

December 18, 2023

Via Email: SOS.office@maine.gov

Shenna Bellows
Secretary of State
State of Maine
Department of the Secretary of State
148 State House Station
Augusta, ME 04333-0148

Re: In re: Challenge to Primary Nomination Petition of Donald J. Trump,
Republican Candidate for President of the United States

DONALD J. TRUMP'S EVIDENTIARY OBJECTIONS

Donald J. Trump (“President Trump”) submits this *Brief to Maine Secretary of State* Shenna Bellows (“Secretary of State” or “Secretary”) Regarding Evidentiary Objections. The Challengers to President Trump’s nomination petitions rely heavily on the Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol (“January 6th Report” or “Report”), the “evidence” the Report relied upon, information from other proceedings concerning President Trump’s ballot access, videos and photographs, as well as other pieces of evidence to support their allegation that President Trump “engaged in insurrection or rebellion” against the United States, “or [has] given aid or comfort to the enemies thereof.”

At the outset, President Trump notes he had no meaningful time to review Challengers’ and Intervenor CREW’s (“Intervenor”) evidence in advance of the hearing. Indeed, President Trump did not have an opportunity to even review all evidence before the

hearing started, and he certainly did not have adequate time to develop and present rebuttal evidence. This creates a fundamental due process violation.

And all of the evidence they proffer is completely irrelevant because: (a) section 336 is limited to the falsity *vel non* of the declaration on the candidate's consent form; (b) the declaration by its plain language limits any representations concerning candidate qualifications to those "listed" on the form itself—that is, those stated in Article II of the United States Constitution; and (c) the evidence proffered by the Challengers is not asserted to show whether President Trump truthfully declared that he met all Article II qualifications. It is therefore improper for the Secretary of State to consider *any* piece of evidence that does not directly address Article II qualifications. Consideration of anything else is outside of that scope the permissible scope of any determination that the Secretary has been authorized to make under sections 336 or 337. This includes every exhibit that challengers proffer except President Trump's consent form and the Challengers' voting qualifications. All other evidence should be excluded as irrelevant.

The Maine Administrative Procedure Act, 5 M.R.S. § 9057 states that "[e]vidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude irrelevant or unduly repetitious evidence." But even under this standard, much of the proffered evidence is improper for the Secretary of State to consider in reaching her decision. For the additional reasons stated below, President Trump objects to, and the Secretary should exclude, the following:

I. Final Report, Select Committee to Investigate the January 6th Attack on the United States Capitol, HR 117-663, 117th Cong., 2d Sess. (Dec. 22, 2022) (Challengers' Exhibit No. 7).

Challengers rely heavily on the January 6th Report - including the exhibits, interviews, documents, videos, statements, and reports upon which the Select Committee relied upon while drafting the Report. In addition to issues surrounding the formation and bias of the Select Committee, this Report presents substantial evidentiary issues, including improper legal conclusions and speculation, hearsay, and other problems that render the Report the antithesis of the “kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs.”

The Report itself is hearsay and each of the statements that it contains, quotes, and relies upon—the documents, the testimony, the transcribed interviews, and the like—is also inadmissible hearsay. Further, the Report is unreliable and untrustworthy as a product of a politically motivated and biased grandstanding exercise, as President Trump demonstrates below. Indeed, the Report is so unreliable that almost none of the Report’s Eleven Recommendations, taking up a mere four pages out of over 800, have not been adopted. For example, the Electoral Count Act and the several criminal statutes discussed in the Report have not been amended per the Select Committee’s recommendations; the House of Representatives’ civil subpoena enforcement authority has not been clarified; and not one person present at the Capitol on January 6, 2021, has been indicted – much less convicted, under 18 U.S.C. § 2383. Instead, the Report, in line with its aim, has largely been used against President Trump in efforts to remove his name from state primary election ballots. Even the

judge in *Anderson*¹ announced in her Final Order that she only considered and cited 31 of the Report's conclusions, even though the petitioners in that case originally sought to admit all 411 conclusions. Thus, even a tribunal predisposed to remove President Trump from the ballot did not find the vast majority of conclusions to be reliable.² The Secretary should therefore refuse to admit the Report.

A. The January 6th Report is Hearsay.

The January 6th Report is itself hearsay under Maine Rule of Evidence 802. Rule 802 generally forbids out-of-court statements that “[t]he declarant does not make while testifying at the current trial or hearing [and that a] party offers in evidence to prove the truth of the matter asserted in the statement.”³ Here, President Trump, the party whose presence on the Maine ballot is being challenged, was not a party to the Select Committee's proceedings, had no lawyer or other representative to protect his interests, and had no opportunity to cross-examine the witnesses, to introduce testimony or documents, or to question the accuracy or truth of the Report's conclusions or the information that formed the basis for those conclusions. The Select Committee has been widely recognized as a political show trial or partisan political star chamber. It broke the normal rules in the way it was formed and the way it conducted itself. And its goal was not a search for truth, but rather an effort to

¹ *Anderson v. Griswold*, Docket No. 2023-CV-32577, 2023 WL 8006216 (Colo. Dist. Ct. 2023).

² *See id.* at *7 n.7.

³ Me. R. Evid. 801-802.

support a predetermined political conclusion. That conclusion drove the public hearings, which were orchestrated by a television producer and featured highly edited (and sometimes doctored) “evidence” for dramatic effect. Challengers now offer this political, partisan document as evidence, and President Trump’s inability to challenge or rebut that evidence violates his right to due process.

The Report and its evidentiary basis does not fit within any exception to the hearsay rule found in the Maine Rules of Evidence, including Maine Rule of Evidence 803(8), which allows records or statements of a public office only if:

- (A) It sets out:
 - (i) The office’s regularly conducted and regularly recorded activities;
 - (ii) A matter observed while under a legal duty to report; or
 - (iii) Factual findings from a legally authorized investigation.

- (B) The following are not within this exception to the hearsay rule:
 - (i) Investigative reports by police and other law enforcement personnel;
 - (ii) Investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party;
 - (iii) Factual findings offered by the state in a criminal case;
 - (iv) Factual findings resulting from special investigation of a particular complaint, case, or incident; and
 - (v) Any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

The Maine Rules of Evidence explicitly disallow “[f]actual findings resulting from special investigation of a particular . . . incident.”⁴ Even if the Secretary finds that bar unpersuasive, she should find that the circumstances surrounding the drafting of the Report indicate lack

⁴ Maine Rule of Evidence 803(8)(B)(iv).

of trustworthiness, and even if she were *allowed* to consider the Report – which she is not – that she should not do so due to the Report’s lack of reliability.

B. The January 6th Report is unreliable and untrustworthy.

The formation of the Select Committee that issued the Report, and the Report itself, are fraught with problems that cannot now be rectified. All members on the Select Committee – prior to their appointment onto the Select Committee – voted to impeach President Trump for incitement of insurrection, which shows that they had arrived at their conclusion before the investigation had begun. Indeed, not a single member who disagreed—which included nearly half of the House’s 435 Representatives—served on the Select Committee, demonstrating a complete and unprecedented break with House procedures. The Speaker of the House refused to allow the Minority leader to pick members that would offer a different view, and as a result, minority members who had voted against impeachment had no opportunity to selecting or examine competing witnesses, or ask questions that would rebut the impeachment narrative, or offer the Select Committee differing opinions. Further, contrary to normal Congressional procedures, Select Committee was exceedingly unusual because it was staffed with prosecutors, rather than normal congressional staff. And political, pro-impeachment Representatives directed the Committee’s operations on a daily basis. One investigator on the Select Committee even served as the personal attorney for one of the Committee members, reinforcing that investigators had no independence from the political Committee members. The predetermined and political nature of the Report make its findings unreliable.

When considering the admissibility of Congressional reports, triers-of-fact are instructed to judge trustworthiness according to a “nonexclusive list of four factors [that the Advisory Committee to the rules of evidence] thought would be helpful in passing on this question: (1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held;” and (4) possible motivation problems.⁵ In *Coleman v. Home Depot, Inc.*, the Third Circuit stated:

Most notably, a report may be untrustworthy “if the report appears to have been made subject to a suspect motivation. For example, if the public official or body who prepared the report has an institutional or political bias, and the final report is consistent with that bias.” *Federal Rules of Evidence Manual* 1688–89 (Stephen A. Saltzburg et al. eds., 7th ed. 1998); *see also Pearve v. E.F. Hutton Group, Inc.*, 653 F.Supp. 810, 814 (D.D.C.1987) (excluding findings made in a congressional report because, “[g]iven the obviously political nature of Congress, it is questionable whether any report by a committee or subcommittee of that body could be admitted under rule 803(8)(C) against a private party. There would appear to be too great a danger that political considerations might affect the findings of such a report”).⁶

“Congressional reports are not entitled to an additional presumption of trustworthiness or reliability — beyond the one already established in the Advisory Committee Notes—simply by virtue of having been produced by Congress.”⁷ “[C]ourts have

⁵ *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 n.11 (1988); *Barry v. Tr. of Int'l Ass'n Full Time Salaried Officers & Emps. of Outside Local Unions & Dist. Counsel's (Iron Workers) Pension Plan*, 467 F. Supp. 2d 91, 97 (D.D.C. 2006).

⁶ *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1342 (3d Cir. 2002).

⁷ *Barry*, 467 F. Supp. 2d at 98; *see also Anderson v. City of New York*, 657 F. Supp. 1571, 1577–79 (S.D.N.Y. 1987) (finding subcommittee report unreliable and inadmissible based on the four factors and that the committee engaged in grandstanding and heard testimony from interested parties).

based their decisions in part on the possibility that partisan political considerations, as well as elected officials' tendency to 'grandstand,' have influenced the factual findings, conclusions, or opinions included in Congressional reports.”⁸ Courts have also emphasized “whether members of both parties joined in the report, or whether the report was filed over the dissent of the minority party. Where the former has occurred . . . courts have been more likely to reject challenges to the admissibility of Congressional reports.”⁹ “[R]eports that are truly reliable on a methodological and procedural level are less likely to provoke bitter divisions than those that have politics, rather than policy or truth-seeking, as their ultimate objective.”¹⁰ Chief here are the concerns of political bias and motivation, as President Trump demonstrates below.

The January 6th Report is more akin to the House report discussed in *Barry* than it is to the Senate Report.¹¹ Unlike the Senate Report at issue in that case, the January 6th Report was not only the product of bias and political grandstanding, but it was also completed without any meaningful involvement of minority viewpoints, the minority party, or minority staff. This was highly irregular for a congressional committee and left no opportunity for the

⁸ *Barry*, 467 F. Supp. 2d at 98 (collecting cases).

⁹ *Id.* (collecting cases).

¹⁰ *Id.* at 99.

¹¹ *Id.* at 100-01.

expression of dissent.¹² The report was also full of “inflammatory rhetoric.”¹³ The Select Committee relied on carefully selected witnesses and a handpicked set of evidence to prove a predetermined political narrative the Committee’s operations also showed its bias.

As a preliminary matter, the Secretary must first determine whether the January 6th Report is reliable enough to be admitted into evidence. The Secretary should examine the context surrounding the formation of the Select Committee and its “findings,” and find that neither was the product of a bipartisan, reliable exercise whose work-product should be acceptable.

As Congressman Nehls noted in his declaration submitted before the court in *Anderson*, “Any assertion that the Select Committee was established or run to produce a reliable, bipartisan, factual investigation is simply false. . . . [T]he Select Committee was established and run as a highly partisan kangaroo court, intended to create support for the Democrat Party’s favored political narrative.”¹⁴ After a failed attempt to establish a bipartisan commission, on June 28, 2021, then-Speaker Nancy Pelosi introduced H. Res. 503, “Establishing the Select Committee to Investigate the January 6th Attack on the United States Capitol.” Two days later, the House passed H. Res. 503 on a near party-line vote of 222 yeas and 190 nays. Notably, only two Republicans—Reps. Cheney and Kinzinger, who

¹² *See id.*

¹³ *See id.* at 101.

¹⁴ President Trump’s Exhibit 26, Declaration of Congressman Troy Nehls, ¶¶ 2, 25, October 17, 2023.

were President Trump’s political rivals and had voted to impeach him for the events of January 6—voted in favor of H. Res. 503.¹⁵

H. Res. 503 instructed the Speaker to appoint thirteen members to the Committee, only five of which “shall be appointed after consultation with the minority leader.”¹⁶ Thus, from the beginning, the Select Committee was designed to have an 8-5 imbalance that substantially favored the Democrat majority. Speaker Pelosi appointed Chairman Thompson to serve as chair of the Committee and appointed six additional Democrat members: Reps. Lofgren, Schiff, Aguilar, Murphy (FL), Raskin, and Luria, all of whose statements judging President Trump’s culpability for the events of January 6th have been established for the Secretary of State. She also appointed Republican Rep. Cheney without any designation of position.¹⁷ Then-House Minority Leader Kevin McCarthy recommended five Republican members to serve on the Committee, consistent with H. Res. 503: Rep. Jim Banks of Indiana to serve as Ranking Member and Reps. Rodney Davis of Illinois, Jim Jordan of Ohio, Kelly Armstrong of North Dakota, and Troy Nehls of Texas to serve as additional minority members. Unwilling to allow an effective minority position on the Select Committee—even with the pre-baked 8-5 Democrat majority—Speaker Pelosi refused to appoint Rep. Banks

¹⁵ *Id.* at ¶ 3; President Trump’s Exhibit 27, Kristin Wilson and Clare Foran, Only two House Republicans vote for the January 6 select committee, CNN, June 30, 2021, available at: <https://edition.cnn.com/2021/06/30/politics/republicans-january-6-select-committee-vote/index.html> (last visited December 14, 2023).

¹⁶ President Trump’s Exhibit 26, Nehls Decl., ¶ 4.

¹⁷ *Id.*, ¶ 5.

to serve as Ranking Member. Nor did she appoint any of Minority Leader McCarthy’s other recommended minority members. In a public statement, she acknowledged that her refusal to appoint the members recommended by the then-Minority Leader was an “unprecedented decision.”¹⁸ Instead, Speaker Pelosi appointed Rep. Kinzinger—the only Republican other than Rep. Cheney who voted in favor of H. Res. 503—and left four vacancies.¹⁹

On July 21, 2021, Minority Leader McCarthy issued a statement condemning Speaker Pelosi’s partisan actions and sheer abuse of power:

Speaker Nancy Pelosi has taken the unprecedented step of denying the minority party’s picks for the Select Committee on January 6. This represents an egregious abuse of power and will irreparably damage this institution. Denying the voices of members who have served in the military and law enforcement, as well as leaders of standing committees, has made it undeniable that this panel has lost all legitimacy and credibility and shows the Speaker is more interested in playing politics than seeking the truth.

Unless Speaker Pelosi reverses course and seats all five Republican nominees, Republicans will not be party to their sham process and will instead pursue our own investigation of the facts.²⁰

¹⁸ President Trump’s Exhibit 26, Nehls Decl., ¶¶ 6-7; President Trump’s Exhibit 28, Press Release, Nancy Pelosi, Speaker, U.S. House of Representatives, Pelosi Statement on Republican Recommendations to Serve on the Select Committee to Investigate the January 6th Attack on the U.S. Capitol (July 21, 2021), available at: <https://web.archive.org/web/20211222223910/https://www.speaker.gov/newsroom/72121-2> (last visited December 14, 2023).

¹⁹ President Trump’s Exhibit 26, Nehls Decl., ¶ 8.

²⁰ *Id.*, ¶ 24; President Trump’s Exhibit 29, McCarthy Statement about Pelosi’s Abuse of Power on January 6th Select Committee, Jul. 21, 2021, available at: <https://www.cbsnews.com/news/kevin-mccarthy-jan-6-committee-picks-removed-pelosi-rejects-jim-jordan-jim-banks/> (last visited December 17, 2023).

Speaker Pelosi's actions achieved their intended result and the Select Committee effectively lacked minority party representation, including a minority staff. Witnesses who disagreed with the Select Committee's narrative were therefore not called, a minority report was not issued, and findings regarding the many failures of House security, intelligence, and communications problems that contributed to what occurred on January 6th were not included in the January 6th Report.²¹ Speaker Pelosi left no stone un-turned in ensuring that the Select Committee would achieve their intended result, appointing an open and partisan Democrat, Timothy Heaphy, as the Chief Investigator of the Select Committee even after Heaphy had donated thousands of dollars over his career to Democrats and Democratic party causes.²² And, thus, from the very beginning, the Select Committee was an exercise in partisanship and not in fact-finding.

The Committee was irregularly composed from the beginning. For example, House Rules dictate that a committee chair shall designate “[a] member of the majority party . . . as vice chair of the committee.”²³ On September 2, 2021, Chairman Thompson announced in a press release that “he has named Representative Liz Cheney (R-WY) to serve as the Vice Chair of the Select Committee.”²⁴ Rep. Cheney was a member of the Republican Conference

²¹ President Trump's Exhibit 26, Nehls Decl., ¶ 9.

²² President Trump's Exhibit 30, Timothy Heaphy's Political Contributions.

²³ House Rule XI(2)(d).

²⁴ President Trump's Exhibit 26, Nehls Decl. at ¶ 10; See President Trump's Exhibit 31, Press Release, Bennie Thompson, Chairman, Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, Chairman Thompson Announces Representative Cheney as [gesslerblue.com](https://www.gesslerblue.com)

of the House of Representatives, and thus was not formally a member of the majority party. That she was nonetheless designated for the position of Vice Chair of the Select Committee—and was given one of the 8 seats originally designated for a Democrat member—is ample indication that she was understood to be what she was: a fanatical political opponent of President Trump who used her Select Committee membership to target him politically.

Similarly, the Select Committee never had a ranking minority member, even though under the House Resolution creating it certain aspects of its operations required the participation of one. For example, a House Resolution provided: “The chair of the Select Committee, upon consultation with the ranking minority member, may order the taking of depositions.”²⁵ But neither H. Res. 503 nor the House Rules define the term “ranking minority member.” That term, by custom and practice of the House of Representatives, is defined by the parties themselves in their respective Conference and Caucus Rules. Under the Republican Conference Rules of the 117th Congress, a member’s designation as the ranking Republican member of a Committee comes only through nomination by the Steering Committee and election by the Conference.²⁶ Further, the rules provide that, for a

Select Committee Vice Chair (Sept. 2, 2021), available at: <https://january6th-benniethompson.house.gov/news/press-releases/chairman-thompson-announces-representative-cheney-select-committee-vice-chair> (last visited December 17, 2023).

²⁵ H. Res. 503.

²⁶ Rule 14 of the Republican Conference Rules of the 117th Congress.

Select Committee, such nominations shall be made by the minority leader. No ranking minority member was ever designated in accordance with the Republican Conference Rules for the Committee.²⁷ Therefore, the Committee had no ranking minority member.²⁸ As a result, none of the depositions taken by the Committee were taken in conformity with the requirements of H. Res. 503.

The Committee held its first hearing on July 27, 2021.²⁹ After the hearing, Chairman Thompson reportedly “told reporters the select committee could have another hearing in August while the House is scheduled to be in a seven-week recess.”³⁰ But the Committee did not have another hearing in August 2021; nor did it have another hearing for the remainder of 2021. Instead, the Committee waited almost a year to hold a second hearing, holding it on June 9, 2022, right at or before the majority of the 2022 midterm primary and primary runoff elections.³¹ The Committee subsequently held seven additional hearings during the summer

²⁷ Rule 13 of the Republican Conference Rules of the 117th Congress.

²⁸ President Trump’s Exhibit 26, Nehls Decl., ¶¶ 11-13.

²⁹ *Id.* at ¶ 15; See President Trump’s Exhibit 32, Press Release, Select Committee, Select Committee to Investigate the January 6th Attack on the United States Capitol to Hold First Hearing July 27th (Jul. 20, 2021), available at: <https://january6th-benniethompson.house.gov/news/press-releases/select-committee-investigate-january-6th-attack-united-states-capitol-hold-first> (last visited December 14, 2023).

³⁰ President Trump’s Exhibit 26, Nehls Decl., ¶ 16; President Trump’s Exhibit 33, Melissa Macaya et al., Capitol Riot Committee Holds First Hearing, CNN (Jul. 27, 2021), available at: https://www.cnn.com/politics/live-news/jan-6-house-select-committee-hearing-07-27-21/h_f000be289ea8ac4e1fb4b992b3d0b80e (last visited December 14, 2023).

³¹ President Trump’s Exhibit 26, Nehls Decl., ¶¶ 17-18.

of 2022: on June 13, 2022, June 16, 2022, June 21, 2022, June 23, 2022, June 28, 2022, July 12, 2022, and July 21, 2022.³² After holding no hearings for two and a half months, the Committee decided to hold one more hearing on October 13, 2022—less than one month before the 2022 midterm elections.³³

It is no secret that the two nominally Republican Select Committee members—each of whom had declared their positions when they voted to impeach President Trump well before the Select Committee was formed—openly took shots at President Trump throughout the life of the Committee, often on matters having nothing to do with the events of January 6. For example, at the October 13, 2022, hearing of the Committee, Congressman Kinzinger focused on his policy disagreements with President Trump’s orders pursuant to his authority as commander in chief of the armed forces, stating “President Trump issued an order for large-scale US troop withdrawals. He disregarded concerns about the consequences for fragile governments on the front lines of the fight against ISIS and Al-Qaeda terrorists.” Congressman Kinzinger further referenced conversations between the President and his subordinates, including General Keith Kellogg, National Security Advisor to the Vice President, and General Mark Milley, Chairman, Joint Chiefs of Staff.³⁴ Of course,

³² President Trump’s Exhibit 26, Nehls Decl., ¶ 19; President Trump’s Exhibit 34, Select Committee, Past Hearings, available at: <https://january6th-benniethompson.house.gov/news/press-releases/thompson-chency-opening-statements-select-committee-hearing> (last visited December 14, 2023).

³³ President Trump’s Exhibit 26, Nehls Decl., ¶ 20.

³⁴ *Id.* at ¶¶ 20-21.

none of this had anything to do with the events of January 6. Numerous articles highlight both Rep. Kinzinger and Cheney's anti-Trump bias and their continued obsession with President Trump.³⁵

The Select Committee issued the January 6th Report on December 22, 2022. But throughout its lifespan, its partisan rancor was the subject of criticism. From its inception, Americans saw through the partisanship. Poll results released in August 2021 confirmed that perception:

A majority of voters say they believe the House select committee investigating the Jan. 6 attack on the Capitol is biased, according to a new Harvard CAPS-Harris Poll survey. Fifty-eight percent of voters polled said they believed the committee set up by Speaker Nancy Pelosi (D-Calif.) was biased, while 42 percent said they thought it was fair. Americans want an examination of the riots over the summer and the origins of the virus over investigating Jan. 6th,”

³⁵ President Trump's Exhibit 35, Brian Naylor, GOP Rep. Adam Kinzinger, who voted to impeach Trump, won't run for reelection, NPR, October 29, 2021, available at: <https://www.npr.org/2021/10/29/1050454729/gop-rep-adam-kinzinger-who-voted-to-impeach-trump-wont-run-for-reelection> (last visited Oct. 16, 2023); President Trump's Exhibit 36, Steve Peoples and Paul Weber, Kinzinger goes to Texas in search of anti-Trump Republicans, Associated Press, April 30, 2021, available at: <https://apnews.com/article/donald-trump-adam-kinzinger-elections-illinois-political-organizations-4a8ca7b3e66818622c146c7b65f04aaf> (last visited December 14, 2023); President Trump's Exhibit 37, Rick Pearson, US Rep. Adam Kinzinger says he'll focus on GOP anti-Trump movement rather than run for statewide office, Chicago Tribune, Jan. 5, 2022, available at: <https://web.archive.org/web/20220201044329/https://www.chicagotribune.com/politics/ct-adam-kinzinger-trump-20220106-6lm6rmlkvhefnah5p5y3pcgea-story.html> (last visited December 14, 2023); President Trump's Exhibit 38, Kristina Peterson, Liz Cheney Draws More GOP Fire Over Anti-Trump Stance, Wall Street Journal, May 4, 2021, available at: <https://www.wsj.com/articles/liz-cheney-draws-more-gop-fire-over-anti-trump-stance-11620161615> (last visited December 14, 2023); President Trump's Exhibit 39, Julia Manchester, 58 percent say Jan. 6 House committee is biased: poll, The Hill, Aug. 2, 2021, available at: <https://thehill.com/homenews/house/565981-58-percent-say-jan-6-commission-is-biased-poll/> (last visited December 14, 2023).

said Mark Penn, the co-director of the Harvard CAPS-Harris Poll survey. “The voters reject the Pelosi move to toss Republicans off of the committee and see it now as just a partisan exercise.”³⁶

One year after the events of January 6th, Minority Leader McCarthy stated, “Unfortunately, one year later, the majority party seems no closer to answering the central question of how the Capitol was left so unprepared and what must be done to ensure it never happens again Instead, they are using it as a partisan political weapon to further divide our country.”³⁷ Shortly thereafter, Minority Leader McCarthy stated, “It is not serving any legislative purpose. The committee’s only objective is to attempt to damage its political opponents — acting like the Democrat Congressional Campaign Committee one day and the DOJ the next.” He continued:

The committee has demanded testimony from staffers who applied for First Amendment permits. It has subpoenaed the call records of private citizens and their financial records from banks while demanding secrecy not supported by law. It has lied about the contents of documents it has received. It has held individuals in contempt of Congress for exercising their Constitutional right to avail themselves of judicial proceedings. And now it wants to interview me about public statements that have been shared with the world, and private conversations not remotely related to the violence that unfolded at the Capitol. I have nothing else to add.

As a representative and the leader of the minority party, it is with neither regret nor satisfaction that I have concluded to not participate with this select

³⁶ President Trump’s Exhibit 39.

³⁷ President Trump’s Exhibit 40, Monique Beals, McCarthy says Democrats using Jan. 6 as ‘partisan political weapon’, The Hill, Jan. 2, 2022, available at: <https://thehill.com/homenews/house/587954-mccarthy-says-democrats-using-jan-6-as-partisan-political-weapon-ahead-of/> (last visited December 14, 2023).

committee's abuse of power that stains this institution today and will harm it going forward.³⁸

House Republicans repeatedly protested and condemned the Select Committee's partisanship. On June 8, 2022, for example, Rep. Bice of Oklahoma issued a statement highlighting that the Select Committee was merely a political stunt:

After a year of overreaching subpoenas and dramatized hearings, the next show trial event from the January 6 Select Committee will take place Thursday, during prime time. This further proves that this biased committee does not intend to investigate what occurred on Jan. 6, but instead weaponize the government for their own political gain.

As you may remember, there were two bills voted on by the House of Representatives last year regarding Jan. 6. I voted in favor to establish a fair, nonpartisan commission, modeled on the September 11 Commission, to fully investigate the security failure and ensure that this incident at our Nation's Capital would not happen again. . . .

However, I vehemently opposed legislation that established the January 6 Select Committee, because I was deeply concerned it would be nothing but political theater for House Democrats. Sadly, this is precisely what we are witnessing today. In creating the membership of this committee, Speaker Pelosi broke 232 years of House precedent, trampling over the rights of the Minority party, by rejecting Republican's chosen Members, including Rep. Banks (R-IN) and Rep. Jordan (R-OH). This move eliminated the objectivity and legitimacy of this committee from the very start. . . .

³⁸ President Trump's Exhibit 26, Nehls Decl., ¶ 24; President Trump's Exhibit 41, Barbara Sprunt, The top House Republican won't comply with Jan. 6 panel request to voluntarily testify, NPR, Jan. 12, 2022, available at: <https://www.npr.org/2022/01/12/1072544752/jan-6-panel-investigating-insurrection-requests-kevin-mccarthys-voluntary-testim> (last visited December 14, 2023); President Trump's Exhibit 42, Leader McCarthy's Statement about Pelosi's Illegitimate Select Committee, Jan. 12, 2022, available at: <https://www.wunc.org/2022-01-12/the-top-house-republican-wont-comply-with-jan-6-panel-request-to-voluntarily-testify> (last visited December 14, 2023).

Now, many Democrats on the committee are even using it to call for the dismantling of our institutions, including the electoral college. They have also called to nationalize all election laws completely disregarding federalism and trampling over states' rights. A major goal of the committee is becoming increasingly clear: to normalize and ram through a far-left agenda.

I strongly opposed what we are seeing today, which is a dangerous, political stunt. Our country could have benefited from a bipartisan commission that would have worked to protect the People's House and keep Americans who visit and work there safe and secure in the future, while also holding Pelosi and those in charge accountable for their failures. Unfortunately, the reasons why I voted against the Jan. 6 Select Committee have come true. No progress has been made, Republicans have no voice, and Democrats continue their witch hunt against the Republican party to distract from their catastrophic foreign and domestic policy failures.³⁹

Minority Leader McCarthy, on June 9, 2022, delivered remarks calling the Select Committee illegitimate and echoing Rep. Bice's concerns:

Speaker Pelosi's Select Committee on January 6 is unlike any committee in American history. In fact, it's the most political and least legitimate committee in American history. It has used congressional subpoenas to attack Republicans, violate due process, and infringe on the political speech of private citizens. It has been caught altering evidence – including text messages from Ranking Member Jordan. It has permanently damaged the House and divided the country. It's a smokescreen for Democrats to push their radical agenda To be clear, the violence at the Capitol that day was wrong, and we have repeatedly denounced it. But keeping the Capitol safe is not the point of Pelosi's illegitimate Select Committee. From the beginning, the Select Committee refused to investigate the real circumstances that led to the riot, including the lack of security around the Capitol. They also ignored left-wing mob violence, which led to riots and loss of life across the country. When House Republicans proposed investigating these facts, Speaker Pelosi did not respond for 3 months. Then, she jumped to create the Select Committee. Not only that, she rejected my picks to serve on that Committee – violating 232 years of House tradition. Pelosi rejected Congressman Banks, a distinguished

³⁹ President Trump's Exhibit 43, Stephanie Bice, Democrats' Partisan Jan. 6th Committee, June 8, 2022, available at: <https://bice.house.gov/media/weekly-columns/democrats-partisan-jan-6th-committee> (last visited December 14, 2023).

Afghanistan veteran. She rejected Congressman Jordan, the ranking member of the Judiciary Committee. But while she rejected qualified Republicans, she appointed radical Democrats. She appointed Chairman Thompson, who — to be clear — objected to presidential electors in 2005. She appointed Congressman Raskin, who also objected to presidential electors in 2017 AND called for President Trump’s impeachment before Trump took office. And she appointed Congressman Schiff, despite his years of lying about the Russia-Collusion Hoax and the Hunter Biden Laptop. The future of our nation rests on the ability of Americans to trust our political system, to have safer streets, to have affordable food and gas, and to have confidence that elected officials are listening to real concerns. Democrats are using January 6 to avoid accountability for making the nation less safe and less prosperous. But Americans are not fooled by Democrats’ distractions. And Republicans are not deterred from focusing on the issues that matter most to them. Now I want to bring up Congressman Jim Banks. As we said at the time Speaker Pelosi rejected my picks to serve on the committee – Republicans would be conducting our own investigation. And Jim Banks has led that.⁴⁰

Vice President Pence referred to the partisan nature of the Select Committee as a “disappointment.”⁴¹ He refused to provide testimony to the Select Committee, stating, “The Congress has no right to my testimony. . . . We have a separation of powers under the Constitution of the United States, and I believe it sets a terrible precedent for the Congress to summon a vice president of the United States to speak about deliberations that took place at the White House.”⁴² He also stated that “It seemed to me in the beginning, there was an

⁴⁰ President Trump’s Exhibit 44, Leader McCarthy, House GOP: The Select Committee is Illegitimate, June 9, 2022, available at: <https://wpde.com/news/nation-world/house-republicans-promise-to-investigate-jan-6-panel-congress-insurrection-investigation-administration-commitee-rodney-davis> (last visited December 14, 2023).

⁴¹ President Trump’s Exhibit 45, Caroline Linton, Pence says he thinks there will be "better choices" than Trump for president in 2024, CBS News, Nov. 16, 2022, available at: <https://www.cbsnews.com/news/mike-pence-donald-trump-2024-better-choices-face-the-nation-interview/> (last visited December 14, 2023).

⁴² *Id.*

opportunity to examine every aspect of what happened on January 6, and to do so more in the spirit of the 9/11 Commission — nonpartisan, nonpolitical, and that was an opportunity lost.”⁴³ Members of the United States Senate felt the same way about the Select Committee.⁴⁴

As Congressman Nehls’ Declaration makes clear, besides being partisan, the Select Committee also engaged in dishonest behavior. “In one remarkable display—later admitted by the Select Committee’s spokesman when the press reported it—Select Committee staff doctored evidence and a Member of the Committee publicly presented that falsified evidence during a hearing.”⁴⁵ “In addition, the Select Committee doctored silent video captured by security cameras in the House, adding a soundtrack to make their presentation more dramatic.”⁴⁶

But Republicans were not the only ones condemning the Select Committee for its obvious political nature. Ted Van Dyk penned an op-ed in the Wall Street Journal, stating

⁴³ President Trump’s Exhibit 46, Brady Knox, Mike Pence says he will not testify to Jan. 6 committee, Washington Examiner, Nov. 16, 2022, available at: <https://www.washingtonexaminer.com/news/justice/pence-not-testify-jan-6-committee> (last visited December 14, 2023).

⁴⁴ President Trump’s Exhibit 47, Melissa Quinn, Rubio says January 6 committee is a “complete partisan scam,” CBS News, Feb. 7, 2022, available at: <https://www.cbsnews.com/news/marco-rubio-january-6-committee-partisan-face-the-nation/> (last visited December 14, 2023).

⁴⁵ President Trump’s Exhibit 26, Nehls Decl., ¶ 22.

⁴⁶ *Id.* at ¶ 23.

“Count me as a Democrat disappointed by the way my party has responded to Donald Trump” He continued:

The House Jan. 6 hearings offered an opportunity to examine Mr. Trump's activities carefully. But it didn't happen. Thursday's opening statements by Chairman Bennie Thompson and Republican Rep. Liz Cheney were more like prosecutors' closing arguments than introductions to a fact-finding inquiry. Ms. Cheney read aloud a statement by Mr. Trump that was supposed to implicate him in inciting his followers-but she left out that he told his followers: "Go home."

The committee members included harsh Trump critics like Rep. Adam Schiff. Speaker Nancy Pelosi rejected Republican members nominated by Minority Leader Kevin McCarthy and allowed only Mr. Trump's outspoken Republican opponents—Ms. Cheney and Rep. Adam Kinzinger—to serve on the committee. As a result, chances for a bipartisan outcome were lost and any minority report will be undertaken outside the committee. There will be no consensus on any findings, only further polarization.⁴⁷

Media outlets aired the Democrats' open secret that coverage of the Select Committee's work during prime time would be a tool in the Democratic Party's arsenal to continue to control the House past 2022. The New York Times wrote, “With their control of Congress hanging in the balance, Democrats plan to use made-for-television moments and a carefully choreographed rollout of revelations over the course of six hearings . . . to persuade voters that the coming midterm elections are a chance to hold Republicans accountable for [January 6th].”⁴⁸ The partisan motivation of House Democrats shone in this primetime opportunity to

⁴⁷ President Trump's Exhibit 48, Ted Van Dyk, Jan. 6 Hearing Disappoints This Democrat, Wall Street Journal, June 12, 2022, available at: <https://www.wsj.com/articles/jan-6-hearing-disappoints-this-democrat-partisan-cheney-thompson-investigation-security-trump-11655038308> (last visited December 14, 2023).

⁴⁸ President Trump's Exhibit 49, Annie Karni and Luke Broadwater, Jan. 6 Hearings Give Democrats a Chance to Recast Midterm Message, The New York Times, June 7, 2022, [gesslerblue.com](https://www.gesslerblue.com)

grandstand. To underscore its partisan purpose, the House Democrats hired a television producer to orchestrate their hearings in order to maximize their political impact in the runup to the 2022 election.

If the political bent of the Select Committee was not already clear by the way it was formed and staffed, the conduct of the Committee in ensuring the achievement of the purposes of H.R. 503 further illuminates the issue. According to H.R. 503, the Select Committee had three purposes: 1) “To investigate and report upon the facts, circumstances, and causes relating to the January 6, 2021, domestic terrorist attack upon the United States Capitol Complex;” 2) “To examine and evaluate evidence developed by relevant Federal, State, and local governmental agencies regarding the facts and circumstances surrounding the domestic terrorist attack on the Capitol;” and 3) “To build upon the investigations of other entities and avoid unnecessary duplication of efforts by reviewing the investigations, findings, conclusions, and recommendations of other executive branch, congressional, or independent bipartisan or nonpartisan commission investigations into the domestic terrorist attack on the Capitol.” Instead, the “evidence” and “findings” of the January 6th Report focused almost exclusively on the conduct of President Trump before and after the General Election in 2020. Staffers intimately involved with the information-gathering arm of the Select Committee and the role information learned through the Select Committee’s

available at:

<https://web.archive.org/web/20230105192247/https://www.nytimes.com/2022/06/07/us/politics/jan-6-hearings-tv-democrats.html> (last visited December 14, 2023).

investigation played in the drafting of the January 6th Report have lamented “that important findings unrelated to Trump will not become available to the American public.”⁴⁹ Further, that certain information related to President Trump and useful to him in his ongoing legal matters is unavailable to both him and the public after the Select Committee’s failure to properly archive is concerning. It further highlights the underlying point that the Select Committee was only ever an exercise in political grandstanding culminating in a political hitjob against President Trump.⁵⁰

The January 6th Report, rooted in political bias and grandstanding aimed in part to secure a Democratic majority in Congress during the 2022 midterm elections is a poisonous tree under which Challengers intend to introduce allegedly damning evidence. As noted above, President Trump challenges this use of the January 6th Report and *all* documents, statements, reports, and videos cited by or derivative of that report.

⁴⁹ President Trump’s Exhibit 50, Jacqueline Alemany, Josh Dawsey and Carol D. Leonnig, Jan. 6 panel staffers angry at Cheney for focusing so much of report on Trump, The Washington Post, Nov. 23, 2022, available at: <https://www.washingtonpost.com/politics/2022/11/23/liz-cheney-jan-6-committee/> (last visited December 14, 2023).

⁵⁰ President Trump’s Exhibit 51, Catherine Yang, Trump Trying to Subpoena Records Missing From January 6 Select Committee Archives, The Epoch Times, Oct. 11, 2023, available at: https://www.theepochtimes.com/us/trump-trying-to-subpoena-records-missing-from-january-6-select-committee-archives-5508235?utm_source=Morningbrief&src_src=Morningbrief&utm_campaign=mb-2023-10-12&src_cmp=mb-2023-10-12&utm_medium=email&cta&utm_source=Morningbrief&est=5%2BJlyMJcrOKGUi2B32%2FyfcdMISXGc31irTxezMWPoFLWGt%2FYwpOGHC9rOxL8 (last visited December 14, 2023).

C. The Report and Excerpted Findings Contain Multi-Level Hearsay and Other Evidentiary Concerns.

The Report is also inadmissible because it contains multi-level hearsay under Maine Rule of Evidence 805 for which Challengers must find valid exceptions. As the Court in *Barry* noted, when a congressional report includes out-of-court statements that are also hearsay, hearsay within hearsay is present.⁵¹ “These other hearsay statements are admissible only ‘if each part of the combined statements conforms with an exception to the hearsay rule provided in’ the [] Rules of Evidence.”⁵² The January 6th Report quotes and relies upon hundreds of other reports, documents, videos, and third-party statements. *Each is hearsay.* Even if the Secretary of State were to admit the January 6th Report into evidence, it is still Challengers’ burden to overcome the multi-level hearsay objections President Trump makes here to each and every such subsidiary component of the report.

The Report that Challengers seek to admit is irrelevant, lacks foundation that Challengers could have developed in the record (but chose not to), is unauthenticated by the record in this case, and represents an improper attempt to get testimony not subject to cross-examination into the record. President Trump also objects to the findings from the January 6th Report Challengers seek to admit in Exhibit No. 77, which contains their own evidentiary issues and are inadmissible for the same reasons applicable to the untrustworthy and unreliable January 6th report: they come from an untrustworthy report, they contain

⁵¹ *Barry*, 467 F. Supp. 2d at 102.

⁵² *Id.*

numerous instances of hearsay, including hearsay within hearsay, they demonstrate improper legal conclusions, and the Select Committee out of which these “findings” emanate was politically motivated to do the work it believed the Senate—whose constitutional duty it was to try President Trump for incitement of insurrection—failed to do. Not one member who had not already registered a determination—by voting to impeach President Trump or issuing a statement condemning President Trump for his specific actions on January 6—that President Trump was at fault for the events of January 6 was allowed to sit on that committee. President Trump hereby incorporates all of his arguments regarding the January 6th Report’s inadmissibility here.

The January 6th Report contains hundreds of “findings” that Challengers provide no evidence to support or that contain hearsay in and of themselves. Many of these findings also rely upon evidence that would be inadmissible in a court of law. Challengers must identify which portions of the Report upon which they seek to rely in order for President Trump to specifically challenge the admissibility of those portions and it is the Challengers’ burden to demonstrate that the portion they seek to admit is admissible. However, to orient the Secretary on these many issues, President Trump points to various findings from the Report that demonstrate his evidentiary concerns:

D. Specific Objections

The Report contained over 400 conclusions, and it is functionally impossible for President Trump to guess which conclusion the Challengers seek to rely on, and then draft

objections to every single conclusion in the course of three days. Nonetheless, President Trump has identified and objects to some of the most pertinent conclusions, as follows:

1. Beginning election night and continuing through January 6th and thereafter, Donald Trump purposely disseminated false allegations of fraud related to the 2020 Presidential election in order to aid his effort to overturn the election and for purposes of soliciting contributions. These false claims provoked his supporters to violence on January 6th.

This finding is speculation and opinion, not fact. Second, it is hearsay. Third, it contains hearsay within hearsay because the statement incorporates sources of information that seek to prove the truth of the matter asserted. Fourth, it is not relevant under Rule 402 because it does not tend to prove that President Trump engaged in an insurrection or provided aid or comfort to enemies on January 6, 2021. Fifth, if offered, it would be improper character evidence against President Trump. Sixth, it contains improper legal conclusions made outside of this administrative setting.

2. Knowing that he and his supporters had lost dozens of election lawsuits, and despite his own senior advisors refuting his election fraud claims and urging him to concede his election loss, Donald Trump refused to accept the lawful result of the 2020 election. Rather than honor his constitutional obligation to “take Care that the Laws be faithfully executed,” President Trump instead plotted to overturn the election outcome.

This finding contains the same issues noted above in the first specific objection.

3. Despite knowing that such an action would be illegal, and that no State had or would submit an altered electoral slate, Donald Trump corruptly pressured Vice President Mike Pence to refuse to count electoral votes during Congress’s joint session on January 6th.

This finding contains the same issues noted above in the first specific objection.

4. Donald Trump sought to corrupt the U.S. Department of Justice by attempting to enlist Department officials to make purposely false statements and thereby aid his effort to overturn the Presidential election. After that effort failed, Donald Trump offered the position of Acting Attorney General to Jeff Clark knowing that Clark intended to disseminate false information aimed at overturning the election.

This finding contains the same issues noted above in the first specific objection.

5. Without any evidentiary basis and contrary to State and Federal law, Donald Trump unlawfully pressured State officials and legislators to change the results of the election in their States.

This finding contains the same issues noted above in the first specific objection. Further, it contains conclusions that must be supported by evidence Challengers successfully introduce showing that President Trump’s pressure upon “state officials and legislators” was “unlawful.” They must specify any state or federal law that might prohibit such behavior and why President Trump’s speech was not protected by the First Amendment.

6. Donald Trump oversaw an effort to obtain and transmit false electoral certificates to Congress and the National Archives.

Jan. 6th Report at 4. This finding contains the same issues noted above in the first specific objection. Further, it contains conclusions that must be supported by evidence Challengers successfully introduce showing that President Trump “oversaw” an effort to obtain and transmit alternate slates of electors and that any potential alternate slate of electors gave rise to “false electoral certificates.”

7. Donald Trump pressured Members of Congress to object to valid slates of electors from several States.

This finding contains the same issues noted above in the first specific objection. Further, it must be supported by evidence Challengers successfully introduce showing that the slate of electors that President Trump encouraged various Members of Congress to object to were “valid.”

8. Donald Trump purposely verified false information filed in Federal court.

This finding contains the same issues noted above in the first specific objection.

9. Based on false allegations that the election was stolen, Donald Trump summoned tens of thousands of supporters to Washington for January 6th. Although these supporters were angry and some were armed, Donald Trump instructed them to march to the Capitol on January 6th to “take back” their country.

This finding contains the same issues noted above in the first specific objection.

10. Knowing that a violent attack on the Capitol was underway and knowing that his words would incite further violence, Donald Trump purposely sent a social media message publicly condemning Vice President Pence at 2:24 p.m. on January 6th.

Jan. 6th Report at 5. Although the tweet itself would be admissible, the remainder is inadmissible for the reasons stated above in the first specific objection. This finding purports to know what President Trump knew, which is an impossibility without his presence before the Select Committee. Further, whether President Trump’s words “would incite further violence” is a legal conclusion.

11. Knowing that violence was underway at the Capitol, and despite his duty to ensure that the laws are faithfully executed, Donald Trump refused repeated requests over a multiple hour period that he instruct his violent supporters to disperse and leave the Capitol, and instead

watched the violent attack unfold on television. This failure to act perpetuated the violence at the Capitol and obstructed Congress's proceeding to count electoral votes.

This finding contains the same issues noted in the first specific objection above. Further, this finding attempts to claim knowledge about what President Trump knew, and when, without any basis to make such a claim. Further, whether President Trump received "repeated requests over a multiple hour period" is hearsay. Finally, Challengers must introduce evidence indicating that President Trump's "failure to act" perpetuated the "violence at the Capitol" or otherwise "obstructed Congress's proceeding to count electoral votes."

12. Each of these actions by Donald Trump was taken in support of a multi-part conspiracy to overturn the lawful results of the 2020 Presidential election.

This finding contains the same issues noted in the first specific objection above. Whether a "conspiracy" existed is a legal conclusion for which Challengers must introduce evidence to support.

13. The intelligence community and law enforcement agencies did successfully detect the planning for potential violence on January 6th, including planning specifically by the Proud Boys and Oath Keeper militia groups who ultimately led the attack on the Capitol. As January 6th approached, the intelligence specifically identified the potential for violence at the U.S. Capitol. This intelligence was shared within the executive branch, including with the Secret Service and the President's National Security Council.

This finding contains the same issues noted in the first specific objection above.

14. Intelligence gathered in advance of January 6th did not support a conclusion that Antifa or other left-wing groups would likely engage in a violent counter-demonstration, or attack Trump supporters on

January 6th. Indeed, intelligence from January 5th indicated that some left-wing groups were instructing their members to “stay at home” and not attend on January 6th. Ultimately, none of these groups was involved to any material extent with the attack on the Capitol on January 6th.

This finding contains the same issues noted in the first specific objection above. whether Antifa’s involvement in the events of January 6th were “material” is a legal conclusion for which Challengers must present supporting evidence.

Throughout the Report, statements from President Trump’s advisors and associates at the time are cited and quoted to establish findings. But findings citing those sources cannot be statements of a co-conspirator because Challengers have not alleged a conspiracy to engage in insurrection. Similarly, government reports cited and quoted to establish findings do not always show what agency, group, or source gathered or submitted the “intelligence” in question. They are also hearsay. And assuming that some report would have been available to President Trump, like a summary of a report that does not show the full context, does not show one’s state of mind. Further, many of the findings are needlessly cumulative and often irrelevant, especially where they mention “far-right extremist groups” with which President Trump had no communications. The actions of those groups have no bearing on President Trump’s state of mind or his intent on January 6th. Additionally, the Select Committee took many of President Trump’s statements out of context and without reference to further statements President Trump made asking those gathered in D.C. to be “peaceful” and to “go home.” The Report also relies on transcribed interviews and depositions, which present their own hearsay issues. Lastly, the Report uses the word

“believes” and improperly speculates throughout the Report, which must lead the Secretary of State to conclude these findings are speculative at best. If Challengers wish to admit each of the findings into evidence, they must overcome this omnibus hearsay objection and demonstrate each finding fits into a proper exception. That, ultimately, is Challengers’ burden.

II. PRESIDENT TRUMP’S OTHER EVIDENTIARY OBJECTIONS.

President Trump also objects to the following categories of evidence Challengers seek to admit: documents and evidence imported into this proceeding from *Anderson v. Griswold* and *New Mexico ex rel. White v. Griffin*; videos, photographs, and associated transcripts; and other evidence. President Trump also specifically objects to any piece of evidence touching on his statements and speech.

A. Documents and Evidence Imported into this Proceeding from *Anderson v. Griswold* and *New Mexico ex rel. White v. Griffin* (Challengers’ Exhibit Nos. 8-36, 84-85; Intervenor Exhibit Nos. 1-24; Intervenor Maine Letter; Intervenor Sherman Affidavit).

President Trump makes an omnibus objection to the mound of documents and evidence Challengers and Intervenor seek to import into this hearing from the proceeding in *Anderson v. Griswold*. It is highly improper for the Secretary of State to rely on such evidence that has merely been transplanted into this case. Indeed, in 2017, the Maine Supreme Judicial Court ruled that the “doctrine of judicial notice... does not, however, open the door to the consideration of testimony and exhibits offered in separate proceedings [because a] clear line of demarcation exists between the fact that a pleading, docket entry, or order exists in separate proceedings—all of which are subject to judicial notice if germane to an issue in gesslerblue.com

later judicial proceedings—and the actual evidence submitted in the earlier proceedings.”⁵³

“A court may incorporate evidence submitted in earlier, separate proceedings by agreement of the parties, or admit pertinent findings made in a different proceeding if those findings meet the requirements of collateral estoppel, but it cannot... import and rely upon evidence presented in an earlier judicial proceeding.”⁵⁴

Furthermore, while *Anderson* is on appeal to the Colorado Supreme Court, the trial court there still found that Section Three did not apply to the President of the United States, making President Trump the winner of that proceeding. Res judicata and collateral estoppel principles should keep Challengers from introducing this evidence against him.⁵⁵ Additionally documents from the proceeding in Colorado are irrelevant to the proceeding here, which was filed by Maine voters, not Colorado voters. Some of these documents, like the Final Order the trial court judge issued in Colorado, which contains large amounts of dicta not relevant to the decision’s holding rejecting the attempt to disqualify President Trump from the ballot, as well as transcripts and videos of the proceedings, which consists of partisan argument and purported testimony not subject to cross-examination here, are not evidence at all. The same is true of the final order issued in *New Mexico ex rel. White v. Griffin*, No. D-101-CV-2022-00473, 2022 N.M. Dist. LEXIS 1 (N.M. Dist. Ct. Sep. 6, 2022), appeal dismissed, No. S-1-SC-39571 (N.M. Nov. 15, 2022). All of this is also hearsay.

⁵³ *Cabral v. L’Heureux*, 2017 ME 50, P11.

⁵⁴ *Id.*

⁵⁵ *Id.*

B. Videos, Photographs, and Associated Transcripts (Challengers Exhibit Nos. 6, 38-59, 61, 63, 65-76, 87).

Each of these exhibits is irrelevant, lacks proper foundation not supported by testimony at this hearing, and is unauthenticated by the record here. For example, Exhibit No. 6 is merely video from President Trump's inauguration. There is no explanation regarding why such an exhibit is necessary to the proceedings in this matter. Moreover, the footage in this section spans the course of years, with many dating as far back as 2015 and 2016. Videos containing footage of President Trump's rally speeches are not relevant to a proceeding concerning the events of January 6, 2021, especially when President Trump's words in those speeches and discussions are protected by the First Amendment. Nor are President Trump's words at a CNN town hall event that occurred after January 6, 2021.

Additionally, Exhibit No. 59, video of Gabriel Sterling during a press conference in December 2020, is clear hearsay. Other footage Challengers seek to introduce, like Exhibit Nos. 61 and 65-75, are incomplete and misleading. That incomplete and misleading footage leaves out necessary context which the Secretary of State will not have if she admits these exhibits into evidence. Also, Exhibit Nos. 51 and 87 are derivative of the biased and unreliable January 6th Report that is rife with hearsay issues, which President Trump has already explained should not be admitted into evidence. Those exhibits also contain multi-level hearsay not within any exception. Next, Exhibit No. 51 is heavily edited and produced and represents an improper attempt to get testimony not subject to cross-examination into the record. Lastly, Exhibit No. 87 is duplicative.

C. Other evidence.

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Exhibit No. 37 is irrelevant, lacks foundation not supported by testimony, is not authenticated by the record, and touches on speech protected by the First Amendment. Exhibit No. 60 is irrelevant to the proceedings here and is hearsay in itself. Exhibit No. 62 is irrelevant, lacks foundation not supported by testimony, unauthenticated by the record, is hearsay, contains multi-level hearsay not within any exception, is an unreliable product of a partisan political exercise, and an improper attempt to get testimony not subject to cross-examination into the record. Further, Exhibit No. 80 is irrelevant, lacks foundation not supported by testimony, not authenticated by the record, and touches on speech protected by the First Amendment. Exhibit 81 is taken from another proceeding, is irrelevant, and is not actual evidence but merely a legal conclusion that is not properly the subject of expert evidence. Exhibit Nos. 78-79 and 82-83 are irrelevant to this proceeding. Lastly, Exhibit No. 86 is also irrelevant, is inadequately supported expert testimony, touches on speech protected by the First Amendment, and represents an improper attempt to introduce testimony not subject to cross-examination.

D. President Trump’s First Amendment Concerns.

Challengers and Intervenor seek to introduce exhibits containing President Trump’s speech in an attempt to establish a pattern of conduct and incitement. But President Trump’s statements are protected by the First Amendment and may not properly be considered as evidence against him. Even if “engage” includes “incite” –which President Trump does not concede—Section Three can (and therefore must) be harmonized with First Amendment rights protecting political speech under the *Brandenburg* standards. Speech

cannot be punished as incitement unless it (1) “advoca[tes] the use of force or of law violation,” (2) is “directed to inciting or producing imminent lawless action,” and (3) is “likely to incite or produce such action.”⁵⁶ All three elements must be met: “the speaker’s intent to encourage violence (second factor) and the tendency of his statement to result in violence (third factor) are not enough to forfeit First Amendment protection *unless the words used specifically advocated the use of violence . . .*”⁵⁷ Thus, a court must evaluate the content, form, and context of speech.⁵⁸ Foremost is the objective content of the speech— where speech is protected, “its setting, or context, [can] not render it unprotected.”⁵⁹ Intent is important, but only as an additional hurdle,⁶⁰ not as a substitute for the required focus on the words themselves; tests focusing on a speaker’s intent or the effect on listeners—rather than the speaker’s words—are prohibited.⁶¹

⁵⁶ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁵⁷ *Nwanguma v. Trump*, 903 F.3d 604, 611 (2018) (emphasis added); accord *Hess v. Indiana*, 414 U.S. 105, 107-109 (1973).

⁵⁸ *Snyder v. Phelps*, 562 U.S. 443, 453-54 (2011).

⁵⁹ *Nwanguma*, 903 F.3d at 612.

⁶⁰ *Counterman v. Colorado*, 600 U.S. 66, 76-78 (2023).

⁶¹ *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468-69 (2007) (“A test focused on the speaker’s intent could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another.”); accord 551 U.S. at 492-495 (the “fundamental and inescapable problem” with a test that is “tied to . . . a court’s perception of the import, the intent, or the effect of the [speech]” is “that these tests fall short of the clarity that the First Amendment demands”) (Scalia, J., concurring).

President Trump’s words were not as incendiary as language the Supreme Court has already protected as a matter of law.⁶² As a District of Columbia Circuit judge remarked last year, “you just print out the [President’s January 6] speech . . . and read the words . . . it doesn’t look like it would satisfy the [*Brandenburg*] standard.”⁶³ On January 6th, President Trump called for protesting “peacefully and patriotically,”⁶⁴ to “support our Capitol Police and law enforcement,”⁶⁵ to “[s]tay peaceful,”⁶⁶ and to “remain peaceful.”⁶⁷ This patently fails to meet the first element of *Brandenburg*. To rely on years of speech that long preceded President Trump’s January 6th speech breaks radically with First Amendment jurisprudence and creates a blatant double standard. In determining whether an individual has the specific intent required by *Brandenburg*, triers-of-fact may not consider years of speeches and statements made by the defendant, including to distinct audiences. The Secretary should examine the speech in the narrow context in which it was made and afford it the traditional protections, not create a different standard for President Trump by examining a curated

⁶² See *Claiborne*, 458 U.S. at 902 (“We’re gonna break your damn neck.”); *Hess*, 414 U.S. at 107 (“We’ll take the f[***]ing street again.”).

⁶³ Tr. of Argument at 64:5-7 (Katsas, J.), *Blassingame v. Trump*, No. 22-5069 (D.C. Cir. Dec. 7, 2022).

⁶⁴ President Trump’s Exhibit 27, Transcription of President Trump’s January 6, 2021, speech at the Ellipse, at 4.

⁶⁵ Exhibit 37 at 83.

⁶⁶ *Id.*

⁶⁷ *Id.* at 84.

compilation of speech going back years to seek to ascribe to his words a hidden meaning based on a constitutionally impermissible excursion into distant, unrelated speech to other audiences. This runs counter to *Wisconsin Right to Life's* injunction against an inquiry that leads to the “bizarre result” that what is “protected speech for one speaker” can lead to “penalties for another.”⁶⁸

Conclusion

For the reasons set forth herein, the Secretary of State should refuse to admit the evidence objected to in this brief.

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⁶⁸ 551 U.S. at 468-69.

Certificate of Service

I certify that on this 18TH day of December 2023, the foregoing was electronically served via e-mail on all parties and their counsel of record:

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