the SBLC, and even this Court to accept *carte blanche* any name a party chair submits, irrespective of their qualifications for office. If a party chair submitted Barack Obama's name, or George Washington's name, or their pet's name, § 70E does not prohibit the Secretary, SBLC, or courts from ordering it removed. The Legislature clearly never intended to give party chairs uncheckable power to clog the ballot with frivolous names and confuse voters. *See Bullock v. Carter*, 405 U.S. 134 (1972) ("[A] State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.").

Were there any doubt, the legislative history of § 70E makes this point plain. The sentence at issue here was added by the General Court in 1975 with the passage of St.1975, c. 600, § 16. This act added, in relevant part, the following language:

> The state secretary shall cause to be placed on the official ballot for use at presidential primaries, under separate headings, and in the following order, the names of those candidates or potential candidates for the office of president of the United States whom he shall have

> determined to be generally advocated or recognized in national news media throughout the United States, the names of any other candidates or potential candidates for nomination for president whose names are proposed therefor by nomination papers prepared and furnished by the state secretary, signed in the aggregate by at least twenty-five hundred voters, and the names of those candidates or potential candidates for nomination for president whose names appear on written lists signed by the chairman of the state committee of the political parties, arranged in such order as may be determined by lot under the direction of the state secretary….The chairman of the state committee of a political party and the state secretary shall submit lists or prepare lists of candidates for president, as aforesaid, no later than the first Friday in January and shall notify each such candidate forthwith, by registered mail, of the presence of his name on said lists. **No name shall be removed from said lists, nor from the ballot, unless such candidate shall file with the state secretary an affidavit stating that he does not desire his name printed upon said ballot at the forthcoming presidential primary.** Such affidavit shall be filed with the state secretary no later than five o'clock post meridian on the second Friday in January. Notwithstanding the provisions of section eleven, withdrawal of or **objections to presidential primary nomination papers must be filed no later than five o'clock post meridian on the first Wednesday in January.**

St.1975, c. 600, § 16 (emphasis added). Thus, when this language was added, the Legislature nevertheless included a provision expressly providing for objections to candidates who would otherwise be on the Secretary's list. If the Secretary, SBLC, and courts could not remove names, the Legislature would not have provided for objections at the same time it wrote that names could not be removed from these lists, unless it thought it obvious, as Petitioners do, that the prohibition applies to the state party chair and the candidates themselves.

And were there still any doubt on the meaning of this "[n]o name shall be removed" language, the current text of M.G.L. c. 55B § 5 removes it. This statute — in part, transplanted from the earlier version of § 70E — unequivocally provides, "**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." G.L. c. 55B, § 5 (emphasis added). But if (as all parties agree) the only way to get onto the presidential primary ballot is by one of the routes established in § 70E, and if (as the statute commands) the Secretary and party chair must "submit lists or prepare lists of candidates for president, as aforesaid" — i.e., the party chairs must submit lists of names, and the Secretary must prepare a list of those candidates he has "determined to be generally advocated or recognized in national news media throughout the United States" as well as "the names of any other candidates or potential candidates for nomination for president whose names are proposed therefor by nomination papers prepared and furnished by the state secretary, signed in the aggregate by at least twenty-five hundred voters" — then there would be no actionable objections as no names could be removed. M.G.L. c. 53, § 70E.

As this Court has explained in the context of the Commonwealth's election laws, "Our goal in interpreting two or more statutes relating to the same subject matter is to construe them so as to constitute an harmonious whole, consistent with the legislative purpose." *Lukes v. Bd. of Election Comm'rs of Worcester*, 423 Mass. 826, 829 (1996) (quoting *Independence Park, Inc. v. Board of Health of Barnstable,* 403 Mass. 477, 480 (1988)). To adopt Respondents' interpretation of this standalone "[n]o names shall be removed…" phrase would render its sister statute on the same topic, G.L. c. 55B, §5, a complete nullity. But this Court has often repeated:

> In interpreting statutes, '[n]one of the words of a statute is to be regarded as superfluous, but each is to be given its ordinary meaning

> without overemphasizing its effect upon the other terms appearing in the statute, so that the enactment considered as a whole shall constitute a consistent and harmonious statutory provision capable of effectuating the presumed intention of the Legislature.'

Flemings v. Contributory Ret. Appeal Bd., 431 Mass. 374, 375–76 (2000) (quoting *Commonwealth v. Woods Hole, Martha's Vineyard & Nantucket S.S. Auth.,* 352 Mass. 617, 618 (1967)) (alteration in original). Put more succinctly, "If a sensible construction is available, we shall not construe a statute to make a nullity of pertinent provisions or to produce absurd results." *Id.* Yet Respondents' construction of G.L. c. 53, § 70E would do just that to G.L. c. 55B, §5. This is an even more egregious interpretation given that the language in G.L. c. 55B, § 5 that patently conflicts with Respondents' interpretation was added in its current form in 1990 by St.1990, c. 526, § 40. Thus, "the rule that, where two statutes conflict, the later statute governs because the Legislature is presumed to be aware of existing statutes when it amends or enacts a new one" definitively forecloses Respondents' interpretation and makes clear that the prohibition on removing names in § 70E is directed at the party chairs and candidates themselves. *Wing v. Comm'r of Prob.*, 473 Mass. 368, 374–75 (2015).

C. The term "state ballot" in the first sentence of M.G.L. c. 55B, § 4 clearly includes the state's primary ballot, upon which candidates for President *and* state offices appear

In passing, the Attorney General argues, on behalf of the Secretary and SBLC, that "[w]hile 'state ballot' is not defined, it is not clear that it would include the presidential primary ballot[because e]lsewhere in the General Laws, the Legislature has used different phrases to refer to the presidential primary ballot." Att'y Gen. Resp. at 20, n.4. But this argument is clearly wrong. While the Attorney General is correct that the term "state ballot" is not defined by the

statute, the term "official ballot" is. M.G.L. c. 50, § 1 defines "Official ballot" as "a ballot prepared for any primary, caucus or election by public authority and at public expense." The ballot that Trump seeks to appear on fits this description. Indeed, as Respondents (misguidedly) stress, the Secretary prepares the ballot pursuant to M.G.L. c. 53, §70E, and the taxpayers — including Petitioners — fund the administration of the presidential primary election. And not only are presidential primary candidates voted upon on these ballots; "members of the state, ward and town committees shall also be chosen" on the same ballots. G.L. c. 53, § 70B. It would be impossible to describe these official ballots, governed by Massachusetts state law and administered by state election authorities through tightly regulated legal regimes as anything other than "state ballots."

D. The first sentence of M.G.L. c. 55B, § 4 grants the SBLC jurisdiction to hear these objections without any reference to a "nominee," "nomination papers," or "certificates of nomination"

Much of Respondents' arguments revolve around their contention that Trump's candidacy is entirely unchallengeable because — in their mistaken view — he is not a nominee and was not placed on the ballot by way of nomination papers or a certificate of nomination. They are wrong in nearly every respect, *see infra*. But it is important to note that the first sentence of M.G.L. c. 55B, § 4 vest the SBLC with the jurisdiction and duty to adjudicate objections to "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." This jurisdictional provision leaves no room for discussion of Trump's status as a "nominee" or squabbling over whether he has been placed on the ballot by way of "nomination papers" or a "certificate of nomination." This provision is independent

of those other provisions (which, to be sure, *also separately* grant the SBLC jurisdiction to adjudicate these objections), and as such, it provides a standalone basis for reversal of the SBLC's decision that it lacks jurisdiction.

II. The first clause of the second sentence of M.G.L. c. 55B, § 4 clearly grants the SBLC jurisdiction over challenges like these to "the statutory and constitutional qualifications" of primary election candidates

Independent of the first sentence in M.G.L. c. 55B, § 4, the first clause of the second sentence, too, provides the SBLC with rock-solid jurisdictional footing to adjudicate these objections. This clause reads, "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." M.G.L. c. 55B, § 4.

Given that this language has been interpreted to apply to primary election candidates since time immemorial, it is at first blush puzzling why the Secretary and SBLC have suddenly and dramatically upended their unblemished interpretation of this phrase as granting the SBLC jurisdiction over adjudicating primary election candidates' constitutional qualifications for the offices they seek, until one remembers that the Respondent below is Donald Trump. But as John Adams drafted and the people of this Commonwealth adopted into their Constitution, "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," and "[i]t is the right of every citizen to be tried by judges as free, impartial

and independent as the lot of humanity will admit." Mass. Const. Pt. 1, art. XXIX.[1] Thus, the SBLC — like this Court — cannot create special rules for Trump and instead must guided by the law alone.

The law is clear: the SBLC has both the jurisdiction and non-discretionary duty[2] to adjudicate objections to candidates' "statutory and constitutional qualifications" in both primary and general elections.

A. The term "nominee" refers to those nominated for placement on the ballot, whether primary or general

Despite the clarity in this statute, which explicitly requires the SBLC to adjudicate objections to candidates' "statutory or constitutional" qualifications for the offices they seek, both sets of Respondents make the term "nominee" in this first clause of the second sentence of M.G.L. c. 55B § 4 the centerpiece of their arguments

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[1] *See also In re Enf't of Subpoena*, 463 Mass. 162, 169 (2012) ("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."); *Com. v. O'Neal*, 369 Mass. 242, 273, 339 N.E.2d 676, 693 (1975) (Tauro, C.J., concurring) ("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.").

[2] The law dictates, "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." M.G.L. c. 55B, § 4 (emphasis added). "The word 'shall' indicates the absence of discretion." *Emma v. Massachusetts Parole Bd.*, 488 Mass. 449, 454 (2021) (citing *Hashimi v. Kalil*, 388 Mass. 607, 609 (1983) ("The word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation.")).

for why the SBLC lacks jurisdiction over these objections. But every available tool of statutory construction entirely forecloses their misguided attempts to play legislature and re-write the plainly evident meaning of this statutory provision. Equipped with these tools, it is abundantly clear that the phrase "nominee" means one nominated for a place on the ballot — whether a primary ballot or a general election ballot, and whether nominated by signatures collected on nomination papers, lists submitted by a party chair, or determinations made by a Secretary.

1. Petitioners' interpretation of "nominee" reflects the statute's plain meaning.

This Court has explained:

> Where the statutory language is clear and unambiguous and leads to a workable result, we need look no further. For terms that are not technical, we construe statutory words and phrases in their common and approved usage. If the plain language is ambiguous, however, we turn to extrinsic sources, and other sections of the statute, to resolve the legislative intent.

Harmon v. Comm'r of Correction, 487 Mass. 470, 479 (2021) (internal citations and quotations omitted). Here, the plain, everyday meaning of the word "nominee" includes one nominated (by voters, party chairs, or the Secretary) to stand as a candidate in an election (primary or general), which is also the only interpretation that "leads to a workable result." *See infra*. This is clear without needing to resort to extrinsic sources and other sections of the statute.

Yet doing so only further confirms that the term "nominee" includes individuals nominated to stand as candidates in an election, irrespective of whether the election is a primary or a general election. Indeed, scores of statutory provisions clearly adopt this construct of the term. For starters, Chapter 55B itself describes

"[o]bjections to certificates of *nomination* and *nomination* papers for candidates at a presidential primary." M.G.L. c. 55B, § 5 (emphasis added). Likewise, M.G.L. c. 53 § 70E directs the Secretary to print on the presidential primary ballot "the names of any other candidates or potential candidates for nomination for president whose names are proposed therefor by *nomination* papers." Indisputably, these "nomination papers" and "certificates of nomination" are how voters *nominate* an individual to stand as a candidate in the presidential primary. Once this is achieved, the candidate becomes a *nominee*, nominated by the signatories to his or her *nomination* papers or certificate of *nomination*.

Further statutes *in pari materia* make this even clearer. The statute governing nomination papers "[f]or a candidate's name to appear on a *primary* ballot," *Sholley v. Sec'y Of Com.*, 59 Mass. App. Ct. 121, 123 (Mass. App. Ct. 2003) (emphasis added), reads: "Every nomination paper shall state in addition to the name of the candidate, (1) his residence, with street and number thereof, if any, (2) *the office for which he is nominated*, and (3) the political party whose nomination he seeks." M.G.L. c. 53, § 45 (emphasis added). Likewise, another statute that expressly "applies only to candidates for president who file nomination papers to be placed on the ballot at *presidential primaries*, and to all candidates at regular state *primaries* and biennial state elections," describes the review process for "[a] candidate who has a deficient number of signatures or who still has ten per cent or less signatures *in excess of the number needed for nomination*." M.G.L. c. 55B, § 6 (emphasis added). Obviously, then, the legislature considered candidates who have obtained the requisite number of signatures on their "nomination papers" to have achieved "the

number needed for nomination," thereby effectuating their "nomination" to the primary ballot and transforming them into a "nominee." Even this Court, recounting the decision in a prior case, has described one selected by a party convention for inclusion on a primary ballot — even by an insufficient margin — as "a convention nominee." *Langone v. Sec'y of Com.*, 388 Mass. 185, 188 (1983) (emphasis added) ("The Justices interpreted the proviso to mean that a convention *nominee* who fails to receive at least 15% of the convention vote on any ballot is not entitled to have his or her name placed on the *primary ballot*."); *see also Att'y Gen. v. McOsker*, 198 Mass. 340, 344 (1908) (explaining that the term "nomination papers" helps distinguish between those candidates nominated by a party and those "which are nominated by individuals"). These select examples — and there are scores more — make clear that the term "nominee" is, in every day parlance, applicable to those nominated to stand as candidates in both primary *and* general elections.

Not only do these examples elucidate the everyday meaning of the term "nominee"; they also implicate the consistent usage canon. This Court has instructed, "Where the same statutory term is used more than once, the term should be given a consistent meaning throughout. The need for uniformity in interpreting statutory language becomes more imperative where a word is used more than once in the same section." *Williams v. Bd. of Appeals of Norwell*, 490 Mass. 684, 694–95 (2022) (internal quotations, citations, and alterations omitted). "Indeed," this Court has explained, "we repeatedly have rejected constructions of words in a statute that would require us to attribute different meanings to the same words in the same paragraph, or impose two different meanings to a word within one section." *Id.* (internal quotations

omitted). Here, the only way to read the term "nominee" consistent throughout Section 55B, and throughout the *in pari materia* election laws, is to ascribe it this everyday meaning.[3]

2. Petitioners' interpretation of "nominee" reflects the clear intent of the legislature.

Aside from just its plain meaning, the term "nominee" must be given a construction that effectuates the intent of the legislature:

> The general and familiar rule is that a statute must be interpreted according to the intent of the Legislature ascertained from all the words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.

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[3] The Attorney General cites M.G.L. c. 53, § 2, claiming it "provides that a candidate can only become a nominee after a primary or caucus." Att'y Gen. Resp. at 23. But it does nothing of the sort; it merely states, "candidates of political parties for all elective offices, . . . shall be nominated . . . in primaries or caucuses." *Id.* (quoting M.G.L. c. 53, § 2). Petitioners certainly do not quibble with the fact that candidates in general elections are *also* nominees (there, nominated by the voters or political parties). But the Attorney General misses the mark by suggesting that the term "nominee" is *confined* to candidates in a general election because it can *also* be used in that context, no less so than one arguing that the Court is an improper place to raise legal arguments by citing a reference to a tennis court. At least in this instance, the term "nominee" is used consistently throughout the statutes to refer to one nominated to stand as a candidate in an election — it is just used to refer to both primary *and* general elections.

The Attorney General is further afield in writing that "[i]t requires no canons of statutory interpretation or resort to dictionary definitions to conclude that a candidate for nomination is not a nominee." *Id.* at 23–24. Instead, she seems to conclude that her word alone is sufficient to divine the term's meaning, and the Court should look no further into the matter. But courts have long employed these canons because the "canons are tools designed to help courts better determine what [the legislature] intended," *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 23 (2006), whereas "[r]hetoric, unsupported by facts, remains only rhetoric, even if stridently proclaimed."*Kelly v. United States*, 924 F.2d 355, 357 (1st Cir. 1991).

Hanlon v. Rollins, 286 Mass. 444, 447 (1934). Here, for the last 100 years, this Court has looked "to the statutory scheme 'as a whole,'" and consistently explained "that 'the general purpose of the Legislature in enacting the statutes regulating elections was to make a reasonably consistent and harmonious body of law **which should have the final result of filling the offices required by law**.'" *Libertarian Ass'n of Massachusetts v. Sec'y of Com.*, 462 Mass. 538, 551 (2012) (alterations omitted) (emphasis added) (first quoting *Wolfe v. Gormally,* 440 Mass. 699, 704 (2004); then quoting *Thacher v. Secretary of the Commonwealth*, 250 Mass. 188, 190 (1924)). Here, only Petitioner's interpretation of the term "nominee" furthers this legislative purpose, whereas Respondents' interpretation cuts in the exact opposite direction.

3. Adopting Respondents' position that "nominee" does not include those nominated to stand as candidates in primary elections would run afoul of the canon against absurdity.

Even if, after employing all the aforementioned tools of construction, the Court were still left with the impression that the term "nominee" may not include primary election candidates — indeed, even if the plain meaning of the term "nominee" would generally *exclude* primary candidates (which is not the case) — the term *as used in the statute* necessarily includes them. This is because, when interpreting statutory terms, this Court has explained:

> 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 beyond question that interpreting "nominee" to exclude all primary election candidates would indeed lead to absurd and illogical results, and Respondents make no efforts in their responses to refute this point.

Nor could they. It would be patently irrational to refuse the Commission jurisdiction to adjudicate statutory and constitutional 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.* Respondents have made no efforts to explain why the legislature would possibly have constructed its objection regime to necessitate the sheer chaos of disqualifying the *only* party candidate in a general election when disqualification at the primary stage would still leave voters and parties with an actual established winner, prevent the need for re-doing a primary election or otherwise restricting democratic participation in the selection of a general election candidate.

Accordingly, this reading of the term "nominee" would indeed be absurd, illogical, and contrary to the statute's legislative purpose. In contrast, Petitioners'

interpretation avoids this absurdity and allows the Commission to fulfill the statute's intended purpose: keeping ineligible candidates off the ballot.

4. An unbroken history of adjudicating primary candidates' constitutional qualifications makes clear the SBLC's ruling below is an exception carved specifically for Donald Trump.

Finally, the SBLC's unbroken history of explicitly declaring it possesses jurisdiction over objections to primary candidates' constitutional qualifications for the offices they seek and of adjudicating these challenges only reinforces that the SBLC's tortured definition of the phrase "nominee" is an invention it created simply because the candidate at issue is Donald Trump.

In her response, the Attorney General inexplicably states: "The Commission decisions Petitioners cite miss the mark because those decisions, which discussed the inhabitancy requirement for the offices sought by those candidates, all involved the residence information on the nomination papers the candidates had filed to appear on the primary ballot." Att'y Gen. Resp. at 21–22. In so arguing, the Attorney General appears to believe that the Court will not read these decisions. If it does, it will see that the Attorney General has simply invented this justification whole cloth. Indeed, all of the decisions Petitioners have cited directly engage with the question of constitutional qualifications for office. None of them purport to adjudicate challenges to the residency information listed on the candidates' nomination papers. In fact, *only one of these decisions so much as mentions any nomination papers at all*.

For example, the entirety of the "Introduction" section of the SBLC's decision in the Romney case — which, like the others cited by Petitioners, challenged the

constitutional qualifications of the candidate to run in a *primary* election — is as follows:

> The Respondent, Mitt Romney, is a Republican candidate for the office of Governor of the Commonwealth of Massachusetts. To seek that office, he must have been an "inhabitant" of the Commonwealth of Massachusetts for "seven years next preceding" his election, which, in this case, is from November 5, 1995. Mass. Const. Pt. 2, C. 1, § 2, Art. 2.
>
> Objections were filed challenging the Respondent's eligibility to seek the office of Governor. The Objectors claim that, when the Respondent accepted the position of President and Chief Executive Officer of the Salt Lake Organizing Committee of the 2002 Winter Olympic Games and relocated to Utah from 1999 until February 2002, the Respondent became an inhabitant of the state of Utah, thereby abandoning his Massachusetts domicile.
>
> The Commission finds, rules and concludes that the Respondent's testimony was credible in all respects regarding the fact that the Respondent intended Massachusetts to be his domicile from 1971 to the present. The Commission further finds that the Objectors have failed to prove by a preponderance of the evidence that the Respondent ever abandoned his Massachusetts domicile and established domicile in Utah. The Commission finds, rules and concludes, as a matter of fact and law, that the Respondent has been a continuous inhabitant of Massachusetts from 1971 to present.
>
> The Respondent therefore has met the inhabitancy qualification of the Massachusetts Constitution and is eligible to appear on the ballot as candidate for the office of Governor of the Commonwealth of Massachusetts.

Ex. 14 at 1–2. The entire "Conclusion" section is as follows:

> The Objectors have failed to prove by a preponderance of the evidence that the Respondent ever abandoned his Massachusetts domicile when he went to Utah to assume the position of President and CEO of the Salt Lake Organizing Committee for the 2002 Winter Olympics.
>
> The Commission finds and concludes, as a matter of fact and law, that the Respondent has been a continuous inhabitant of Massachusetts from 1971 to present. The Commission therefore finds, rules and concludes that the Respondent has met the inhabitancy qualification of the Massachusetts Constitution and is therefore eligible to appear on

> the ballot as candidate for the office of governor of the Commonwealth of Massachusetts. The Objections are OVERRULED on the merits and the Secretary is ordered to print the Respondent's name on the Republican state primary ballot as a candidate for governor.

Id. at 40–41. *Nowhere* in the extremely detailed, 40-page decision does the SBLC *ever* mention nomination papers or the address listed thereupon, though it repeatedly cites the constitutional qualifications to hold the Office of Governor. The same is true for the other cases cited by Petitioners: only one of them mentions any nomination papers or addresses listed on candidacy forms, and it did not play any sort of significant role in the SBLC's analysis. In contrast, all of these decisions mention the constitutional qualifications for candidates running for office and the SBLC's jurisdiction over such claims pursuant to M.G.L. c. 55B, § 4, and they all adjudicate the objections on the basis of the candidate's constitutional qualifications. See, e.g., Ex. 15 at 9 ("The Commission, therefore, finds, rules and concludes that the Respondent has met the inhabitancy qualification of the Massachusetts Constitution and is therefore eligible to appear on the ballot as candidate for the office of State Representative."); Ex. 16 at 14 ("The Commission, therefore, finds, rules and concludes that the Respondent has met the inhabitancy qualification of the Massachusetts Constitution and is therefore eligible to appear on the ballot as candidate for the office of State Representative. Therefore, based on the evidence presented to the Commission, the Objection is OVERRULED on the merits."); Ex. 17 at 1 ("An objection was filed challenging the Respondent's eligibility to seek the office of State Representative. The Objector claims that the Respondent has not been an inhabitant of the district for one year. The Commission finds, rules and concludes

that the Objector has not proven by a preponderance of the evidence that the Respondent was not an inhabitant of the district for one year prior to the date of the election.").

Not only has the SBLC long held that primary election candidates — despite usage of the word "nominee" in the statute — are subject to objections challenging their "constitutional qualifications" before the Commission; Justices of this Court, too, have reached the same conclusion. *See, e.g.*, *Swig v. State Ballot Law Commission*, 265 Mass. 19, 21 (Mass. 1928) (noting single Justice held SBLC had "jurisdiction to consider and determine the objections to the nomination of" petitioner who was disqualified from primary ballot).

It has been the SBLC's longstanding precedent interpreting its own jurisdiction to encompass objections over the constitutional qualifications of primary candidates, notwithstanding the word "nominee" in M.G.L. c. 55B, § 4. It has only deviated now because the Respondent before it is Donald Trump. But the SBLC has been correct for the last few decades, and is incorrect now: M.G.L. c. 55B, § 4 provides the SBLC jurisdiction over the constitutional qualifications of primary election candidates, Trump included.

B. The first clause of the second sentence of M.G.L. c. 55B, § 4 grants the SBLC jurisdiction to hear these objections without any reference to a "nominee," "nomination papers," or "certificates of nomination"

It bears briefly reiterating that the SBLC's jurisdiction over and mandatory duty to adjudicate the merits of objections to primary candidates' "statutory and constitutional qualifications" is a freestanding statutory basis for jurisdiction. It is in no way tied to there being "nomination papers" or a "certificate of nomination." As

such, under this statutory provision — separately and apart from all others — the SBLC has jurisdiction to hear these objections.

III. The second clause of the second sentence of M.G.L. c. 55B, § 4 clearly grants the SBLC jurisdiction over challenges like these to "the certificates of nomination or nomination papers filed in any presidential or state primary"

Entirely independent of the aforementioned jurisdiction-vesting statutory provisions, the second clause of the second sentence of M.G.L. c. 55B, § 4, too, explicitly grants the SBLC jurisdiction over and the duty to hear these Objections. It provides: "The commission shall have jurisdiction over and render a decision on any matter referred to it, pertaining to…the certificates of nomination or nomination papers filed in any presidential or state primary." M.G.L. c. 55B, § 4.

While Respondents attempt to graft the phrase "certificates of nomination or nomination papers" onto every jurisdiction-granting provision of M.G.L. c. 55B, § 4, this is the only jurisdictional provision that actually could require the presence of "certificates of nomination or nomination papers."[4] Even still, Trump has been placed on the ballot via a certificate of nomination as used in M.G.L. c. 55B, § 4.

[4] Petitioners note that the phrase "pertaining to" is quite broad, and thus the statute does not necessarily require a candidate to be nominated via these means. Indeed, it would be plausible to reason that any disqualification in a primary election *pertains to* the nomination papers or certificate of nomination of all other candidates. However, Petitioners do not rely on such a broad conception of the phrase "pertaining to," as jurisdiction is clear irregardless.

A. In the context of M.G.L. c. 55B, the phrase "certificates of nomination" must, by necessity, mean party nominations via the submission of candidate lists by a party chair

While the Secretary and SBLC, through the Attorney General, explain many of the requirements for certificates of nomination in other contexts to suggest that a party chair's nomination does not qualify in *this* context, they fail to explain the phrase's meaning as used in M.G.L. c. 55B, §§ 4–5. Indeed, "adopting the Commonwealth's construction would violate the fundamental and long-standing principle of statutory interpretation 'that we must strive to give effect to each word of a statute so that no part will be inoperative or superfluous.'" *Commonwealth v. Fleury*, 489 Mass. 421, 427 (2022) (quoting *Ciani v. MacGrath*, 481 Mass. 174, 179, (2019)). Further, it would render the statutory language entirely nonsensical and, worse still, it would render the entire statutory scheme facially unconstitutional. Accordingly, Petitioners' construction — that the party chair nominations constitute challengeable certificates of nomination — is the only acceptable interpretation of these statutes.

First, all parties here have repeatedly agreed there are only three routes by which a candidate can gain access to the presidential primary ballot. *See* M.G.L. c. 53, § 70E. All parties have further agreed that one of these routes is by submitting nomination papers (which, again, all parties seem to agree are challengeable under M.G.L. c. 55B, §§ 4–5). But Petitioners contend that one of the other routes — submission of names by a party chair — constitute "certificates of nomination," reflecting the venerable understanding that the distinction between "certificates of nomination" and "nomination papers" "is for the purpose of showing which candidates, belonging to the party, are regularly nominated and which are nominated

by individuals." *McOsker*, 198 Mass. at 344. Respondents, for their part, argue that neither of the other two routes constitute "certificates of nomination."

This argument, however, is fatally flawed. M.G.L. c. 55B § 4 specifically provides for challenges to "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. c. 55B, § 5 in turn provides: "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." If only "nomination papers" result in a candidate gaining access to a primary ballot, the phrase "certificates of nomination" is entirely superfluous. But this "would violate the fundamental and long-standing principle of statutory interpretation 'that we must strive to give effect to each word of a statute so that no part will be inoperative or superfluous.'" *Fleury*, 489 Mass. at 427 (quoting *Ciani*, 481 Mass. at 179).

At the same time, the Attorney General argues that the phrase "certificates of nomination" "refer[s] to a certificate of nomination being conveyed *after a party convention*." Att'y Gen. Resp. at 26 (emphasis in original). But this contention contravenes the canon against absurdity: if this is so, then under M.G.L. c. 55B, § 5, an objector would have a deadline of objecting to such certificates well before they could ever exist. Worse still, the SBLC would need to *rule* on such objections in advance of the primary election pursuant to M.G.L. c. 55B, § 10. In short, Respondents' conception of "certificates of nomination" as limited to post-primary

election documents makes no sense in the context of this statutory scheme and would render the objection provisions of the statute patently absurd. Petitioners' interpretation, by contrast, would save the statutory schema from absurdity.

But the Respondents' reading of the statutory scheme is in graver peril still, as their interpretation would almost certainly render the entire statutory structure facially unconstitutional. Yet this Court "must construe the statute, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *Bd. of Appeals of Hanover v. Hous. Appeals Comm. in Dep't of Cmty. Affs.*, 363 Mass. 339, 364 (1973) (internal quotations and citations omitted).

Under Respondents' interpretation of the interplay between M.G.L. c. 53, § 70E and M.G.L. c. 55B, §§4–5, the *only* presidential primary candidates whose eligibility for office can be challenged are those who earned a place on the ballot by collecting signatures on pre-approved nomination forms. Indeed, under the interpretation advanced by all Respondents, candidates like Trump who are placed on the ballot by a party chair are quite simply immune from any eligibility challenges, while their similarly situated counterparts who earned placement through nomination papers are subject to challenge. But as the federal courts have tried to make clear to this Secretary, "Ballot 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…")). Thus, by eschewing Petitioners' interpretation that party nominations under M.G.L. c. 53, § 70E are challengeable "certificates of nomination" while simultaneously acknowledging (as they must, given the plain text of the statutes) that candidates gaining access via "nomination papers" *are* challengeable, Respondents necessarily adopt a conception of statutory regime that runs afoul of the Equal Protection Clause. It is only Petitioners' reading of "certificates of nomination" that spares the statute from deep constitutional jeopardy, and accordingly, it is only Petitioners' interpretation that this Court should accept.

Therefore, because the SBLC indisputably has jurisdiction over these claims, this Court is duty bound to reverse their decision holding otherwise.

IV. Trump is collaterally estopped from re-litigating his eligibility under Section 3 of the Fourteenth Amendment

As described in Petitioners' Objections and their Motion for Summary Decision before the SBLC, Trump is collaterally estopped from re-litigating the legal and factual issues underpinning the Colorado Supreme Court's decision holding him ineligible under Section 3 of the Fourteenth Amendment. *See* Petitioners' Emergency Petition, Exhibit 1, ¶¶ 335-52; Exhibit 5. It makes no difference that this decision is stayed pending Trump's appeal before the U.S. Supreme Court. The Full Faith and Credit Clause obligates this Court to give *Anderson* "*at least*" the preclusive effect it would receive in Colorado. See *Durfee v. Duke*, 375 U.S. 106, 109 (1963) (emphasis added). But that obligation is a floor, not a ceiling. *See, e.g.*, *Dancor Const., Inc. v. FXR Const., Inc.*, 64 N.E.3d 796, 810 (Ill. Ct. App. 2016) (explaining that forum state can apply its own law to preclude re-litigation of issues even where the rendering

state's law would not). In fact, Massachusetts, like most other states and federal courts, follows the opposite rule than the one proposed by Trump, holding that a decision is final for preclusion purposes notwithstanding the pendency of an appeal. *See O'Brien v. Hanover Ins. Co.*, 692 N.E.2d 39, 44 (Mass. 1998); *accord So. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.*, 740 F.2d 1011, 1018-19 (D.C. Cir. 1984); Restatement (Second) of Judgments § 13 cmt. f (1982). This Court should follow Massachusetts law and give effect to that majority rule here.

IV. Trump is ineligible to serve as President under Section 3 of the Fourteenth Amendment

In his response, Trump raises numerous arguments purporting to explain why, contrary to the text, history, and purpose of Section 3 of the Fourteenth Amendment, the U.S. Constitution precludes the SBLC or this Court from disqualifying him for engaging in insurrection. These arguments were forcefully (and correctly) rejected by the Colorado Supreme Court in *Anderson* and thus, for the reasons Petitioners have argued, Trump is precluded from relitigating them here.

But, regardless of *Anderson's* preclusive effect, this Court should reject Trump's strained, ahistorical, and thoroughly discredited constitutional theories. Section 3 of the Fourteenth Amendment is clear: Donald Trump is ineligible to seek or hold the office of President of the United States because he engaged in an insurrection against the U.S. Constitution. Nothing in Section 3, or anywhere else in the U.S. Constitution, dispossesses state officials of their authority and obligation under state law to deny insurrectionists access to the primary ballot.

A. Trump's eligibility under Section 3 is not a nonjusticiable political question

Trump contends that neither the SBLC nor this Court can adjudicate his eligibility under Section 3 because this issue involves a nonjusticiable political question that can only be answered by Congress. But Section 3 does not contain "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Indeed, as the Court explained in *Anderson*, it contains the opposite: "[A]lthough Section Three requires a 'vote of two-thirds of each House' to remove the disqualification set forth in Section Three, it says nothing about who or which branch should determine disqualification in the first place." *Anderson*, 2023 CO 63, ¶ 114. The drafters of the Fourteenth Amendment demonstrably knew how to assign exclusive authority to Congress to perform certain functions relating to Section 3; this Court must respect their choice *not* to assign the exclusive authority to assess eligibility under Section 3 to Congress (or any other entity).

On the whole, the Constitution "says nothing about who or which branch should determine whether a candidate satisfies the qualification criteria either in the first instance or when a candidate's qualifications are challenged." *Id.* at ¶ 116. Thus, absent any textual commitment of exclusive authority to adjudicate eligibility under Section 3 to Congress, Trump's nonjusticiability argument runs headlong into the fundamental constitutional principle that states retain substantial authority over the operation and administration of federal elections, including presidential elections. *See, e.g.*, *Gonzalez v. Arizona*, 677 F.3d 383, 391 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013) (constitution

"empowers both the federal and state governments to enact laws governing the mechanics of federal elections"). For example, as the U.S. Supreme Court recently noted in upholding the constitutionality of state laws imposing conditions on how presidential electors vote, "Article II, § 1's appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint." *Chiafalo v. Washington*, 140 S.Ct. 2316, 2324 (2020). And nothing in Twelfth Amendment or elsewhere "vests the Electoral College with the power to determine the eligibility of a presidential candidate." *Anderson*, 2023 CO 63, ¶ 117.

Trump's other nonjusticiability arguments fare no better. Trump contends that the Constitution's assignment of exclusive authority to Congress to conduct impeachment proceedings means no other entity can "impose a disqualification to hold federal office." But that argument is entirely irreconcilable with how Section 3 was implemented in the immediate aftermath of its enactment, during which time (1) Congress granted amnesty to many former Confederates who had not previously been impeached from office, demonstrating that Congressional action (or, for that matter, criminal conviction) was *not* a prerequisite to disqualification under Section 3, *see, e.g.*, Gerard N. Magliocca, *Amnesty and Section 3 of the Fourteenth Amendment*, 36 Const. Comment. 87, 98-99 (2021) (describing special congressional action in 1868 to enforce Section 3 and remove Georgia legislators), and (2) state courts adjudicated and resolved claims that individuals were "disqualified from holding office under the 14th Amendment of the Constitution of the United States," *In re Tate*, 63 N.C. 308, 309 (1869); *see also Worthy v. Barrett*, 63 N.C. 199, 201 (1869). This historical evidence is particularly persuasive because of its temporal proximity to the passage of

the Fourteenth Amendment. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 66 (2022).

Trump also contends that Section 3 cannot be enforced by anyone other than Congress because Section 5 of the Fourteenth Amendment authorizes Congress to "enforce by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. But Section 5 does not mean that Section 3 is not self-executing—Section 5 applies to Section 1 just as much as Section 3, so if Section 5 renders Section 3 non-self-executing, then it would also render Section 1 non-self-executing, a premise which is clearly incorrect. *See City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) ("As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing."); *cf. South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (Fifteenth Amendment, which like the Fourteenth has a provision authorizing congressional enforcement legislation, "has always been treated as self-executing and has repeatedly been construed, without further legislative specification"); *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009) (confirming that Section 1 of Fifteenth Amendment is self-executing); *see also* 16 Am. Jur. 2d Constitutional Law § 107 (prohibitory provisions are generally considered self-executing).

Finally, Trump suggests that it would be "beyond absurd" for state courts and state officials to adjudicate the eligibility of presidential qualifications under Section 3. Yet that is precisely the system the Constitution enacts. Rather, even in the context of federal elections, "[n]ot only do States retain sovereignty under the Constitution, there is also a fundamental principle of equal sovereignty among the States," *Shelby*

Cnty., Ala. v. Holder, 570 U.S. 529, 544 (2013). Trump's argument that state officials and state courts have no role in administering presidential elections is an argument for amending the Constitution, not interpreting the Constitution the Framers did in fact enact.

B. Section 3 does not require implementing legislation

Relatedly, Trump argues that this Court must abstain from ruling on the merits of his eligibility under Section 3 because "there is no Congressional civil enforcement legislation currently in existence." As described above, this argument rests on the misguided premise that Section 3 departs from the default rule that constitutional provisions are presumed to be self-executing. *See* 16 Am. Jur. 2d Constitutional Law § 103. Moreover, Section 3 is no exception to the principle that state courts are fully empowered to adjudicate claims under the Constitution (including the Fourteenth Amendment itself) without congressional permission. The mere fact that Congress has the power to enforce Section 3 through legislation does not mean that without such legislation, states are *unable* to adjudicate questions arising under Section 3.

In fact, the argument proves too much. Section 5 applies to the *entire* Fourteenth Amendment, including Section 1's Due Process and Equal Protection Clauses. If Section 5 meant that states could not adjudicate questions under Section 3 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 in every state routinely adjudicate such questions without any specific congressional legislation authorizing them to do so. Since Section 5 applies the same to Section 3 as it does to Section 1, state court adjudication of federal due process and

equal protection questions refutes any argument that Section 5 somehow means specific legislation is needed before states can enforce the Fourteenth Amendment.[5]

Again, this argument is irreconcilable with historical practice around the time the Fourteenth Amendment was enacted. Congress first enacted Section 3 enforcement legislation in 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—i.e., *before* Congress had yet passed a federal statute to enforce Section Three in the first place—gave Section 3 amnesty to individuals from jurisdictions such as the District of Columbia, Indiana, Kentucky, Maryland, Missouri, New Mexico, New York, Tennessee, and West Virginia.[6] If federal authorization were required for Section Three enforcement, then

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[5] *See, e.g.*, Mark Graber, *Legislative Primacy and the Fourteenth Amendment*, Balkinization, (Apr. 22, 2022) (observing that logic of a "legislative primacy" theory under which Congress must implement Section Three by legislation would apply equally to Section One, such that "[j]udges who swear off implementing Section 3 are on principle obligated to swear off implementing Section 1," and "the same courts that refuse to disqualify persons from public office who participated in the January 6, 2021 insurrection will on principle be obligated to reverse the Supreme Court's decision in Brown v. Board of Education (1954), which was also based on the independent judicial authority to interpret the Fourteenth Amendment"), https://balkin.blogspot.com/2022/04/legislative-primacy-andfourteenth.html.

[6] *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).

no one would have required amnesty until at least May 1870. Under Trump's argument, two-thirds of both houses of Congress repeatedly passed amnesties for no purpose *in the immediate aftermath of enacting Section 3*. These acts removing the disqualification—passed by Congress months or years before any congressional statute authorizing federal Section Three enforcement—show that Congress understood that Section 3's disqualification could be enforced by the *states*. In other words, Congress treated disqualification as something that might merit congressional amnesty, even without federal enforcement legislation, *precisely* because it could be enforced by states.

C. The Presidency is an "Office Under the United States"

Trump's argument that the Presidency is not an "office under the United States" as required under Section 3 was considered and comprehensively repudiated by the Colorado Supreme Court in *Anderson*. As the Court explained:

> When interpreting the Constitution, we prefer a phrase's normal and ordinary usage over "secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *District of Columbia v. Heller*, 554 U.S. 570, 577, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). Dictionaries from the time of the Fourteenth Amendment's ratification define "office" as a "particular duty, charge or trust conferred by public authority, and for a public purpose," that is "undertaken by ... authority from government or those who administer it." Noah Webster, An American Dictionary of the English Language 689 (Chauncey A. Goodrich ed., 1853); *see also* 5 Johnson's English Dictionary 646 (J.E. Worcester ed., 1859) (defining "office" as "a publick charge or employment; magistracy"); *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) ("An office is defined to be 'a

public charge or employment,' ...."). The Presidency falls comfortably within these definitions.

. . .

It seems most likely that the Presidency is not specifically included because it is so evidently an "office." In fact, no specific *office* is listed in Section Three; instead, the Section refers to "any office, civil or military." U.S. Const. amend. XIV, § 3. True, senators, representatives, and presidential electors are listed, but none of these positions is considered an "office" in the Constitution. Instead, senators and representatives are referred to as "members" of their respective bodies. *See* U.S. Const. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members ...."); *id.* at § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."); *id.* at art. II, § 1, cl. 2 ("[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.").

. . .

This reading of the language of Section Three is, moreover, most consistent with the Constitution as a whole. The Constitution refers to the Presidency as an "Office" twenty-five times. *E.g.*, *id*. at art. I, § 3, cl. 5 ("The Senate shall chuse [sic] their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise *the Office of President of the United States*." (emphasis added)); *id.* at art. II, § 1, cl. 5 (providing that "[n]o Person except a natural born Citizen ... shall be eligible to the *Office of President*" and "[t]he executive Power shall be vested in a President of the United States of America [who] shall hold *his Office* during the Term of four Years" (emphases added)). And it refers to an

> office "under the United States" in several contexts that clearly support the conclusion that the Presidency is such an office.

Anderson, 2023 CO 63, ¶¶ 130-133.

This conclusion is fully consistent with constitutional text, purpose, and history. *See, e.g.*, John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 Stan. L. Rev. 141, 146 (1995) ("The Presidency is surely an 'Office under the United States.'"). Trump's argument would lead to the absurd conclusion that, under the Incompatibility Clause, someone could simultaneously serve as President and a member of Congress. Art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."). The argument is especially absurd given the context in which Section 3 was enacted. *See* Gerard N. Magliocca, *Amnesty and Section 3 of the Fourteenth Amendment*, 36 Const. Comment. 87, 93-94 (2021) ("Congress did not intend (nor would the public have understood) that Jefferson Davis could not be a Representative or a Senator but could be President.").[7] During the congressional debates over Section 3, one Senator explicitly asked why ex-Confederates "may be elected President or Vice President of the United States, and why did you omit to exclude them? I do not understand them to be excluded from the

[7] *See also* Samuel Bray, "*Officer of the United States" in Context*, The Volokh Conspiracy (Jan. 22, 2024) ("It is hard to imagine that the Reconstruction Congress that proposed Section 3 of the Fourteenth Amendment, and the state legislatures that ratified it—in the middle of an intense struggle with President Andrew Johnson, and focused on all the problems that could come from a President who was not on board with reconstruction—would say that the two people who should be allowed to be Confederates would be the President and Vice President.") (https://reason.com/volokh/2024/01/22/officer-of-the-united-states-in-context/).

privilege of holding the two highest offices in the gift of the nation." Another Senator replied, "Let me call the Senator's attention to the words 'or hold any office, civil or military, under the United States.'" *See* Cong. Globe, 39th Cong., 1st Sess. 2899 (1866). This answered the question in 1866, and it answers the question in 2024.

Against the plain text of the Constitution and the weight of authority interpreting the various provisions addressing the Presidency, Trump relies on the canon of statutory construction that "[t]he expression of one thing implies the exclusion of others." But Trump's invocation of this canon is based on a selective and acontextual reading of the relevant constitutional provisions. Moreover, as this Court recently cautioned, "[i]t is generally agreed in courts across this nation that expressio unius is a maxim of statutory construction that should rarely be used when interpreting constitutional provisions and, then, only with great caution" *Lyons v. Sec'y of Commonwealth*, 490 Mass. 560, 576 (2022) (quoting *Bush v. Holmes*, 919 So. 2d 392, 420 (Fla. 2006) (Bell, J., dissenting)). Text, history, and purpose all point in one direction—the Presidency is an "Office Under the United States."

For similar reasons, the President is an "officer of the United States" under the U.S. Constitution. As the court explained in *Anderson*, the President is an "officer of the United States" for at least four distinct reasons:

> First, the normal and ordinary usage of the term "officer of the United States" includes the President. . . . Second, Section Three's drafters and their contemporaries understood the President as an officer of the United States. . . . Third, the structure of Section Three persuades us that the President is an officer of the United States. . . . Fourth, the clear purpose of Section Three—to ensure that disloyal officers could never again play a role in governing the country—leaves no

> room to conclude that "officer of the United States" was used as a term of art.

Anderson, 2023 CO 63, ¶¶ 145–151. This logical conclusion is wholly consistent with the prevailing view among scholars and jurists. *See, e.g.*, Steven G. Calabresi, *Response, The Political Question of Presidential Succession*, 48 Stan. L. Rev. 155, 159 n.24, 165-66 (1995) ("The best reading is that the President and the Vice President are the 'Officers of the United States.'"); *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1371 (Fed. Cir. 2006) (Gajarsa, J., concurring in part and concurring in the en banc judgment) ("The Constitution repeatedly designates the Presidency as an 'Office,' which surely suggests that its occupant is, by definition, an 'officer.'"); *United States v. Maurice*, 26 F. Cas. 1211, 1214 (Marshall, Circuit Justice, C.C.D. Va. 1823) (No. 15,747) ("An office is defined to be a public charge or employment, and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States."). Indeed, in other litigation, Trump has taken precisely the opposite position on this question. *See K&D LLC v. Trump Old Post Off. LLC*, 951 F.3d 503, 507 (D.C. Cir. 2020). Accordingly, this Court should reject Trump's argument that the constitutional provision designed to guard against

D. As President, Trump served as an officer under the Constitution and took an oath to support the United States Constitution

Trump's argument that Section 3 does not apply to him because he did not swear an oath to support the United States Constitution when he served as President of the United States is nonsensical. According to Trump, the oath he swore to "preserve, protect, and defend the United States Constitution" is not an oath within the meaning of Section 3 because "the word 'support' is nowhere to be found." The

Court in *Anderson* rejected this strained argument because "[t]he language of the presidential oath . . . is consistent with the plain meaning of the word 'support'" and historical evidence near the time Section 3 was adopted demonstrated that the more "specific language" contained in the presidential oath "does not make it anything other than an oath to support the Constitution." *Anderson*, 2023 CO 63, ¶¶ 156–158. Or, as legal scholar Samuel Bray recently put it,

> The argument . . . that a presidential oath to "preserve, protect, and defend the Constitution" is not an oath to "support" the Constitution is risible. Try explaining it to a child. It is an argument that should be treated with derisive scorn by everyone who encounters it. It is the kind of magic-words literalism that is the reason people think they hate lawyers. Justice Scalia once said that if he accepted a certain argument "I would hide my head in a bag." That is a fitting response to the argument that the presidential oath does not require the President to support the Constitution.[8]

Trump's formalistic argument to the contrary is wholly without merit.

E. Petitioners' claim is ripe and Massachusetts law prohibits candidates who are ineligible to *hold* an office to appear on a ballot in order to *seek* that office

Trump argues that, even if this Court agrees he is ineligible to hold the office of the presidency, this Court cannot adjudicate Petitioners' claim because he is only seeking to appear on the presidential primary ballot. But it is indisputable that Massachusetts, like all states, "has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Bullock v. Carter*, 405 U.S. 134 (1972); *see also Hassan v. Colorado*, 495 F. App'x 947 (10th Cir. 2012)

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[8] Samuel Bray, "*Officer of the United States" in Context*, The Volokh Conspiracy (Jan. 22, 2024) (https://reason.com/volokh/2024/01/22/officer-of-the-united-states-in-context/).

(Gorsuch, J.) ("[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."); *Anderson*, 2023 CO 63, ¶ 54 ("[S]everal courts have expressly upheld states' ability to exclude constitutionally ineligible candidates from their presidential ballots."). And this Court's precedent, and the basic function and purpose of Massachusetts' election laws, confirms that an individual who is constitutionally ineligible to hold an office cannot appear on a primary ballot in connection with seeking that office. *See, e.g.*, *Thacher v. Cook*, 250 Mass. 188, 191 (Mass. 1924) ("The party nominations must be effective to the end of an election . . . . 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."); *see also Pereira v. Sec'y of Com.*, 29 Mass. App. Ct. 499, 502 (1990) (explaining that election laws must "be read with an eye to the legislative purpose of their enactment," which in the primary context is twofold: "giving voters the opportunity to express their preferences and effectively nominate only as many candidates as could be elected"). Accordingly, Petitioners' challenge to Trump's placement on the primary ballot is ripe for adjudication by this Court.

CONCLUSION

For the foregoing reasons, this Court should declare that Donald Trump is ineligible to stand as a candidate for President of the United States on the Massachusetts primary ballot and order that the Secretary and SBLC take all necessary steps to effectuate his removal from the ballot. Alternatively, this Court should declare that the SBLC has jurisdiction over these Objections and order it to

render an appealable decision on the merits no later than the statutory deadline under M.G.L. c. 55B, § 10 of January 29, 2024, at 5:00 PM.[9]

Respectfully submitted,

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By their attorneys and authorized representatives,

Date: January 26, 2024

/s/ Shannon Liss-Riordan

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[9] Petitioners note that despite efforts to obtain the filings through outreach to their counsel, Marc Salinas, neither Petitioners nor their counsel have seen copies of the response filed by the Massachusetts Republican Party, nor have they seen copies of any exhibits filed by the Massachusetts Republican Party or Donald John Trump. Petitioners did finally receive a copy of the response filed by Trump at 5:52 PM last night.

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CERTIFICATE OF SERVICE

I, Shannon Liss-Riordan, a member of the bar of this Court, hereby certify that on this day, January 26, 2024, the foregoing Reply was served by email and hand delivered by courier, to the State Ballot Law Commission and Secretary of the Commonwealth and to Donald John Trump and the Massachusetts Republican Party, through their respective counsel as follows:

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January 26, 2024

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