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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**. and **COLORADO REPUBLICAN STATE CENTRAL COMMITTEE,** an unincorporated association, and **DONALD J. TRUMP,** **Intervenors.**	▲ COURT USE ONLY ▲
Attorneys for Respondent and Intervenor 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:

INTERVENORS' PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

1. Petitioners seek to disqualify President Trump from appearing on Colorado's Republican Party Presidential Primary Preference ballot. In seeking his disqualification, the Petitioners do not rely on President Trump's physical participation in the riots on January 6, 2021, but rather point to his public speeches and written communications. Americans across the political spectrum have reacted to President Trump's political communications in passionate and often polarizing ways. But the primary issue before the Court is narrowly focused on whether President Trump's public speech disqualifies him under Section Three of the First Amendment.

2. President Trump (and the Colorado Republican Party) have sought to dismiss this matter on multiple jurisdictional grounds. These arguments have raised weighty and important issues of first impression. To name only a few, they include standing, the textual interpretation of the Fourteenth Amendment, the self-executing nature of the Fourteenth Amendment, application of First Amendment speech standards, the nature of Congressional authority to implement a constitutional provision, the rights of political parties, and the separation of powers between the different governmental branches. Although the Court has uniformly ruled against President Trump and the Colorado Republican Party, they raise important issues, and the Court will therefore again address those issues in light of additional evidence and argument adduced at the five-day hearing.

3. There seems to be little dispute that January 6, 2021, witnessed violence at the Capitol. But the parties sharply agree as to the nature and extent of that violence, and most

importantly whether President Trump caused that violence. Here, the Court is called upon to determine whether President Trump "engaged in" that violence, and whether that violence constituted an "insurrection," as those terms are used in Section Three of the Fourteenth Amendment.

4. The Court recognizes that this matter has been a subject of intense national focus and controversy. And it recognizes that these important constitutional and policy issues have been litigated in an exceptionally compressed timeframe of less than two months, over the course of a five-day factual hearing, outside the normal application of the Colorado Rules of Civil Procedure. Nonetheless, the Court is required to place aside the passions raised by this case and dispassionately apply the law to the limited record in this case.

FINDINGS OF FACT

I. President Trump's Speeches and Tweets

1. On March 1, 2015, President Trump gave a speech in Louisville, Kentucky. During the video, President Trump's supporters are fighting protestors. Exhibit P123. President Trump specifically told his supporters, "don't hurt him." *Id.*

2. On November 21, 2015, President Trump spoke in Birmingham, Alabama. Exhibit P50. During his speech, he told the crowd about a protestor, "Get him the hell out of here." *Id.*

3. On November 22, 2015, President Trump spoke in a Fox News interview during which he talked about whether someone should be roughed up. Exhibit P48.

4. On February 1, 2016, President Trump gave a speech in Cedar Rapids, Iowa. Exhibit P51. During that speech, when a protestor was getting ready to throw a tomato at him, he told people to "knock the crap out of him." *Id.*

5. On Feb. 22, 2016, President Trump gave a speech in Las Vegas, Nevada. P52. During that speech he said, "I love the old days;" "We're not allowed to throw punches." *Id.*

6. On March 11, 2016, President Trump gave a speech in Palm Springs, Florida, at which he talks about protestors being violent and loud. Exhibit P53.

7. On August 9, 2016, President Trump gave a speech in Wilmington, North Carolina. Exhibit P 159. During the speech he discussed Hilary Clinton possibly winning the election and her desire to abolish the Second Amendment. He said that if she gets to pick the judges, there is nothing the crowd could do, "although the Second Amendment people – maybe there is, I don't know." *Id.*

8. On August 15, 2017, during a press conference, President Trump addressed the violence at the Unite the Right Rally in Charlottesville, Virginia. Exhibit P56. During that speech, President Trump made controversial comments regarding the protestors that were taken out of context. He referred to the protestors about the removal of a statute as having "people who were very fine people, on both sides." *Id.* Among other things, President Trump

stated during that speech: "And you had people — and I'm not talking about the neo-Nazis and the white nationalists — because they should be condemned totally. But you had many people in that group other than neo-Nazis and white nationalists. Okay? And the press has treated them absolutely unfairly." *Id.*

9. On October 18, 2018, President Trump spoke in Montana, during which speech he discussed a political candidate, Greg Gianforte "body-slamming" a reporter. Exhibit P57.

10. On October 23, 2015, President Trump gave a speech where he admonished the crowd regarding a protestor, "Get 'em out!" Exhibit P127. He further said, in relation to serial interruptions by protestors that after the first time, "I'll be a little more violent." And, he said, "Get the hell out of here." *Id.*

11. On May 8, 2019, President Trump gave a speech in Panama City, Florida. Exhibit P58. During that speech, someone in the crowd said, "Shoot them." *Id.* In response, President Trump said, "only in the Panhandle." *Id.*

12. On August 17, 2020, President Trump gave a speech in Minnesota during which he stated that he would "only lose if the election is rigged." Exhibit P61.

13. On August 24, 2020, President Trump gave a speech in Charlotte, North Carolina, during which he discussed having "12 more years" and "16." Exhibit P62. He also discussed that there are 80 million ballots outstanding and that his campaign was spied upon. *Id.*

14. On September 23, 2020, President Trump gave a White House briefing at which he said, in response to whether there would be a peaceful transfer of power, "gotta see what happens." Exhibit P64.

15. On October 31, 2020, President Trump retweeted a video of his supporters surrounding the Biden-Harris bus in Texas. Exhibit P71.

16. On November 4, 2020, President Trump gave a speech from the White House where he talked about "we're winning everywhere," "we won Georgia," and that there was "fraud on our nation." Exhibit P47.

17. On December 1, 2020, President Trump retweeted a video of a statement by Gabriel Sterling regarding what was occurring in Georgia. Exhibit P148, at 27. President Trump's tweet said "Rigged Election. Show signatures and envelopes. Expose the massive voter fraud in Georgia. What is Secretary of State and @BrianKempGA afraid of. They know what we'll find!!!" *Id.*

18. On December 2, 2020, President Trump gave a speech from the White House during which he stated that the 2020 election involved "tremendous voter fraud." Exhibit P99.

19. On December 22, 2020, President Trump gave a speech from the White House during which he referenced his, "landslide win." Exhibit P100.

20. On December 19, 2020, President Trump retweeted a Worldwide Trump Supporters video. Exhibit P148, at 43.

21. During his speech on January 6, 2021, at the Ellipse (the "Ellipse Speech"), President Trump did not make any calls for violence. Exhibit P49.

22. There is no evidence that, during the Ellipse Speech, that President Trump intended his use of the term "fight" to encourage any violence—whether against an individual, whether as a group in a riot, whether against the police, or whether to storm the Capitol to stop the counting of the electoral ballots. Exhibit P49.

23. There is no evidence that President Trump intended his references to Vice President Pence to encourage violence. Exhibit P49.

24. President Trump did not call for violence of any kind in the Ellipse Speech.

25. In the Ellipse Speech President Trump did not show the specific intent to encourage the listeners to storm the Capitol and stop the counting of the electoral votes. Exhibit P49.

26. In a Tweet at 2:38 PM on January 6, 2021, President Trump said "Please support our Capitol Police and Law Enforcement, They are truly on the side of our Country. Stay peaceful!" Exhibit P148, at 83.

27. In a Tweet at 3:13 PM on January 6, 2021, President Trump said "I am asking everyone at the U.S. Capitol to remain peaceful. No violence! Remember, WE are the Party of Law & Order – respect the Law and our great men and women in Blue. Thank you!" *Id.*, at 84.

28. In a video statement by President Trump on January 6, 2021, at 4:03 PM, President Trump told the people at the Capitol that he "Know[s] your pain," and that they should "go home, need peace." Exhibit P68. President Trump's statement was appropriate for the moment, including the statement that he knows their pain as he was talking to an unruly crowd and trying to get through to them. Exhibit P68.

29. In a Tweet at 6:01 PM on January 6, 2021, President Trump said "These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever! Exhibit P148, at 84.

30. President Trump participated in a townhall on May 10, 2023, during which he said that his supporters do listen to him, and that Speaker Pelosi and Mayor Bowser were in charge on January 6, 2021, and did not do their jobs. Exhibit P134. This video is irrelevant as it has no probative value as to whether President Trump specifically intended to cause the attack on the Capitol and the interruption of the counting of the electoral votes on January 6. To the extent it is relevant, it shows President Trump rightly stating that Speaker Pelosi and Mayor Bowser failed to ensure that the Capitol was properly protected on January 6. *Id.*

31. The following videos produced by the J6 Committee are not original videos of what they purport to show. Because Petitioners did not offer a witness to explain what changes the Select Committee made to them and whether what they showed was a true and accurate depiction of what was occurring in them, they are unreliable and I will not accord them any weight: Exhibits P92, P94, P109, P166.

II. Speakers at the Ellipse

1. Ms. Katrina Pierson ("Pierson") worked on President Trump's re-election campaign as a "senior advisor" who "helped to oversee comms, media, and coalitions" and she explained that "Coalitions [are] basically grassroots – different organizations and entities that have a common purpose [that] typically get together for one cause." (TR. 11/01/2023, p. 270:12-20).

2. Pierson was responsible for vetting coalition members and, in so doing, made sure that the fringe elements of President Trump's supporters were not elevated. (TR. 11/01/2023, p. 271:8-17-20).

3. Women for America First, the group that organized the Ellipse event was run by Ms. Amy Kremer ("Kremer"), was not a fringe group and instead was "one of the pros." (TR, 11/01/2023, p. 273:14-24).

4. Kremer, they kept extremist elements off the stage at the Ellipse because they were known for sowing chaos and having over-the-top rhetoric. Kremers and Women for

America First were peaceful and just wanted to follow the constitutional process. (TR. 11/01/2023, p. 275:3-11).

5. Women for America First split off from a larger group because the other members of that larger group were to chaotic and extreme. Women for America First went on their own path and did bus tours, because that's what they had done for years, and their bus tour was called March for Trump. (TR. 11/01/2023, p. 275:20-25).

6. President Trump spoke to Women for America First, and not to any of the other groups on January 6 because it was the most peaceful and main-stream group. (TR. 11/01/2023 p. 279:6-11).

7. Both Pierson and Kremer did not want extremists such as Alex Jones, Ali Alexander, and Roger Stone to speak at the Ellipse on January 6. (TR. 11/01/2023 p. 281:4-11).

8. Pierson met with President Trump to discuss the speakers. President Trump removed all the extremists from the stage at the Ellipse and only wanted elected officials plus Kremer to speak, with Pierson introducing her. (TR. 11/01/2023 p. 293:8-11).

III. President Trump wanted National Guard available on January 6

1. Kash Patel testified regarding conversations with President Trump and President Trump's desire to have National Guard available on January 6.

2. The DOD timeline shows that on Sunday, Jan. 3, 2021, President Trump informed Acting Secretary of Defense Miller and Chairman of the Joint Chiefs of Staff Milley that he agreed with activating the Washington DC National Guard to support law enforcement on January 6. Exhibit P1027; (TR. 11/01/2023, pp. 205:5-206:25).

3. Patel remembered those discussions about utilizing National Guard forces for the upcoming protest. (TR. 11/01/2023, p. 212:1-3).

4. During this conversation, the President authorized 10,000 to 20,000 National Guardsmen and women to be utilized, if necessary, around the country to provide assistance to local law enforcement. (TR. 11/01/2023, p. 212:17-20).

5. Patel understood from that meeting was that President Trump had authorized the needed number of National Guard troops, and under the law, the President had completed the first part of a two-step process. (TR. 11/01/2023, p. 214:9-13).

6. On January 5, 2021, President Trump called Acting Secretary of Defense Miller and confirmed Patel's understanding that the President had authorized use of sufficient troops to "do what's required to protect the American people. (TR. 11/01/2023, p. 216:5-17). This confirmation, however, was superfluous because the President had already implemented the process required under the law. (TR. 11/01/2023 p. 216:23-25). Patel and other Department of Defense personnel did not discuss detailed operational planning with President Trump because those types of discussion usually do not occur, as they are handled

down the chain of command by people better positioned to do so. (TR. 11/01/2023, p. 217:4-21).

7. Patel attended a meeting with the FBI's Washington D.C. Field Office at some point between January 3, 2021, and January 6th, and at no point did the FBI, or anyone with the Department of Justice state that they needed additional, or different, authorization from the President. (TR. 11/01/2023, pp. 217:22-219:11).

8. Patel testified that it was President Trump's understanding, based on the advice of legal counsel, that he could not formally activate the National Guard without the D.C. Mayor's request. (TR. 11/01/2023, p. 222:11-18). Mayor Bowser, the D.C. Mayor, had written a letter (Exhibit P1028) explicitly declaring that she did not want Federal troops in D.C. (TR. 11/01/2023, pp. 222:22-25).

9. While Pierson was in with the President to discuss speakers at the Ellipse, President Trump told an aide, Max Miller that they should have 10,000 troops at the Capitol on January 6 to make sure that there were no problems. (TR. 11/01/23, 295: 2-17).

IV. Professor Simi's Expert Report

1. Simi testified that he identified "patterns" he said he "observed" in President Trump's communications were based on President Trump's public communications in speeches and tweets from 2015-2021. These public statements included a public rally where President Trump told the crowd to "get the protestors the hell out of there" (TR.

10/31/2023, p. 211:21-212:8); a 2016 rally where President Trump publicly said that the crowd should "knock the crap out of tomato throwers" if someone were hypothetically to throw a tomato at him (TR. 10/31/2023, p. 213:14-25); another 2016 rally where President Trump said someone should hypothetically be punched in the face (TR. 10/31/2023, p. 214:6-24); a 2018 rally where President Trump discussed another politician who had previously body-slammed a reporter (TR. 10/31/2023, p. 215:21-216:6); President Trump's "stand back and stand by" comment from a debate in 2020 (TR. 10/31/2023, p. 216:9-217:6); and President Trump's omission of explicitly condemning violence in 2020 when retweeting a video of the Assistant Secretary of State of Georgia expressing concern about threats he and his staff had received from third-parties (TR. 10/31/2023, p. 217:7-218:19). Simi testified that these examples constituted a pattern of encouraging and promoting violence and awareness on President Trump's part that acts of violence had occurred and that he was "basically endors[ing] and affirm[ing] the violence." (TR. 10/31/2023, p. 221:10-21). None of these statements explicitly endorsed actual violence.

2. Simi admitted that his standard for whether President Trump would be engaging in plausible deniability by saying "but don't hurt him" after saying "get that person out of there" about a protestor at one of his rallies depends on a prior pattern and context. (TR. 10/31/2023, pp. 200:25-201:18; 203:16-204:5). Simi admitted that President Trump saying "but don't hurt him" immediately after saying "get that person out of here" could be plausible deniability that was just an extension of a call to violence. (TR. 10/31/2023, pp. 203:22-204:10).

3. Simi interpreted President Trump's use of rhetoric as being different from other political speakers based on his understanding the relationship between President Trump and far-right extremists, which had "to be understood within a pattern that developed over multiple years." (TR. 10/31/2023, p. 76:6-13). President Trump's words were different from other politicians, claimed Simi, because "the meaning of words within that pattern, within that context, take certain shape" and "the same word, though in a different context without that pattern would obviously have different meanings." (TR. 10/31/2023, p. 76:9-17).

4. Simi testified that he considered President Trump's direct statements to his supporters to be nonviolent or peaceful to protestors at his rallies, such as saying "don't hurt him," after saying that protestors should be removed were an example of plausible deniability and were not genuine based on Simi's interpretation of the pattern of President Trump's conduct. (TR. 10/31/2023, p. 72:14-73:5).

5. Simi also testified that far-right extremists interpreted President Trump's disavowal of far-right extremists and racist or bigoted groups as not genuine and only an act of political cover that President Trump needed to do politically. (TR. 10/31/2023, p. 74:24-75:9; 75:16-22).

6. All of Simi's testimony was based on President Trump's protected speech and not any actions by President Trump.

7. Simi admitted that all of the "patterns" of speech and behavior that he saw President Trump engage in are normal patterns of political speech. (TR. 10/31/2023, pp. 141:7-142:9).

8. Simi admitted that in order to interpret the patters of behavior and speech that he identified required someone to be exposed to it for a period. Of time to being to understand those patterns and the amount of time need to understand those patterns will vary.

9. Simi testified that he President Trump explicitly included remarks condemning white supremacists, neo-nazis and the KKK when discussing the Charlottesville riot. (TR. 10/31/2023, pp. 162:17-165:1).

10. Simi admitted that he had no evidence regarding President Trump's intention regarding how his December 19, 2020, "will be wild" tweet should be interpreted. (TR. 10/31/2023, p. 205:12-23). Simi admitted that his expert opinion does not address the issue of President Trump's intent and that he is "not in President Trump's mind," and that all he was testifying about what the patterns he and other scholars had observed regarding far-right extremism and the relationship between President Trump and far-right extremists. (TR. 10/31/2023, p. 205:22-207:4).

11. Simi further admitted that his testimony was limited to noticing the consistency of patterns in President Trump's communication over time and how it was

interpreted by far-right extremists, and that President Trump's intent whether to mobilize people to violence on January 6th was beyond the scope of his opinion. (TR. 10/31/2023, pp. 206:20-207:4).

12. Simi admitted that he did not listen to all of President Trump's speeches since 2015 and did not listen to every word President Trump said in his speeches. (TR. 10/31/2023, p. 230:6-11). Simi admitted that "there may have been lots of . . . things [President Trump] said outside of [his] scope of review" that either endorsed violence or advocated peacefulness, but he did not know because he did not review them. (TR. 10/31/2023, p. 230:12-25).

13. Simi admitted that the examples he relied on in his testimony of President Trump's public statements that supposedly encouraged violence did not result in violence following imminently. Simi admitted that the 2015 rally did not have evidence of anyone "roughed up." (TR. 10/31/2023, pp. 232:15-233:3). Simi admitted that the 2016 rally where President Trump said to "knock the crap out of tomato throwers" did not have evidence of anyone having the crap knocked out of them. (TR. 10/31/2023, p. 233:4-17). Simi admitted that there was no evidence of violence after President Trump's 2018 comments about body slamming. (TR. 10/31/2023, p. 233:18-21).

14. Simi admitted that the pattern he claimed to observe of President Trump's encouragement and promotion of violence was solely based on President Trump's speech;

speech that did not result in immediate violence and which did not include any violent conduct by President Trump. (TR. 10/31/2023, pp. 233:25-234:14).

15. Simi did not take into account First Amendment standards in evaluating President Trump's speech.

V. An alternate view of the Capitol on January 6.

1. Mr. Tom Bjorklund ("Bjorklund") testified that on the morning of January 6th, he arrived in Washington D.C. to listen President Trump's speech at the Ellipse. (TR. 11/2/2023, p. 152:3-6).

2. Rather than watch President Trump's speech from inside the Ellipse, Bjorklund (along with his brother and his brother's friend, Steve) decided to watch from the Washington Monument area and were able to hear the speech because the speech's organizers had set up speakers. (TR. 11/2/2023, pp. 151:16-152:4).

3. Police Officer Daniel Hodges' ("Hodges") platoon was sent to the intersection of 11th and Constitution on the morning of January 6 to monitor the speech at the Ellipse. (TR. 10/30/2023, pp. 69:16-70:3).

4. Former United States Capitol Police Officer Winston Pingeon was assigned to the Civil Disturbance Unit ("CDU") on January 6th, 2021, and began his shift between 8:00

am and 9:00 am that day, and the CDU was staged in the truck tunnel along New Jersey Avenue and Constitution Avenue. (TR. 10/30/2023, pp. 188:21-189:2; 192:7-12).

5. The crowd at the Washington Monument and the Ellipse (shown in Exhibit 1001) was enormous – estimated by Bjorklund to be as large as 350,000 strong – and it was "very friendly," "diverse," and "really super nice." (TR. 11/2/2023, pp. 153:19-154:11).

6. When asked about the tenor of the crowd at the Ellipse when President Trump was speaking, Bjorklund testified that people were "just cracking up" because the President was saying "some really funny things." (TR. 11/2/2023, p. 158:20-25).

7. Representative Eric Swalwell ("Swalwell") testified that Vice President issued a "Dear Colleague" statement around 1:00 pm, explaining that he would not step outside what he thought his constitutional duties were regarding the counting of votes. (TR. 10/30/2023, p. 161:1-24).

8. Bjorklund listened to most of President Trump's speech but left "near the end" to find a bathroom. He did hear President Trump say that "he wanted us to go down to the Capitol, you know, peacefully make our voices heard, or something to that effect." (TR. 11/2/2023, p. 160:3-10).

9. Bjorklund decided to walk from the Washington Monument to the Capitol because he believed President Trump was going to give another speech from the Capitol. As he walked to the Capitol, which occurred around 2 o'clock, (TR. 11/2/2023, p. 168:18-19),

Bjorklund engaged in conversation with various people who were all "casually going towards the Capitol." (TR. 11/2/2023, pp. 165:3-166:24). The crowd casually going toward the Capitol from the Ellipse and the Washington Monument is shown in Exhibit 1007. (TR. 11/2/2023, p. 167:1-3).

10. The photos and videos taken by Bjorklund and put into evidence show that far from being an insurrection, the events of January 6th constituted a riot by a subset of the people who were in Washington D.C. on that day. Exhibits P1000-P1020. None of Bjorklund's videos and pictures show anyone committing violence – in fact, they primarily show hundreds of people simply milling about. *Id.*

11. As Bjorklund wandered towards the Capitol, he heard some explosions and thought "Hey, they're lighting off fireworks" that were "in honor of Trump speaking" although he didn't see any because, as he would learn later, they were tear gas. (TR. 11/2/2023, p. 172:15-25; p.174:8-10).

12. When Bjorklund was approaching the Capitol, he encountered a person with a megaphone directing people into the area of the Capitol where the police were shooting tear gas at protestors. While the man with the megaphone was "yelling, go into the – you know – go over there," but Bjorklund responded by saying "that's stupid" and he went to an area of the Capitol, shown in Exhibit P1012; (TR. 11/2/2023, p. 178:10-11), adjacent to where the man was directing him. (TR. 11/2/2023, pp. 175:3-176:22).

13. Bjorklund testified that he didn't see any violence from where he was standing aside from the "Capitol police…just shooting, you know, flash-bangs and stuff at people," but that the people hear him "were just standing there. They weren't moving towards the Capitol." (TR. 11/2/2023, p. 177:2-24).

14. Hodges testified that, while some members of the crowd were violent, that not every person in the crowd was violent and that he did not see any rioters with firearms. (TR. 10/30/2023, pp. 95:16-18; 75:15-76:2).

15. Hodges provided videos that were utilized by Petitioners, but those videos are of limited value. *See* Exhibits P10-19. While Hodges' videos do show violence, they do not help to inform the Court whether what occurred on January 6, 2021, was a riot or an insurrection. They do not show whether the rioters in the videos shared a common purpose with the people around them or with other people at the Capitol that day who were not in the videos. *Id.* They also do not provide the Court with any information about President Trump's intent and whether he intended for them to riot – whether the rioters inferred that President Trump wanted them to riot is not the same as President Trump inciting them to do so. Finally, the statements by the people in those videos are hearsay and are excluded.

16. Bjorklund also testified that, as he approached the Capitol, there weren't signs or anything indicating that he was not allowed to proceed closer to the Capitol. (TR. 11/2/2023, p. 320:7-12).

17. While Bjorklund was standing near the steps in front of the House of Representatives wing of the Capitol, he noted that Officers were "staggered" in a "formation" across the stairs blocking access to the Capitol building. (TR. 11/2/2023, pp. 289:20-291:2).

18. Bjorklund testified that the police who had been forming the barrier on the stairs to the House of Representatives wing of the Capitol "walked off the line" and "marched off," leaving only a couple of officers behind on the steps. (TR. 11/2/2023, p. 292:2-7). Immediately after the police who had been blocking the steps march off, Bjorklund heard a man ask one of the remaining police officers if he could go up and look in the window of the Capitol and the officer said "Sure. Go ahead." (TR. 11/2/2023, pp. 291:3-292:1).

19. After hearing the police give permission to walk up the stairs, Bjorklund did so, and he walked up to the Capitol and put his hand on the Capitol and prayed for our country. (TR. 11/2/2023, p. 292:11-19).

20. While standing at the top of the stairs near the entrance to the House of Representatives wing of the Capitol, Bjorklund witnessed "people beating on the windows" yelling "let us in." (TR. 11/2/2023, p. 293:5-15). In response, Bjorklund said "dude, not cool." (TR. 11/2/2023, p. 296:6-8).

21. Bjorklund kept watching the rioters trying to break the windows and "at one point they broke through the window…and they went through that window. And then, within…maybe three minutes, the big doors opened" and Bjorklund witnessed people going into and out of the Capitol. (TR. 11/2/2023, pp. 297:14-298:1).

22. Bjorklund did not go into the Capitol himself, and he saw one man and his son come out of the Capitol, and the man told him "its really cool in there, you should go in" to which Bjorklund responded by saying "Dude, there are cameras in there. And I don't think they want us in that building." (TR. 11/2/2023, p. 298:15-25).

23. Pingeon testified that he does not know how many members of the crowd that attacked the Capitol had attended the rally at the Ellipse, and in fact, wasn't able to tell if any particular person had attended the rally at the Ellipse at all, or whether any of the rioters had even read any tweet ever sent by President Trump. (TR. 10/30/2023, pp. 237:13-21; 238:5-8; 238:9-12).

24. Bjorklund testified that what was transpiring at the Capitol was not what he came there for and were doing things that he didn't agree with. He said that "it was very clear to me that this wasn't what – you know, what was planned. And I just felt like, you know, people were acting stupidly. And I really felt like – I felt like this actually was counterproductive to what Trump was trying to do." (TR. 11/2/2023, pp. 316:19-317:3).

25. Following this interaction, Bjorklund went back down the steps and stood near the police cars because he "felt like that was probably a safe place to be, rather than near where they were, you know, breaking windows" and he "didn't want to be any part of that." (TR. 11/2/2023, p. 299:6-13).

26. While Bjorklund was standing by the police cars, a "bunch of people [came] running down the stairs. And they said that they were shooting people inside the Capitol." However, Bjorklund "didn't believe them. [He] thought that was really stupid" and he sarcastically remarked that "Right. There's a little girl in the Capitol, and they shot her." (TR. 11/2/2023, p. 300:12-23). He thought that it "seemed absurd" because the people he could see were "milling about. They're nonviolent, you know, other than people breaking the windows." He "didn't see any weapons" and "the police told [them] that [they] could go up" the steps to the Capitol. (TR. 11/2/2023, p. 301:1-6).

27. At this point, Bjorklund received a call from his brother, who had stayed with the car at the Washington Monument and never came to the Capitol, and his brother wanted to know what was going on and told Bjorklund that "Trump said to be peaceful." (TR. 11/2/2023, p. 305:7-23).

28. Swalwell testified that he read the same message from President Trump and admits that the tweet said to support Capitol police and stay peaceful. (TR. 10/30/2023, pp. 181:14-23; 182:7-10). Swalwell further testified that President Trump had issued three tweets

containing statements encouraging peace between 2 and 3:30 pm and again around 6:00 pm. (TR. 10/30/2023, pp. 183:13-17; 183:19-184:2).

29. Bjorklund then left the Capitol and, as he was retracing his steps back to his car at the Washington Monument, he did not see any further violence, and he testified that at this point "everybody was just milling around. People were walking around the side that [he] had just come from, and…[he] didn't hear any more flash-bangs or tear gas or anything – but [they] were leaving because we got a text [saying] to leave." (TR. 11/2/2023, p. 308:11-22). The text to which Bjorklund was referring came from the D.C. Mayor and was "an emergency broadcast type of text" that "just came across [his] phone and it said, please leave the Capitol." (TR. 11/2/2023, p. 306:18-24).

30. After leaving the Capitol, Bjorklund walked back to his car at the Washington Monument, after which he went sightseeing and then departed Washington D.C. (TR. 11/2/2023, pp. 310:10-311:18).

31. Bjorklund, when asked if the people at the Capitol were "a mob sent by Trump to attack the Capitol building" responded that those were not the instructions that he got, and that "Donald Trump said to go down and peacefully make your voices heard" and many of the people at the Capitol were "clearly not doing that." (TR. 11/2/2023, p. 354:2-15).

VI. Previous disturbances at the Capitol.

1. During the summer of 2020, rioters during the Black Lives Matter riots attempted to breach the Capitol by braking through the barricades. (TR. 11/2/23, pp. 199:18-200:3).

2. In 2016, after a mass shooting, Democrats wanted to have gun control bills heard. (TR. 11/2/23, p. 200:4-13). Then Speaker Ryan refused to comply with Democrats' demands, so they occupied the floor of the Capitol and tried to intimidate Republicans and take control of their side of the floor. (*Id.* at 200:11-22). Democrats essentially shut-down the business on the floor that day (*Id.* at 201:3-5).

VII. The January 6th Select Committee and Report

1. 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—voted in favor of H. Res. 503. Nehls Decl. at ¶ 3

2. 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." *Id.* at ¶ 4. Thus, from the beginning, the Select Committee was designed to have an 8-5 imbalance that substantially favored the Democrat majority. *Id.*

3. 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. She also appointed Republican Rep. Cheney without any designation of position. *Id.* at ¶ 5.

4. Mr. Heaphy is a Democrat who was asked by House Democratic leadership to serve as Chief Investigator of the Select Committee. (TR. 11/2/2023, p. 150:16-24; 151:2-5; 207:20-22; 208:15-17).

5. 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. *Id.* at ¶¶ 6-7.

6. Nancy Pelosi stated that there would be five Republicans on the Select Committee. Within a week or ten days, she started naming the Democrats that would serve on the committee. Then-Minority Leader Kevin McCarthy, named five Republicans, but Speaker Pelosi denied the picks of Reps. Jim Jordan and Jim Banks. At that point, McCarthy withdrew all five names and refused to have anybody from the Republican Party sit on the committee. Nancy Pelosi first announced Rep. Liz Cheney would serve, then Rep. Kinzinger. (TR. 11/2/2023, pp. 207-208).

7. The five Republicans who Leader McCarthy assigned to the committee did not serve on the committee and did not share the views of Liz Cheney or Adam Kinzinger. (TR. 11/2/2023, p. 211:17-20).

8. Representatives Kinzinger and Cheney were the only Republicans who were placed on the Select Committee. (TR. 10/30/2023, p. 179: 15-19).

9. During President Trump's impeachment for the events of January 6th, only five percent of the Republican conference voted for impeachment. And Reps. Cheney and Kinzinger were two of the few Republicans who voted for impeachment. (TR. 11/2/2023, p. 210:3-6).

10. Indeed, every member on the committee voted for impeachment. In the House, the vote to impeach President Trump for his alleged incitement of insurrection garnered 54% of the vote with 46% opposed. Not a single member on the Select Committee was in the 46% who voted against impeachment. (TR. 11/3/2023, p. 197:10-12).

11. Reps. Cheney and Kinzinger did not represent the views of most of the Republican conference. (TR. 11/2/2023, p. 211:3-5).

12. Reps Kinzinger and Cheney were more aligned with the result Democrats were looking to achieve. With Reps. Kinzinger and Cheney as the Republicans on the Select Committee, it was not as adversarial or challenging for the evidence as it would have been if

the five members appointed by Leader McCarthy or others in the conference were allowed to sit on that committee. (TR. 11/2/2023, p. 214:8-18).

13. To Congressman Buck's knowledge, rejecting or refusing McCarthy's picks was not normal in the history of Congress. (TR. 11/2/2023, p 215:18-19). Typically, the process is for the minority party to be able to assign individuals/members to the committee assignments. (TR. 11/2/2023, p. 216:2-12). *See also* Nehl's Decl., ¶ 3, Exhibit C to Respondent and Intervenor Donald J. Trump's Motion in Limine to Exclude Petitioners' Anticipated Exhibits. In a public statement, then-Speaker Pelosi acknowledged that her refusal to appoint the members recommended by the then Minority Leader was an "unprecedented decision." *Id.* at ¶¶ 6-7. *See also* 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 Oct. 16, 2023).

14. There were no minority staff on the Select Committee when normally majority and minority staff are present. (TR. 11/3/2023, pp. 198:2-5; 198:9-10).

15. Members of the Select Committee made various statements following January 6, 2021, and leading up to their placement on the Select Committee, which demonstrates that they had already arrived at conclusions on President Trump's culpability. (TR.

11/3/2023, pp. 181:12-21; 184:6-9; 186:2-9; 189:10-21; 191:1-5). For example, on January 6, 2021, Chair of the Select Committee Bennie Thompson tweeted, "Trump fed this monster with his vile and dangerous talk." He also stated, "The events of today are the inevitable result of the tyrannical and idiotic leadership of Donald Trump" and "Former President Trump has to be held accountable for his actions that precipitated the riot at the U.S. Capitol on January 6." Exhibits 1084, 1085.

16. Statements like the above by other members of the Select Committee are reflected in Exhibits 1086, 1087, 1088, 1095, 1099, 1101, 1105, 1106, and 1108.

17. That Heaphey testified the members of the Select Committee could still be open-minded in their investigation will receive no weight.

18. The Select Committee was unusual in that normally members are not involved, but here members were involved in the day-to-day investigatory matters like participating in witness interviews and receiving up-to-the-minute reports on information learned. (TR. 11/3/2023, p. 153:2-14; 173:15-17).

19. The Select Committee was also unusually composed of attorney investigators when normally it is composed of non-partisan staff. (TR. 11/3/2023, pp. 151:14-18; 151:21-152:3; 152:7-15; 175:12-21). Most of the staff the Select Committee hired had never worked in Congress before. (TR. 11/3/2023, p. 152:19-24). Two hired attorney staffers also served

as private counsel to Rep. Cheney and Rep. Kinzinger, respectively. (TR. 11/3/2023, pp. 154:11-17; 174:7-12; 174:25-175:4).

20. From the outset, the Select Committee's processes were entirely political. Drawing upon his experience investigating the Iran-Contra affair, Rep. Buck noted that there was an adversarial system employed in that investigation that produced a minority report. He contrasted that with the January 6th Report at issue in this case, where there was no minority report because there was no minority. It was simply one viewpoint that was shared. (TR. 11/2/2023, p. 215:2-11).

21. While the Committee interviewed a large number of witnesses and reviewed many documents, the number of witnesses and documents do not make this committee more successful than others. (TR. 11/3/2023, p. 171:19-25).

22. Witnesses who disagreed with the Select Committee's narrative were not called, a minority report was not issued, and findings regarding failures of House security, intelligence, and communications problems that contributed to the events of January 6th were not included in the January 6th Report. Nehls Decl. at ¶ 9.

23. The evidence collected by the Select Committee was not subject to the adversarial process. (TR. 11/2/2023, p. 216:22-217:1).

24. Not only was the evidence not subject to the adversarial process, but the Select Committee departed from their practice of using original pieces of evidence and

instead combined different pieces of evidence it collected into one for use in public proceedings, dubbing police radio transmissions over silent Capitol police surveillance footage. (TR. 11/3/2023, p. 158:13-20).

25. Rep. Buck read parts of the January 6th Report and spoke to individuals who were alleged to have done things in the Report. Many of those people were not questioned. (TR. 11/2/2023, p. 217:10-16). Conversely, there were witnesses and documents that were not included in the Report, making it incomplete. (TR. 11/2/2023, p. 219:1-6).

26. The Report also failed to address Speaker Pelosi's and the House Sergeant at Arms' role in not having National Guard present on January 6, 2021. This information, in addition to more that was left out of the Report, would have been important to look at to be able to judge President Trump's actions and nonactions in this case. (TR. 11/2/2023, p. 218:2-10).

27. The Select Committee produced no minority report. Minority Reports generally provide the other side of the story and the context for what one side is alleging. It is important to have the full picture. (TR. 11/2/2023, p. 221:8-13).

28. The resolution of the Select Committee required production of a report addressing the facts and circumstances that gave rise to the attack on the Capitol and recommendations to try to prevent similar events in the future. (TR. 11/3/2023, pp. 156:2-7; 191:15-19). But the Report did not adequately address failures of law enforcement to prepare

against potential bad conduct leading up to and on the day of January 6, 2021.(TR. 11/3/2023, pp. 199-200; 203:23-24). Further, the Report did not arrive at a conclusion on whether President Trump was directly briefed about any of the intelligence available to law enforcement. (TR. 11/3/2023, p. 217:2-8).

29. The Report was also wrong on several issues. For example, Rep. Jordan stated that he received a subpoena and was in the process of negotiating a date for his testimony. The Select Committee never got back to his staff. In other words, he was willing to testify, but the Report says that he was unwilling to testify. (TR. 11/2/2023, p. 223:10-16). Rep. Jordan also sent legal analysis he did not draft regarding election decertification to Mark Meadows but was not advocating for decertification despite the Report stating that he was advocating for decertification. (TR. 11/2/2023, p. 224:1-6). Facts like these highlight that at every opportunity, the Select Committee took the opportunity to interpret facts in the worst possible light for its political opponents and was not taking an unbiased view of the facts.

30. In contrast to the un-asked questions, the questions that were asked by the Select Committee were designed to demonstrate President Trump's involvement and culpability on January 6th or to elicit answers that would demonstrate such involvement and culpability in the events of January 6th. (TR. 11/2/2023, p. 227:17-22). The process was not set up in a way that would elicit the whole truth in those hearings. (TR. 11/2/2023, p. 228:6-9).

31. Congressional proceedings are political, not a search for the truth. They seek to promote different political views and the members of congressional committees are chosen because they either raise a certain amount of money or engage in beneficial political activities. This process is not in any way similar to court proceedings. (TR. 11/2/2023, p. 348:9-20). The Select Committee was a political committee lacking the viewpoint of those that did not believe that President Trump committed an impeachable offense on January 6th and was biased from the beginning. (TR. 11/2/2023, p. 349:1-4).

32. Like most Congressional proceedings, the purpose of that report was political. And the political purpose was ultimately to win elections and to paint one side in as bad of a light as possible. That is why there is a minority report in an investigation like this. (TR. 11/2/2023, p. 229:4-12). Rep. Buck has served in Congress for nearly a decade and the political nature of these investigations is one of the reasons he looks forward to not returning to Congress. (TR. 11/2/2023, p. 247:8-11).

33. Cross-examination, in terms of the President's culpability, would have been important. (TR. 11/2/2023, p. 230:3-13). There were things that happened on January 6, 2021, that occurred outside of his scope of knowledge. (TR. 11/2/2023, p. 250:16-20).

34. Despite the Select Committee's claims of transparency, it did not post the questions they did not ask, the document they did not subpoena, and the witnesses they did not interview. (TR. 11/2/2023, p. 256:12-16).

35. The Select Committee withheld the identity of witnesses and transcripts. (TR. 11/3/2023, p. 160:8-15).

36. Speaker McCarthy issued a statement one year after the events of January 6, 2021:

> 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 committee's abuse of power that stains this institution today and will harm it going forward.
>
> *Id.* at ¶ 24.

CONCLUSIONS OF LAW

I. This Court declines to exercise jurisdiction under Section 1204.

1. In the *Omnibus Ruling on Pending Dispositive Motions*, the Court reserved for trial the question of whether the Secretary or the Petitioners have the authority to investigate or presumably enforce Section 3 of the Fourteenth Amendment. *Omnibus Ruling on Pending Dispositive Motions* (the "Omnibus Order"), Oct. 20, 2023, p. 16. The Court also reserved for trial a decision on how often and on what bases the Secretary excludes candidates based on constitutional deficiencies. *Id.* at 17.

2. In light of the testimony and additional information at trial, the Court declines jurisdiction under Section 1204.

3. Ms. Hilary Rudy, testifying on behalf of the Colorado Secretary of State, could not identify any situation in which the Secretary of State has ever engaged in the type of analysis this case is presents, i.e., whether a candidate for office qualifies to be the President of the United States based on constitutional provisions.

4. Ms. Rudy was unable to point to a single instance in which the Secretary excluded someone based on a disputed issue of qualifications. She only was able to point to the *Hassan v. Gessler*, 495 Fed. Appx. 947 (10th Cir. 2012). (TR. 11/1/23, p. 109:7-10). In that case, Mr. Hassan refused to sign the statement of intent, and, therefore, the Secretary did not have to evaluate whether Mr. Hassan actually met the qualifications to be President. (TR 11/1/23, pp. 142:19-143:2). In other words, this was not a case involving a dispute over qualification.

5. None of the statutory provisions of the Colorado Election Code, particularly C.R.S. § 1-4-1201 et seq. and § 1-1-113, give to the Colorado Secretary of State any authority to decide constitutional election qualifications. The Secretary does not investigate presidential candidate qualifications for office. (TR 11/1/2023, p. 115:4-11). Rather, her role is solely ministerial, to enforce the specific, nondiscretionary statutory requirements for election candidates particularly enumerated under the election code, such as, for example in some circumstances the requirement for a notarized statement of intent.

6. In asserting that the Secretary has the power to enforce Section Three, Rudy initially testified that state statute existed to "give effect to the federal qualifications for office." (TR 11/1/23, p. 133:11-20). But she could not cite to that statute and subsequently defaulted to a general view that "all of the qualifications and requirements for the presidential primary are contained within Article 12 – I'm sorry, within Part 12 of Article 4." (TR 11/1/23, p. 134:5-14).

7. The Secretary of State's authority in presidential primary elections is enumerated and defined carefully by statute; her responsibility is to either confirm that a candidate is affiliated with a party that is a "major political party" according to statute and is a bona fide candidate, pursuant to that party's rules, or to confirm that the candidate submitted a proper notarized candidate's statement of intent. C.R.S. § 1-4-1204(1)(b) and (c). In neither circumstance does the law vest in her any authority to determine the candidate's election qualifications.

8. No other provision in Part 12 of Article 4 holds that the Secretary is mandated to "give effect to the federal qualifications for office." Further, there is no provision in the Colorado Election Code that authorizes her to enforce Section Three.

9. Further, the Secretary's requirement that a candidate check boxes indicating eligibility in the statement of intent is not authorized by any state statute, rule, or regulation. (TR 11/1/23, p. 129:17-20).

10. Nonetheless, the statement of intent at issue in this case does not include a check box that refers to Section Three disqualifications, because the statement of intent does not contain an exhaustive list of qualifications. (TR 11/1/23, p. 114:12-19).

11. According to Rudy when evaluating the state's jurisdiction to enforce Section Three, the Secretary relies solely on a candidate's affirmation that he or she has complied with all laws. (TR. 11/1/2023, p. 135:12-20).

12. No provision in Colorado law gives the Secretary the power to decide constitutional requirements of political candidates. The evidence at trial, which demonstrated that the Secretary has never actually excluded a presidential candidate from the ballot for constitutional reasons, (TR. 11/1/2023, p. 109:7-10) also reflects the fact that no statutory provision gives the Secretary the authority to make any federal constitutional determinations.

13. Rather, the Secretary relies solely on a seemingly general power to enforce federal law, expressed in a catch-all candidate affirmation that the candidate has complied with all applicable laws. (TR. 11/1/2023, p. 114:20-22). Accordingly, the matter before the Court goes beyond implicating the Fourteenth Amendment. The core of this case is a Section Three under federal law.

14. Accordingly, this Court cannot provide the relief sought by Petitioners. It may only order the Secretary to act if the Secretary has a mandatory duty to act in a particular way under the Election Code. Because the petitioners have failed to identify such a duty, this proceeding must be dismissed.

15. Reinforcing this conclusion, Section 1204, which specifically governs presidential primaries, expressly reflects the authority of political parties, not the Secretary of State, to make determinations regarding whether a candidate is a bona fide candidate for office.

16. And finally, Section 1204's provisions are structurally incompatible with the kind of complex litigation required to litigate constitutional issues such as that posed by Section Three. Section 1204 states:

> No later than five days after the challenge [to a presidential primary candidate] is filed, a hearing must be held at which time the district court shall hear the challenge and assess the validity of all alleged improprieties. The district court shall issue findings off act and conclusion of law no later than forty-eight hours after the hearing.

C.R.S. § 1-4-1204(4).

17. Section 1204 mandates a hearing within five days, and a decision from this Court in 2 days. C.R.S. § 1-4-1204(4). Despite the parties' diligent efforts in this case, it has proven impossible to properly litigate the underlying constitutional issues in this case in five days. The *Verified Petition* was filed on September 6, 2023, and the hearing did not commence until October 30, 2023, instead of the statutorily mandated date of September 11, or 49 days after the five-day rule in Section 1204 expired.

18. These short timelines further demonstrate that Section 1204 imposes very limited and specific requirements on candidates, and that the short timelines in Section 1204 are adequate to adjudicate those limited, specific, requirements.

II. This Court declines to exercise jurisdiction over claims arising under Section Three.

A. Petitioners lack standing, because they have no concrete and particularized interest.

1. Petitioners have admitted, in a filing in the federal court, that they have no legal interest in the outcome of this case.

2. In opposing remand, Petitioners argued that their claim in this case was a "paradigmatic 'generalized grievance' … based on an "abstract injury" to the "generalized interest" of voters in "constitutional governance." **Exhibit B to Respondent's Motion to Dismiss filed September 22, 2023**, *Petitioners' Unopposed Motion to Remand, Anderson, et. al v. Griswold, et. al*, No. 1:23-cv-02291-PAB at 7 (Sept. 8, 2023). In fact, they base their standing solely on their status as "eligible electors" and Colorado law that purportedly gives them standing to sue. *Id.* at 8.

3. Petitioners previously withdrew their claim for declaratory relief, tacitly acknowledging that they lacked standing to assert that claim. And, I have determined in Conclusions of Law, Section I that this matter is not appropriately considered under the Colorado statutes that Petitioners contend allow them to assert standing on that basis and incorporate that showing by reference here. Petitioners brought this case pursuant to Section 1204, which is merely a procedural vehicle to address certain election related issues. This

case, however, is not appropriately brought under Section 1204, and therefore, this action is due to be dismissed for lack of standing.

B. Section Three does not apply to President Trump.

1. President Trump is not subject to Section Three, under which a person is disqualified only if he "previously [took] an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State . . . ." U.S. Const. amend. XIV, § 3. Because President Trump was never a congressman, state legislator, or state officer, Section Three applies only if he was an "officer of the United States." *Id.* But as that term was used in Section Three, it did not cover the President. Furthermore, Section Three can disqualify someone only if his oath was "to support the Constitution of the United States." *Id.* But the Constitution prescribes a different oath for President.

2. At the outset, Petitioners face an exceedingly high bar because Section Three does not list the President or Vice President as positions subject to disqualification. It lists Senators, Representatives, Presidential Electors, and "other officers of the United States." Well-established canons of constitutional interpretation reject this approach. Under the "Omitted-Case Canon," "[n]othing is to be added to what the text states or reasonably implies." Bryan A. Garner & Antonin Scalia, A Dozen Canons of Statutory and Constitutional Text Construction, 99(2) Judicature (2015), at 80. On its face, Section Three lists all federal elective positions except the President and Vice President. Thus, it does not reasonably imply inclusion of those two.

3. In addition, a word should be construed according to the company it keeps, and it should be read to be "of the same nature" as surrounding terms. *Id.* In this case, it is counterintuitive to read the final, general catch-all phrase "officer of the United States" as silently including the presidency. Lash, Kurt, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment* (Oct. 3, 2023), at 28. Available at SSRN: https://ssrn.com/abstract=.

4. The omission of "President" was not an oversight. In an early draft, Representative Samuel McKee introduced language that stated, "No person shall be qualified or shall hold the office of President or vice president of the United States, Senator or Representative in the national congress…." *Lash*, *supra*, at 9. But the final language of Section Three removed the reference to the "President or vice president." The legislative history thus shows that the drafters knew exactly what they were doing when they excluded the President and Vice President.

5. And this approach made sense—the positions of President and Vice President were already protected through the disqualifying provision applying directly to presidential electors—the very people who elected the President and Vice President.

6. Also, it makes sense because of who elects the President and Vice President and who elects the other elected officials. The President and Vice President are elected by all the states, whereas the other elected officials are elected solely by individuals within their states. The named elected officials could be elected solely by states (or subsets thereof) that seceded from the Union, and the drafters would want to prevent them from electing certain people to those positions. On the other hand, the President and Vice President, being

elected by the entire nation, do not present the same danger inasmuch as any influence by the Confederate states was outweighed by that of the Union states. For instance, in the election of 1860, President Lincoln won 180 electoral votes by winning only northern (Union) states, and the remaining states only accounted for 123 electoral votes. *See* https://guides.loc.gov/presidential-election-1860. Also, regardless of this electoral power, the national election would remove the disqualification in the same way that Section 5 provides that power to Congress.

7. The Court can take judicial notice of the electoral votes of each state and the information presented by the Library of Congress pursuant to C.R.E. 201. The number of electoral votes of each state "is capable of ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See* C.R.E. 201(b). The link above provides "the necessary information" for the Court to determine those electoral votes.

8. Another textual argument supports the conclusion that the President is not included in the Section 3 disqualification. Section 3 lists the positions insurrectionists are disqualified from holding in descending order from the highest positions they cover (senators and representatives) to the lowest (officers of the states): "No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State." U.S. Const. amend. XIV, § 3. It makes no logical sense to *exclude* the Presidency from the enumerated list only to include the Presidency obliquely in a generic reference to "any office" toward the end of the

list. The Presidency is the most important elected position of the United States, and the Presidency would be included explicitly if the drafters intended it to be.

9. The phrase "Officers of the United States," as used in the Constitution of 1788, does not refer to elected positions. *See* Josh Blackman & Seth Barrett Tillman, *Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?*, 15(1) N.Y.U. J.L. & LIBERTY 1 (2021). This established meaning had not changed by 1868, when the Fourteenth Amendment was ratified. *Id.* Shortly following ratification of Section Three:

> In 1876, the House of Representatives impeached Secretary of War William Belknap. During the trial, Senator Newton Booth from California observed, "the President is not an officer of the United States." Instead, Booth stated, the President is "part of the Government." Two years later, David McKnight wrote an influential treatise on the American electoral system. He reached a similar conclusion. McKnight wrote that "[i]t is obvious that . . . the President is not regarded as 'an officer of, or under, the United States,' but as one branch of 'the Government.'

Sweeping and Forcing the President Into Section 3, *supra* at 106.

10. Very recent U.S. Supreme Court case law affirms this historical precedent. Interpreting the Appointments Clause, Chief Justice Roberts observed that "[t]he people do not vote for the 'Officers of the United States.'" *Free Enterprise Fund v. Public Company,* Accounting Oversight Board, 561 U.S. 477, 497-98 (2010). And, again, Chief Justice Roberts wrote "Article II distinguishes between two kinds of officers—principal officers (who must be appointed by the President with the advice and consent of the Senate) and inferior officers (whose appointment Congress may vest in the President, courts, or heads of

Departments)." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, n. 3 (2020). Neither category includes the President, but instead refers to those whom he appoints.

11. In addition to historical precedent, five constitutional sections show that the President is not an "officer of the United States:"

a. *First*, the Appointments Clause in Article II, Section 2 distinguishes between the President and officers of the United States. Specifically, the President "shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const. art. II, § 2.

Clearly, the President does not appoint himself or herself, and the Presidency is not an office "established by Law." Further, the catch-all phrase "all other Officers" follows "ambassadors, other public Ministers and Consuls, and Judges of the supreme Court." Thus, the word "other" denotes "other than the officers just enumerated." And that does not include the President.

b. *Second*, the Impeachment Clause in Article II, Section 4 separates the President and Vice President from the category of "civil Officers of the United States:" "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. II, § 4.

Here, the Constitution draws a sharp distinction between the President and Vice President on the one hand and civil officers on the other. In response, Petitioners argue—without authority or citation—that the President is neither a civil nor a military officer but is some ill-defined and novel blend of both because he is the Commander-in-Chief. Resp. at 30. Imaginative, to be sure. But contradicted by Justice Joseph Story, who noted in his commentaries that the President, even as Commander in Chief, is still a civil officer. *2 Joseph Story, Commentaries on the Constitution of the United States* § 791, at 259-60 (Boston, Hilliard, Gray, & Co. 1833); *see* Blackman and Tillman, *Offices and Officers of the Constitution Part III: The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62 S. TExhibit L. Rev. 349 (2023) at 400 n. 219 (explaining that the Treasury prepared rolls of compensation for federal officials in the early republic and that the President was included on the "civil list," not the military list).

c. *Third*, the Commissions Clause in Article II, Section 3 specifies that the President "shall Commission all the Officers of the United States." U.S. Const. art. II, § 3. Again, the President does not, and cannot, commission himself. Petitioners counter by arguing that the President commissions himself by taking the oath of office. Resp. at 30. But an oath is not a commission. A commission is a formal paper providing evidence of an officer's appointment to his position. *See Marbury v. Madison*, 5 U.S. 137, 137-38 (1803) ("A commission is not necessary to the appointment of an officer by the executive []. A commission is only *evidence* of an appointment")

(emphasis in the original). By its nature, it describes an appointment to a position by someone who holds the power to make that appointment. *See id.* The presidency is not a commissioned or appointed position; it is elected. And Petitioners' logic is self-defeating; the President cannot commission himself to assume power if he does not already hold the office.

d. *Fourth*, under the Oath and Affirmation Clause of Article VI the President is explicitly absent from the enumerated list of persons the clause requires to take an oath to support the Constitution. The list includes "[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States." US. Const. art. VI, cl. 3. The absence of the President, combined with the otherwise generic reference to executive officers of the United States toward the end of the list, indicates that Article VI does not include the President as an officer of the United States.

e. *Fifth*, Article VI provides further support for distinguishing the President from "Officers of the United States" because the oath taken by the President under Article II, Section 2 is not the same as the oath prescribed for officers of the United States under Article VI. Unlike officers of the United States under Article VI, the President has his own distinct oath and there is no evidence that any President has ever taken a separate, additional oath pursuant to Article VI. *See* Blackman and Tillman, Part III, *supra*, at 423. Indeed, Section Three's text indicates it

is patterned after Article VI. The language designating to whom Section Three applies tracks the equivalent language in Article VI:

Article VI	Section Three
The *Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States,* shall be bound by Oath or Affirmation, to support this Constitution; . . .	No person shall . . . hold any office . . . who, having previously taken an oath, as *a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State,* to support the Constitution of the United States, shall have engaged in insurrection….

Both provisions identify positions in descending order from the highest positions they cover (senators and representatives) to the lowest (officers of the states). Both omit the President. And both specify an oath "to support" the Constitution.

12. Section Three was drafted to cover the same individuals covered by Article VI's oath requirement, based on a straight-forward application of the "well-established rule of construction, *expressio unius est exclusio alterius.*" *See* A. Scalia & B. Garner, Reading Law 107 (2012) ("Negative–Implication Canon[:] The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*")); Lash, *supra*, at 26-27. That is Latin for the inclusion of one thing implies the exclusion of another. By specifically naming only the high offices of Senator and Representative, the text of either provision can reasonably be read as excluding unnamed other high federal offices like that of the President. Lash, *supra*, at 27.

13. Even if this Court were to determine that President Trump was an officer of the United States, Section Three of the 14th Amendment does not, by its terms apply to all officers of the United States, but rather only to those who have taken "previously taken an

oath…to *support* the Constitution of the United States." (emphasis supplied). President Trump did not, and could not, take the specified oath; instead, the oath President Trump took is that required of all presidents by Article II of the Constitution:

> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and *will to the best of my Ability, preserve, protect and defend the Constitution of the United States*.

U.S. Const, art. II, cl. 8 (emphasis supplied). This oath differs from the oaths other members of the federal and state governments take:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, *to support this Constitution* . . . .

Id. at art. VI, cl. 3 (emphasis added).

And Section Three contains the identical, emphasized, phrase:

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

U.S. Const., amend. XIV, § 3.

14. On one hand, the Constitution requires members of Congress and those appointed to offices under the United States to take an oath to "support" the Constitution. On the other hand, the Constitution requires the President to take an oath to "preserve, protect and defend" the Constitution. This difference is significant for two reasons. First, it

shows that the drafters of the Fourteenth Amendment did not understand or intend the President to be an Officer of the United States, because his oath does not require "support" of the Constitution. Second, taking an oath to support the Constitution further limits the class of people to whom Section Three applies, and President Trump (who never took such an oath) is not one of those people. This was the view of a leading constitutional scholar, writing contemporaneously with the ratification of the Fourteenth Amendment. *See* George Washington Paschal, *The Constitution of the United States Defined and Carefully Annotated* xxxviii (W.H. & O.H. Morrison, Law Booksellers 1868) (opining that the Article VI oath and Section 3 apply to "precisely the same class of officers"); *id.* at 250 n.242 (Section 3 is "based upon the higher obligation to obey th[e Article VI] oath"); *id.* at 494 (noting that the "persons included in this [Section 3] disability are the same who had taken an official oath under clause 3 of Article VI").

15. Furthermore, Section Three's reliance on an oath to "support" the Constitution is no accident, but rather rooted in Framer's robust debate and careful wordsmithing of the U.S. Constitution itself. When drafting the Impeachment Clause, the Framers initially referred to the President, Vice President, and "other civil officers of the U.S." 2 The Records of the Federal Convention of 1787, at 545 and 552 (Farrand ed., 1911). But upon further deliberation, the Framers changed the Impeachment Clause to remove the word "other." *Id.* at 600. This change shows that the Framers understood that the President was not an "other" officer of the United States, but rather that he stood apart in a category separate from "officers of the United States."

16. The words that both the Framers and the drafters of the Fourteenth Amendment chose must be given their proper meaning, and where they chose different phrases, those phrases must be accorded different meanings. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 4, 334, 4 L. Ed. 97 (1816) ("From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental."); *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. __, 142 S. Ct. 1929, 1939 (2022) ("our usual presumption that 'differences in language like this convey differences in meaning.'"). The Framers described the President differently than "officers" of the United States and chose a different oath for the President compared to senators, representatives, state legislators, and executive and judicial officers. The framers of Section Three followed these established conventions. They used a phrase—officer of the United States— that was understood to exclude the President, and they further limited the scope of any disability to those officers who had taken the Article VI oath to "support" the Constitution. President Trump was not an officer of the United States and never took the Article VI oath. Section Three therefore does not apply to him by its own terms.

17. Petitioners cannot overcome this with their reliance on what they contend is common word usage. As a practical matter, this argument is easily refuted even on its own terms—for example, as commonly used and understood, the terms "officers" and "office holders" are not synonymous. Otherwise, all police officers and traffic safety enforcement officers would be understood to be occupying an "office." And this argument ignores the

Constitution's specific and consistent definition of the class of "Officers of the United States" across several constitutional sections, which does not include the President. A nebulous "common usage" standard does not overcome carefully prescribed definitions for terms as discussed above.

18. Petitioners' examples of public references to the President as an officer are colloquialisms without persuasive force. They do not control the meaning of the Constitution's use of "Officers of the United States" as a distinct, constitutionally-defined category, as evidenced by the Constitution's persistent distinction between the President and "Officers of the United States." Similarly, the term "Chief Executive Officer" is a defined-term in the corporate world and its use by Presidents to refer to themselves does not help to define the term "Officers of the United States." Indeed, it should be understood to mean that the President is the head of the Executive Branch as a Chief Executive Officer is the head of a business—and the buck stops with him.

19. Petitioners also cite the congressional debates over Section Three for support, claiming that they show Section Three was commonly understood to apply to the President. But none of their citations supports their argument as they claim. First, they cite to an exchange in the Senate in which Senator Reverdy Johnson expressed his understanding that Section Three omitted the President and Vice-President. 39 Cong. Globe, 1st Sess., 2899. Petitioners rely on the retort from Senator Lot Morril that the phrase "or hold any office, civil or military, under the United States" was meant to include the President and Vice-President, and Senator Johnson's response that he was perhaps wrong about his impression

that the President was excluded. *Id.* Petitioners claim this exchange is evidence that the original public meaning of Section Three was that it included the President.

20. But it demonstrates just the opposite. No less a figure than Senator Johnson, who was considered one of the preeminent constitutional lawyers in Congress (Phillip Shaw Paludan, A PEOPLE'S CONTEST: THE UNION & CIVIL WAR 1861-1865, at 29 (1996). *See also*, Earl M. Maltz, The Fourteenth Amendment as Political Compromise--Section One in the Joint Committee on Reconstruction, 45 Ohio St. L.J. 933, 957 (1984) (Reverdy Johnson was "[a] noted constitutional authority" who "remained a respected figure in the Senate.")) read the plain text of Section Three to exclude the President and Vice President. His conciliatory and collegial response to Senator Lot does not alter his correct assessment that Section Three excluded the President. *See* Lash, supra, at 27-28.

21. Petitioners also mis-interpret a shortened quotation by Senator Howard regarding "the election of the next or any future President of the United States" Petitioner's use of this clause in Senator Howard's quotation is wildly misleading, because it quotes Senator Howard out of context. Senator Howard was lamenting the ineffectiveness of Section Three, because it did not disenfranchise rebels from voting, and they could appoint disloyal electors who would then be able to elect a disloyal President:

> It is due to myself to say that I did not favor this section of the amendment in the committee. I do not believe, if adopted, it will be of any practical benefit to the country. It will not prevent rebels from voting for members of the several State Legislatures. A rebel, notwithstanding this clause, may vote for a member of the State Legislature. The State legislature may be made up entirely of disloyal elements, in consequence of being elected by a rebel constituency. That Legislature when assembled has the right, under the Constitution to

> appoint presidential electors itself if it shall choose to do so, and to refuse to refer that question to the people. It is the right of every State. It is very probable that the power of the rebel States would be used in exactly that way. *We should therefore gain nothing as to the election of the next or any future President of the United States.*

39 Cong. Globe, 1st Sess., 2768.

22. Petitioners' other citations to the ratification debates actively undermine their position. Thaddeus Stevens argued that Section Three "should be carried out 'both in reference to the presidential and all other elections.'" This statement referred to the effect of Section Three upon presidential electors—as they are who are elected, and Section 3 specifically mentions them. And it was preceded by Stevens' direct and strident affirmation that Section Three *is not self-enforcing*:

> I say if this amendment prevails you must legislate to carry out many parts of it. You must legislate for the purpose of ascertaining the basis of representation. You must legislate for registry such as they have in Maryland. It will not execute itself, but as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have the right to do.

39 Cong. Globe, 1st Sess., 2544.

23. And Petitioners' citation to a discussion involving Burr is irrelevant: it concerned only a general view that the United States government has a history of punishing treasonous conduct. 39 Cong. Globe, 1st Sess., 2534. It did not discuss the specific applicability of Section Three.

24. Petitioners' pattern of mischaracterization continues. They quote Senator Garrett Davis of Kentucky for the proposition that he "saw no legal difference between the

constitutional requirement that 'all officers, both Federal and State, should take an oath to support' the Constitution and the constitutional requirement that the president 'take an oath, to the best of his ability to preserve, protect, and defend the Constitution.'" False. His actual statement argued that the Framers had already considered means for defending the Constitution against insurrections through oaths, and that the oaths to support the Constitution (by federal and state officers) were distinct from the Presidential oath to preserve, protect, and defend the Constitution. Specifically, he stated that the framers "provided that the Constitution, and laws of Congress made in pursuance of it, should be the supreme law of the land; that all officers, both Federal and State, should take an oath to support it; that the President, before entering upon the execution of his office, should take an oath, to the best of his ability to preserve, protect, and defend the Constitution." 39 Cong. Globe, 1st Sess., App. 234 (1866) (emphasis added). Again, by recognizing the distinction between the officers' oath and the President's oath, Senator Davis's statements supports President Trump's position.

25. Petitioners cite other statements during the debates, but none of these concern Section Three's application to the presidency. The statements merely evince a general attitude amongst the debaters that Section Three should punish traitors and prevent them from holding office, but they say nothing about whether Section Three applies to the President and Vice President.

26. Petitioners also rely on two opinions from Attorney General Stanbery and one from the Department of Justice's Office of Legal Counsel under President George W. Bush.

None is relevant here. At no point in either of Stanbery's two opinions (See 12 U.S. Op. Att'y Gen. 182 (1867); 12 U.S. Op. Att'y Gen. 141 (1867)) did he analyze the application of Section Three to the President, nor did he otherwise discuss the presidency beyond an offhand reference in one of the opinions when explaining the extent of a military general's governing power under miliary order, No. 1. Petitioners would have Stanbery's incidental colloquial reference to the President as "simply an executive officer," 12 U.S. Op. Att'y Gen. 182, 196 (1867), which was a rhetorical flourish emphasizing the undue power assumed by military generals under order No. 1, be treated as evidence that the President is a constitutional "Officer of the United States." In reality, neither of Stanbery's opinions passes judgment on whether the President is an "Officer of the United States" for any purpose relevant to this litigation, much less analyzes the question. Stanbery simply did not address the current subject matter.

27. Petitioners' citation to the Office of Legal Counsel opinion from 2007 in fact supports President Trump's position. In full, the opinion states that the President is not an officer of the United States because officers of the United States are specifically those individuals to whom the President delegates authority he holds under the Constitution:

> The text and structure of the Constitution reveal that officers are persons to whom the powers "delegated to the United States by the Constitution," U.S. Const. amend. X, are in turn delegated in order to be carried out. The President himself is said to "hold [an] Office," and the Constitution provides that "[t]he executive Power shall be vested in" that office. *The President cannot carry out the executive power alone, and so the Constitution further contemplates that executive power will be delegated to officers to help the President fulfill this duty.*

Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 78-79 (2007) (emphasis supplied). By the opinion's own text, an officer of the United States is someone delegated power by the President.

28. Petitioners elsewhere cite various judicial opinions yet admit—as they must—that none of them addresses the question of whether the President is an officer of the United States within Section Three of the Fourteenth Amendment. Instead, the cases cited by Petitioners only refer to the President as an "officer" in the general sense of the word, as part of analyses that do not address whether the President is constitutionally an "Officer of the United States." They therefore provide no support for Petitioners' position. *See Webster v. Fall*, 266 U.S. 507, 511 (1924) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); *see also District of Columbia v. Heller*, 554 U.S. 570, 625 n.25 (2008) (refusing to follow statement in previous decision characterized as "dictum" because "the point was not at issue and was not argued"); *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) ("[S]ince we have never squarely addressed the issue, and have at most assumed [it], we are free to address the issue on the merits.").

29. The *Floyd Acceptances* only referred to the President as an officer generally, meaning an individual who holds an office and has duties and authority defined by law. *The Floyd Acceptances*, 74 U.S. 666, 676–77 (1868). The opinion had nothing to do with whether the President falls under the constitutional category of "Officers of the United States." Along the same lines, the Circuit Court for the District of Columbia in *U.S. ex rel. Stokes v.*

Kendall, 26 F. Cas. 702, 753 (C.C.D.D.C. 1837), aff'd, 37 U.S. 524, 9 L. Ed. 1181 (1838)) referred to the President as "but an officer" for the same purpose: describing the President as being like any other government official in that his powers and authority are inherently limited because they derive from law. None of these general references to the President as "an officer" has any bearing on the constitutional question of whether the President is an "Officer of the United States."

30. And *Lucia v. SEC*, 138 S. Ct. 2044 (2018) also undermines Petitioners' argument. There, the Supreme Court distinguished between officers and mere employees under the Appointments Clause. Under its test, "an individual must occupy a 'continuing' position established by law to qualify as an officer" and must exercise "significant authority pursuant to the laws of the United States." *Id.* at 2051. *Lucia* directly stated that the "established by law" means the position is established by statute. *Id.* at 2057 ("For federal officers, that duty is 'established by Law'—that is, by statute."). Thus, the first element of this test would remove the President from the category of "Officers of the United States," because the President's position is not "established by law." *See* Blackman and Tillman, *supra*, at 378. This approach is consistent with the Appointments Clause and with Professors Tillman and Blackman's scholarship:

> The phrase "shall be established by law" refers to post-ratification positions that will or would be established by future federal statutes. And these statutes must be created through bicameralism and presentment. These positions were not established by the Constitution itself . . . Beyond the Appointments Clause, the Constitution of 1788 uses the phrase "by law" in eight other provisions—in each provision that phrase refers to the enactment of federal statutes.

Blackman and Tillman, *supra*, at 378-79. "Established by law" means established by statute, not the Constitution. As *Lucia* and Professors Blackman and Tillman's scholarship show, the President cannot be an "officer of the United States" under the Appointments Clause, because that clause limits "Officers of the United States" to positions "established by law."

B. The Relief that Petitioners Request Would Unconstitutionally Impose an Additional Qualification for Office.

1. Section Three of the Fourteenth Amendment prohibits individuals from *holding* office, not from being on the ballot for an office under the United States, being nominated for such office, or being elected to such office. U.S. Const. amend. XIV, § 3. This distinction matters because it speaks directly to when the requirements of Section Three are operative. They are not operative or ripe for challenge until an individual *holds* office; a challenge to ballot access is thus premature.

2. This distinction matters because even if there is a "disability" under Section Three, it may be lifted by a two-thirds vote of each House. *Id.* Thus, even if someone is unquestionably disqualified under Section Three, they may still appear on the ballot and be elected by the people. Whether they are able ultimately to "hold" the office depends on whether Congress "remove[s] such disability." *Id. See also generally Smith v. Moore*, 90 Ind. 294, 303 (1883) (describing the distinction between restrictions on being *elected* versus *holding* an office and noting, "[u]nder [Section Three] . . . it has been the constant practice of the Congress of the United States since the Rebellion, to admit persons to seats in that body who were ineligible at the date of the election, but whose disabilities had been subsequently

removed."); *Privett v. Bickford*, 26 Kan. 52, 58 (1881) (analogizing to Section Three and concluding that voters can vote for an ineligible candidate who can only take office once his disability is legally removed); *Sublett v. Bedwell*, 47 Miss. 266, 274 (1872) ("The practical interpretation put upon [Section Three] has been, that it is a personal disability to 'hold office,' and if that be removed before the term begins, the election is made good, and the person may take the office.").

3. The Ninth Circuit's opinion in *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000) further illustrates why this distinction is important. The Constitution, at U.S. Const. art. I, § 2, cl. 2, provides that members of the House of Representatives "when elected, be an inhabitant of that state in which he shall be chosen." A California law required Californian candidates for Congress to satisfy a residency requirement at the time he or she filed his or her nomination papers. *Id.* at 1034. The Schafer court determined that California's law was unconstitutional because it added qualifications that are not found in the Constitution—namely that a candidate meet the residency requirement "prior to the time appointed by the Constitution." *Schaefer*, 215 F.3d at 1038-39.

4. Timing was critical in reaching this conclusion. The Constitution provides that an individual must be an inhabitant of the state "when elected." U.S. Const. art. I, § 2, cl. 2. "When elected" is not "when nominated" because nonresident candidates could move into the State and "inhabit" it in the period between nomination and election. *Schaefer*, 215 F.3d at 1038-39. Here, holding office is not running for office, being nominated by a party, or even being elected to office. Seeking to prematurely enforce a constitutional limitation as

Petitioners do here effectively imposes an additional qualification to become President, which is not permitted. *See Id. See also U.S. Term Limits, Inc.*, 514 U.S. at 802.

5. Tellingly, this analysis of timing is also consistent with the plain text of the Twentieth Amendment, which expressly contemplates the possibility of a president-elect who has not "qualified" for office. U.S. Const. amend. XX, § 3.

6. As Judge Branch of the Eleventh Circuit explained in her concurring opinion in *Greene v. Secretary of State for Georgia*, what Petitioners seek to do in this case, like what the challengers to Rep. Greene's qualifications under the Fourteenth Amendment sought to do in that case, is unconstitutional in that it unlawfully seeks to impose an additional qualification for office in violation of *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995). *Greene v. Secretary of State for Georgia*, 52 F.4th 907, 913-916 (11th Cir. 2022). In *Greene*, Representative Greene, who like President Trump here, faced a state court challenge to her eligibility to appear on a ballot based upon supposed disqualification pursuant to Section 3 of the Fourteenth Amendment, appealed from denial of an injunction stopping the state court proceeding. The Eleventh Circuit dismissed her appeal as moot because the state court proceeding had already concluded (rejecting the challenge to her eligibility on the merits). *Id.* at 910. Judge Branch concurred in the dismissal based on mootness, but wrote separately to emphasize that the district court should have stopped the state court proceeding because the State's attempt to decide the disputed question of qualification under Section 3 of the 14th Amendment amounted to an impermissible attempt to impose a substantive qualification in violation of the rule stated in *U.S. Term Limits*:

> in purporting to assess Rep. Greene's eligibility under the rubric of § 3 of the Fourteenth Amendment to the U.S. Constitution, Georgia imposed a substantive qualification on her. The State was not merely, as the district court incorrectly concluded, enforcing the preexisting constitutional disability in § 3. Instead, the State Defendants, acting under the Challenge Statute, forced Rep. Greene to defend her eligibility under § 3 to even appear on the ballot pursuant to a voter challenge to her candidacy—thereby imposing a qualification for office that conflicts with the constitutional mechanism contained in § 3. In other words, by requiring Rep. Greene to adjudicate her eligibility under § 3 to run for office through a state administrative process without a chance of congressional override, the State imposed a qualification in direct conflict with the procedure in § 3—which provides a prohibition on being a Representative and an escape hatch.

52 F.4th at 915 (internal footnotes omitted). In other words, if this Court were to determine President Trump was ineligible to run for office (not hold office as Section Three's language states, U.S. Const. amend. XIV, § 3), it would unconstitutionally gut the explicit mechanism in Section Three that provides Congress the authority to remove any Section Three disability, because President Trump would not have the chance to win the election and ask Congress to remove the disability.

7. In this regard, Petitioners' claim is also unripe, because the text of Section Three makes Petitioners claims premature. Even assuming—solely for the sake of argument—that Section Three applies to presidents; Petitioners overlook ripeness concerns.

8. "Ripeness requires that there be an actual case or controversy between the parties that is sufficiently immediate and real so as to warrant adjudication." *Beauprez v. Avalos*, 42 P.3d 642, 648 (Colo. 2002). A court must wait until a case has "taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Pub.*

Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 244 (1952). Ripeness considers fitness and hardship. Courts "will not consider uncertain or contingent future matters because the injury is speculative and may never occur." *Metal Mgmt. W., Inc. v. State*, 251 P.3d 1164 (Colo. App. 2010) (*quoting Jessee v. Farmers Ins. Exchange*, 147 P.3d 56, 59 (Colo.2006)). "In deciding ripeness, courts look to the hardship of the parties of withholding court consideration and the fitness of the issues for judicial decision." *Stell v. Boulder County Dep't of Social Servs*., 92 P.3d 910, 914–15 (Colo. 2004).

9. Even if a president-elect were theoretically subject to disqualification, Congress could respect the will of voters and remove any disability imposed by the Fourteenth Amendment. The November 2024 election is a long way off, and it imposes no burden on Petitioners to determine whether an actual controversy will exist. The real burden comes from preventing voters from even having a choice.

10. Contrary to what Petitioners have elsewhere suggested, postponing this dispute until it is ripe is far from absurd. To the contrary, President Trump's position is well-grounded in the plain language and legislative history of the Constitution, directly applicable case law, and American political tradition. If a president-elect were to hypothetically face a disability under Section Three, the Constitution explicitly provides the remedy: Under the Twentieth Amendment, "[i]f a President shall not have been chosen before the time fixed for the beginning of his term, *or if the President elect shall have failed to qualify*, then the Vice President elect shall act as President until a President shall have qualified." U.S. Const. amend. XX, § 3 (emphasis supplied). Courts recognize that "[t]he

Twentieth Amendment, Section 3 . . . provides the process to be followed if the President elect shall have failed to qualify, in which case the Vice President shall act as President until a President shall have qualified." *Kerchner v. Obama*, 669 F. Supp. 2d 477, 483 n.5 (D.N.J. 2009), *aff'd*, 612 F.3d 204 (3d Cir. 2010).

D. Congressional action is required to enforce Section Three; it is not self-executing when used to bar a candidate.

1. Section Three of the Fourteenth Amendment is not self-executing and cannot be applied to support a cause of action seeking judicial relief absent Congressional enactment of a statute authorizing Petitioners to bring such a claim in court. A recent article by scholars Joshua Blackman and Seth Barrett Tillman summarizes the question of whether Section Three is self-executing as follows:

> In our American constitutional tradition, there are two distinct senses of self-execution. First, as a shield—or a defense. And second, as a sword—or a theory of liability or cause of action supporting affirmative relief. The former is customarily asserted as a defense in an action brought by others; the latter is asserted offensively by an applicant seeking affirmative relief.
>
> For example, when the government sues or prosecutes a person, the defendant can argue that the Constitution prohibits the government's action. In other words, the Constitution is raised defensively. In this first sense, the Constitution does not require any further legislation or action by Congress. In these circumstances, the Constitution is, as Baude and Paulsen write, self-executing.
>
> In the second sense, the Constitution is used offensively–as a cause of action supporting affirmative relief. For example, a person goes to court, and sues the government or its officers for damages in relation to a breach of contract or in response to a constitutional tort committed by government actors. As a general matter, to sue the federal government or its officers, a private individual litigant must invoke a federal statutory cause of action. It is not enough to merely allege some unconstitutional state action in the abstract. Section 1983, including its statutory antecedents, *i.e.*, Second Enforcement Act a/k/a Ku Klux Klan Act of 1871, is the primary modern statute that private individuals use to vindicate constitutional rights when suing state government officers.

> Constitutional provisions are not automatically self-executing when used offensively by an applicant seeking affirmative relief. Nor is there any presumption that constitutional provisions are self-executing.

Blackman and Tillman, *Sweeping and Forcing the President Into Section 3: A Response to William Baude and Michael Stokes Paulsen*, at 12, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4568771.

2. Importantly, Blackman and Tillman's article has substantially refuted the Baude and Paulsen article cited by the Petitioners. The strength of their arguments has caused Baude and Paulsen to substantially modify their own analysis. *See* Baude and Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4568771. And Stephen Calabresi, a well-respected constitutional scholar and dean of the Northwestern University Law School, fully reversed his earlier agreement with Baude and Paulsen and has now concluded that Section Three does not prevent President Trump from serving as President. Prof. Steven G. Calabresi, *Donald Trump Should be on the Ballot and Should Lose*, https://reason.com/volokh/2023/09/16/steve-calabresi-donald-trump-should-be-on-the-ballot-and-should-lose/, last visited Sept. 29, 2023.

3. Ample precedent supports Blackman and Tillman's conclusions. As those authors show, one year after ratification, the Chief Justice of the Supreme Court of the United States ruled that Section Three was not self-executing and that it could only be enforced through specific procedures prescribed by Congress or the United States

Constitution. *See In re Griffin*, 11 F.Cas. 7 (C.C.Va 1869). He reasoned that a different conclusion would have created an immediate and intractable national crisis.

4. More specifically, in ruling that the Section Three was not self-executing, Justice Chase focused on Section Three's text and America's due process tradition:

> The object of the amendment is to exclude from certain offices a certain class of persons. Now, it is obviously impossible to do this by a simple declaration, whether in the constitution or in an act of congress, that all persons included within a particular description shall not hold office. For, in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate. To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable; and *these can only be provided for by congress.*

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

5. Justice Chase listed three other reasons: first, under Section Five "congress shall have power to enforce, by appropriate legislation, the provision of this article," explicitly vests in Congress the power to enforce it. *Id.* Second, the final clause of Section Three "gives to congress absolute control of the whole operation of the amendment." *Id.* And finally, he recognized that existing officeholders are not automatically removed by Section Three, but that "legislation by congress is necessary to give effect to the prohibition, by providing for such removal." *Id.*

6. Following this ruling, Congress almost immediately enacted legislation suggested by the Chief Justice. In 1870, Congress passed a law, entitled the "Enforcement Act," 16 Stat. 433 (1871) which allowed federal district attorneys – but not state election officials – authority to enforce Section Three. The Enforcement Act allowed U.S. district

attorneys to seek writs of quo warranto from federal courts to remove from office people who were disqualified by Section Three, and it further required the courts to hear such proceedings before "all other cases on the docket." The Act provided for separate criminal trials in federal court of people who took office in violation of Section Three, and federal prosecutors immediately started exercising quo warranto authority, bringing charges against Jefferson Davis and others. These actions, however, waned after a few years, *see* Amnesty Act of 1872 (removing most disqualifications in the manner provided by Section Three; Pres. Grant Proclamation 208 (suspending quo warranto prosecutions), and the Amnesty Act of 1898 completely removed all Section Three disabilities incurred to that date.

7. In 1925, the Enforcement Act was repealed entirely. This made sense, because nearly every participant in the Civil War had by then passed away. A century later, in 2021, legislation was introduced in Congress to create a cause of action to remove individuals from office who were engaged in insurrection or rebellion, but that bill died in Congress. See H.R. 1405, 117th Cong. 2021. Thus, there is presently no statute authorizing any person to bring actions seeking disqualifications under Section Three of the Fourteenth Amendment. Chief Justice Chase's order and the subsequent legislative history shows that Section Three is not self-executing unless Congress takes action to make it so and that it does not give secretaries of state the authority to remove a presidential candidate from the ballot. A successful challenge would create a patchwork of 51 state (and district) election laws, orders, and rulings that would likely conflict with one another, thus contradicting established precedent,

constitutional tradition, and common sense. It would cause the exact crisis Justice Chase feared.

8. Petitioners' efforts to distinguish *Griffin* fail. To the extent that Petitioners assert that Griffin is irrelevant because it did not address whether states could pass their own procedures for enforcing Section Three, their argument misses the boat. This argument fails because (1) Colorado has not passed any such law, *see* Reply in Support of Motion to Dismiss at 11-21 (explaining that the Colorado Election Code imposes no duty on the Secretary of State to enforce Section Three), (2) Section Three enforcement is preempted by Congress's role in enforcing it under the Constitution, *see supra* at III, and (3) Chief Justice Chase made clear—as does Section Five of the Fourteenth Amendment—that the power to pass legislation to enforce Section Three rests with Congress: "[Section Three is] to be made operative in other cases by the legislation of congress in its ordinary course." *In re Griffin*, 11 F. Cas. at 26.

9. To the extent that Petitioners claim that Chief Justice Chase contradicted himself two years later in *Case of Davis*, 7 F. Cas. 63 (C.C.D. Va. 1871), they are simply wrong. In *Davis*, Chief Justice Chase held that Section Three was self-executing as a defense to attempts to deprive Jefferson Davis of his rights after he had already been disqualified under Section Three. Chief Justice Chase did not discuss Section Three as self-executing when used offensively by a private or state actor to deprive someone of his rights. This distinction between when a constitutional provision is used as a sword or as shield is well understood and reflected in constitutional jurisprudence. *See* ¶ 1 of this section, *citing*

Blackman and Tillman, *Sweeping and Forcing the President Into Section 3: A Response to William Baude and Michael Stokes Paulsen*, at 12, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4568771 (last visited October 16, 2023).

10. This distinction also defeats Petitioners' arguments based on the supposed self-executing nature of other sections of the Fourteenth Amendment. Section One of the Fourteenth Amendment is self-executing for purposes of defending an individual's rights when an action is brought against him by the government. But legislation authorized by Section Five is necessary for an individual to bring an action to enforce Section One offensively. *City of Boerne v. Flores*, 521 U.S. 507 (1997), which Petitioners cite, reflects this distinction. The Court recognized that "Section 1 of the [Fourteenth Amendment] imposed self-executing limits on the States." *Id.* at 522.

11. Moreover, the United States Supreme Court has regularly reiterated that the enforcement power of the Fourteenth Amendment lies only in Congress, and Section 5 of the Fourteenth Amendment confers the enforcement power on Congress to determine "whether and what legislation is needed to" enforce the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 33 (1991) (Scalia, J., concurring) ("It cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform.") "Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the

amendments fully effective." *Ex parte Va.*, 100 U.S. 339, 345 (1879); *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921) ("[I]t cannot rightly be said that the Fourteenth Case Amendment furnishes a universal and self-executing remedy.").

12. It is Congress who has been provided the sole authority to provide the enforcement for the Fourteenth Amendment, not the states. *Cedar-Riverside Associates, Inc. v. City of Minneapolis*, 606 F.2d 254 (8th Cir. 1979) (stating that Congress intended 42 U.S.C. § 1983 as an exclusive remedy for constitutional violations committed by municipalities and that "no reason exists to imply a direct cause of action (for such violations) under the fourteenth amendment."); *Foster v. Michigan*, 573 F. App'x. 377, 391 (6th Cir. 2014) ("[W]e have long held that § 1983 provides the exclusive remedy for constitutional violations."); *Burns-Toole v. Byrne*, 11 F.3d 1270, 1273 n.3 (5th Cir. 1994) (providing that § 1983 is the appropriate vehicle for asserting violations of constitutional rights); *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) ("We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983."). In other words, it is clear and black letter law that absent Congressional authorization, no private individual has a self-executing right to sue on the basis of any provision of the Fourteenth Amendment.

13. These authorities reinforce Chief Justice Chase's conclusion that Section Three is self-executing for defensive purposes against the government (as in Davis) but requires an act of congress to be used offensively to deprive someone of rights (as in Griffin). And that case has never been overruled. Rather, it has been affirmed repeatedly by

other courts and authorities. *See also In re Brosnahan*, 18 F. 62, 81 n.73 (C.C.W.D. Mo. 1883) (McCrary, J., concurring) (same); *Hansen v. Finchem,* 2022 Ariz. Super. LEXIS 5 (Maricopa Cnty. Sup. Ct. 2022) ("given the current state of the law and in accordance with the United States Constitution, Plaintiffs have no private right of action to assert claims under the Disqualification Clause"), *aff'd on other grounds*, 2022 Ariz. LEXIS 168 (Ariz. S. Ct. May 9, 2022); *Rothermel v. Meyerle*, 136 Pa. 250, 254 (1890) (citing *Griffin's Case*, 11 F. Cas. at 26) ("[I]t has also been held that the Fourteenth Amendment, as indeed is shown by the provision made in its fifth section, did not execute itself."); *State v. Buckley*, 54 Ala. 599, 616 (Ala. 1875) (Stone, J.) (same); Mark R. Herring, Va. Attorney General to Lee J. Carter, Delegate, Commonwealth of Virginia Opinion No. 21-003, 2021 Va. AG Lexis 1, 2, n.11 (2021) ("[T]he weight of authority appears to be that Section 3 of the Fourteenth Amendment is not 'self-executing'—put another way, it is possible that Congress may need to pass implementing legislation to make this provision operative.") (citing *Griffin's Case*); *Cale v. Covington*, 586 F.2d 311, 316-17 (4th Cir. 1978) (rejecting the argument that there is an implied cause of action under the Fourteenth Amendment because the Amendment is not a self-executing cause of action).

14. The ratification debates on Section Three further support Chief Justice Chase's position. Congressman Thaddeus Stevens twice argued that Section Three needed enabling legislation. On May 10, 1866, he argued that "if this amendment prevails, you must legislate to carry out many parts of it. … It will not execute itself, but as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the

presidential and all other elections as we have a right to do." Cong. Globe, 39th Cong., 1st Sess., 2544. On June 13, 1866, as the final speaker before the question was called, Congressman Stevens concluded his arguments to support Section Three by passionately arguing "let us no longer delay; take what we can get now, and hope for better things in further legislation; in enabling acts or other provisions." Cong. Globe, 39th Cong., 1st Sess., 3149.

15. Likewise, on January 30, 1867, Thomas Chalfant spoke in opposition to the proposed Fourteenth Amendment, alarmed that only Congress was permitted to judge whether someone had "given aid and comfort to the enemy during the rebellion." Hon. Thos. Chalfant, member from Columbia Country, in the House, January 30, 1867, on Senate Bill No. 3, in the Appendix to the Daily Legislative Record Containing the Debates on the Several Important Bills Before the Legislature of 1867 (George Bergner, ed.) (Harrisburg 1867); *see also* Lash, *supra*, at 37-40. He feared that the then-current makeup of Congress was extremely hostile towards southern leaders (Lash, *supra*, at 39) and thought rebel leaders would have a fair trial only if "under the fifth section of this amendment … by appropriate legislation, for enforcing this amendment …. I can conceive of nothing, unless it be some act authorizing the appointment of a commission to prescribe qualifications and investigate claims of all candidates and candidates for office. This would be one way." Chalfant, *supra* note 85.

16. Chief Justice Chase's conclusion that Section Three is not self-executing for offensive purposes is further supported by the history of the Enforcement Act. Congress

promptly passed the Enforcement Act in 1870 after his opinion in *In re Griffin*, providing enabling legislation for Section Three.

17. These were not isolated opinions. "As far as enabling legislation was concerned, no one disagreed with Thaddeus Stevens that such legislation would be required." Lash, *supra*, at 6. Those involved in the ratification discussion and debate all understood that Section Three was *not* self-executing at the time of its ratification. Petitioners provide no contrary evidence.

E. Congress Has Preempted the States from Judging Presidential Qualifications.

1. Under the doctrine of field preemption, Congress has left no room for states to pass their own laws or enforce their own laws regarding the determination of presidential qualifications. The Colorado Supreme Court has explained the applicable test, citing the Supreme Court of the United States:

> Under the field preemption doctrine, in turn, "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." [ ] Congress's intent to preempt a particular field may be inferred "from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'"

Fuentes-Espinoza v. People, 408 P.3d 445, 448-449 (Colo. 2017) (citing *Arizona v. United States*, 567 U.S. 387, 399 (2012)); *see also Department of Health v. The Mill,* 887 P.2d 993, 1004 (Colo.1994), *cert. denied,* 515 U.S. 1159 (1995).

2. As explained in Section F, below, the manner of counting electoral college votes is dictated by federal statute and the United States Constitution. *See e.g.*, 3 U.S.C. § 15. Further, "mechanisms exist under the Twelfth Amendment and 3 U.S.C. § 15 for any challenge to any candidate to be ventilated when electoral votes are counted," and "the Twentieth Amendment provides guidance regarding how to proceed if a president-elect shall have failed to qualify." *Bowen*, 567 F. Supp. at 1146-47.

3. Because federal constitutional and statutory law has already occupied the field on presidential qualifications, federal law must reign supreme. Additionally, states may not add additional requirements for federal office beyond those listed in the Constitution, including eligibility requirements. U.*S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). Field preemption applies here, which means states cannot meddle with issues of such magnitude.

F. This Court Lacks Power to Decide the Nonjusticiable Political Questions Presented Here.

1. The U.S. Constitution commits to Congress and the Electoral College exclusive power to determine presidential qualifications and whether a candidate can serve as President. Courts cannot decide the issue at the heart of this case. Federal and state courts presented with similar cases challenging the qualifications of presidential candidates have overwhelmingly held that they present nonjusticiable political questions reserved for those entities. This Court should do likewise.

2. Political questions are nonjusticiable and are therefore not cases or controversies. *Baker v. Carr*, 369 U.S. 186, 217 (1962). The Supreme Court set out broad categories that should be considered nonjusticiable political questions:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; [and 6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id.*

3. For its part, Colorado has also adopted a version of the political question doctrine applicable when the courts of this state must determine whether to decide questions of *state* law that may have been entrusted to coordinate branches of *state* government. *See, e.g. Markwell v. Cooke,* 482 P.3d 422 (Colo. 2021). In approaching those questions, the courts of this State have generally considered the *Baker* factors, albeit taking into account the greater jurisdiction granted trial courts in this State as compared to their federal counterparts. *Id.* at 427. Here, the U.S. Constitution reserves exclusively to the United States Congress the power under Section Three to determine whether a person may take federal office. The Petitioners effectively ask this Court to strip Congress of its power to make that determination, including its right to waive the disqualification by a two-thirds vote. Federal and state courts have uniformly ruled that challenges to the qualifications of presidential candidates are non-justiciable, taking into account considerations of comity and the

deference due federal law under the Constitution's Supremacy Clause. This Court should likewise avoid infringing upon Congress' exclusive prerogatives.

4. Numerous courts have held that similar challenges to the qualifications of presidential candidates present nonjusticiable political questions. Most recently, the United States District Court for the District of New Hampshire held that:

> state and federal district courts have consistently found that the U.S. Constitution assigns to Congress and the electors, and not the courts, the role of determining if a presidential candidate or president is qualified and fit for office—at least in the first instance. Courts that have considered the issue have found this textual assignment in varying combinations of the Twelfth Amendment and the Electoral Count Act, 3 U.S.C. § 15, which prescribe the process for transmitting, objecting to, and counting electoral votes; the Twentieth Amendment, which authorizes Congress to fashion a response if the president elect and vice president elect are unqualified; and the Twenty-Fifth amendment and Article I impeachment clauses, which involve Congress in the removal of an unfit president from office.

Castro v. N.H. Sec'y of State, Case No. 23-cv-416-JL at 10-11 (D.N.H. Oct. 27, 2023) ("[The vast weight of authority has held that the Constitution commits to Congress and the electors the responsibility of determining matters of presidential candidates' qualifications."). Notably, that Court rejected the argument, advanced by Petitioners here as well, that amendments to the Electoral Count Act, 3 U.S.C. § 15, affected the analysis. *Id.* at 15 n.27 ("Castro is correct that the Electoral Count Act was revised in 2022… but, to the extent that he is arguing that this amendment limited the ground for objections, that does not appear to be the case.") In any event, this argument conflates the *Constitution's commitment of the issue to Congress* (which triggers the political

question doctrine) with *how Congress chooses to act on it* (which is the political question itself).

5. Nor can the New Hampshire court's holding on this issue be dismissed as dictum simply because the court *also* found that the plaintiff lacked standing. *See, e.g., Woods v. Interstate Realty Co.,* 337 U.S. 535, 537 (1949) ("where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*"); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 346 n.4 (1986) (alternative holdings are not dicta). Moreover, even "[i]f these conclusions were dicta, it does not necessarily follow that they were wrong." *Fouts v. Maryland Cas. Co.*, 30 F.2d 357, 359 (4th Cir. 1929).

6. As the New Hampshire court recognized, during the 2008 and 2012 presidential election cycles, a spate of lawsuits was filed either asking state elections officials to enforce citizenship qualifications on Barack Obama or John McCain or challenging their qualifications outright. In resolving one such challenge, the Third Circuit stated that this was a non-justiciable political question outside the province of the judiciary. *See Berg v. Obama,* 586 F.3d 234, 238 (3d Cir. 2009). Multiple district courts also formally ruled that lawsuits challenging presidential qualifications presented nonjusticiable political questions. For example, in a case brought before the 2008 election seeking to remove Senator McCain from the California ballot on grounds that he did not qualify as a "natural-born citizen" within the meaning of Article II of the Constitution, Judge Alsup explained why, even if the plaintiff could demonstrate standing, the court must dismiss the challenge:

> It is clear that mechanisms exist under the Twelfth Amendment and 3 U.S.C. § 15 for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify. Issues regarding qualifications for president are quintessentially suited to the foregoing process. Arguments concerning qualifications or lack thereof can be laid before the voting public before the election and, once the election is over, can be raised as objections as the electoral votes are counted in Congress. The members of the Senate and the House of Representatives are well qualified to adjudicate any objections to ballots for allegedly unqualified candidates. Therefore, this order holds that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance. Judicial review—if any—should occur only after the electoral and Congressional processes have run their course.

Robinson v. Bowen, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008). This was not, as Petitioners have elsewhere claimed, *dictum*. Rather, after first holding that the original plaintiff in the case lacked standing, the Court rejected an attempt to fix that standing defect by allowing the campaign committee for Alan Keyes—a competing candidate—to intervene as a plaintiff, holding that intervention would be futile precisely because the claim presented a nonjusticiable political question. *Id.* In other words, the court's non-justiciability holding was necessary to its refusal to allow the requested intervention and was thus not *dictum*.

7. In a scholarly opinion five years later resolving a challenge to President Obama's natural born citizenship, another federal court held 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." *Grinols v. Electoral College*,

No. 2:12–cv–02997–MCE–DAD, 2013 WL 2294885, at *5-7 (E.D. Cal. May 23, 2013). Likewise, in 2009 another court rejected a challenge to President Obama's qualifications because, among other things, the claim was "barred under the 'political question doctrine' as a question demonstrably committed to a coordinate political department," because "[t]he Constitution commits the selection of the President to the Electoral College in Article II, Section 1, as amended by the Twelfth Amendment and the Twentieth Amendment, Section Three," and "[n]one of these provisions evince an intention for judicial reviewability of these political choices." *Kerchner v. Obama*, 669 F. Supp. 2d 477, 483 n.5 (D.N.J. 2009).

8. In rejecting another challenge to President Obama's qualifications, another federal court observed the Twelfth and Twentieth Amendments charged the legislative branch with responsibility for the presidential electoral and qualification process. *Taitz v. Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373 (S.D. Miss. Mar. 31, 2015). That court held that "these matters are entrusted to the care of the United States Congress, not this court" and that the plaintiffs' disqualification claims were therefore nonjusticiable." *Id.*

9. Multiple state courts have also held that secretaries of state had no such power to disqualify a presidential candidate from a ballot because of the doctrine of separation of powers. A New York court denied the Secretary of State authority to check qualifications because that authority presented a political question and a separation of powers issue:

> 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.

Strunk v. New York State Bd. Of Elections, No. 6500/11, 2012 WL 1205117, * 12 (Sup. Ct. Kings County NY, Apr. 11, 2012). As *Strunk* involved not just a challenge to the qualifications of President Obama, but also to Sen. McCain, who was neither elected nor inaugurated, it cannot be dismissed as limited to forbidding post-inauguration challenges to a successful candidate. Indeed, *Strunk* employed the political question doctrine to forcefully reject challenges to candidates' qualifications, holding that the electoral college framework "is the exclusive means to resolve objections to the electors' selection of a President or a Vice President . . . . Federal courts have no role in this process." The court also addressed state court's involvement, explaining that:

> 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. Accordingly, the political question doctrine instructs this Court and other courts to refrain from superseding the judgments [of voters and Congress].

2012 WL 1205117, at *12. And the California Court of Appeals wrote:

> 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.

Keyes v. Bowen, 189 Cal.App.4th 647, 660 (2010); accord *Jordan v. Secretary of State Sam Reed,* No. 12-2-01763-5, 2012 WL 4739216, at *1 (Wash. Super., Aug. 29, 2012).

10. This Court should follow this well-established body of constitutional law, because Colorado courts understand this rule: "the Supremacy Clause mandates that state law give way when it conflicts with federal law." *Middleton v. Hartman*, 45 P.3d. 721, 731 (Colo. 2002), *as modified on denial of reh'g* (May 13, 2002). Accordingly, that clause "counsels against this Court's invading Congress' exclusive province as do basic principles of comity." *See, e.g., Duffy v. Grogan Energy Corp.*, 708 P.2d 809, 811 (Colo. App. 1985).

11. In addition, Section Three itself contains an exclusive grant of jurisdiction to Congress. Even if a presidential candidate were to be disqualified from holding office under Section Three, "Congress may, by a vote of two-thirds of each House, remove such disability." U.S. Const. amend XIV, § 3. By asking this Court to bar President Trump from even appearing on the ballot, the Petitioners also ask this Court to effectively strip Congress of its constitutional power to remove any disability under the Fourteenth Amendment, at any time. Under the plain language of the Constitution, even if a presidential candidate were found to "engage" in insurrection or rebellion, and even if that candidate were elected to office, Congress could still remove that disability. But prohibiting a candidate from even

standing for election would short-circuit this process and remove from Congress its ability to remove the disability from a presidential candidate or officeholder.

12. Petitioners miscite such cases as *Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014); *Hassan v. Colorado*, 495 F. App'x 947 (10th Cir. 2012); *Socialist Workers Party of Ill. v. Ogilvie*, 357 F. Supp. 109 (N. D. Ill. 1972); and *Peace and Freedom Party v. Bowen*, 912 F. Supp. 2d 905 (E.D. Cal. 2012) as support for the proposition that state governments are free to decide disputed questions of qualification under Section Three of the Fourteenth Amendment. None of those cases so holds. Instead, each involved the very different question of a state's ability to exclude a candidate who does not dispute that he or she does not meet the eligibility criteria set forth in the Constitution.

13. As the Ninth Circuit took great pains to make clear in *Lindsay*, this distinction matters a great deal. *Lindsay* involved a 27-year-old candidate who admitted that she was not qualified to serve but wanted to run anyway. The Ninth Circuit repeatedly underscored the importance of the fact that her ineligibility was undisputed, noting:

- "Distinctions based on *undisputed* ineligibility due to age do not 'limit political participation by an identifiable political group whose members share a particular viewpoint, associational preference or economic status.'" 750 F.3d at 1063 (emphasis supplied)(citations omitted).

- "Nor is this a case where a candidate's qualifications were disputed. Everyone agrees that Lindsay couldn't hold the office for which she was trying to run." *Id.* at 1064.

- "Holding that Secretary Bowen couldn't exclude Lindsay from the ballot, *despite her admission that she was underage*, would mean that anyone, regardless of age…would be entitled to clutter and confuse our electoral ballot." *Id.*

- "Lindsay points to 2008 presidential candidate John McCain, who some considered to be ineligible to hold office because he was born outside the United States. But, at worst, McCain's eligibility was disputed. He never *conceded* that he was ineligible to serve…." *Id.* at 1065 (emphasis in original)(citing with approval *Robinson v. Bowen,* 567 F.Supp.2d 1144, 1146–47 (N.D.Cal.2008); *Keyes v. Bowen,* 189 Cal.App.4th 647, 117 Cal.Rptr.3d 207, 214–16 (2010)).

14. Each of Petitioners' other cases—*Hassan* (candidate conceded that he was not a natural born citizen, explicitly alleging in his complaint that he was a "naturalized American citizen"), *Ogilvie* ("plaintiffs' counsel stipulated that the age of Linda Jenness was under 35 years and that she would not reach 35 years of age at the time of the election. Testimony was given that the age of Linda Jenness was 31 years."), and *Peace & Freedom Party* (involving same candidate as *Lindsay*, who conceded that she was 27 years old and therefore ineligible)—likewise involved an undisputedly unqualified candidate. These cases are therefore entirely inapposite here, as President Trump vigorously disputes his alleged disqualification.

15. Petitioners also miscite *Chiafolo v. Washington*, 140 S. Ct. 2316 (2020). which has no bearing on the present matter because it only concerns a state's power to regulate its electors, not presidential candidates, and *Cawthorn v. Amalfi*, 35 F.4th 245 (4th Cir. 2022).

which likewise did not address Section Three or the justiciability of challenge to a presidential candidate's qualifications.

16. The only two cases to depart from the overwhelming trend provide little support for Petitioners' position. In *Elliott v. Cruz*, 137 A.3d 646. (Pa. Commw. Ct. 2016), aff'd, 134 A.3d 51 (Pa. 2016) the Pennsylvania Commonwealth Court evaluated the merits of a challenge to Senator Cruz's qualification as natural-born citizen, but it (1) contradicted the unanimous approach of federal courts, (2) cited no authority for its analysis, and (3) was not subject to appeal on the political question issue because it rejected the challenge. In *Williams v. Cruz*, OAL Dkt. No. STE 5016-16 (N.J. Off. of Admin. Law Apr. 12, 2016) a New Jersey administrative law judge also found that the political question doctrine did not apply to a challenge to Senator Cruz's natural-born status. The administrative judge admitted that only Elliott supported his position, in contrast to cases filed in Illinois, New York, New Hampshire, and elsewhere, all of which had "been dismissed on procedural or other grounds that have not addressed the issue of 'natural born Citizen' on its merits." *Id.* at *7 n.3. That case also rejected the challenge on the merits and thus its ruling on the political question doctrine was not appealed.

17. *Elliott* and *Williams* are both outliers with no persuasive value, yet they are the sole judicial support that Petitioners have been able to unearth for their position.

18. The overwhelming majority of cases reject Petitioners' position and hold that the courts, especially the state courts, are not the proper forum to litigate a disputed issue of a presidential candidate's qualifications.

III. Petitioners have not proven their case by clear and convincing evidence.

1. After reviewing the evidence put forth at this Court's five-day trial regarding the disqualification of President Trump under Section Three of the Fourteenth Amendment, the Court concludes that the "clear and convincing evidence" standard is the correct standard of proof to apply where, as here, a litigant's and the public's constitutional rights are at stake.

2. In the Court's order of October 28, 2023, the Court ruled that it would apply the burden of proof prescribed in C.R.S. § 1-4-1204(4). That section specifies that "[t]he party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence." But upon further review, the Court finds that standard non-dispositive because courts must always apply the appropriate standard of proof as a matter of federal law. "The 'minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.'" *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980)).

3. The Supreme Court of the United States explained when the "clear and convincing evidence standard" is appropriate in *Addington v. Texas*, 441 U.S. 418, 424 (1979). "Clear and convincing evidence" is appropriate when "[t]he interests at stake . . . are deemed to be more substantial than mere loss of money" and a higher standard of proof would be necessary "to protect particularly important individual interests in various civil cases." *Id.*

4. To determine which standard of proof is appropriate, the Court in *Santosky* applied a "straight-forward consideration of the factors identified in *Eldrige* to determine whether a particular standard of proof in a particular proceeding satisfies due process." *Santosky*, 455 U.S. at 754. The factors are "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Importantly, "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" *Id.* at 758 (*Goldberg v. Kelly*, 397 U.S. 254, 262–263 (1970)).

5. In the First Amendment context, like this case which implicates President Trump's First Amendment rights to free speech and petition, this analysis has led the Supreme Court to require proof by clear and convincing proof that a speaker's defamatory statements were made with knowledge or the reckless disregard of their falsity. *BE&K Constr. Co. v. NLRB*, 536 US 516, 531 (2002). Both the United States Supreme Court and the Colorado Supreme Court have consistently found that whenever constitutional rights are at stake, the appropriate standard of proof is either clear and convincing evidence or higher. *See Santosky*, 455 U.S. 745 (clear and convincing evidence needed before terminating parental rights); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (same); *Addington*, 441 U.S. 418 (clear and convincing evidence needed before involuntarily committing defendant to psychiatric hospital); *In re Winship*, 397 U.S. 358 (1970) (beyond a reasonable doubt standard necessary

for juvenile delinquency proceeding); *People in Interest of A. M. D.*, 648 P.2d 625 (Colo. 1982) (applying *Santosky* to hold that clear and convincing evidence is needed before terminating parental rights); *A.M. v. A.C.*, 2013 CO 16 (same); *People in Int. of O.E.P.*, 654 P.2d 312 (Colo. 1982) (preponderance of the evidence standard was acceptable in parental neglect determination because no constitutional rights were threatened, unlike in an action to terminate parental rights).

6. I conclude that the appropriate standard of proof in this proceeding is "clear and convincing evidence" because Petitioners' requested relief would permanently deprive President Trump and Colorado voters of their important constitutional rights regarding freedom of association and voting. All three factors of the *Santosky* analysis indicate that due process requires the "clear and convincing evidence standard." Further, Petitioners premise their claim on assertions that President Trump's speech, protected by the First Amendment, incited individuals on January 6, 2021, to storm the Capitol.

7. First, the private interests at stake are significant. Petitioners here seek to have President Trump declared permanently ineligible for access to the ballot in Colorado for any federal or state office. Unlike a purely monetary interest that merits only a preponderance of evidence standard of proof, the Court finds that the interests threatened in this case are important First and Fourteenth Amendment constitutional rights related to freedom of association. *See Colorado Libertarian Party v. Sec'y of State of Colo.*, 817 P.2d 998, 1002 (Colo. 1991).

8. Second, the Government's interest in regulating its elections is not harmed by using the "clear and convincing evidence" standard and rather are preserved. While the Government does have an interest in regulating its election to ensure they are "'fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes,'" this interest must be balanced against the effect of those regulations on the rights of candidates, political organizations, and voters. *Id.* at 1001-02 (quoting *Storer v. Brown*, 41 U.S. 724, 730 (1974)). To the degree the Government has an interest in substantively evaluating the constitutional qualifications of presidential candidates under Section Three in order to keep disqualified candidates off the ballot (which President Trump has disputed), this interest is only in keeping off candidates who are actually disqualified.

9. Third, the risk of erroneous deprivation of President Trump and Colorado voters' rights in this proceeding is heightened because of its abbreviated procedures. Petitioners have chosen to proceed under Section 113's expedited procedures, effectively depriving President Trump of the use of the discovery process, putting him under significant time-constraints while they have had over a year to prepare, and affording him severely limited procedures for appeal. Because of these procedural pressures, President Trump and Colorado voters face a real risk that their important First and Fourteenth Amendment rights will be erroneously deprived without adequate remedy.

10. The Court finds it has a duty to ensure that the First and Fourteenth Amendment rights of President Trump and Colorado voters are protected by sufficient process. Applying the "clear and convincing" standard of proof protects against an

erroneous deprivation of these rights while serving the governmental interests. The Court further finds that Petitioners must meet this higher standard of proof for the relief they seek.

11. Given the evidence presented in this case and announced in this Court's findings of fact above, the Court finds that Petitioners have not met the "clear and convincing" standard necessary to disqualify President Trump from appearing on Colorado's ballots in 2024.

IV. The findings of the January 6th Report deserve no weight.

1. The Court has allowed the January 6th Report (the "Report") and certain findings to be admitted into evidence, but it has not yet decided the weight the Report will receive. Because Petitioners rely heavily on the Report to bring their case against Intervenor Trump, it is important for this Court to determine its weight. The Appendix attached to these Proposed Findings of Fact and Conclusions of Law contains an individual analysis of each of the Report's findings.

2. To determine the weight the Report will receive, the Court relies on existing standards drawn from caselaw to govern the trustworthiness courts place on congressional committee reports:

> C.R.E. 803(8) excludes from the hearsay rule "factual findings resulting from an investigation made pursuant to authority granted by law." C.R.E. 803(8) is nearly identical to its federal counterpart, F.R.E. 803(8). "Cases interpreting a similar federal rule of evidence are instructive" in Colorado. *Leiting v. Mutha*, 58 P.3d 1049, 1052 (Colo. App. 2002). As such, the Federal Rules of Evidence are instructive when interpreting C.R.E. 803(8) here.

3. When considering a Congressional report's factual findings, courts judge trustworthiness according to the "nonexclusive list of four factors [the Advisory Committee] 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. *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). Especially important here is factor number four.

4. "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." *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). "[C]ourts have 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." *Barry*, 467 F. Supp. 2d at 98 (collecting cases).

5. 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." *Id.* (collecting cases).

6. Most importantly with respect to the January 6th Report, "reports 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." *Id.* at 99.

7. After examining the evidence presented in this case—including the context surrounding the formation of the Select Committee, as well as the findings contained in its Report and in Petitioners' Exhibit 78, the Court concludes that the findings in the Report are untrustworthy and will therefore receive no weight. As explained further below, this is because neither the formation of the Select Committee nor the Report was the product of an unbiased, reliable exercise whose work-product should receive any weight. The Court also places little weight on the characterization of contents of videos, absent direct testimony or other reliable evidence independent of the Report itself.

8. The Court bases this decision on evidence illustrating the formation, composition, and conduct of the Select Committee as noted by documents in the record, such as the Declaration of Congressman Troy Edwin Nehls, and the witness testimony of Congressman Ken Buck, Chief Investigator of the Select Committee, Timothy Heaphy, Kash Patel, Katrina Pierson, and Congressman Eric Swalwell.

9. This Court will only accept Petitioners' characterizations of the Report if they are supported by facts in the form of admitted evidence. I will therefore limit the weight of findings contained in the January 6th Report to only those directly supported by the evidence in this case.

10. Against this backdrop, Petitioners have attempted to rehabilitate the work of the Select Committee and the findings contained in the January 6th Report by painting the Report as trustworthy. But this Court's findings set forth below dictate otherwise.

11. The formation of the Select Committee demonstrates its bias from the outset. Not a single member serving on the Select Committee held a neutral or favorable opinion of President Trump. To the contrary, as discussed below, each member had voted to impeach him in connection with the events of January 6 and each member had issued one or more public statements—before joining the Committee—clearly indicating that he or she had already reached conclusions regarding key issues concerning President Trump's conduct and culpability. The Court places no weight on the fact that two Republicans served on the Committee. The issue is whether the Committee members were biased towards President Trump with respect to their procedures and findings – not whether they were members of the President's political party. Indeed, several of the Petitioners are also Republicans. But they still seek President Trump's disqualification.

12. The procedures used to form the Committee were highly irregular and unusual:

a. After an 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—voted in

favor of H. Res. 503. Declaration of Congressman Troy Edwin Nehls ¶ 3, October 17, 2023.

b. 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." Nehls Decl., ¶ 4; (TR. 11/2/2023, pp. 207-208). Thus, from the beginning, the Select Committee was designed to have an 8-5 imbalance that substantially favored Democrats who were avowedly opposed to President Trump. Nehls Decl. ¶ 4.

c. 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. She also appointed Republican Rep. Cheney without any designation of position. Nehls Decl. ¶ 5; (TR. 11/2/2023, pp. 207-208).

d. 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. Speaker Pelosi refused to appoint Rep. Banks to serve as Ranking Member. Nor did she appoint any of Minority Leader McCarthy's other recommended minority members. Nehls Decl. ¶¶ 6-7; (TR. 11/2/2023, pp. 207-208).

e. In a public statement, Speaker Pelosi acknowledged that her refusal to appoint the members recommended by the then Minority Leader was an "unprecedented decision." Nehls Decl. ¶ 7; (TR. 11/2/2023, p 215:18-19). This comported with Congressman Buck's testimony that the Speaker's decision to reject or refuse McCarthy's picks was unprecedented in the history of Congress. (TR. 11/2/2023, p 215:18-19).

f. Petitioners argue that responsibility for the Select Committee's unprecedented composition is at least shared by Speaker McCarthy and the House Republican Caucus—that is, that it was a self-inflicted wound. Even if responsibility rests partly with Speaker McCarthy or the Republican Party, that does not, however, make it a *self-inflicted* would with respect to President Trump. The question before the Court is not whom to blame for the composition of a Committee that appears to be skewed to one side of a political debate. And importantly, there is no evidence to suggest that Intervenor Trump had any role in the Select Committee's composition. The legal issue for this Court is whether—whatever the reason for it—the composition of the Committee raises questions about the fairness of a process in which Intervenor Trump did not participate. What matters is whether the Committee was truly unbiased.

13. Further facts show that the Committee membership was uniformly biased against President Trump even before it began its investigation.

14. On January 13, 2021, members of the House of Representatives voted on whether to impeach President Trump. The single article of impeachment accused President Trump of "incitement of insurrection" against the U.S. government and "lawless action at the Capitol." (TR. 11/1/2023, p. 190:8). 232 members voted in favor, and 197 voted against. (TR. 11/3/2023, p. 197:2-6).

15. The Select Committee consisted of nine members (seven Democrats and two Republicans), all of whom had exhibited personal animus towards President Trump before joining the Committee. More importantly, each of them had also demonstrated that they had made up their minds on central issues going to President Trump's culpability for the events of January 6 *before* the Committee was even formed.

16. First, before the Committee was even formed, every single member had voted for, and agreed with, the article of impeachment that President Trump incited an insurrection.

17. All Republican and Democratic members of the Committee agreed that President Trump had incited an insurrection. (TR. 10/30/2023, p. 179: 15-19), including the two Republicans on the Committee. (TR. 11/2/2023, p. 210:3-6).

18. Representative Swalwell acknowledged a tweet he posted on February 4, 2022, Exhibit 1066, that Representatives Kinzinger and Cheney were on the same side as Democratic members "in this fight" and that "the fight" referred to the January 6, 2021, investigation, that is, the Select Committee. (TR. 10/30/2023, p. 178:23-179:23).

19. Although 95 percent of the overall Republican conference voted against impeachment, and 46 percent of all members of the House or Representatives voted against impeaching President Trump, not a single Committee member represented the viewpoint that President Trump should not be impeached.

20. The Select Committee lacked any members who had not already evinced a belief through an impeachment vote and through public statements that President Trump did not engage in an insurrection on January 6th. (TR. 11/2/2023, p. 349:1-4; TR. 11/3/2023, p. 197:10-12). The two Republicans on the Committee were no different in this regard; despite their party affiliation as Republicans, Representatives Cheney and Kinzinger did not represent the views the Republican conference, and they did not represent the views of a single member who voted not to impeach President Trump. (TR. 11/2/2023, p. 210:3-6; TR. 11/2/2023, p. 211:3-5).

21. The Court places little weight on Mr. Heaphey's testimony that he believed that the Committee members were unbiased. When shown public statements by Committee members that each one had concluded the President Trump engaged in an insurrection even before the Committee began its work, Mr. Heaphey argued that the public statements were immaterial and did not affect Committee members approach. (TR. 11/3/2023, pp. 181:12-21; 184:6-9; 186:2-9; 189:10-21; 191:1-5; 197:10-12). This was not credible. Even if Mr. Heaphey honestly believed this, the simple fact is that no fact-finder who had previously announced that he or she had already determined the facts before a trial had even begun would be considered unbiased and capable of sitting as a judge or a member of a jury. While

a Congressional Committee is a different, political animal whose members are not required to approach their task with the same lack of bias that participants in a judicial proceeding must, the fact that expressions of bias may not be *disqualifying* does not mean that they do not raise significant questions about the reliability of the results and the fairness of importing those results into a judicial proceeding that is not supposed to be infected by such bias.

22. Compounding the Committee's bias in membership, House Democratic leadership appointed the Chief Investigator of the Select Committee, who was a self-admitted partisan Democrat. (TR. 11/2/2023, p. 150:16-24; 151:2-5; 207:20-22; 208:15-17). Likewise, two of the Committee's attorney investigators simultaneously served as private legal counsel to two Committee members, even while serving as investigators. (TR. 11/3/2023, pp. 154:11-17; 174:7-12; 174:25-175:4). It is difficult to conceive how they could act independently or contrary to the Members' wishes, while serving in this dual capacity.

23. The testimony of Representative Ken Buck credibly demonstrated that the purpose of the Select Committee was a political one. Congressman Buck credibly testified that Congressional proceedings are political, not a search for the truth. They seek to promote different political views and the members of congressional committees are chosen because they either raise a certain amount of money or engage in beneficial political activities. This process is not in any way similar to court proceedings. (TR. 11/2/2023, p. 348:9-20).

24. The political purpose of the Report was to win elections and to paint President Trump in as negative of a light as possible. Generally, the political biases of a

committee may be mitigated by the issuance of a minority report. But no minority existed, and thus the Committee did not produce a minority report. (TR. 11/2/2023, p. 229:4-12).

25. In addition to the irregular procedures surrounding the formation of the Committee, the Committee's subsequent conduct showed substantial irregularities and bias against President Trump.

26. Unlike other Congressional Committees, members of the Select Committee were heavily involved in the day-to-day operations of the investigation. (TR. 11/3/2023, p. 153:2-14; 173:15-17). This hands-on management of Committee affairs meant that the Members' biases permeated the Committee's operations.

27. Due to the Committee's composition, there were no members with more favorable views of Intervenor Trump to cross-examine witnesses and otherwise ask questions that might be inconsistent with the political narrative favored by the Committee members. (TR. 11/2/2023, p. 216:22-217:1).

28. The questions asked by the Select Committee were ones that would demonstrate Intervenor Trump's involvement and culpability in January 6th or elicit answers that would demonstrate his involvement and culpability in the events of January 6th. (TR. 11/2/2023, p. 227:17-22). The process was not set up in a way that would elicit the whole truth in those hearings. (TR. 11/2/2023, p. 228:6-9).

29. Drawing upon his experience investigating the Iran-Contra affair, Congressman Buck noted there was an adversarial system employed in that investigation that produced a minority report. (TR. 11/2/2023, p. 215:2-11); (TR. 11/2/2023, p. 221:8-13).

But the January 6 Committee lacked a minority staff that could have worked independently from the majority staff, as is normal for congressional committees. (TR. 11/2/2023, p. 216:2-12); (TR. 11/3/2023, pp. 198:2-5; 198:9-10). Mr. Heaphey was unable to provide even a single example of another committee that lacked a minority staff. (TR. 11/2/2023, p. 198:15-20).

30. The Committee did not allow cross-examination of witnesses. (TR. 11/2/2023, p. 230:3-13).

31. Despite the Select Committee's claims of transparency regarding the materials it did compile, the Committee did not and could not post the questions they did not ask, the documents they did not subpoena, and the witnesses they did not interview. (TR. 11/2/2023, p. 256:12-16).

32. Witnesses who disagreed with the Select Committee's narrative were not called. Nehls Decl. ¶ 9; (TR. 11/2/2023, p. 217:10-16; TR. 11/2/2023, p. 221:8-13). For example, exculpatory testimony from Katrina Pierson and Kash Patel was excluded from the final Report. (TR. 11/2/2023, p. 219:1-6; TR. 11/1/2023, pp. 230:13-15; 231:3-9; TR. 11/1/2023, pp. 296:2-8; 297:10-16).

33. The Report also failed to include other potentially relevant evidence. For example, Rep. Jordan stated that he received a subpoena and was in the process of negotiating a date for his testimony. He stated that was willing to testify, but the Report did not include that information. (TR. 11/2/2023, p. 223:10-16).

34. Questions asked by the Select Committee were designed to elicit testimony demonstrating President Trump's involvement and culpability in violence on January 6th. (TR. 11/2/2023, p. 227:17-22). Accordingly, the process was not set up in a way that would elicit the whole truth in those hearings. (TR. 11/2/2023, p. 228:6-9).

35. The Select Committee's staff included an unusually large proportion of attorney investigators, whereas other Congressional committees rely on internal staff, without a focus on criminal investigation. (TR. 11/3/2023, pp. 151:14-18; 151:21-152:3; 152:7-15; 175:12-21). In addition, most of the staff the Select Committee hired had never worked in Congress before. (TR. 11/3/2023, p. 152:19-24).

36. Lastly, the findings in the Report contain yet another infirmity. To the extent that specific findings contain hearsay not within an exception, those hearsay statements should be given no weight. *See* Appendix.

37. The Court will likewise limit weight placed upon the video evidence that stems from the Select Committee's investigation, for several reasons.

38. First, the video evidence was not authenticated by eyewitnesses, subject to cross examination in court.

39. The video evidence was not subject to the adversarial process at the time it was considered as part of the Report. (TR. 11/2/2023, p. 216:22-217:1).

40. There exists credible evidence that video clips were highly edited for use in public proceedings and dubbed over with police radio transmissions. Nehls Decl. ¶ 23; (TR. 11/3/2023, p. 158:13-20).

41. A verified complaint filed by Trentiss Evans against Petitioners' counsel alleges that video footage of Mr. Evans was manipulated to create a false impression that he advocated violence shortly after President Trump spoke at the Ellipse. (*Evans v. Olson et al.*, Case No: 2-23CV32577) Although a verified complaint from another case cannot be used to prove manipulation, a sworn complaint in federal court directly contesting the content of an edited video provides another reason for this Court to approach edited videos and characterizations of those videos with caution.

42. In short, bootstrapping into evidence the work of politicians whose motivations are evident and suspect -- no matter how "damning" the findings may be -- is improper here, especially when the findings are used against a private party like President Trump. *See Pearce 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").

43. The subject matter of this lawsuit is the exact subject matter considered by the Committee. And in light of the Committee's deep structural bias and multiple departures from normal behavior, this Court must be hypervigilant about the stain of bias. And the evidence before the Court demonstrates that bias pervaded the Select Committee throughout its existence.

44. Overall, the Court must find the Report untrustworthy and, accordingly, it gives the Report no weight.

V. Petitioners have not shown that President Trump himself "engaged" in an insurrection.

A. "Engagement" requires specific intent.

1. Setting aside for the moment whether the violence on January 6th constituted an "insurrection," as a first step this Court must determine whether President Trump "engaged" in that activity.

2. This Court has already ruled that Petitioners must prove that President Trump had the specific intent to cause violence at the Capitol on January 6, 2021. (Tr. 10/30/2023, p. 284:20-24).

3. The law also supports a finding that before a Court can disqualify a candidate based on inciting an insurrection (which President Trump does not concede), it must find that he or she specifically intended to cause the actions that were the purported insurrection. *Candelaria v. People*, 2013 CO 47, ¶ 14 (gathering statutes).

4. Petitioners themselves agree with this position. *Response in Opposition to President Trump's Third Motion to Dismiss*, at 36 (citing William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section 3*, 172 U. Pa. L. Rev. (forthcoming 2024), at 18, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751) (emphasis added).

5. To prove specific intent, Petitioners must show that President Trump intended to cause "the specific result" of which they complain—namely the use of violence

at the Capitol to prevent the counting of the electoral votes. "INTENT", Black's Law Dictionary (11th ed. 2019); CJI-CRIM, F:185, "Intentionally (and with intent)," *citing* C.R.S. § 18-1-501; CJI-Civ 32:5, *citing* C.R.S. § 18-1-501. Petitioners must, therefore, provide direct evidence that President Trump specifically intended to cause the purported insurrection.

6. Petitioners argue that "engage" includes "incite." They state repeatedly that President Trump "incited" people to use violence to forcibly prevent the counting of electoral votes. *See Ver. Pet.* p. 60. That legal framework, however, does not withstand analysis.

7. As a matter of common usage, the word "engage" connotes active, affirmative involvement. For example, Black's Law Dictionary defines "engage" to mean "employ or involve oneself; to take part in; to embark on." Black's Law Dictionary (11th ed. 2019). This demands a significant level of activity, not mere words or inaction.

8. The conclusion that "engagement" is separate from, and requires a greater level of activity than, "incitement" is also supported by the historical record.

9. Section Three was modeled partly on the original Constitution's Treason Clause, and partly on the Second Confiscation Act, which Congress had previously enacted in 1862. Section Two of the Confiscation Act used the terms "incite" and engage" separately, punishing anyone who "shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States … or give aid or comfort thereto." 12 Stat. 589 & 627 (1862); see 18 U.S.C. § 2383. Thus, "incite" was but one of several acts penalized by that act while "engage" was another.

10. It is well-established law that where multiple terms are used in a statute, they are to be construed as having different meanings to avoid rendering any words or phrases superfluous. The Colorado Supreme Court has many times held, "[o]ur precedents clearly instruct, however, that "'the use of different terms signals an intent on the part of the General Assembly to afford those terms different meanings.'" *People v. Rediger*, 416 P.3d 893, 899 (Co. 2018), *quoting Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1010 (Colo. 2008). Furthermore courts "may not construe a statute so as to render any statutory words or phrases superfluous." *Id.*

11. The United States Supreme Court applies the same legal canon of interpretation. Accordingly, it is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1998), and courts must give effect to every word that Congress used in the statute." *Lowe v. SEC*, 472 U.S. 181, 207 n. 53 (1985).

12. Accordingly, in 1862, in the context of the Civil War, Congress well understood that those terms had different meanings. And Congress must be understood to have had those differences in mind when it drafted Section Three to cover similar territory, also in the context of the Civil War, just four years later. Section Three, ratified six years later with the rest of the Fourteenth Amendment, similarly covers "insurrection or rebellion."

13. Unlike the Confiscation Act, however, Section Three omits any penalty for 'incit[ing] or "assist[ing]" an insurrection, and it penalizes only those actually "engag[ing] in" insurrection. The omission of these terms from Section Three may not be dismissed—as

Petitioners and their expert, Professor Magliocca, would have it—as being without significance. The attempt to equate "incite" with "engage," *see* Professor Magliocca, Tr., November 1, 2023, 37:16-25, violates basic rules of statutory construction. Instead, as Professor Delahunty testified, the omission of "incite" from Section Three "very strongly suggests that it was not covering the same class of activities as the Second Confiscation Act did." (Professor Delahunty, TR. 11/3/23, 57:13-58:11).

14. Controlling Supreme Court precedent interpreting statutory history establishes the significance of such an omission. In *United States v. Wells*, 519 U.S. 482 (1997), the Supreme Court held that when Congress dropped a materiality requirement from a recodified and consolidated statute, Congressional action had to be understood as a deliberate act on Congress's part – despite the Reviser's note expressly stating that "apart from two changes not relevant here, the consolidation 'was without change of substance….'" *Id.* at 496. Here, of course, there is no such reviser's note nor anything else to suggest that Congress intended no substantive change when it omitted "incite." The presumption that Congress intended its language choices to have their natural effect is compelling, and Petitioners have not provided any evidence – beyond speculation – to the contrary.

15. Petitioners' and their experts' reliance on early grand jury charges reported in the press are of little use in determining what "engaging in" an insurrection means. Grand jury charges are weak guidance; they are not court rulings and there is no evidence that the defendants in any of those cases actually raised the issue of engagement, or whether the term

"engaging in" was actually litigated. As a matter of longstanding law "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents *See, e.g., Webster v. Fall*, 266 U.S. 507, 511 (1924).

16. The grand jury charge in *In re Charge to Grand Jury*, 62 F. 828, 830 (N.D. Ill. 1894) also suffers a fundamental deficiency. It tracked the Second Confiscation Act of 1862, which specifically included the term "incite." It did not track Section Three, which does *not* include the word incite. And there would have been no reason for the court charging that grand jury to have focused on that key textual difference between statutory and constitutional text, the court and grand jury did not consider Section Three to be at issue in that case.

17. Finally, Congress's immediate post-ratification consideration of Section Three itself reflects the same understanding, that "engage" required more than mere words that could be interpreted as incitement. In 1870—just two years after the Fourteenth Amendment was ratified—Congress considered whether a Representative-elect from Kentucky was disqualified by Section Three when, before the Civil War began, he had voted in the Kentucky legislature in favor of a resolution to "resist [any] invasion of the soil of the South at all hazards." 41 Cong. Globe at 5443. The House of Representatives found that this was *not* disqualifying. *Id.* at 5447.

18. Similarly, in 1870 the House of Representatives also considered the qualifications of a Representative-elect from Virginia who, before the Civil War, had voted

in the Virginia House of Delegates for a resolution that Virginia should "unite" with "the slaveholding states" if "efforts to reconcile" with the North should fail, and stated in debate that Virginia should "if necessary, fight," but who after Virginia's actual secession "had been an outspoken Union man." *Hinds' Precedents of the House of Representatives of the United States*, 477 (1907). The House of Representatives also found that this was not disqualifying under Section Three. *Id.* at 477-78. By contrast, the House did disqualify a candidate who "had acted as colonel in the rebel army" and "as governor of the rebel State of North Carolina." *Id.* at 481, 486.

B. Petitioners' evidence fails to show that President Trump "engaged" in insurrection.

1. In their effort to prove "engagement," the Petitioners have offered evidence in three forms. First, is President Trump's speeches and tweets. Second is the January 6th Report, and lastly is opinion testimony from Professor Simi. In response, President Trump has offered testimony from witnesses who witnessed President Trump's actions in the days before January 6th (Katrina Pierson and Kash Patel) and three attendees at the Ellipse (Amy Cramer, Tom Van Flein, and Tom Bjorklund).

2. All of Petitioners' evidence regarding President Trump's actions consist of President Trump's words spoken or written at speeches, debates, press conferences, video addresses, or in tweets. Much – if not all – of this evidence is uncontested. The parties do, however, place different weight and interpretations on President Trump's speech.

3. None of this evidence supports a conclusion that President Trump engaged in an insurrection. None of the speech shows that he ordered people to attack the Capitol, or that he developed plans to attack the capitol (either individually or jointly with others), voted to attack the Capitol, or himself participated in the attack on the Capitol.

4. Nonetheless, because Petitioners argue that President Trump incited an attack on the Capitol, the Court will also evaluate President Trump's speech to determine whether he "incited" an attack on the Capitol.

C. When considering speech, the Court must harmonize the application of the First and Fourteenth Amendments.

1. Political speech is, of course, protected by the First Amendment of the U.S. Constitution. U.S. Const. amend I. Petitioners claims, by contrast, rest upon application of the Fourteenth Amendment. This Court must consider both Amendments and is required to reject Petitioner's invitation to prefer the Fourteenth Amendment over the First if it is reasonably possible to harmonize them.

2. When interpreting the Constitution, "every provision must be read in light of other provisions relating to the same subject matter." 16 Am. Jur. 2d Constitutional Law § 66. Each provision is "of equal authority with every other, but no greater, and to be construed and applied in harmony with all the provisions of that instrument. *Poindexter v. Greenhow*, 114 US 270, 286 (1885). The goal is to promote harmony among the various provisions. 16 Am. Jur. 2d Constitutional Law § 67. "The same principle which requires that two statutes be reconciled, if possible, and both be given effect, applies in the interpretation

and application of different sections of the same Constitution…." *People v. Higgins,* 168 P. 740, 741 (Colo. 1917). Indeed, this has been the rule in Colorado for nearly 150 years. *See People ex rel. Livesay v. Wright*, 6 Colo. 92, 95 (1881) ("A construction which raises a conflict between different parts of the constitution is not admissible, where, by any reasonable construction, they may be made to harmonize.").

3. As such, this Court will "adopt an interpretation of the language that harmonizes different constitutional provisions, rather than one that would create a conflict between them." *Patterson Recall Comm., Inc. v. Patterson*, 209 P.3d 1210, 1214 (Colo. Ct. App. 2009). *See also Zaner v. City of Brighton,* 917 P.2d 280, 283 (Colo. 1996). "[T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously." Garner & Scalia, *Reading Law: The Interpretation of Legal Texts* 180 (2012). *See, also*, *W. Virginia Univ Hosps, Inc. v. Casey*, 499 US 83, 101 (1991) ("[I]t is our role to make sense rather than nonsense out of the corpus juris.").

4. And this mandate to harmonize constitutional provisions also existed at the time of ratification of the Fourteenth Amendment. Cooley, *A Treatise on the Constitutional Limitations Which Rest the Legislative Power of the States of the American Union* 58 (1868) ("one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together").

5. Even if the two Amendments did conflict, the conflict would be governed by the general-specific canon and the First Amendment would prevail. Even "when conflicting provisions simply cannot be reconciled," "the specific provision is treated as an exception to

the general rule." Garner & Scalia, *Reading Law*, at 183. The First Amendment protects a specific protected right—President Trump's speech—from Petitioners' expansive construction of Section Three's prohibitions. That specific protection must prevail.

6. But here they do not conflict. Section Three's disqualification provision can be easily harmonized with First Amendment rights protecting political speech simply by holding that protected speech under the First Amendment cannot support disqualification under Section Three. Accordingly, because they can be thus reconciled, controlling precedent requires this Court to thus reconcile them.

7. The Petitioners argue that President Trump incited violence. Directly controlling is *Brandenburg v. Ohio* and its progeny, which set forth standards for when speech can be considered actual incitement to violence, thus removing it from First Amendment protections. The Supreme Court has set a high bar; "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." *Brandenburg v. Ohio*, 395 US 444, 447 (1969). The *Brandenburg* court explained that previous cases had said, "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Id.* at 448, *citing in Noto v. United States*, 367 U.S. 290, 297-298 (1961). And the Court held a statute unconstitutional because it criminalized activity that did not include "incitement to imminent lawless action." *Brandenburg*, 385 US at 448.

8. Later courts have defined *Brandenburg's* test for incitement as: (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." *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)).

9. When reviewing speech to see if it constitutes unprotected incitement, the Court will only look to the actual words spoken and their objective meaning. *Nwanguma v. Trump*, 903 F.3d 604, 613 (6th Cir. 2018). Courts have rejected efforts to examine instead the subjective effect of speech on the audience, because basing a regulation of speech on the reaction of the listener is not content neutral. *Bible Believers v. Wayne County*, 805 F.3d 228, 247 (6th Cir. 2015).

10. And the 6th Circuit has taught that plaintiffs and petitioners cannot avoid the strictures of *Brandenburg* by arguing that speech over time groomed listeners to a propensity to engage in violence. *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). Such a "glacial process of personality development is far from the temporal imminence that we have required to satisfy the Brandenburg test." *Id.*

11. As the Supreme Court recently underscored in *Counterman v. Colorado*, to clear the incitement bar requires a showing of "specific intent . . . equivalent to purpose or knowledge." 600 U.S. 66, 81 (2023) (citing *Hess v. Indiana*, 414 U.S. 105, 109 (1973)).

12. Applying this body of caselaw to President Trump's speech harmonizes the First Amendment with Section Three of the Fourteenth Amendment, "mak[ing] sense rather than nonsense out of the corpus juris." *Casey*, 499 US at 101.

D. President Trump did not call for violence prior to January 6th, 2021

1. President Trump's speech at issue in this case falls into three general categories. First is speech that took place prior to January 6, 2021, that did not reference events on January 6, 2021. Second is speech (in the form of tweets) that took place before January 6, 2021, but that also referenced events to occur on January 6, 2021. And third is speech that took place on January 6, 2021. The court will first look at speech that took place prior to January 6, 2021.

2. None of President Trump's communications prior to January 6, 2021, advocated violence. At most President Trump refused to condemn isolated instances of violence, most of which involved protestors at speeches.

3. At a speech on March 1, 2015, President Trump pointed out a disruptive protestor. He stated: "Don't hurt him, don't hurt him. See, if I say, 'go get him,' I get in trouble with the press, the most dishonest human beings in the world. The worst. If I say, 'don't hurt him,' then the press says, 'well Trump isn't as tough as used to be,' can you believe that?" Exhibit 123.

4. This statement was from a speech that concerned only the events at that speech. Nothing he said referred to the Capitol, the certification of the votes, or the speech at the Ellipse on January 6th. This speech is therefore a far cry from advocating violence at

the U.S. Capitol, on January 6, 2023, to overthrow the government or to prevent the counting of electoral votes.

5. Further, his call to action in this speech was much different than a call to attack the U.S. Capitol on January 6, 2021: even if it constituted a call to violence, it was limited to the specific circumstances of an individual protestor at his speeches, and bore no relation to the violence that would be involved in a call to attack the Capitol to achieve a political objective.

6. And a statement to the effect of "get him out of here" about disruptive protestors, does not, as a matter of law encourage harmful violence as part of the protestors' removal, especially when accompanied by words to the effect of "don't hurt him." Exhibit 123; Exhibit 50. This type of speech was explicitly held not to be unprotected incitement in *Nwanguma v. Trump*, 903 F.3d 604 (6th Cir. 2018).

7. At a speech on November 21, 2015, President Trump again pointed out a disruptive protestor and stated, "Get him the hell out of here, would you, please;" "Throw him out;" and "Get out." Exhibit 50. This speech is not a call to violence, for the reasons described above.

8. In a phone interview on November 22, 2015, President Trump referred to the protestor who was removed from his November 21, 2015, event: "The man that was, I don't know, you say was roughed up, he was so obnoxious and so loud. He was screaming. I had 10,000 people in the room yesterday. 10,000 people. And this guy started screaming by

himself. And they, I don't know, rough up? Maybe he should have been roughed up. Because it was absolutely disgusting what he was doing." Exhibit 48.

9. This comment was a hypothetical ("maybe" and "should have"), did not refer to a present situation that could be acted upon, and included no direction or command to act. Exhibit 48. It also had nothing to do with the Capitol or January 6th.

10. At a speech on February 1, 2016, President Trump again told the audience that he had been advised that protestors might throw tomatoes at him during the event. He comedically suggested that "if you see someone getting ready to throw a tomato, knock the crap out of them, would you," and then said "I promise you, I will pay for the legal fees." Exhibit 51.

11. Of all Petitioner's examples, this is the closest President Trump came to calling for violence. But even this is unavailing to Petitioners' case. First, the statement was couched as "if." Second, as a factual matter it did not incite violence, because no evidence exists that any violence even took place. Third, a statement about an individual protestor is far removed from an attack on the Capitol on January 6, 2021. And fourth—inasmuch as it took place nearly five years before January 6, 2021, this 2016 incident cannot as a matter of law be said to have met the imminence test required under *Brandenburg*. Indeed, as discussed in more detail in the next section, none of the incidents discussed in this section can possibly meet that test.

12. At a speech on February 22, 2016, President Trump pointed out a disruptive protestor who was punching and striking people in the audience. He commented on the

protestor's violent behavior and said, "you know what they used to do to guys like that when they were in a place like this? They'd be carried out on a stretcher, folks;" and "I'd like to punch him in the face, I tell you." Exhibit 52.

13. President Trump's comment that he'd "like to punch him in the face" was a statement of opinion and a hypothetical, and it did not call for or direct any violence toward the man. Exhibit 52. It also had nothing to do with the Capitol. Similarly, his comment from the same speech that in the old days protestors like that would be "carried out on a stretcher" was also a hypothetical about what would have occurred in a different time and culture if someone started a fight in a crowd, and it was neither an actionable call to violence nor was it related to the Capitol or January 6th.

14. At a speech on March 11, 2016, President Trump commented on the violent protestor from the February 22, 2016, as well as the forceful response of some of the members of the audience that protestor was striking, saying "he was very loud and started swinging at the audience, and, you know what, the audience swung back and I thought it was very, very appropriate," and "that's what we need a little bit more of." Exhibit 53. This was a statement of his opinion about the conduct of others, did not include a command or direction to act, referred to events from three weeks prior, and had nothing to do with the Capitol or January 6th.

15. On August 15, 2017, President Trump gave a speech after the Charlottesville "Unite the Right" rally, in which he stated that the event in which people protested (or supported) removing the Robert E. Lee statue had "very fine people" on both sides of the

issue. He further explicitly clarified that his comment referred only to people innocently protesting the statue's removal, and he disavowed white nationalist and neo-Nazis entirely. Exhibit 56.

16. At a speech on October 18, 2018, President Trump recounted the story of Montana Governor Greg Gianforte body slamming a reporter named Ben Jacobs, joking that "any guy who can do a body slam is my guy," "I had heard he body slammed a reporter," and "I know Montana pretty well, I think it might help him, and it did." Exhibit 57. This comment did not incite violence because it was only an expression of President Trump's opinion about Gianforte's conduct from years earlier and included no statements directing any conduct by anyone. Nor did it relate to the Capitol or January 6th.

17. At a speech on May 8, 2019, President Trump described hundreds of people illegal crossing the southern border, how other countries have used violence to repel illegal border crossing, and how the U.S. cannot and should not use violence but must find a solution. President Trump rhetorically asked "how do you stop these people" and an audience member jokingly called out "shoot them." President Trump jokingly responded about the mock suggestion, "that's only in the panhandle you can get away with that stuff. Only in the panhandle." Exhibit 58.

18. The response to the audience member who shouted "shoot them" about illegal crossers at the border was a humorously framed disavowal of the audience member's comment. Exhibit 58. President Trump responded, "that's only the panhandle you can get away with that stuff," which specifically distinguished the audience member's comment as

ridiculous and outside the mainstream. President Trump's response did not constitute incitement because it did not call for or direct violence, did not relate to an imminent conduct, was a disavowal of violence, and did not relate to the Capitol or January 6th.

19. On December 1, 2020, President Trump tweeted a video of Gabriel Sterling criticizing President Trump directly. Giving Mr. Sterling a platform to articulate his views cannot be considered a call to violence. And President Trump's commentary about the tweet wholly ignored the issue of violence. He wrote "Rigged Election. Show signatures and envelopes. Expose the massive voter fraud in Georgia. What is Secretary of State and @BrianKempGA afraid of. They know what we'll find!!!" Exhibit 148 at 27. President Trump's tweet did not refer to violence in any way, did not direct violence toward any actionable target, and did not refer to the Capitol or January 6th. The most that could be said for this tweet is that President Trump *ignored* the issue of violence that Sterling raised in the video that President Trump responded to.

20. President Trump also tweeted on December 19, 2020, a video produced by an unknown person entitled "Fight for Trump!" The video featured footage of various audiences across the United States and world peacefully waving American flags or displaying pro-Trump banners and paraphernalia with audio of a crowd chanting "fight for Trump" and overlaid music. Exhibit 148 at 43; Exhibit 73. This cannot be considered an incitement to violence because it only showed generic footage of peaceful and joyous pro-American or pro-Trump events with a rock-and-roll soundtrack and a "fight for Trump" chant. The natural and objective understanding of "fight for Trump" here is a call for generic political

support for President Trump. The video itself neither refers to violence nor directs violence toward any actionable target. Nor did the video refer to the Capitol or the events of January 6th.

21. *Brandenburg* and its progeny also hold that a speaker's speech cannot be incitement unless the speech occurs proximately in time to actual violence. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *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)).

22. The imminence requirement means that the impact from the speech must occur without delay. *Rodríguez-Cotto v. Pierluisi-Urrutia*, 2023 U.S. Dist. LEXIS 57310, *51 (Dist. P.R. 2023) *citing* Webster's New World Dictionary of American English (3rd ed.)(defining imminent as likely to happen without delay); The American Heritage Dictionary of the English Language (4th ed.)(defining imminent as about to occur). It "must not be remote or even probable; it must immediately imperil." *Landmark Communications v. Va.*, 435 U.S. 829, 845 (1978) *citing Craig v. Harney*, 331 U.S. 367 (1947). Speech that occurs days, weeks, months, and years prior to any violence does not meet this requirement.

23. Even if the above videos and other communications could be reasonably construed as a call to violence (which they cannot be), they all fail the imminence test. All took place years and months in advance of January 6, 2021. Furthermore, not a single speech referenced the date of January 6, 2021, or the Capitol, or a rally at the Ellipse on that date. In short, they occurred too far before the January 6 riot. *Rodríguez-Cotto,* 2023 U.S. Dist. LEXIS 57310, *51; *Landmark Communications*, 435 U.S. at 845.

24. The same is true of the second category of speech of which Petitioners complain, the anodyne tweets President Trump made in advance of January 6 urging people to attend his speech at the Ellipse on January 6, 2021. Not only do they not call for violence or illegal action on their face, but they do not come close to meeting the constitutionally required imminence test.

25. In a tweet on December 19, 2020, a notice of the planned speaking event on January 6, 2021: "Peter Navarro releases 36-page report alleging election fraud 'more than sufficient' to swing victory to Trump washex.am/3nwaBCe. A great report by Peter. Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6th. Be there, will be wild!" Exhibit 148 at 41.

26. The objective and natural reading of President Trump's "will be wild" statement is merely that he meant the planned event on January 6th would be spirited and entertaining. The tweet contained no reference to the Capitol building, no reference to force or violence, and no reference to taking any action to delay or disrupt vote certification.

27. In a tweet on December 26, 2020, President Trump wrote "The "Justice" Department and the FBI have done nothing about the 2020 Presidential Election Voter Fraud, the biggest SCAM in our nation's history, despite overwhelming evidence. They should be ashamed. History will remember. Never give up. See everyone in D.C. on January 6th." Exhibit 148, at 50. The objective and natural reading of President Trump's "see everyone in D.C." statement is merely an indication that he would be speaking on January

6th. The tweet contained no reference to the Capitol building, no reference to force or violence, and no reference to taking any action to delay or disrupt vote certification.

28. In a tweet on December 27, 2020, President Trump wrote "See you in Washington, DC, on January 6th. Don't miss it. Information to follow!" Exhibit 148, at 55. The objective and natural reading of President Trump's "see you in Washington DC" statement is merely an indication that he would be speaking on January 6th. The tweet contained no reference to the Capitol building, no reference to force or violence, and no reference to taking any action to delay or disrupt vote certification.

29. In a tweet on December 30, 2020, President Trump wrote "JANUARY SIXTH, SEE YOU IN DC!" Exhibit 148, at 60. The objective and natural reading of President Trump's "SEE YOU IN DC" statement is merely an indication that he would be speaking on January 6th. The tweet contained no reference to the Capitol building, no reference to force or violence, and no reference to taking any action to delay or disrupt vote certification.

30. In a tweet on January 1, 2021, President Trump wrote "The BIG Protest Rally in Washington, D.C., will take place at 11.00 A.M. on January 6th. Location details to follow. StopTheSteal!" Exhibit 148, at 62. The objective and natural reading of President Trump's statement is merely an indication that he would be speaking on January 6th and that he believed that the election had been stolen from him. The tweet contained no reference to the Capitol building, no reference to force or violence, and no reference to taking any action to delay or disrupt vote certification.

31. In a tweet on January 1, 2021, President Trump wrote "Massive amounts of evidence will be presented on the 6th. We won, BIG!" Exhibit 148, at 63. The objective and natural reading of President Trump's statement is merely an indication that he believed that the election had been stolen from him and that while speaking to the crowd on January 6th that he would reveal the evidence. The tweet contained no reference to the Capitol building, no reference to force or violence, and no reference to taking any action to delay or disrupt vote certification.

32. In a tweet on January 1, 2021, President Trump "re-tweeted" Kylie Jane Kremer's post about the event on January 6th, and he said "A great honor!" Exhibit 148, at 64. The objective and natural reading of President Trump's statement is merely that he was honored to be speaking at the event on the 6th. The tweet contained no reference to the Capitol building, no reference to force or violence, and no reference to taking any action to delay or disrupt vote certification.

33. In a tweet on January 1, 2021, President Trump wrote "January 6th. See you in D.C." Exhibit 148, at 66. The objective and natural reading of President Trump's statement is merely an indication that he would be speaking on January 6th. The tweet contained no reference to the Capitol building, no reference to force or violence, and no reference to taking any action to delay or disrupt vote certification.

34. In a tweet on January 2, 2021, President Trump "re-tweeted" Kylie Jane Kremer's post about the event on January 6th, and President Trump did not provide any of his own commentary. Exhibit 148, at 69. The objective and natural reading of President

Trump's "re-tweet" is merely an indication that he would be speaking on January 6th. The tweet contained no reference to the Capitol building, no reference to force or violence, and no reference to taking any action to delay or disrupt vote certification.

35. In a tweet on January 3, 2021, President Trump "re-tweeted" Kylie Jane Kremer's post about the event on January 6th, and he said "I will be there. Historic day!" Exhibit 148, at 72. The objective and natural reading of President Trump's statement is merely that he would be speaking at the event on the 6th. The tweet contained no reference to the Capitol building, no reference to force or violence, and no reference to taking any action to delay or disrupt vote certification.

36. In a tweet on January 4, 2021, President Trump wrote "How can you certify an election when the numbers being certified are verifiably WRONG. You will see the real numbers tonight during my speech, but especially on JANUARY 6th. @SenTomCotton Republicans have pluses & minuses, but one thing is sure, THEY NEVER FORGET!" Exhibit 148, at 74. The objective and natural reading of President Trump's statement is merely an indication that he would be speaking on January 6th and that he believed that the election had been stolen from him and he would be presenting evidence during his speech. The tweet contained no reference to the Capitol building, no reference to force or violence, and no reference to taking any action to delay or disrupt vote certification.

37. In a tweet on January 5, 2021, President Trump wrote "See you in D.C." Exhibit 148 at 75. The objective and natural reading of President Trump's "See you in D.C." statement is merely an indication that he would be speaking on January 6th. The tweet

contained no reference to the Capitol building, no reference to force or violence, and no reference to taking any action to delay or disrupt vote certification.

38. In a tweet on January 5, 2021, President Trump wrote "Washington is being inundated with people who don't want to see an election victory stolen by emboldened Radical Left Democrats. Our Country has had enough, they won't take it anymore! We hear you (and love you) from the Oval Office. MAKE AMERICA GREAT AGAIN!" Exhibit 148, at 76. The objective and natural reading of President Trump's statement is merely an indication that he recognized that many of his supporters were in D.C. to hear him speak about the election that he believed was stolen. His remark that his supporters "won't take it anymore" was a reference to their frustration, but not in any way an indication that he wanted them to do violence. The tweet contained no reference to the Capitol building, no reference to force or violence, and no reference to taking any action to delay or disrupt vote certification.

39. In a tweet on January 5, 2021, President Trump wrote "I will be speaking at the SAVE AMERICA RALLY tomorrow on the Ellipse at 11AM Eastern. Arrive early – doors open at 7AM Eastern. BIG CROWDS!" Exhibit 148, at 78. The objective and natural reading of President Trump's statement is merely that he would be speaking on the Ellipse at 11AM on January 6th. The tweet contained no reference to the Capitol building, no reference to force or violence, and no reference to taking any action to delay or disrupt vote certification.

E. President Trump did not advocate or call for violence on January 6, 2021.

1. Third are President Trump's communications on January 6, 2021. These consist of his speech at the Ellipse, two subsequent tweets, and a video address. None of these called for violence, and in fact each and every one contained an admonition for people to behave peacefully.

2. On January 6, President Trump's speech at the Ellipse did not advocate violence but contained numerous peaceful statements about rallying and engaging in the protestors' protected First Amendment right to petition the government:

a. 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.

b. 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;

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

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

e. 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.

f. 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…

g. 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.

h. So let's walk down Pennsylvania Avenue.

President Trump's January 6, 2021, speech at the Ellipse, Exhibit 49.

3. At no point in any of these statements did President Trump advocate, implicitly or explicitly, rioting, attacking the Capital, entering the Capitol, or preventing the counting of the electoral votes. Instead, President Trump advocated being at the Capital to "cheer on our brave senators and congressmen and women" who are on his side; "peacefully and patriotically" making their voices heard; giving the Republicans he considered weak, "the kind of pride and boldness that they need to take back our country;" and "seeing" what the Senators and Congressmen would do. And this last point in particular could not logically be considered a call to violence, because those at the Capitol could not "see" what the Senators

and Congressmen would do if they were to attack Capital and prevent the Senators and Congressmen from counting electoral votes.

4. In other words, both the plain text of the spoken words, and the words when read in context, make clear that President Trump listed his policy and political objectives, and refrained from advocating violence. This is not anywhere near sufficient to prove the requisite intent to incite his listeners to violence or a violation of the law. *Brandenburg*, 395 US at 447.

5. Likewise, President Trump's speech did not call for people to attack Vice-President Pence, he just expressed his disagreement with him:

a. "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." Ex. 49, speech of President Trump.

b. 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. *Id.*;

c. 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. *Id.*;

d. 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. *Id.*;

e. 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. *Id.*;

f. And Mike Pence, I hope you're going to stand up for the good of the 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. *Id.*;

g. 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. *Id.*

6. Next, are President Trump's communications on January 6, 2021, following his speech at the Ellipse. None of these called for violence, and in fact all called for peaceful behavior.

a. President Trump tweeted at 2:28 pm: "Please support our Capitol Police and Law Enforcement. They are truly on the side of our Country. Stay peaceful!" Ex. 148 at 83.

b. Forty-five minutes later President Trump again tweeted at 3:13 pm: "I am asking for everyone at the U.S. Capitol to remain peaceful. No violence! Remember, WE are the Party of Law & Order – respect the Law and our great men and women in Blue. Thank you!" Ex. 148 at 84.

c. One hour and four minutes later, at approximately 4:17 pm, President Trump tweeted a video in which he stated, "I know your pain. I know you're hurt. We had an election that was solen from us. It was a landslide election and everyone knows it, especially the other side. *But you have to go home now. We have to peace. We have to have law and order. We have to respect our great people in law and order. We don't want anybody hurt. . . . We have to have peace.* So go home. We love you. You're very special. You've seen what happens. You see the way others are treated that are so bad and so evil. *I know how you feel, but go home and go home in peace."* Ex. 68 (emphasis supplied).

7. All of these tweets called for peace. That is the antithesis of violence.

F. President Trump's use of the word "fight" was a call for political action, not physical violence.

1. Petitioners have proffered expert testimony and argued that President Trump's use of the word "fight" was a call to violence that incited the crowd to violence. President Trump, however, provided persuasive evidence that use of the word "fight" – including variants such as "fight like hell" or "fight like our lives depend on it" is a common political call to political action. Exhibit 1074, Exhibit 1026.

2. Indeed, President Trump provided ample evidence that many political figures – including President Biden, U.S. Senators, U.S. Representatives, and other political figures – commonly use the term "fight" to spur people to political action. There is no evidence that President Trump's use of the word "fight" (or similar language) is different from the same way many other political leaders us the term to spur people to political action.

3. Second, direct testimony, corroborated by video evidence, shows that attendees at President Trump's political speech at the rally – including those who shared President Trump's belief of a stolen or irregular election – did not interpret President Trump's use of the term "fight" (or any other words) as a call to violence.

4. When President Trump spoke about "fighting" Ms. Kremer did not view his speech to urge actual physical violence. Rather she heard him speaking "metaphorically. You know, political. I mean, we say 'Fight like hell' all the time or, you know, 'Never back down,' 'Continue to fight.' I mean that is not physical fighting. That's metaphorical." Day 3 at 50:1-5.

5. Likewise, Tom Bjorklund, who attended the rally at the Ellipse, in response to a question from opposing counsel addressed what President Trump stated:

Q. Mr. Bjorklund, the truth is that none of those people are Antifa. They were a mob sent by Trump to attack the Capitol building. Isn't that true?

A. Not the instructions I got.

Q. Not the instructions you got? Is that what you said?

A. Yeah. Donald Trump said to go down and peacefully make your voices heard. That's what I heard.

TR. 11/2/23, p. 354:2-12.

6. Third, both Ms. Kremer and Mr. Bjorklund provided photographic and video evidence showing crowd behavior at the Ellipse, both during and after President Trump's speech. All of this video showed people generally listening to speeches or milling about.

Exhibits 1000-1011, 1022, 1023. Persuasive evidence shows that President Trump's speech did not spur any violence from those who heard his speech at the Ellipse on January 6, 2021.

G. Professor Simi's testimony does not establish that President Trump intentionally incited any violence on January 6, 2021.

1. Petitioners called Professor Simi, as an expert in the behavior of far-right extremist groups. His analysis focused on patterns of communications by far-right extremist groups, and how President Trump's statements were likely received among members of those groups.

2. Professor Simi's analysis is of limited value, however, because he did not interview or talk to any person who committed violence on January 6. His research has been directed towards learning about characteristics of far -right extremists in general, but he did not employ his normal methodology – such as interviews or field work – to research how right-wing extremists reacted to the communications involving January 6, 2021. (TR. 11/1/23, pp. 133:8-14, 134:4-8, 139:6-19). Accordingly, this aspect of his testimony involving the critical issues in this case was not "grounded in the methods and procedures of science," but was, instead, based on "subjective belief [and] unsupported speculation." *People v. Ramirez*, 155 P.3d 371, 378 (Colo. 2007).

3. Simi's expert testimony can be summed up as "when someone makes certain comments or speeches, to understand the impact of that speech, [one must] understand not just the words that are used but the contextual factors of which there can be many. (TR. 11/1/23, p. 209:4-11).

4. As an example, Simi testified that the term "1776" meant, to far right extremists, a call to violence. That same term, however, would be interpreted much differently by the public at large, because "the term for insiders within far-right extremist culture is understood in a way that would likely be different for outsiders who aren't steeped in that culture." (TR. 11/1/23, 152:13-17).

5. Simi consistently testified that the manner in which far-right extremists interpret particular communications depends entirely on context. Under his analysis, the same word can have different meanings, depending on many factors. And oftentimes, a person must be immersed in far-right extremist culture for substantial time before that person begins to interpret certain terms as a call to violence. (TR. 11/1/23, pp. 166:24-167:24).

6. But even giving Professor Simi's analysis full weight, his testimony that far-right extremist groups interpreted Trump's speeches as a call to violence does not fulfill the legal standards set forth above in *Brandenburg*. Namely, Simi testified that people immersed in far-right extremism culture will interpret words much differently than members of the general public, not immersed in far-right extremist culture. But under *Brandenburg*, this Court must look to the objective meaning of words, not the listener's subjective reaction.

7. For that reason, Professor Simi's testimony that extremists interpreted President Trump's speech as a call to violence is irrelevant under the controlling legal standards set forth in *Brandenburg*. *Nwanguma v. Trump*, 903 F.3d 604 (6th Cir. 2018).

8. As a factual matter, the Court also notes that in contrast to Simi's testimony that extremists viewed President Trump's speech as a call to violence, direct eyewitness testimony demonstrates that the vast majority of those listening to President Trump's speech did *not* view President Trump's comments as a call to violence.

9. The organizer of the January 6th rally at the Ellipse testified that at the end of President Trump's speech, the crowd was happy, not angry. (TR. 10/31/23, p. 50:14-24). She stated "People were happy. They – I mean, it was a fantastic event. They got to hear their President. And they love him. And so it was just a happy, joyful occasion. And you could see it on people's faces." (*Id.* 54:7-15). This is the opposite of a mob that interpreted the speech as a call to violence.

10. This comports with the crowd's behavior both before and during President Trump's speech. Ms. Kremer testified that the rally at the Ellipse was "uplifting, patriotic, and just full of love. I mean, happy people dancing and just waiting to see their President." (Kremer Testimony, TR. 11/2/23, p. 48:3-7). She testified that during President Trump's speech, "they're cheering for him. And you know, when he does these speeches, he plays off the crowd. And they're very reactive." (*Id.* at 49:1-6); the crowd did not get angry while President Trump was speaking. (*Id.* at 49:10-13), and President Trump did not exhort the crowd to storm the Capitol. (*Id.* at 49:14-19). And as a general matter, Kremer stated that President Trump would never incite violence because "that's not how he is." (TR. 11/2/23, p. 85:16-18).

11. Importantly, Ms. Kremer's testimony was corroborated by video footage showing a peaceful crowd as it left the January 6 Speech. (*Id.* 51:17-52:2), Exhibit 1023.

12. Other eyewitness evidence also showed a peaceful reaction to President Trump's speech: Tom Bjorklund did not interpret President Trump's speech as advocating violence. (TR. 11/2/23, pp. 160:3-10; 354:2-12). And he immediately refuted the assertion that violent people at the Capitol "were a mob sent by Trump to attack the Capitol building. Isn't that true?" (*Id.* 354:2-5). His response was "Not the instructions I got…. Donald Trump said to go down and peacefully make your voices heard. That's what I heard." (*Id.* 354:6-12).

13. Likewise, Tom Bjorklund's brother did not interpret President Trump's speech as a call to violence. (*Id.* 160:3-161:18), and his friend, "Steve," walked to the Capitol, (*Id.* 161:9-21), and did not engage in any violence. (*Id.* 358:14-359:7).

14. Again, Bjorklund's testimony was corroborated by extensive video showing a peaceful, nonviolent crowd.

15. Professor Simi also testified that President Trump's speech was characteristic of, and matched, the forms and modes of communication by far-right extremists.

16. The Court is unwilling, however, to draw any conclusions from this match, because Simi also testified that the methods of communication used by far-right extremists are "generic features of social life, human behavior, which is what makes them so powerful." (TR. 11/1/23, p. 142:3-9), and that every person uses "doublespeak" to some extent. (TR. 11/1/2023 p. 147:23-25). In other words, testimony about common methods of

communication used by President Trump cannot show that President Trump intentionally used those common methods to communicate with far-right extremists.

17. For this same reason, certain themes allegedly used by President Trump (or others) does not prove an intent to communicate with far-right extremists. For example, Simi testified that use of conspiracy theories is widespread in American political discourse and has been for decades. (TR. 11/1/2023, pp. 143:18-144:11). He testified that an us-versus-them framework is a common these in American politics, ranging across the political spectrum. 144:12-25. And that frustration with elected legislatures and a desire for a president to take things into his or her own hands is also a widespread theme. (TR. 11/1/2023, pp. 145:24-146:17).

18. Critically important, Professor Simi disavowed his ability to discern President Trump's intent; he explicitly stated that his opinion did not address the issue of whether President Trump intended to call right wing extremists to action. (TR. 11/1/23, p. 205:19-23). He further testified that "I'm not in President Trump's mind." (*Id.* at 208:8-11, 199:4-9).

19. This disavowal was consistent with the limited scope of Professor Simi's testimony. For example, Simi testified that in order for a person to engage in certain types of communications with far-right extremists, such as double-speak, the speaker must either know that he or she is engaging in double-speak or must suspect that different audiences will receive his or her message in different ways. (TR. 11/1/23, pp. 156:25-157:8).

20. But neither Simi nor the Petitioners offered evidence that President Trump spoke with intentionality or knowledge of far-right extremists. Indeed, in response to

questioning from this Court, Simi readily admitted that he did not have any evidence that President Trump was trained in, or knowledgeable about, forms of extremist communication. (TR. 11/1/23, pp. 127:25-128:3).

21. And Simi also testified that he could not determine whether a speaker was engaged in doublespeak, absent an understanding of that speaker's intent. (TR. 11/1/23, pp. 157:25-158:2). This, of course, applies to speech by President Trump. Rather, Simi testified that interviews and field work were critically important to determine intent. (TR., 11/1/23, p. 158:3-5). This again reinforces the deficiencies in Simi's methodology, as applied to the specific events of January 6th.

22. As another example, Simi referred to the upcoming January 6th rally at the Ellipse with the statement "will be wild." Professor Simi only looked at how far right extremists interpreted that communication. He did not testify about President Trump's intent in sending the tweet – or indeed, whether President Trump himself, instead of a member of his staff, actually sent that particular tweet. (TR., 11/1/23, pp. 205:12-206:4). And of course he did not testify about how *non*-far right extremists interpreted that tweet.

23. The record also contains direct evidence showing that President Trump did not intend to instruct extremists – or anyone else – to commit violence on or before January 6, 2022.

24. First, the day before the rally on January 6th, President Trump reviewed a list of speakers for the January 6 rally at the Ellipse and removed nearly everybody, except for a few officeholders. (TR. 11/1/2023, pp. 292:6-294:4). His former assistant, Pierson,

supported that decision, because the President removed speakers who might engage in "inflammatory rhetoric." (TR. 11/1/2023, p. 275:1).

25. Second, at the September 29, 2020, Presidential debate, the moderator asked President Trump to disavow certain white supremacist groups and to instruct them to "stand down." When President Trump asked to whom he should address such a statement, then Vice President Biden suggested "Proud Boys." In response, to both the moderator's request to tell groups to stand down and to then Vice President Biden's suggestion of the Proud Boys, President Trump told the "Proud Boys" to "stand back and stand by." Exhibit 1083 (Video of the 9/29/2020 debate); Exhibit 1080 (Transcript of the 9/29/2020 debate)

26. And the full context of President Trump's speech further undermines the assertion that President Trump directed speech at far-right extremists. The next day at a press conference, President Trump further stated that he did not who the Proud Boys were, and he forcefully stated that whoever they were, they "have to standdown, let law enforcement do their work." Exhibit 1081.

27. Third, President Trump's speech on August 14, 2017, after the Charlottesville incident was a call for peace. In it he said: "We condemn in the strongest possible terms this egregious display of hatred, bigotry and violence. It has no place in America. And as I have said many times before, no matter the color of our skin, we all live under the same laws, we all salute the same great flag, and we are all made by the same Almighty God. We must love each other, show affection for each other, and unite together in condemnation of hatred,

bigotry, and violence. We must rediscover the bonds of love and loyalty that bring us together as Americans." Exhibit 1059.

H. Engagement does not include a failure to act.

1. The Petitioners next argue that President Trump engaged in an insurrection because he failed to authorize the National Guard to deploy on January 6, or alternatively that he failed to authorize the National Guard to deploy quickly enough. This argument fails for three reasons.

2. First, the term "engage" requires affirmative action. A failure to take action—including an allegation that President Trump failed to deploy the National Guard—cannot be considered "engaging in" an activity. Indeed, Petitioners have not shown that President Trump's purported inaction on January 6 caused or "incited" the riot on January 6.

3. And logically, President Trump's purported inaction on January 6 could not have caused or "incited" the riot as that decision allegedly came after the riot began at the Capitol.

4. Second, this Court may not second-guess or adjudge a president's decision to mobilize or not mobilize the National Guard.

5. Professor Banks testified that President Trump could have authorized the National Guard to respond to the Capitol on January 6 after the rioters began to storm the Capitol. Banks Testimony, (TR. 10/31/2023, p. 248:4-12). He also testified that he could have activated the National Guard prior to January 6. (*Id.* at 249:22-250:7). At no point did

Professor Banks testify that President Trump had a legal duty to authorize the National Guard.

6. As a general matter, "whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." *Martin v. Mott*, 25 U.S. 19, 31-32 (1827). *See also Luther v. Borden*, 48 U.S. 1, 45 (1849).

7. The remedy for an abuse of that discretion "is to be found in the constitution itself," meaning the impeachment power of the Congress:

> In a free government, the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue, and honest devotion to the public interests, *the frequency of elections, and the watchfulness of the representatives of the nation, carry with then all the checks which can be useful to guard against usurpation or wanton tyranny*.

Martin, 25 U.S. at 32 (emphasis added).

8. More specifically, it is well established that courts may not second guess the President in the exercise of his discretionary authority t*o call out the military to quash a purported insurrection. Id. See also Luther*, 48 US at 44-45 (1849) (holding that the President has the exclusive authority to call out the militia to support the lawful government of a state in the case of an insurrection).

9. President Trump had the sole discretion, delegated to the Secretary of the Army, to decide whether to call out the National Guard on January 6th, and this Court has no permissible role in second-guessing that decision.

10. Third, and relatedly, Petitioners asserted that this Court may impose disqualification under Section Three of the Fourteenth Amendment upon President Trump, based upon an alleged failure to discharge what they contend were his obligations under the Constitution's Take Care clause. That clause states in pertinent part that the President "shall take Care that the Laws be faithfully executed…." U.S. Const. art. II, § 3.

11. These claims are not judicially cognizable; they are simply not justiciable. As the Supreme Court has made clear, it is not appropriate for courts to entertain claims brought by those seeking to second guess a President's exercise of discretion granted by either the Constitution or by federal statute. Rather, such claims present nonjusticiable political questions, raise insuperable separation of powers concerns, and in the case of a state court like this one raise issues under the Supremacy Clause.

12. This was most recently illustrated in *United States v. Texas*, 599 U.S. 670 (2023), in which the Court held that a group of states could not challenge under the Take Care clause the Executive's exercise of discretion not to enforce certain immigration laws passed by Congress that explicitly required that the federal government "shall" arrest and detain certain non-citizens. *Id.* at 674. The Court held that the plaintiffs lacked standing, while emphasizing that the concerns that drove that determination were "built on a single basic idea—the idea of separation of powers." *Id.* at 676 (internal citation omitted).

13. The Court further explained that lawsuits challenging the President's exercise of discretionary authority under the Take Care clause—even where the statute at issue contains mandatory "shall" language that the Executive is alleged to have flouted—"run up

against the Executive's Article II authority to enforce federal law. . . . Under Article II, the Executive Branch possesses authority to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.'" *Id.* at 678 (citations omitted). Moreover, "[i]n addition to the Article II problems raised by judicial review of the Executive Branch's arrest and prosecution policies, courts generally lack meaningful standards for assessing the propriety of enforcement choices…." *Id.* at 679. "All of those considerations help explain why federal courts have not traditionally entertained lawsuits of this kind…. Our constitutional system of separation of powers 'contemplates a more restricted role for Article III courts.'" *Id.* at 681.

14. Unlike the *Texas* plaintiffs, Petitioners here have identified no statute containing mandatory "shall" language, making the case against a court second-guessing a President's exercise of discretionary authority even clearer. Under the *Baker v. Carr* factors, even Petitioners necessarily concede that all of the decision-making that they challenge has been expressly allocated to the President either by the Constitution (the Take Care clause) or by statute. And all of the decisions they challenge involve discretionary issues that the Court is being asked to second-guess, relying on the luxury of hindsight, but simultaneously lacking meaningful standards for conducting that exercise in second-guessing a President's decision about how and when to exercise his discretion to turn out the National Guard domestically.

15. As the Supreme Court made clear in *Texas*, there are other forums in which a President's exercise of such discretion may appropriately be examined. *Id.* at 685. The Supreme Court specifically noted the possibility of Congressional oversight—and here this

Court notes that President Trump was impeached but not convicted—and the role that elections appropriately play in holding elected officials to account. *Id.* But it is not this Court's appropriate role to substitute its judgment for that of the President on such an issue.

16. Accordingly, to the extent that Petitioners' claim rests on assertions that the President should have exercised his discretion differently on January 6, this Court must reject it.

I. Credible, direct testimony shows that President Trump authorized use of the National Guard for January 6, 2021.

1. Even if this Court had the authority to review President Trump's decision, direct testimony shows that President Trump in fact authorized the National Guard to be deployed on January 6.

2. The President is the commander-in-chief of the Washington, DC, National Guard. (Banks Testimony, TR. 11/31/23, p. 248:4-12).

3. President Nixon delegated this presidential authority to the Secretary of Defense, who in turn delegated this authority to the Secretary of the Army in 1969. This authority has not been rescinded by President Trump or any President since. (Banks Testimony, TR. 10/31/2023, p. 267:9-18). (*See also* Patel Testimony, TR. 11/1/23, p. 216:10-15).

4. Accordingly, President Trump did not have to take any formal action to allow the deployment of the Washington, D.C., National Guard on January 6, as that authority was already delegated to the Secretary of the Army.

5. Further, the Department of Defense Inspector General reported, in a report issued during the Biden Administration, that on January 3, 2023, President Trump spoke to Acting Secretary of Defense Miller and Chairman of the Joint Chiefs of Staff General Milley and "asked about the election protest preparations." Acting Secretary Miller told him "we've got a plan and we've got it covered." Exhibit 1031, Review of the DOD's Role, Responsibilities, and Actions to Prepare for and Respond to the Protest and its Aftermath at the U.S. Capitol Campus on January 6, 2021, November 16, 2021. (*See also* Patel Testimony, TR. 11/1/23, pp. 210:23-211:10).

6. Mr. Patel testified further that, at the same meeting, President Trump "authorized ten to twenty thousand National Guardsmen and women to be utilized, if necessary, around the country to provide assistance to local law enforcement." (Patel Testimony, TR. 11/1/23, p. 212:7-20).

7. As of January 3, 2021, President Trump had "authorized the National Guard troops [the Department of Defense] needed" to prepare for January 6. (Patel Testimony, TR. 11/1/23, p. 214:9-14). And Patel reasonably understood that President Trump had authorized the Department of the Army to take whatever action necessary to prepare for and respond to any problems on January 6th, without further authorization from President Trump. (Patel Testimony, TR. 11/1/23, pp. 214:2-215:24).

8. On January 5, 2021, President Trump, after asking about the status of security preparations for January 6, also told Acting Secretary Miller to "do what's required to protect

the American people," which was reasonably understood to refer to the deployment of National Guard troops as needed. (Patel Testimony, TR. 11/1/23, p. 216:5-12).

9. President Trump's statements to Acting Secretary Miller, as well as the pre-existing authorization by Executive Order, provided the Department of Defense all the authorization it needed to implement its processes and prepare for January 6. (Patel Testimony, TR. 11/1/23, pp. 216:23-217:3). And, the Department of Defense had all necessary authorization from President Trump to "deploy National Guard troops to keep the peace on January 6." (Patel Testimony, TR. 11/1/23, p. 218:5-11).

10. The Department of Defense did not discuss the operational specifics with President Trump, but instead left those details to "career professionals" who "perform[ed]those logistical preparatory works, such as activating the National Guard and running drills." (Patel Testimony, TR. 11/1/23, p. 217:4-21).

11. On January 5, 20223, President Trump told a different aide that he wanted 10,000 National Guard troops available on January 6th, 2021. (Pierson testimony, TR. 11/1/23, p. 294:2-17).

12. The lack of a written order from President Trump is not necessary for the Court to make this factual determination. The authority to deploy the National Guard is already delegated to the Secretary of the Army, and he did not need formal authorization from the President to deploy the National Guard. President Trump's verbal authorization merely indicated his approval but the existing authorization was sufficient as a matter of law.

13. Regardless of whether President Trump's authorization was official or even superfluous, the undisputed testimony that President Trump authorized at least 10,000 National Guard troops is especially relevant here, because it shows President Trump's state of mind – that he wanted to ensure peaceful behavior on January 6, 2021, that he believed he had authorized the National Guard, and that he reasonably relied on Acting Secretary Miller's assurances he did not need to do anything else. In short, he reasonably believed that the U.S. Army had sufficient resources and plans in place to prevent or respond to any outbreaks of violence.

14. President Trump was informed that the Department of Defense had a plan in place to keep the peace on January 6, 2023, and there is no reason to think he would not have believed that. (Banks Testimony, TR. 10/31/23, p. 280:7-20).

15. Further, the evidence shows good reason why the Department of Defense did not mobilize the National Guard prior to the outbreak of violence on January 6, 2021. Mayor Bowser of Washington, DC, had specifically, rejected the suggestion of additional National Guard troops for January 6 in a letter addressed to the acting Chairman of the Joint Chiefs of Staff, the Acting Secretary of Defense and the Secretary of Defense. Exhibit 156. She reinforced this rejection of National Guard troops by making her letter public. *Id.*

16. The evidence further shows that once Mayor Bowser requested National Guard troops at 2:22 pm on January 6, the Army took action to deploy those troops, who were deployed by 5:02 pm, a time-period of 2.5 hours. Exhibit 1027.

17. When President Trump asked about security in the days leading up to January 6, the Department of Defense informed President Trump that it had a plan in place to assist the District of Columbia and the National Capitol Police Department. The DOD IG's report makes clear that President Trump expressly told Acting Secretary Miller on the evening of January 5 to "do what's required to protect the American people." And there is no evidence in the record suggesting that anyone in leadership at the Department of Defense ever suggested, much less told President Trump, that it required more or different authorization from him to deploy National Guard troops. Moreover, President Trump did send out tweets—both written and a video message—asking the rioters to be peaceful and respect law enforcement. Thus, the Court finds that President Trump took action to prevent violence on January 6, 2021, and that he had no intent to incite violence on that date.

J. Specific conclusions from the January 6, 2021, report deserve no weight and are not supported by the evidence.

1. As noted above, the January 6th Report should be accorded little weight. But the court addresses several specific conclusions, as lacking persuasive value.

2. Finding 82 of the Report refers to the subjective interpretation of President Trump's statements about election integrity by far-right groups. It fails, however, to identify any objective or actionable calls to violence, imminent or otherwise, or any connection to the Capitol building or vote certification on January 6th: Among other things, this Finding

makes no effort to reconcile its conclusion with the requirements of the First Amendment, which this Court is required to do. Accordingly, the Court cannot accept it.

3. Next, Finding 83 of the January 6th Report refers to the reaction by Proud Boys to President Trump's December 19, 2020, "will be wild" tweet, but the tweet itself did not refer to violence, imminent or otherwise, and the subjective interpretation of the tweet was irrelevant in the absence of any objective call to violence. This finding suffers from the same limitations as Professor Simi's testimony. Among other things, this Finding makes no effort to reconcile its conclusion with the requirements of the First Amendment, which this Court is required to do. Accordingly, the Court cannot accept it.

4. Likewise, the Report states "Chapter 8 of this report documents how the Proud Boys led the attack, penetrated the Capitol, and led hundreds of others inside. Multiple Proud Boys reacted immediately to President Trump's December 19th tweet and began their planning. Immediately, Proud Boys leaders reorganized their hierarchy, with Enrique Tarrio, Joseph Biggs, and Ethan Nordean messaging groups of Proud Boys about what to expect on January 6th." Exhibit 78 at 8. This portion of the Report documents how others acted, not how President Trump acted. To the extent that Petitioners rely on this Finding to support their claim that President Trump incited violence, among other things, this Finding makes no effort to reconcile its conclusion with the requirements of the First Amendment, which this Court is required to do. Accordingly, the Court cannot accept it.

5. Next, finding 163 of the January 6th Report refers to a tweet by President Trump from December 14, 2020, regarding his election integrity claims. specifically, it states

President Trump said "We've proven" the election was stolen, but "no judge, including the Supreme Court of the United States, has had the courage to allow it to be heard." The Report further states "That was how President Trump described efforts to overturn the election in court one day before the electoral college met on December 14, 2020. That was false." Regardless of the truth or falsity of President Trump's statements, they did not call for violence. To the extent that Petitioners rely on this Finding to support their claim that President Trump incited violence, among other things, this Finding makes no effort to reconcile its conclusion with the requirements of the First Amendment, which this Court is required to do. Accordingly, the Court cannot accept it.

6. Finally, the only support that President Trump "planned" the riots on January 6 comes from an opinion by Mr. Heaphy during his direct testimony (Tr. 11/3/23, p. 210:23-23) in which he referenced the J6 Report. But Mr. Heaphy did not identify a single fact that supported his opinion. To the extent that Petitioners rely on this assertion to support their claim that President Trump incited violence, among other things, this conclusory assertion makes no effort to reconcile its conclusion with the requirements of the First Amendment, which this Court is required to do. Accordingly, the Court cannot accept it.

V. The events on January 6, 2021, at the Capitol did not constitute an insurrection

1. Not only do the Petitioner's bear the burden of proof, but they also must overcome the presumption that any ambiguity should be construed in favor of allowing an election to go forward. It is a "'fundamental principle of our representative democracy,'

embodied in the Constitution, that 'the people should choose whom they please to govern them.'" *U.S. Term Limits v. Thornton*, 514 U.S. 779, 783 (1995) (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)). Likewise, under Colorado law the Election Code is to be "liberally construed," and "substantial compliance with the provisions or intent of this code shall be all that is required." C.R.S. § 1-1-103. *See, e.g., Loonan v. Woodley*, 882 P.2d 1380, 1383 (Colo. 1994). Accordingly, equally plausible interpretations and ambiguities should be resolved in favor of allowing people the right to choose the candidate of their choice.

2. The parties do not agree on what constitutes an insurrection.

A. There is no commonly accepted or binding definition of insurrection, and thus the term must be narrowly construed.

3. As a starting point, Section Three does not define the term "insurrection," nor has Congress provided a working definition or set forth the elements that constitute an "insurrection." Section 3 of the Fourteenth Amendment is partly modeled on a segment of the Treason Clause -- "adhering to their Enemies, giving them Aid and Comfort." U.S. Const. art. III, § 3, cl. 1. But Section Three does not define the terms used in its offense element, in contrast to the Treason Clause, which is defined as "levying War against them [the United States], or in adhering to their Enemies, giving them Aid and Comfort." U.S. Const. art. III, § 3, cl. 1. And unlike Section Three, the Treason Clause specifies how that crime is to be proven – "on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." *Id.*

4. Other constitutional provisions provide little guidance. Section Four of the Fourteenth Amendment, which includes the Amendment's only other reference to "insurrection" does not provide a definition, but merely states "[N]either the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States." U.S. Const. amend. XIV, § 4.

5. And lastly, the Constitution's only other express reference to insurrection is in Article I, Section 8, Clause 15, which grants Congress the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Overall, the lack of textual guidance creates uncertainty as to how Section Three uses the term "insurrection."

6. Some interpretative help, however, may be gleaned from Section Three's juxtaposition of the terms "rebellion" and "insurrection." On the one hand, the canon against superfluity argues that the terms must have distinct meanings. Article I, Section 9, for example, allows the suspension of *habeas corpus* "in Cases of Rebellion or Invasion," but does not include insurrection. U.S. Const. art. I, § 9, cl. 2. On the other hand, the canon "*noscitur a sociis*," which applies in constitutional as well as statutory construction, *Virginia v. Tennessee*, 148 U.S. 503, 518–20 (1893), suggests that an "insurrection" must be comparable to or commensurate with a "rebellion" in salient ways. Accordingly, the best that can be gleaned from the constitutional framework is that an insurrection is comparable to, but falls short of, a rebellion.

7. After reviewing the applicable law and parties' assertions, the Court cannot find any widely accepted or binding definition of "insurrection." Accordingly, the Court looks to contemporaneous sources at the time of the Fourteenth Amendment's passage.

8. Most valuable among these sources are congressional enactments that took place shortly before or after the debate and ratification of Section Three. Early in the life of the Republic, Congress exercised its powers under Article IV, Section 4 regarding "domestic Violence" to enact the Calling Forth Act of 1792, ch. 28, § 1, 1 Stat. 264, 264 (repealed 1795), which is codified in its current form in the Insurrection Act. 10 U.S.C. §§ 251–255 (2018). The Calling Forth Act restricted the ability of states to request federal assistance to cases of "insurrection" rather than of "domestic Violence," as Article IV, Section 4 permitted. The Congressional Research Service suggests that "[p]erhaps 'domestic violence' was interpreted to be restricted to violence of a sufficient magnitude to constitute an insurrection, or the word 'insurrection' was meant to convey armed violence that did not amount to a rebellion or revolution seeking to overthrow the government in part or all of a state." Congressional Research Service, R42659, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law* 7 n.40 (2018). It is reasonable to infer, then, that Congress understood "insurrection" to be violence at a level somewhere midway between "domestic Violence" on the one hand and "rebellion" on the other.

9. Next was the Second Confiscation Act, which prescribed penalties for "any rebellion or insurrection against the authority of the United States." Even scholars opposed to President Trump consider it "practically a glossary of the terms later used in Section

Three." William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section 3*, 172 U. Pa. L. Rev. (forthcoming 2024), at 82. In *United States v. Greathouse*, 26 F. Cas. 18, 21 (N.D. Cal. 1863), Justice Field clarified that these acts, "in the judgment of the court, amount to treason within the meaning of the constitution." "Treason" against the United States under the Constitution consists of "only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." U.S. Const. art. III, § 3, cl. 1. Accordingly, "insurrection" requires something akin to "levying war." Therefore, "rebellion" and "insurrection" are best understood through reference to "treason." Accordingly, "insurrection" need not be a four-year civil war, but it does require something more than a three-hour riot.

10. In addition, the *Verified Complaint* quotes Sen. Waitman Willey, during the Senate debate on Section Three, as applying that section to people who have shown themselves "faithless in the past . . . [through] their insane efforts to destroy this Government." *Ver. Pet.* 372. This definition is seemingly limited to people who seek to "destroy" the federal government.

11. This Court also considers as relevant court opinions from the Civil War and Reconstruction eras. *The Prize Cases* 67 U.S. 635 (1862) was perhaps the Court's most important decision during the Civil War and was undoubtedly familiar to the members of Congress who debated and drafted the Fourteenth Amendment. It addressed the status of the Confederates under both public international law (the laws of war) and constitutional law. This required the Court to elucidate and distinguish between the terms "war," "civil war," "rebellion" and "insurrection." The Court wrote:

> The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, claims sovereign rights as against the other.
>
> *Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government.* A civil war is never solemnly declared; it becomes such by its accidents— the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign; the world acknowledges them as belligerents, and the contest a *war*.

Id. at 666–67 (emphasis added).

12. The Court here distinguished between an "[i]nsurrection against a government" and an "organized rebellion." A rebellion constitutes a "civil war" or (more likely) becomes one when suitably characterized by the "number, power, and organization of the persons who originate and carry it on." *Id.* at 666. An "[i]nsurrection against the government" must therefore be something short of an "organized rebellion," and still shorter of a "civil war," but the actions must be broad and lasting enough to be capable of emerging into a rebellion.

13. An 1878 Supreme Court decision from just after Reconstruction echoed *The Prize Cases*. In *Ford v. Surget*, 97 U.S. 594 (1878) the Court said:

> Insurrection may or may not culminate in an organized rebellion, and it may or may not assume such aggressive proportions as to be justly denominated territorial war, the universal rule being that rebellion becomes such, if at all, by virtue of its numbers

and the organization and power of the persons who originate it and are engaged in its prosecution. *Id.* at 609–10.

14. *Case of Davis,* 7 F. Cas. 63, 96 (C.C.D. Va. 1871), likewise considered "insurrection or rebellion" to be "usually [a civil war's] first stages." The Court looked to factors such as the numbers, organization, and power of those originating the insurrection or rebellion. And an insurrection must be large enough, organized enough, and powerful enough to pose the possibility of culminating in an organized rebellion, or reasonably constituting a civil war's first stages.

15. One year after the Confiscation Act became law, in 1863, Chief Justice Chase— a Lincoln appointee —construed Section Three's terms and held the Act prohibited only conduct that "amount[s] to treason within the meaning of the Constitution," not any lesser offense. *United States v. Greathouse*, 26 F. Cas. 18, 21 (C.C.N.D. Cal. 1863). Indeed, the Chief Justice concluded that not just any form of treason would do: he held that the Act only covered treason that "consist[ed] in engaging in or assisting a rebellion or insurrection." *Id.* Writing in the same case, a second judge confirmed and clarified that, for these purposes, "engaging in a rebellion and giving it aid and comfort[] amounts to a levying of war," and that insurrection and treason involve "different penalt[ies]" but are "substantially the same." *Id.*

16. Other contemporary sources equated insurrection with rebellion. John Bouvier's 1868 legal dictionary defined *insurrection* as a "rebellion of citizens or subjects of a country against its government," and *rebellion* as "taking up arms traitorously against the

government." *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* (Philadelphia, G.W. Childs, 12th ed., rev. and enl. 1868). Here, "insurrection" was treated as the equal of "rebellion," and both required the taking up of arms.

17. And the definition of "insurrection" found in General Order No. 100, issued by President Lincoln to the Union Army, stated thar an "insurrection" was "the rising of peopled *in arms*" (emphasis added). Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* 42 (1863)).

18. Meanwhile, other authorities are said by Petitioners to vary from this definition. Over a quarter of a century after the ratification of Section Three, a federal court issued a grand jury charge in *In re Charge to Grand Jury* 62 F. 828 (N.D. Ill. 1894):

> Insurrection is a rising against civil or political authority,— the open and active opposition of a number of persons to the execution of law in a city or state. Now, the laws of the United States forbid, under penalty, any person from obstructing or retarding the passage of the mail, and make it the duty of the officers to arrest such offenders, and bring them before the court. If, therefore, it shall appear to you that any person or persons have willfully obstructed or retarded the mails, and that their attempted arrest for such offense has been opposed by such a number of persons as would constitute a general uprising in that particular locality, then the fact of an insurrection, within the meaning of the law, has been established; and he who by speech, writing, or other inducement assists in setting it on foot, or carrying it along, or gives it aid or comfort, is guilty of a violation of law. It is not necessary that there should be bloodshed; it is not necessary that its dimensions should be so portentous as to insure probable success, to constitute an insurrection. It is necessary, however, that the rising should be in opposition to the execution of the laws of the United States, and should be so formidable as for the time being to defy the authority of the United States. When men gather to resist the civil or political power of the United States, or to oppose the execution of its laws, and are in such force that the civil authorities are inadequate to put

> them down, and a considerable military force is needed to accomplish that result, they become insurgents; and every person who knowingly incites, aids, or abets them, no matter what his motives may be, is likewise an insurgent.

Id. at 830.

19. This interpretation is far broader than the limited guidance set forth in other congressional enactments, Supreme Court rulings, and Justice Chase's formulation. In this Court's view, an "insurrection" exists, at least for the purposes of federal criminal law, when (1) there has been "the open and active opposition of a number of persons to the execution of law in a city or state," (2) the opposition to the execution of the law must be "by such a number of persons as would constitute a general uprising in that particular locality," (3) Criminal liability for an insurrection extends to those "who by speech, writing, or other inducement assists in setting it on foot, or carrying it along, or gives it aid or comfort," (4) "it is not necessary that there should be bloodshed," and (5) "it is not necessary that its dimensions should be so portentous as to insure probable success." *Id.*

20. One problem with accepting that court's view on the meaning of insurrection is that there is simply no evidence that the issue of the definition of insurrection was raised in the court proceeding, much less considered and passed upon, by the court. This deprives the opinion of any precedential force. *See, e.g., Webster v. Fall*, 266 U.S. 507, 511 (1924) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

21. Petitioners also note that a federal judicial opinion also near in time to Section Three's ratification stated that "insurrection or rebellion … may be committed by simply giving counsel to enemies or others raising insurrection." *Case of Davis,* 7 F. Cas. 63, 93–94 (C.C.D. Va. 1871). But what Petitioners fail to note is that this quotation comes not from any ruling by the court, but rather only from the summary of the argument of one party's counsel -- in this case the argument of the district attorney, Mr. Wells. *Id.* at 93. Although such summaries were common in 19th Century judicial reports, they form no part of the holding—or even, properly considered, the opinion—*of the court.*

22. Finally, Petitioners assert that in 1868 (the year in which Section 3 was ratified), a state court said in *Chancely v. Bailey* 37 Ga. 532 (1868).

> If the late war had been marked merely by the armed resistance of *some* of the citizens of the State to its laws, or to the laws of the Federal Government, as in the cases in Massachusetts in 1789 [possibly a reference to Shays' Rebellion of 1786-87], and in Pennsylvania in 1793 [the Whiskey Rebellion of 1791-74], it would very properly have been called an *insurrection*, and the acts of such insurgents have been held as illegal.

Id. at 548–49.

23. This quoted language does not, however, come from the majority's opinion, but rather is found in a dissent. As a portion of a dissenting opinion, the quoted language obviously does not state the holding of the case and therefore it is inaccurate for Petitioners to contend that this quotation expressed that court's definition of an insurgency.

24. Historical references to the Fries Rebellion and Whiskey Rebellion are potentially relevant. Both involved armed insurgents, although neither rose to the level of

military conflict only because "the insurgents made no resistance to the army sent against them." *Case of Fries*, 9 F. Cas. 924, 933 (C.C.D. Pa. 1800). And both involved sustained and organized opposition to federal authority that lasted far more than a few hours. Both prompted an explicit invocation of the President's authority to quell an insurrection. Both required the deployment of combat troops. Baude and Paulsen at 88-89. And both resulted in explicit treason charges against at least some of their leaders. *See* Peter Kotowski, *Whiskey Rebellion*, Wash. Library, https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/whiskey-rebellion/#:~:text=Two%20men%2C%20John%20Mitchell%20and,true%20challenge%20to%20federal%20authority (noting the militia arrested 150 men for treason, including two who were convicted); *Case of Fries*, 9 F. Cas. 924, 933 (C.C.D. Pa. 1800). Neither was limited to a three-hour riot.

25. Despite the relevance of the cases, one difficulty with placing significant reliance on the *Fries* court's opinion regarding what constituted insurrection is that the defendant, Fries, was not represented by counsel at trial and accordingly did not have the opportunity to have the issue fully and fairly litigated. 9 F. Cas. at 925 ("Mr. Lewis and Mr. Dallas, before engaged to act for the prisoner, on account of the conduct directed by the court to be observed by the counsel, withdrew their assistance; so that the prisoner was left without counsel"). Significantly, defense counsel objected to the proceedings so vigorously that he withdrew, because presiding Justice Samuel Chase (as distinct from the later Chief Justice Salmon Chase) refused to permit defense counsel to even argue whether his client's

conduct met the legal test for treason. The Justice instead insisted upon telling the jury that the defendant's conduct constituted treason, *without allowing legal argument to be presented by counsel*. *Id.* at n.1. So egregious was this conduct that not only did defense counsel insist upon withdrawing rather than participate in this sham trial, but the incident later became the basis for the first article of Justice Chase's impeachment by the House of Representatives. *Id.*

26. In testimony before the Court, the Petitioners' expert Professor Gerald Magliocca presented additional interpretations of the word "insurrection."

a. His opinion, based on historical examples and dictionaries, that "Insurrection was any public use of force or threat of force by a group of people to hinder or prevent the execution of the law. (TR 11/1/23 p. 26:21-23). This definition does not require arms and would apply to something as limited as a "threat of force" to merely "hinder" the execution of a law, which would mean that threatening to shoot a police office to prevent an arrest could constitute a full insurrection:

b. A dictionary definition defining insurrection: "[Insurrection is] a rising against civil or political authority, the open and active opposition of a number of persons to the execution of law in a city or state." (*Id.* 30:20-23). This definition too is overly broad and includes mere opposition to the execution of a law, while also being limited to only applying to cities or states.

c. A Grand Jury instruction in 1861: "The conspiracy and the insurrection connected with it must be to effect something of a public nature concerning the

United States," which includes "overthrowing the government, or to nullify and totally hinder the execution of some U.S. law or the U.S. Constitution, or some part thereof, or to compel its abrogation, repeal, modification, or change by a resort to violence." (*Id.* 33:4-11). This definition requires nullification or total hinderance and requires a resort to violence, not merely threats. It should also be noted that a Grand Jury instruction does not constitute the holding of a court.

d. Repetition of Francis Lieber: "Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws." (*Id.* 35:5-7).

e. Former Attorney General Stanbery's description of insurrection in one of his opinions: "[I]t must be an overt and voluntary act done with the intent of aiding or furthering the common unlawful purpose, namely, the insurrection." (*Id.* 42:14-17). By referring to "the" insurrection, this definition is based upon, and explicitly refers to, the Civil War.

27. These varied and inconsistent definitions of "insurrection" underscore the caution with which this Court should proceed when attempting to give meaning to Section Three's use of "insurrection." Moreover, some of the definitions of "insurrection" surveyed here carry one far away from the context of the Civil War, which the framers of Section 3 assuredly had uppermost in mind and draw one instead into the context of more commonplace or less threatening criminal activity (e.g., supposed "insurrections" that are brief and non-violent). Thus, even if these definitions were considered to be mildly helpful

in defining the meaning of the term as used in Section 3, they still leave considerable uncertainty, about a specific definition that could have sweeping political consequences for the presidential election and later cases.

28. Petitioners seek to resolve this ambiguity, in part, by arguing that President "Trump's own impeachment counsel admitted 'everyone agrees' there was 'a violent insurrection of the Capitol.'" *Ver. Pet.* ¶ 363, and to that end they ask the court to consider a statement from Michael Van Der Veen, which states in full:

> All of us, starting with my client, are deeply disturbed by the graphic videos of the Capitol attack that have been shown in recent days. The entire team condemned and have repeatedly condemned the violence and law breaking that occurred on January 6 in the strongest possible terms. We have advocated that everybody be found and punished to the maximum extent of the law. Yet the question before us is not whether there was a violent insurrection of the Capitol. On that point, everyone agrees.

Pet. Exhibit 105.

29. The court does not treat this as an admission from President Trump, for three reasons. First, Mr. Van Der Veen did not testify to this statement in court, and therefore it is "presumptively untrustworthy" because Mr. Van Der Veen was "not present in the courtroom to explain the statement in context." *Blecha v. People*, 962 P.2d 931, 937 (Colo. 1998).

30. Second, context is important here because on its face the statement does not admit that President Trump agreed an insurrection took place. Specifically, the phrase "that point," as used in the sentence "on that point, everyone agrees" referred to the nature of "The question before us" in the previous sentence. All Mr. Van Der Veen said was that

everyone agreed that "the question before" Congress was "not whether there was a violent insurrection." This construction is consistent with President Trump's position in this case and his previous denials in other matters.

31. Third, as a matter of law the statement cannot serve as a judicial admission, which is a "formal, deliberate declaration which a party or his attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute." *Kempter v. Hurd*, 713 P.2d 1274, 1279 (Colo. 1986), and they apply to the same proceeding. *Id.* Here, the statement was not a formal judicial proceeding, the goal was not to dispense with a fact, and the existence of an insurrection was hotly disputed in Congress.

32. Accordingly, this Court is limited to treating "insurrection," as understood at the time of the passage of the Fourteenth Amendment, to mean the taking up of arms and preparing to wage war upon the United States. When considered in the context of the time, this makes sense. The United States had undergone a horrific civil war in which over 600,000 combatants died, and the very survival of the nation was in doubt. Focusing on war-making was the logical result. And as shown by the omission of the word "incitement" in Section Three, Congress did not intend that provision to encompass those who merely encouraged an insurrection, but instead limited its breadth to those who actively participated in one.

B. The lack of criminal charges or a conviction also urges a narrow construction of "insurrection."

1. A final factor urging a restrained reading is the fact that President Trump has not been charged with the crime of insurrection. Congress has passed a criminal statute punishing insurrection, in 18 U.S.C. § 2383, which reads:

> Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.

18. U.S.C. § 2383.

2. This Court has not held that a criminal conviction is necessary in order to disqualify President Trump under Section Three, and it therefore sets aside, for purposes of this analysis, the question of whether Congress sought to implement Section Three through 18 U.S.C. § 2383. Nonetheless, the fact that federal prosecutors in the District of Columbia have charged neither President Trump nor any other individual with insurrection provides very strong evidence that the events of January 6, 2021, did not, in fact, constitute an insurrection.

3. First, federal prosecutors have substantially greater resources available – including subpoena powers, grand jury investigatory powers, and substantial time – to develop a case.

4. Second, Section 2383 is, in fact, broader than Section Three; the standard of behavior explicitly includes "incite" in addition to engage "engage," and it applies to the "authority of the United States" or any federal law whatsoever.

5. And third, in the *U.S. v. Trump,* Case No. 23-cr-257 (D.D.C 2023) federal prosecutors have described President Trump's actions in terms that exactly parallel the Petitioners' case. Indeed, the prosecutor's description of the case could be used as Petitioner's introduction to their *Verified Petition*:

> On August 1, 2023, the grand jury returned an indictment charging the defendant with perpetrating three criminal conspiracies that targeted the collection, counting, and certification of the 2020 presidential election results, and with obstructing, and attempting to obstruct, the congressional certification of those results, which took place at the United States Capitol on January 6, 2021. ECF No. 1. The congressional certification on January 6 was central to the defendant's criminal conspiracies and his obstruction effort, and the indictment makes clear that he bears responsibility for the actions at the Capitol on that day.
>
> First, in the months after the 2020 presidential election, the defendant cultivated widespread anger, resentment, and mistrust of the election results by spreading knowingly false claims of election fraud. In the weeks leading up to January 6, the defendant repeatedly urged his supporters to travel to Washington, D.C., on the day of the congressional certification, telling them, "Be there, will be wild!"
>
> Then, on January 6, the defendant used multiple means to attempt to obstruct the congressional certification, including by directing an angry and violent crowd to the Capitol. In particular, the indictment alleges that, on the morning of the certification, the defendant reiterated knowingly false claims of election fraud and gave his supporters false hope that the Vice President could and might still change the election outcome to favor the defendant. The defendant then exhorted his supporters to "fight like hell" and go to the Capitol. *Id.* Following this instruction, thousands of people marched to the Capitol both during and after the defendant's speech.
> As the crowd at the Capitol-which included supporters the defendant had called to the city and directed to the Capitol-broke through barriers, violently attacked law enforcement officers attempting to secure the building, and broke into the building, the defendant refused to take action to calm the violence. Instead, he sought to further stoke anger, which he had initially cultivated, against the Vice President. After the defendant issued a tweet that the Vice President "didn't have the courage to do what should have been

> done," members of the crowd responded, chanting phrases such as "Hang Mike Pence!"; "Where is Pence? Bring him out!"; and "Traitor Pence!"
>
> Finally, as the attack on the Capitol halted the congressional certification for several hours, the defendant and his co-conspirators sought to exploit the delay to further obstruct the proceeding.

U.*S. v. Trump,* Case No. 23-cr-257, *Government's Opposition to Defendant's Motion to Strike Inflammatory Allegations from the Indictment*, pp. 2-3 (D.D.C 2023).

6. Those prosecutors use the exact same description, seek to convict President Trump of criminal activity, and yet do not seek charges under Section 2383. This provides persuasive evidence that the Court should adopt a restrictive reading of "insurrection" and that President Trump's actions did not constitute an insurrection.

C. Petitioners' definition of "insurrection" is overly broad.

1. Petitioners advance a broad definition of "insurrection" that means "(1) an assemblage of persons, (2) acting with the purpose to oppose the continuing authority of the Constitution of the United States, (3) by force." *Ver. Pet.* ¶¶ 369, 391. To be sure, this definition itself varies from Professor Magliocca's definition, underscoring again the arbitrary choice of a definition of "insurrection." But more importantly, Petitioners' definition takes, perhaps, the broadest possible interpretation of the term "insurrection" and would seem to conflate *any* obstruction of government officials with high treason.

2. This is not, and cannot be, correct. There must be a distinction between "insurrection" and common street crime. And, presumably, Petitioners would claim some distinction between the January 6th rioters on one hand, and the Antifa rioters one the other, who besieged, attempted to burn down, and violently assaulted the federal courthouse in

Portland, Oregon—a siege that lasted for more than 120 days, caused more than $1.6 million in damage to the courthouse, and saw at least three federal officers blinded with lasers—while being encouraged by various sitting members of Congress as well as various state officials, and the January 6 rioters. Yet, Petitioners' proffered definition offers no standard for making these distinctions.

3. Section Three limits this ability to draw in common – if widespread – violent crimes, without a clear standard for "insurrection." Petitioners seek a type of drastic constraint on the right of the American people to govern their own affairs, and this constraint should be reserved for only the most heinous offenses—such as waging war against the United States. The definition proposed by Petitioners encompasses a much larger group of people who would be disabled from serving in public office, whereas the more limited approach set forth by President Trump is more appropriate for this radical punishment.

4. Lastly, the Court notes that current, popular definitions of "insurrection" provide little guidance as to what "insurrection" meant at the time Section Three was drafted in 1866 and ratified in 1868. A court must interpret a constitutional provision to effectuate "the intentions of the framers of our constitution." *Markwell v. Cooke*, 2021 CO 17, P33. Current dictionary definitions do not provide evidence of the meaning of the word "insurrection" as used by the Framers in the late 1860's.

D. Evidence from the hearing does not demonstrate an insurrection

1. At the outset, the Court notes the paucity of evidence concerning the existence of an insurrection on January 6, 2021. The evidence before the Court boils down to a handful of witnesses, a number of very short – and often highly edited – videos or documents, and conclusory findings from the January 6th Report. From this exceptionally limited evidence, the Petitioners ask this Court to declare an insurrection. They ask this Court to characterize the opinions, purposes, actions of tens of thousands (and perhaps hundreds of thousands) of people.

2. All witnesses produced by the Petitioners and President Trump had limited perspectives, and none could provide a global perspective of the crowd's purpose (to the extent it existed), organization, or other characteristics. At most, the Court was presented with a handful of perspectives, out of thousands and thousands potential eyewitness accounts. Nor did any witness occupy a position of authority that would have given that witness an overview or broader perspective of the January 6th events, beyond personal, limited observation.

3. Petitioners provide no cognizable, non-speculative evidence that the "mob" at the Capitol had a unified purpose to commit an act of insurrection, whether based on any direct evidence of the crowd's intent or evidence that it was organized and coordinated to achieve a unified purpose of any kind.

4. Next, Petitioners provide no evidence that a significant, large, or overwhelming portion of the crowd at the Capitol was armed.

5. Petitioners also cannot show that scope of violence on January 6 large enough or powerful enough to have the potential to grow into a full rebellion.

6. And lastly, military action was *not* necessary to halt the violence, because the Petitioners themselves argue that the crowd dispersed solely due to President Trump's video communication to go home.

7. First, the Petitioners cannot show that the crowd at the Capitol had a unified purpose to commit insurrection, drawn from statements of intent or indications of a high degree of organization and commitment. Instead, the evidence demonstrates that the crowd at the Capitol contained many individuals with many different and potentially conflicting goals.

8. While Officers Hodges' and Pingeon's testimony and videos from the Capitol do show violence from certain members of the crowd, this evidence does not demonstrate a consistent intent among the crowd as a whole. Both officers' perspectives were naturally limited to the particular flashpoints they responded to, and they did not have the opportunity to assess, much less understand, the crowd as a whole, its motivations, or whether it was organized. To the degree that either officer testified to the motivations or apparent organization of members of the crowd, this testimony was limited to single individuals around them.

9. Hodges testified that he interpreted shouts by people in the crowd as giving him the impression that "they understood that we were there to protect the Capitol, which was antithetical to their goals; that by protecting the United States Capitol, we were

somehow breaking our oaths to the Constitution; that were traitors to the United States." (*Id.* 86:23-87:2). But this is a subjective impression, based on his limited perspective, of what the various things shouted out by individuals in the crowd meant. He had no direct knowledge of anyone in the crowd's "goals," no less any supposed "goal" of the crowd overall.

10. Likewise, Pingeon's testimony about the meaning of what some members of the crowd shouted at him and his fellow officers is similarly conjectural. He testified that their statements "were things like, 'Trump sent us,' and things like, 'we don't want to hurt you, but we will;'" "we're getting in that building, and 'stop the steal' and a variety of other pro-Trump messages like that." (*Id.* 201:4-11). But like Hodges, Pingeon also had no direct knowledge of the meaning behind those statements, whether those statements represented widespread sentiment, as opposed to the statement from the limited number of people seeking confrontation with the police. And none of the statements demonstrated insurrectionary intent.

11. The limited perspective of two individuals, no matter how credible and laudatory, cannot demonstrate the purpose of the crowd who made these statements, no less the purpose of the crowd overall. Even individual statements that a person was "there to break inside and to get into the U.S. Capitol" (*Id.* 202:16-23) does not demonstrate an insurrectionary purpose among others, or the crowd as a whole.

12. Further, the officers did not know who in the crowd had attended President Trump's speech or had ever read one of his tweets, or what percentage of people who had

attended the speech went to the Capitol and vice-versa. (*Id.* 123:13-125:2; 236:1-238:12). As such, the most that either man could testify to is the violent intentions of those individuals with whom they fought directly. But their observations do not provide evidence that people were part of an organized insurrection, or instead violent, opportunistic rioters.

13. Much of the officers' testimony indicates the crowd was *not* organized and did *not* have a unified purpose. Hodges testified that "the size of the mob was the greatest weapon utilized by the mob that day" and that "nonviolent people in the mob were still a part of the crowd" (*Id.* 79:3-12) and "they created all the problems that I had previously attested to" (*Id.* 82:6-11). Rather than an organized and effectively marshalled force, Hodges describes the crowd as a mob that created problems for police due to its sheer mass rather than any coordination or organization to be violent and oppositional. This is reflected in the videos from Hodges' bodycam, which shows him pushing through a dense part of the crowd and shouting, "make way," with no opposition or even reaction from the crowd members, even though just minutes before Hodges had to fight off several people. Exhibit 11; Exhibit 12.

14. Hodges' descriptions of his physical struggles with members of the crowd also demonstrates no organization or unified conduct among the crowd's members. He recognized that as he moved through the crowd many people were "just peacefully standing there," even though they impeded his "ability to do [his] job that day." (*Id.* 95:12-18; 123:2-7). "Even the people who were not – I didn't observe attacking us made it difficult for us to analyze the threats, engage those who were violent, and – because we had no idea who was

going to become violent or who would not. The crowd made is so that the mob, when they fell back, had a defense that made it very difficult for us to deal with." (*Id.* 95:20-96:1).

15. Similarly, Hodges complained that the lack of coordination within the crowd made it hard for him to identify violent individuals because they could retreat into the disorganized mass of the people peacefully standing there without organized or violent intentions: "There were no uniformed-differentiating people who were violent from people who were not. So, the mob aided and abetted those who were violent in that way, as those who were violent would then fall back into the crowd and we would be unable to engage them." (*Id.* 79:16-20).

16. The image that emerges from Hodges' testimony is that the crowd was a disparate collection of individuals, some of whom were violent, and that it was the lack of coordination or clear organization between the members of the crowd that caused difficulty in dealing with violent individuals difficult.

17. Pingeon's testimony similarly demonstrated that the crowd was not organized to commit violence. What Pingeon saw at the beginning of the crowd's gathering at the Capitol did not reflect unified intent or organization among its crowd members. When Pingeon saw first responders render aid to an individual, he noted that the crowd's reaction "was mixed" and not unified. (*Id.* 199:1-3). He also testified that when he looked at the crowd's initial movement toward the Capitol from an elevated position, he saw thousands (possibly tens of thousands) of people in the crowd, but the only unusual characteristic that some (but not all) were wearing disparate paramilitary gear. (*Id.* 199:20-200:24). He did see

them moving with coordination, aggression, or unified intent. Instead, the crowd ambled like a disorganized crowd does, and Pingeon only noticed that some of its members had a grab-bag of various "tactical" items, such as goggles, helmets, or body armor. He did not testify how many in the crowd had this kind of gear or whether there was any uniformity to the gear that indicated coordination among the people who had it.

18. Nor did Pingeon describe the violence he and other officers encountered as organized, or anything other than rowdy hooliganism. None of the violent encounters with members of the crowd demonstrated any higher organization. Even when Pingeon was outnumbered and fighting with members of the crowd, the great mass of the crowd never participated in the violence. (*Id.* 201:12-16; 208:3-15; 211:3-22; 212:14-13:2; 214:24-215:5).

19. Hodges testified described an interaction with a crowd member who tried to help him who said that "others were coming up from the back." (*Id.* 92:6-10). Although Hodges said he understood these words as indicating "that there was preplanning, coordination, and that they were intentionally encircling the United States Capitol." (*Id.* 92:21-93:3). Instead it showed a participant who sought to thwart others in the crowd.

20. Second, a group of people trying to force their way into the Capitol and shouting "heave-ho" is very limited evidence of organized, insurrectionary intent. (*Id.* 116:5-14). This is also reflected in the video of the crowd's push against the police line. Exhibit 20. And video evidence two to three dozen people (Exhibit 20 at 00:57). It therefore does not reflect on the motivations of the thousands or tens of thousands of other people at the Capitol at that time.

21. Like all witnesses in this case, Officers Hodges and Pingeon were limited to their observations of a small part of the crowd. And bother officers readily admitted their lack of knowledge about anything that occurred beyond the scope of the particular individuals attacking the Capitol on that day. (TR. 10/30/23 p. 120:19-122:1; 234:10-236:25).

22. These limitations also apply to the limited video from Hodge's body camera. Consistent with the officers' testimony, the video footage shows violent struggles combined with a large number of passive spectators. Exhibit 11; Exhibit 12.

23. Second, testimony from other eyewitnesses paints a much different – if equally limited – picture of the events on January 6, 2021. The testimony of Amy Kremer and Tom Bjorklund, the only witnesses to attend the Ellipse speech or go to the Capitol as part of the crowd, demonstrates that there was no insurrectionary intent among the people that came from the Ellipse speech and no organization or intent to commit violence amongst the larger crowd at the Capitol.

24. Both Kremer and Bjorklund attended the Ellipse speech and testified that the audience there was happy, joyous, and entertained while watching President Trump's speech. Kremer described the atmosphere of the crowd as "very, very uplifting, patriotic, and just full of love. I mean, happy people dancing and just waiting to see their President." (TR. 11/2/23 p. 48:3-7). She also described the crowd as filled with a variety of ages and types of people, not just the kind of military-age-males that would be expected in a violent insurrection: "I would say – I mean, all – you know, many types of people We had elderly

people there. We have blue collar workers there. We had professions there. There were donors there. It was, you know, just a wide variety of people that were there." (*Id.* 48:14-20).

25. She described the people listening to President Trump's speech as "cheering for him," and observed that there was no anger in the crowd, "not at all." (*Id.* 49:1-13). Bjorklund testified to seeing the same joy in the crowd, saying that the crowd was entertained by the speech: "everybody was pretty happy and just being there" and that many members in the audience were laughing and enjoying themselves while listening. (*Id.* 158:20-159:19).

26. The crowd maintained its joyous and happy mood as it left the speech. Kremer testified that the mood of the crowd as it left the Ellipse was very happy: "People were happy. They – I mean it was a fantastic event. They got to hear their President. And they love him. And so, it was just a happy, joyful occasion. And you could see it on people's faces." (*Id.* 54:7-15).

27. Tellingly, Bjorklund, as the only witness to attend both the Ellipse speech and go to the Capitol, testified that he went to the Capitol because he understood President Trump's speech as calling people like him to "go down to the Capitol and, you know, peacefully make our voices heard" (*Id.* 160:5-10), rather than going for an insurrectionary purpose. Both Kremer nor Bjorklund believed that others in the crowd shared their view that President Trump never called on people to "storm the Capitol" (*Id.* 49:14-50:5).

28. Bjorklund view of events was neither more nor less valid than other witnesses. But importantly, his testimony – corroborated by photos and videos – shows that thousands,

and perhaps tens of thousands, of people at the Capitol were not violent and exhibited no insurrectionary intent. As Bjorklund arrived, he saw people standing peacefully, even as police fired flashbangs and teargas (*Id.* 176:20-177:4), he did not see members of the crowd commit violence, (*Id.* 177:9-13), and that members of the crowd never surged forward or assaulted police officers. (*Id.* 177:20-24).

29. Bjorklund's testimony is consistent with Hodges' and Pingeon's testimony in that the vast majority of the crowd was peaceful and not organized for any particular purpose, much less a violent or insurrectionary one, and that violence from members of the crowd came from particular violent individuals.

30. Bjorklund also did not see evidence of insurrectionary intent or organization when he made his way up to the Capitol building.

31. First, the police themselves did not appear to treat the crowd as demonstrating a unified, insurrectionist or unlawful intent. Bjorklund was able to move right past a squad of police arrayed near the Capitol; he walked within five feet of them, said, "hi," and was ignored by them. (*Id.* 288:7-289:17). He then observed one person approach a line of officers and ask if he could walk past them up to the windows of the Capitol building, to which one police officer simply shrugged and said, "sure, go ahead" before walking off the scene with the other officers. (*Id.* 290:24-292:7). This incident demonstrates that the police did not consider the crowd generally as threatening violence either to them or to the Capitol building. Bjorklund's testimony contextualizes Hodges' and Pingeon's testimony, showing

that violence from members of the crowd was limited to certain individuals at certain flashpoints – it did not indicate an overall intent or organization generally.

32. To be sure, Bjorklund saw unlawful conduct; two people broke at least one window, (*Id.* 293:5-294:3, 294:16-296:8), but many in the crowd expressed disapproval and immediately walked away from this scene of violence. (*Id.* 296:22-297:9).

33. One event in particular undercuts Petitioners' narrative that a unified mob stormed the Capitol. Bjorklund testified that he did not go in the Capitol after the doors were opened because he could see the metal detectors were going off and he recognized that "we're not supposed to go in there." (*Id.* 298:7-14). He then saw a "professional looking man" exit the building with a young man alongside him; Bjorklund asked him, "did you take a nice tour," to which the man responded, "it's really cool in there, you should go in." (*Id.* 298:15-22). Bjorklund responded to the man's apparent naivete saying, "dude, there are cameras in there. And I don't think they want us in that building." (*Id.* 298:23-25). Thus, the only direct evidence from a witness of the motivation of anyone who entered the Capitol is that he went in because of the opportunity to see "cool" things and he did not demonstrate any violent or insurrectionary purpose.

34. After walking away from the building, Bjorklund stood by police cars because he "felt like that was probably a safe place to be, rather than near where they were . . . breaking windows" and because he "didn't want any part of that." (*Id.* 299:6-13). This shows that the "general crowd" at that location was nonviolent and not insurrectionary. (*Id.* 299:16-24).

35. Bjorklund also stated that "it just seemed absurd" that a person could have been shot, because (1) people were "milling about," (2) people were "nonviolent . . . other than people breaking the windows," (3) he "didn't see any weapons" and (4) "the police told us that we could go up" (*Id.* 301:1-6). For Bjorklund, none of the conduct he could see at the Capitol, including the limited lawlessness of vandalism and trespassing, rose to the level of violence or insurrection.

36. Bjorklund ultimately left the Capitol when he received a text message from the D.C. Mayor. (*Id.* 306:18-307:1). And as he was leaving, he saw the crowd at the Capitol grounds "just milling around," without violent behavior; "people were going and . . . just coming and going, walking around," and he "didn't hear any more flash-bangs or tear gas or anything" (*Id.* 308:11-22).

37. Next, Bjorklund saw people who acted violently or tried to provoke others, but he described them as "suspicious" (*Id.* 318:11-17), "out of place" and not "like a Trump guy." (*Id.* 313:17-314:11).

38. In short, Bjorklund's testimony was fully corroborated by video, and from his perspective people at the Capitol were peaceful. The Court's review of his photographs and videos shows no insurrectionary purpose, violence, or organization. Exhibits 1000-1016.

39. Lastly, the absence of firearms or deadly weapons among the crowd at the Capitol also strongly indicates that the crowd neither intended to commit violence or insurrection nor was organized to do so. Petitioners have provided no evidence of large numbers of weapons amongst the crowd at the Capitol. Rather they show only makeshift or

situational weapons such as flagpoles, stolen riot batons and police shields, bike rack style barriers, and pepper-spray. (TR. 10/30/23, p. 75:15-76:8; 220:19-221:2). Except for one person who carried a knife – but did not brandish or use it (*Id.* 106:21-24), not a single witness testified to the presence of arms.

40. Finding 107 of the January 6th Report (Exhibit 78 at 9), claims that hundreds of cannisters of pepper spray and knives were confiscated by Secret Service agents, alongside dozens of brass knuckles, tasers, and a handful of pieces of body armor, gas masks, and scissors or screwdrivers, this finding fails to indicate an insurrection took place. This is compared to a backdrop of 27,000 people who passed through magnetometers at the Ellipse. Only 2% were found to have pepper spray, knives, or brass knuckles. None had guns. This comports with the lack of witness testimony to firearms or use of weapons, beyond chemical irritants, and it is consistent with Bjorklund and Kremer' testimony that members of the crowd were not armed.

41. The limited number of dangerous items, lack of eyewitness testimony about dangerous items, failure to identify a single firearm, and failure to identify a single person using any deadly weapon, all indicate that the crowd was not "armed," and certainly not armed to the extent necessary to create a widespread insurrection.

42. Ultimately, the "greatest weapon" use on January 6, 2021, was its sheer mass. (TR. 10/30/23, p. 79:3-15; 82:6-11). Not armaments.

43. The violence at the Capitol on January 6, 2021, was unacceptable. But the lack of organization, the lack of arms, the lack of widespread violence, and the large numbers of

passive bystanders, indicates that the crowd at the Capitol was neither violent enough nor powerful enough to constitute an insurrection or rebellion. This does not minimize or condone the violence that officers Hodges and Pingeon had to endure. But it does indicate that the riot at the Capitol did not have the organization, numbers, or power to constitute an insurrection.

Respectfully submitted this 10th day of November 2023,

GESSLER BLUE LLC

s/ *Scott E. Gessler*
Scott E. Gessler

GESSLER BLUE LLC

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

Certificate of Service

I certify that on this 10th day of November 2023, the foregoing was electronically served via e-mail or CCES on all parties and their counsel of record:

By: *s/ Scott E. Gessler*
Scott E. Gessler