DISTRICT COURT **CITY AND COUNTY OF DENVER, COLORADO** 1437 Bannock Street, Room 256 Denver, CO 80202 Phone: (303) 606-2300	
NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and **CHRISTOPHER CASTILIAN**, **Petitioners**, v. **JENA GRISWOLD,** in her official capacity as Colorado Secretary of State, and **DONALD J. TRUMP** **Respondents**.	▲ COURT USE ONLY ▲
Attorneys for Respondent Donald J. Trump: Scott E. Gessler (28944), sgessler@gesslerblue.com Geoffrey N. Blue (32684), gblue@gesslerblue.com Gessler Blue LLC 7350 E. Progress Place, Suite 100 Greenwood Village, CO 80111 Tel. (720) 839-6637 or (303) 906-1050	Case Number: 2023CV32577 Division:
DONALD J. TRUMP'S SPECIAL MOTION TO DISMISS PURSUANT TO C.R.S. § 13-20-1101(3)(A)	

Certification under C.R.C.P. 121 § 1-15(8)

The undersigned counsel has conferred with the Petitioners' counsel regarding this motion, who oppose the relief requested.

INTRODUCTION

Petitioners' case is based solely on President Donald J. Trump's speech or lack of speech. Despite the First Amendment's protection of the rights of free speech and petition, Plaintiffs seek to use government power to prevent President Trump from becoming president again by claiming he "engaged" in and "instigated" an insurrection. To be sure, President Trump will separately seek dismissal of this case as a legal matter, because the Fourteenth Amendment applies to one who "engaged in insurrection or rebellion," not one who only "instigated" any action. But for purposes of this motion, controlling case law amply demonstrates that Trump's actual words were protected speech under the First Amendment, and he did not "instigate" any violence, insurrection, or rebellion.

ARGUMENT

I. This lawsuit is subject to this *Special Motion to Dismiss* under Colorado's anti-SLAPP statute.

In 2019, the Colorado General Assembly determined that it wanted "to encourage continued participation in matters of public participation and that [such] participation should not be chilled through abuse of the judicial process."[1] Therefore, to protect individuals who exercise their First Amendment rights "to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law," the General

[1] C.R.S. § 13-20-1101(1)(a).

Assembly enacted Colorado's Anti-SLAPP law.[2] The statute aims to balance the "constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government" with the "rights of persons to file meritorious lawsuits for demonstrable injury."[3]

In order to achieve that balance, "the statute creates a procedural mechanism that allows a district court to assess the merits of a lawsuit in its early stages and determine if it is nonmeritorious [sic]…."[4] As the Court of Appeals explained in *Creekside Endodontics*:

> The statute allows a person (usually a defendant) to file a special motion to dismiss "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States constitution or the state constitution in connection with a public issue." The trial court then "consider[s] the pleadings and supporting and opposing affidavits" to determine whether "the plaintiff has established that there is a *reasonable likelihood that the plaintiff will prevail on the claim.*"[5]

When the Court determines that the plaintiffs have not shown that they have a "reasonable likelihood" of succeeding on the merits, the Court must dismiss the action.[6] And to further protect a speaker's First Amendment rights, the statute awards a successful defendant attorney's fees incurred in bringing a special motion to dismiss.[7]

Resolving a special motion to dismiss involves a two-step process. First, the

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[2] C.R.S. § 13-20-1101(1)(b) (the "Statute"), "SLAPP" is short for Strategic Lawsuits Against Public Participation.

[3] *Id.*; *Salazar v. Pub. Tr. Inst.*, 2022 COA 109M, ¶¶ 11-12.

[4] *Creekside Endodontics v. Sullivan*, 2022 COA 145, ¶ 22.

[5] *L.S.S. v. S.A.P.*, 2022 CO 123, ¶ 21 (emphasis added)(citations omitted).

[6] C.R.S. § § 13-20-1101(3)(a).

[7] C.R.S. § § 13-20-1101(4)(a).

defendant must make "a threshold showing that the conduct underlying the plaintiff's claim falls within the scope of the anti-SLAPP statute—that is, that the claim arises from an act 'in furtherance of the [defendant's] right of petition or free speech . . . in connection with a public issue.'"[8] Second, the burden shifts to the Petitioners to establish a "reasonable likelihood of success on his claim."[9]

To assess a reasonable likelihood of success, the Court reviews "the pleadings and the evidence to determine 'whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment.'"[10] The Court does not "weigh evidence or resolve conflicting factual claims," but simply "accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law."[11] To make the necessary showing of a "reasonable likelihood of prevailing," a Plaintiff cannot rely on the mere allegations averred in the Complaint.[12] Instead, a Plaintiff must adduce "competent, admissible evidence" showing that he has a legally sufficient claim,[13] and must "meet the defendant's constitutional

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[8] *L.S.S.*, 2022 CO at ¶ 21 (quoting C.R.S. § 13-20-1101(3)(a)).

[9] *Salazar v. Pub. Trust Inst.*, 2022 COA 109M, ¶ 21. *See also McGarry v. Univ. of San Diego*, 154 Cal. App. 4th 97, 108 (2007).

[10] *L.S.S.*, 2022 COA at ¶ 23 (quoting *Baral v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016)).

[11] *L.S.S.*, 2022 at ¶¶ 23-24 (quoting *Baral*, 376 P.3d at 608) (emphasis added).

[12] See, e.g., *DuPont Merck Pharm. v. Super. Ct.*, 78 Cal. App. 4th 562, 568 (2000) ("to satisfy [its] burden under the second prong of the anti-SLAPP statute, it is not sufficient that [plaintiff's] complaint survive a demurrer" or motion to dismiss); *Church of Scientology of Cal. v. Wollersheim*, 42 Cal. App. 4th 628, 656 (1996).

[13] *Mindys Cosmetics v. Dakar*, 611 F.3d 590, 599 (9th Cir. 2010) (citation omitted).

defenses…."[14]

Finally, the Court must "take into consideration the applicable burden of proof in determining whether the plaintiff has established a likelihood of prevailing."[15] Petitioners must meet that burden, or the Court must dismiss this case.

II. Petitioners' claims all stem from President Trump's protected First Amendment rights.

The anti-SLAPP statute provides four non-exclusive examples of acts that are considered to be "Act[s] in furtherance of a person's right of petition or free speech … in connection with a public issue":

> **(I)** Any written or oral statement or writing made before a legislative, executive, or judicial proceeding or any other official proceeding authorized by law;
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> **(II)** Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body or any other official proceeding authorized by law;
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> **(III)** Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; or
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> **(IV)** Any other conduct or communication in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.[16]

President Trump's statements fall within these subsections.

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[14] *Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 359 (1995); *McGarry v. Univ. of San Diego*, 154 Cal. App. 4th 97, 108 (2007).

[15] *L.S.S.*, 2022 COA 123 at ¶ 42 (quoting *Annette F. v. Sharon S.*, 15 Cal. Rptr. 3d 100, 114 (Ct. App. 2004)).

[16] C.R.S. § 13-20-1101(2)(a).

All of Petitioners' claims against President Trump are premised on speech (or refusal to speak). At no time do Petitioners argue that President Trump did anything other than engage in either speaking or refusing to speak for their argument that he engaged in the purported insurrection. Their claims are based on allegations that he said things that made him a participant in the purported "insurrection";[17] incited other people to engage in the riot;[18] things he should have said to stop the riot;[19] involvement in planning his speech on January 6, 2021;[20] and positions he took in litigation.[21]

President Trump's speech concerned election fraud and the hard-fought 2020 Presidential election. And claims of fraud and a stolen election are the epitome of public issues.[22]

III. President Trump's statements fell well within First Amendment protection, and well outside of any instigation or incitement of violence.

President Trump satisfies the first prong of Colorado's anti-SLAPP statute, because the statute applies to Petitioners' claims. Petitioners must now meet their burden. But they cannot do this, because President Trump's actions were all protected by the First Amendment.

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[17] *See, e.g., Verified Petition*, ¶¶ 392-429.
[18] *Id.* at ¶¶ 402-419.
[19] *Id.* at ¶¶ 422-429.
[20] *Id.* at ¶¶ 98-107.
[21] *Id.* at ¶ 227.
[22] *Coomer v. Lindell*, 2023 U.S. Dist. LEXIS 43709, *13 (D. Colo. 2023).

"[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection."[23] Moreover, "[t]he arguably 'inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.'"[24] And, "[w]here the First Amendment is implicated, the tie goes to the speaker."[25]

A well-developed body of law exists to guide this Court in determining what type of speech is protected by the First Amendment, and what type of speech constitutes incitement to violence. The Supreme Court's test in *Brandenburg v. Ohio* precludes speech from being sanctioned as incitement to riot unless: (1) the speech explicitly or implicitly encouraged the use of violence or lawless action; (2) the speaker intends that his speech will result in the use of violence of lawless action; and (3) the imminent use of violence or lawless action is the likely result of his speech."[26] This test "helps prevent a law from deterring 'mere advocacy' of illegal acts—a kind of speech falling within the First Amendment's core."[27]

All of President Trump's speech about which Petitioners complain is constitutionally protected. President Trump's speech prior to January 6, 2021, fail *Brandenburg's* imminence requirement: it all took place well before January 6, 2021, before the assemblage of any

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[23] *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)) (quotation marks omitted).

[24] *Id.* at 453 (quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987)).

[25] *Fed. Election Comm'n v. Wisc. Right to Life*, 551 U.S. 449, 474 (2007).

[26] *Nwanguma v. Trump*, 903 F.3d 604, 609 (6th Cir. 2018) (quoting *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 246 (6th Cir. 2015) (en banc)).

[27] *Counterman v. Colorado*, 143 S. Ct. 2016, 2115 (2023).

crowd in Washington, D.C., and indeed before any rally or event had even been scheduled. Likewise, no evidence exists showing that speech prior to January 6, 2021, even contemplated any action on January 6, 2021, let alone encouraged people to engage in violence on that day.

And on January 6, 2021, President Trump's speech did not explicitly encourage violence or lawless action. Rather, he explicitly advocated non-violence, declaring "I know that everyone here will soon be marching over to the Capitol building to *peacefully and patriotically* make your voices heard."[28] As one federal court has explicitly found, "the President's words on January 6th did not explicitly encourage the imminent use of violence or lawless action."[29]

A. President Trump's speech prior to January 6, 2021, fails the imminence requirement.

The Petition recites at length statements by President Trump, beginning as far back as 2016.[30] But Petitioners' lengthy recitation of what they consider unflattering speech (often taken out of context) does not enable them to overcome First Amendment protections and punish President Trump for speech. To be sure, they attempt a narrative that President

[28] *See, generally,* Associated Press, *Transcript of Trump's speech at rally before US Capitol riot,* Associated Press (Jan. 13, 2021), https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-mediae79eb5164613d6718e9f4502eb471f27, last visited September 22, 2023. Petitioners cited to this transcript in their *Verified Petition* (*Verified Pet.*, ¶ 279).

[29] *Thompson*, 590 F. Supp. 3d at 115.

[30] *Verified Pet.*, ¶ 448.

Trump's speech was part of a deep, multi-year plan to incite insurrection. But they can cite nothing that actually meets applicable legal standards, and the fact remains that Trump's speech was not likely to result, imminently, in lawless action. It was therefore protected by the First Amendment.[31]

The imminence test "must require at least some showing of temporal imminence, lest the word be rendered linguistically incoherent,"[32] and "most commentators have had little or no trouble concluding that the Court's opinion in *Brandenburg* adopts a highly protective imminence test."[33]

After *Brandenburg*, the Supreme Court revisited "imminence" in *Hess v. Indiana*. There, the Court held that, because "there was no evidence, or rational inference from the import of the language, that [defendant's] words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State…."[34] As the Ninth Circuit concluded from *Hess*, "a state cannot constitutionally sanction advocacy of illegal action at some indefinite future time."[35]

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[31] *Nwanguma*, 903 F.3d at 609; *see also McCoy v. Stewart*, 282 F.3d 626, 631 (9th Cir. 2002).

[32] Calvert, 51 Conn. L. Rev. at 132, *citing* Martin H. Redish & Michael J.T. Downey, *Criminal Conspiracy as Free Expression*, *76 ALB. L. REV. 697, 730 (2012-2013)*

[33] Calvert, 51 Conn. L. Rev. at 132, *citing* Martin H. Redish, *Unlawful Advocacy and Free Speech Theory: Rethinking the Lessons of the McCarthy Era*, 73 U. CIN. L. REV. 9, 65 (2004).

[34] *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (emphasis added).

[35] *McCoy v. Stewart*, 282 F.3d 626, 631 (9th Cir. 2002) (internal quotes omitted).

More importantly, the Ninth Circuit noted that imminence required speech that advocated specific action. It held that the speech in question was "[f]ar from demonstrating a specific intent to further illegal goals; [the] speech appears to fit more closely the profile of mere abstract advocacy of lawlessness."[36] The court focused on a complete lack of evidence showing that the speaker advocated the commission of a crime.[37]

Here, Petitioners have not cited to a single statement by President Trump before January 6, 2021, advocating storming the capital or stopping the counting of the electoral ballots. And they cannot identify any such speech, because President Trump never made any statement advocating storming the Capitol or forcibly stopping the electoral vote count. Their theory regarding statements before January 6th appears to be that President Trump gradually undermined his supporters' inherent belief in the rule of law to the point that they were willing to break the law on January 6, 2021. But the Sixth Circuit has soundly rejected this theory of causation:

> Even the theory of causation in this case is that persistent exposure to the defendants' media gradually undermined Carneal's moral discomfort with violence to the point that he solved his social disputes with a gun. *This glacial process of personality development is far from the temporal imminence that we have required to satisfy the Brandenburg test.*[38]

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[36] *Id.*

[37] *Id.*

[38] *James v. Meow Media, Inc.,* 300 F.3d 683, 698 (6th Cir. 2002) (emphasis added) *citing Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 253 (2002).

For these reasons, President's Trump's statements prior to January 6, 2021, could not, under directly controlling Supreme Court precedent, incite or instigate anything. They don't meet the imminence test and fall well within protected speech under the First Amendment.

B. President Trump's speech prior to January 6, 2021, cannot be used to disqualify him from office because it did not incite the riot.

President Trump's statements before the January 6, 2021, speech are not actionable because none of those statements advocated violence or lawless action, including the riot that occurred on January 6, 2021. One searches in vain for a single statement advocating violence on January 6, 2021.

C. President Trump's speech on January 6, 2021, does not encourage the use of violence or lawless action.

President Trump's January 6, 2021, speech did not encourage the use of violence or lawless action.[39] The Petition quotes President Trump's January 6, 2021, speech, but, importantly, not a single statement in that speech advocated storming the Capital, rioting, or preventing the counting of the electoral votes.

Petitioners complain that President Trump discussed Vice-President Pence, stating his hope that the Vice-President would be courageous, do the right thing, and stand up for the Constitution:

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[39] *See, generally,* Associated Press, *Transcript of Trump's speech at rally before US Capitol riot,* (Jan. 13, 2021), https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-mediae79eb5164613d6718e9f4502eb471f27.

1. "I hope Mike is going to do the right thing. I hope so. I hope so. Because if Mike Pence does the right thing, we win the election";

2. "The states got defrauded … Now they want to recertify. … All Vice President Pence has to do is send it back to the states to recertify and we become president and you are the happiest people";

3. "I just spoke to Mike. I said: 'Mike, that doesn't take courage. What takes courage is to do nothing. That takes courage.' And then we're stuck with a president who lost the election by a lot and we have to live with that for four more years. We're just not going to let that happen";

4. "And Mike Pence is going to have to come through for us, and if he doesn't, that will be a, a sad day for our country because you're sworn to uphold our Constitution";

5. "[Pennsylvania] want[s] to recertify. But the only way that can happen is if Mike Pence agrees to send it back. Mike Pence has to agree to send it back";

6. "And Mike Pence, I hope you're going to stand up for the good of our Constitution and for the good of our country. And if you're not, I'm going to be very disappointed in you. I will tell you right now. I'm not hearing good stories"; and

7. "So I hope Mike has the courage to do what he has to do. And I hope he doesn't listen to the RINOs and the stupid people that he's listening to."[40]

None of the statements advocate, explicitly or implicitly, that the listeners attack Vice-President Pence or the Capitol. Petitioners want this Court to read into these statements things that were *not* said.

[40] *Verified Pet.* at ¶ 279.

Petitioners then challenge President Trump's exhortation to fight: "And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore"[41] to suggest that President Trump was "plausibly" encouraging his supporters to literally "fight."

In *Hess v. Indiana*, the Court found protected speech included the statement "[w]e'll take the f[***]ing streets later (or again)" while the speaker stood in front of a crowd of antiwar demonstrators after a number of demonstrators had just been forcibly removed from the street.[42] Similarly, in *Nwanguma*, the Court found that exhorting a crowd to "get 'em out of here" several times in reference to a protestor at a political rally was neither an explicit nor implicit exhortation to violence, particularly when coupled with the admonition "don't hurt 'em."[43] President Trump's actual words on January 6th are less inflammatory than those at issue in *Hess* or *Nwanguma*, and do not qualify as "implicit" incitement.

Petitioners also ignore the full textual context of President Trump's words, which the Supreme Court has admonished courts *not* to do.[44] President Trump's use of the word "fight" was clearly metaphorical, referring to a political "fight," not a literal fistfight or other violent interaction. For example, he stated, in reference to Rudy Giuliani, "He's got guts. He

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[41] *Verified Pet.* at ¶ 281. Plaintiffs highlight his words in the speech to make it seem like President Trump himself was emphasizing the words beyond normal.

[42] *Hess*, 414 U.S. at 107.

[43] *Nwanguma*, 903 F.3d 60, 611–12 (6th Cir. 2018).

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

fights, he fights."[45] No reasonable listener would understand that metaphorical statement to suggest that Mr. Giuliani, a 76-year-old man, was getting into fist fights. Similarly, President Trump referred to Jim Jordan and other Congressmen, stating "they're out there fighting. The House guys are fighting."[46] Rep. Jordan is no Preston Brooks – he is not caning people on the House floor; his "fight" is political. In reference to the press, President Trump stated "it used to be that they'd argue with me. I'd fight. So I'd fight, they'd fight, I'd fight, they'd fight. Pop pop. You'd believe me, you'd believe them. Somebody comes out. You know, they had their point of view, I had my point of view, but you'd have an argument."[47] President Trump did not engage in physical fights with the press—such "fights" were verbal sparring. Whatever political anger may exist, no one has plausibly claimed that President Trump and his antagonists in the press have come to physical blows. The verb "fight" has multiple meanings, only a few of which include a physical altercation. Historically, President Trump has consistently used the word "fight" to mean "to oppose the passage or development of"[48] or "to engage in a quarrel; argue,"[49] to use two commonly understood meanings. When read in context, President Trump's exhortation to "fight" is unambiguously

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[45] Associated Press, *Transcript of Trump's speech at rally before US Capitol riot* (Jan. 13, 2021), https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-mediae79eb5164613d6718e9f4502eb471f27.

[46] *Id.*

[47] *Id.*

[48] *Merriam-Webster.com Dictionary*, s.v. "fight," https://www.merriam-webster.com/dictionary/fight, last visited September 21, 2023.

[49] The American Heritage® Dictionary of the English Language, 5th Edition, available at https://www.wordnik.com/words/fight, last visited September 21, 2023.

a reference to applying political pressure, not engaging in illegal or violent activity, even absent his exhortation to the crowd to proceed "peacefully."

Ultimately, there is no implicit or explicit exhortation to violence in President Trump's speech.[50] The plain language of President Trump's speech was not "incitement" under *Brandenburg*.

D. President Trump did not intend for his supporters to interpret his speech as an incitement to violence.

Finally, President Trump's speech contains no indication that he intended his supporters to riot and invade the capital building. *Brandenburg* holds that before a court can penalize someone for their speech, they must show intent on behalf of the speaker.[51] Even statements that advocate the use of force or breaking of the law are protected absent such intent. No statement Petitioners cite in their Petition shows President Trump intended to encourage or incite his followers to riot, storm the Capital, and prevent the counting of the electoral votes.

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[50] Associated Press, *Transcript of Trump's speech at rally before US Capitol riot* (Jan. 13, 2021), https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-mediae79eb5164613d6718e9f4502eb471f27.

[51] *Brandenburg*, 395 US at 447 ("the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation *except where such advocacy is directed to* inciting or producing imminent lawless action and is likely to incite or produce such action." (emphasis added)).

The Supreme Court recently underscored the centrality of the intent component of the *Brandenburg* analysis when it made clear that even recklessness was insufficient to support an incitement claim:

> When incitement is at issue, we have spoken in terms of specific intent, presumably equivalent to purpose or knowledge. *See Hess*, 414 U. S., at 109, 94 S. Ct. 326, 38 L. Ed. 2d 303; *supra*, at 8. In doing so, we recognized that incitement to disorder is commonly a hair's-breadth away from political "advocacy"—and particularly from strong protests against the government and prevailing social order. *Brandenburg*, 395 U. S., at 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430. Such protests gave rise to all the cases in which the Court demanded a showing of intent. *See ibid.; Hess*, 414 U. S., at 106, 94 S. Ct. 326, 38 L. Ed. 2d 303; *Claiborne Hardware Co.*, 458 U. S., at 888, 928, 102 S. Ct. 3409, 73 L. Ed. 2d 1215. And the Court decided those cases against a resonant historical backdrop: the Court's failure, in an earlier era, to protect mere advocacy of force or lawbreaking from legal sanction. *See, e.g., Whitney v. California,* 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927); *Gitlow v. New York*, 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925); *Abrams v. United States*, 250 U. S. 616, 40 S. Ct. 17, 63 L. Ed. 1173 (1919). A strong intent requirement was, and remains, one way to guarantee history was not repeated. It was a way to ensure that efforts to prosecute incitement would not bleed over, either directly or through a chilling effect, to dissenting political speech at the First Amendment's core.[52]

None of President Trump's pre-January 6, 2021, statements show any intent to encourage his supporters to resort to violence, much less the "purpose or knowledge" that *Counterman* makes clear is required. It is true that President Trump used provocative language (although on January 6 he undisputedly admonished his listeners to proceed "peacefully and patriotically"), but provocative language is protected by the First Amendment.[53] Indeed,

[52] *Counterman*, 143 S.Ct. at 2118.
[53] *Brandenburg*, 395 US at 447.

Brandenburg specifically held that the First Amendment prevents government from punishing "advocacy of the use of force or of law violation *except where such advocacy is directed to* inciting or producing imminent lawless action and is likely to incite or produce such action." Here, President Trump's speech did not even approach advocacy of the use of force or a violation of law.

Further, even if the quoted portions of President Trump's January 6, 2021, speech were ambiguous as to whether he was advocating rioting, storming the Capital, or preventing the counting of the electoral ballots—and they are not—the full context of President Trump's speech shows that he was not doing so. Instead, he was advocating a peaceful march to the capital and a rally there. He stated:

1. Now, it is up to Congress to confront this egregious assault on our democracy. And after this, we're going to walk down, and I'll be there with you, we're going to walk down, we're going to walk down.

2. we're going to walk down to the Capitol, and we're going to cheer on our brave senators and congressmen and women, and we're probably not going to be cheering so much for some of them.

3. I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard.

4. Today we will see whether Republicans stand strong for integrity of our elections.

5. Today we see a very important event though. Because right over there, right there, we see the event going to take place. And I'm going to be watching. Because history is going to be made. We're going to see whether or not we have great and courageous leaders, or whether or not we have leaders that should be ashamed of themselves throughout history, throughout eternity they'll be ashamed. And you know what? If they do the wrong thing, we

should never, ever forget that they did. Never forget. We should never ever forget.

6. So I hope Mike has the courage to do what he has to do. And I hope he doesn't listen to the RINOs and the stupid people that he's listening to.

7. So we're going to, we're going to walk down Pennsylvania Avenue. I love Pennsylvania Avenue. And we're going to the Capitol, and we're going to try and give.

8. The Democrats are hopeless, they never vote for anything. Not even one vote. But we're going to try and give our Republicans, the weak ones because the strong ones don't need any of our help. We're going to try and give them the kind of pride and boldness that they need to take back our country.

9. So let's walk down Pennsylvania Avenue.[54]

At no point in any of these statements does he advocate, implicitly or explicitly, rioting, storming the Capital or preventing the counting of the electoral votes. He advocates being at the Capital to "cheer" on the Republicans who are on his side. He advocates "peacefully and patriotically" making their voices heard. He advocates giving the Republicans he considers weak, "the kind of pride and boldness that they need to take back our country." He also talks about "seeing" what the Senators and Congressmen will do. They would not "see" what the Senators and Congressmen would do if the plan were to invade the Capital and prevent the Senators and Congressmen from counting the electoral votes.

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[54] Associated Press, *Transcript of Trump's speech at rally before US Capitol riot* (Jan. 13, 2021), https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-mediae79eb5164613d6718e9f4502eb471f27.

In other words, both the plain text of the spoken words, and the words when read in context, make clear that President Trump is listing his policy and political grievances, and that he is *not* advocating violence or preventing the counting of the electoral ballots. He is advocating rallying at the Capitol to encourage the representatives to politically challenge the counting of the electoral votes. This is not anywhere near sufficient to prove the requisite intent to incite his listeners to violence or a violation of the law.

To prevail on their claims, Petitioners would have to come forward with affidavits showing that President Trump had that requisite intent, *i.e.,* "purpose or knowledge," to incite his listeners to violence or a violation of the law for their claims not to be barred under *Brandenburg* and its progeny. They cannot do so.

Under directly controlling Supreme Court Precedent, President Trump's words were not incitement.[55] They fall within First Amendment protections, and they do not and cannot constitute "engagement" in an insurrection or rebellion.

IV. Petitioners' claims also fail as a matter of law for other reasons.

As will be discussed in more detail in Respondent's Motion to Dismiss based upon the federal issues which will be filled pursuant to this court's orders, Petitioners will be unable to prove that there is a reasonable likelihood of success on their claims.

[55] *Brandenburg*, 395 US at 447.

A. The Ability to Determine Presidential Qualifications Rests with a Joint Session of Congress, Not State Elections Officials.

Over the last 15 years, there have been numerous lawsuits filed asking state elections officials and the courts to ensure the qualifications of Barack Obama, John McCain, and Kamala Harris or to challenge them outright. The Third Circuit, in an order issued during one such challenge, stated that this was a political question not within the province of the judiciary.[56] Multiple state and federal district courts have also ruled that lawsuits by citizens challenging presidential qualifications presented non-justiciable political questions.[57]

That makes sense because allowing individual state elections officials or courts from across the country to usurp Congress's role in determining presidential qualifications would sow unprecedented confusion and uncertainty. If Congress wanted states to play a part in determining the qualifications for president, it could have said so. It didn't. And in the

[56] *See Berg v. Obama*, 586 F.3d 234, 238 (3d Cir. 2009) ("We also denied that motion, reiterating Berg's apparent lack of standing and also stating that Berg's lawsuit seemed to present a non-justiciable political question.").

[57] *See e.g., Grinols v. Electoral College*, 2013 WL 2294885, *7 (E.D. Cal. May 23, 2013) ("These various articles and amendments of the Constitution make clear that the Constitution assigns to Congress, and not to federal courts, the responsibility of determining whether a person is qualified to serve as President of the United States. As such, the question presented by Plaintiffs in this case—whether President Obama may legitimately run for office and serve as President—is a political question that the Court may not answer."); and *Strunk v. New York State Bd. Of Elections*, No. 6500/11, 2012 WL 1205117, at *12 (Sup. Ct. Kings County NY Apr. 11, 2012) ("If a state court were to involve itself in the eligibility of a candidate to hold the office of President, a determination reserved for the Electoral College and Congress, it may involve itself in national political matters for which it is institutionally ill-suited and interfere with the constitutional authority of the Electoral College and Congress.").

absence of a delegation of express power to state elections officials to judge a presidential candidate's qualifications, and a clear process by which to do so, the result would be chaos. The California Court of Appeals' language in *Keyes v. Bowen*, 189 Cal.App.4th 647 (2010), is instructive:

> In any event, the truly absurd result would be to require each state's election official to investigate and determine whether the proffered candidate met eligibility criteria of the United States Constitution, giving each the power to override a party's selection of a presidential candidate. The presidential nominating process is not subject to each of the 50 states' election officials independently deciding whether a presidential nominee is qualified, as this could lead to chaotic results. Were the courts of 50 states at liberty to issue injunctions restricting certification of duly-elected presidential electors, the result could be conflicting rulings and delayed transition of power in derogation of statutory and constitutional deadlines. Any investigation of eligibility is best left to each party, which presumably will conduct the appropriate background check or risk that its nominee's election will be derailed by an objection in Congress, which is authorized to entertain and resolve the validity of objections following the submission of the electoral votes.[58]

Colorado's laws, like the laws of the rest of the states, do not, nor can they, allow for state election officials to determine if a presidential candidate has violated the Fourteenth Amendment. This Court should reject the Petitioner's request.

B. Petitioner is Unlikely To Prevail Because The Fourteenth Amendment Is Not Self-Executing When Used Offensively, And Congress Has Not Passed A Statute Authorizing Plaintiff To Bring This Claim.

Even if this Court had jurisdiction, and even if judicial action were not barred by justiciability concerns, the Fourteenth Amendment still is not self-executing and cannot be

[58] *Id.* at 660.

applied to support a cause of action seeking judicial relief absent enactment by Congress of a statute authorizing such action.

Among the arguments Petitioners analyze is the historical treatment of the issue by, among others, Chief Justice Chase and the Congress of 1870. Just one year after ratification, Chief Justice Chase, in a circuit court case, ruled that the Fourteenth Amendment was not self-executing.[59] In 1870, presumably in response to *Griffin*, Congress passed a law, entitled the "Enforcement Act of 1870," which allowed federal district attorneys to enforce the Fourteenth Amendment.[60] But the Enforcement Act did not give *state* election officials the authority to enforce the Fourteenth Amendment; it gave *federal* district attorneys that authority.[61] And in 1925, the Enforcement Act was repealed. In 2021, legislation was introduced to provide a cause of action to remove individuals from office who were engaged in insurrection or rebellion, but no further action was taken on that bill.[62] Chief Justice Chase's order and the subsequent legislative history shows that the Fourteenth Amendment is not self-executing and that it does not give secretaries of state the authority to remove a

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[59] *See In re Griffin*, 11 F.Cas. 7 (C.C.Va 1869).

[60] Elliott, Sam D., *When the United States Attorney Sued to Remove Half the Tennessee Supreme Court: The quo Warranto Cases of 1870,* 49 Aug Tenn. B.J. 20, 23-24 (August 2013) (quoting the relevant language from the statute). Ex. 1, Enforcement Act of 1870, § 14, p. 4, (downloaded from the Senate.gov website at https://www.senate.gov/artandhistory/history/resources/pdf/EnforcementAct_1870.pdf).

[61] *See Id.*

[62] *See* H.R. 1405, 117th Cong. 2021.

presidential candidate from the ballot for violations of Section Three of the Fourteenth Amendment.

C. Petitioners are unlikely to prevail because they have not alleged that President Trump violated any provision of Section 3 of the Fourteenth Amendment.

Assuming Petitioner's pleadings to be true and construing all reasonable inferences in the light most favorable to him, the Complaint on its face does not assert a cause of action. The sole legal basis in the Complaint for the requested relief is the allegation that President Trump provided "aid and comfort" to "insurrectionists."

It is matter of public record that President Trump was impeached by the 117th Congress for incitement of insurrection and that he was found ***not guilty*** of those charges by the Senate.[63] Even if all the facts in the Complaint were true, rebellion or insurrection is a federal crime, and no court in the United States has found President Trump guilty of 18 U.S.C. § 2383, nor has any prosecutor has filed an indictment against President Trump for the rebellion or insurrection under that statute.

Petitioners' entire case is based upon the argument that Trump somehow provided aid and comfort to an insurrection. The plain text of Sec. 3 of the 14th Amendment prohibits the holding of office by someone who "engaged in insurrection or rebellion" or

[63] *See* Impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors, H. 24, 117th Cong. (2021). A true and correct copy of the Senate vote of Not Guilty can be found at https://www.senate.gov/legislative/LIS/roll_call_votes/vote1171/vote_117_1_00059.htm, last visited June 19, 2023.

who has "given aid or comfort to the enemies" of the United States. Even if Plaintiff's theory that a President could be prohibited from holding office for giving aid to an insurrectionist was correct, not one of the 1,000+ people charged in connection with the riot at the Capitol on January 6th has yet even been charged—much less convicted—under 18 U.S.C. § 2383, the federal criminal statute that covers "insurrection."[64]

The Fourteenth Amendment does not disqualify President Trump from being President again should the American people choose to elect him.

CONCLUSION

Petitioners brought this case to punish and disqualify President Trump for his words. They seek to prevent him from serving as President because he dared to speak his mind and challenge the 2020 election. But the First Amendment does not permit a person's words to be used against him. As shown above, President's Trumps speech is protected by the First Amendment and does not constitute incitement to violence or illegal action, let alone an insurrection or rebellion. Colorado's anti-SLAPP statute was meant to protect those like President Trump, who speak out forcefully on public issues, but do not incite violence or other illegal behavior. Accordingly, the Court should grant this motion.

[64] *United States v. Griffith*, 2023 WL 2043223, *6 n. 5 (D. DC, Feb. 16, 2023) (finding that "no defendant has been charged with [18 U.S.C. § 2383]); Alan Feuer, *More Than 1,000 People Have Been Charged in Connection with the Jan. 6 Attack,* New York Times (Aug. 1, 2023).

FOR THESE REASONS, the court should dismiss the Petitioner, award Trump attorney fees for this action, and grant Donald J. Trump all such further relief as is just, proper or appropriate.

Respectfully submitted this 22nd day of September 2023,

GESSLER BLUE LLC

s/ *Geoffrey N. Blue*
Geoffrey N. Blue

Certificate of Service

I certify that on this 22nd day of September 2023, the foregoing was electronically served via e-mail or CCES on all parties and their counsel of record:

By: *s/ Joanna Bila*
Joanna Bila, Paralegal