Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203 DATE FILED: November 29, 2023 9:59 AM FILING ID: DEF9CD03C2C41 CASE NUMBER: 2023SA300	
Appeal Pursuant to § 1-1-113(3), C.R.S. District Court, City and County of Denver, Case No. 2023CV032577	
Petitioners-Appellees/Cross-Appellants: Norma Anderson, Michelle Priola, Claudine Cmarada, Krista Kafer, Kati Wright, and Christopher Castilian, v. **Respondent-Appellee:** Jena Griswold, in her official capacity as Colorado Secretary of State, v. **Intervenor-Appellee:** Colorado Republican State Central Committee, an unincorporated association, **Intervenor-Appellant/Cross-Appellee:** Donald J. Trump.	Supreme Court Case No. 2023SA00300

BRIEF OF AMICI CURIAE PROFESSORS CAROL ANDERSON AND IAN FARRELL IN SUPPORT OF PETITIONERS-APPELLEES/CROSS-APPELLANTS

Attorneys for Amici Curiae Professors Carol Anderson and Ian Farrell:

Matthew A. Morr, Atty. Reg. #35913
Ballard Spahr LLP
[redacted]m

Burt M. Rublin*
Ballard Spahr LLP
[redacted]
* pro hac vice motion pending

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with the word limits set forth in C.A.R. 29(d), because it contains 4,748 words. The brief complies with the content and form requirements set forth in Colorado Appellate Rule 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of the Colorado Appellate Rules.

/s/ Matthew A. Morr
Matthew A. Morr

Attorney for Amici Curiae
Professors Carol Anderson and Ian Farrell

Table of Contents

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. STATEMENT OF INTEREST[1]

Amici are scholars in African American Studies and Constitutional Law as well as advocates for racial justice, who have an interest in countering efforts to equate the January 6, 2021 insurrection with legitimate First Amendment-protected protests, including the largely peaceful, lawful protests and demonstrations in support of civil rights and the Black Lives Matter movement. Amici likewise have an interest in correcting mischaracterizations proffered by Donald Trump in the trial court describing this lawsuit seeking to enforce the Fourteenth Amendment Disqualification Clause as voter disenfranchisement, which is ironic given Trump's own persistent efforts to disenfranchise and suppress the votes of Black voters and other voters of color and to baselessly question the validity of their votes in the 2020 Presidential election.

Carol Anderson is the Robert W. Woodruff Professor of African American Studies at Emory University. She has authored numerous books and articles on race in the United States, including *One Person, No Vote: How Voter Suppression is Destroying our Democracy* (2018) and *The Second: Race and Guns in a Fatally Unequal America* (2021). She has been elected into the Society of American

---

[1] No party's counsel authored this brief in whole or in part; and no person, party, or party's counsel contributed money that was intended to fund preparing or submitting this brief, which was prepared on a *pro bono* basis.

Historians, named a W.E.B. Du Bois Fellow of the American Academy of Political and Social Sciences, and selected into the American Academy of Arts and Sciences. Dr. Anderson has served on working groups dealing with race, minority rights, and criminal justice at Stanford's Center for Applied Science and Behavioral Studies, the Aspen Institute, and the United Nations.

Ian Farrell is an Associate Professor at the University of Denver Sturm College of Law. He is a scholar of criminal law and procedure, constitutional law, and the philosophy of law, and authored multiple articles on issues relevant to racial justice.

II. ARGUMENT

A. Courts Have Flatly Rejected Efforts to Compare the Insurrectionists' Conduct on January 6 to Black Lives Matter Protests

Amici Curiae Republican National Party Committee, National Republican Senatorial Committee, and National Republican Congressional Committee have compared the conduct of the insurrectionists on January 6 to that of Black Lives Matter protesters in the Summer of 2020 after the murder of George Floyd. (RNC Amici Br. at 7-8). During the trial, several of Trump's witnesses explicitly drew that comparison. (*See* Nov. 2, 2023 Tr. at 31, 142, 199-201, 244-45, 312). For instance, Congressman Ken Buck testified as follows:

> During the summer of 2020, there were riots. And the rioters had attempted to break through the barricades [at

> the Capitol] … And the goal was to breach the Capitol at that point.

(Nov. 2, 2023 Tr. at 199-200).

These comparisons were undermined by witness testimony, even from Congressman Buck himself. For example, when cross-examined on his attempt to conflate the attack on the U.S. Capitol on January 6th to Black Lives Matter protests, Buck admitted that, unlike on January 6th, "protests in 2020 never breached the Capitol building" and guns were not drawn on the House Floor. (Nov. 2, 2023 Tr. at 266-67). Law enforcement officers who testified at trial stated that there was "no comparison" between the objectives of the mob on January 6th and the violence they endured in any other protests, including protests for racial justice in the summer of 2020. (Oct. 30, 2023 Tr. at 119, 187-188).

In addition, as correctly recognized by a New Mexico court in a decision removing a county commissioner (Couy Griffin) from office pursuant to Section Three of the Fourteenth Amendment because of his participation in the January 6 insurrection, "courts have uniformly rejected arguments by Mr. Griffin and other insurrectionists that their conduct on January 6 was constitutionally-protected protest activity … Courts have likewise rejected January 6 insurrectionists' attempts to compare their conduct to that of Black Lives Matter protesters." *New*

Mexico ex rel. White, No. D-101-cv-2022-00473, 2022 N. M. Dist. LEXIS 1, at *66 (1st Dist. Santa Fe Co., N. Mex. Sept. 6, 2022).

For example, in rejecting an insurrectionist's argument at his sentencing hearing that his January 6 conduct was not different from Black Lives Matter protestors, one court stated:

> [T]hat comparison makes little sense to me… [T]he goal of a lot of the protests in 2020 were to hold police accountable and politicians accountable for police brutality and murder, in George Floyd's case; and it was to improve our political system. **What happened on January 6th is in a totally different category. That protest was to stop the government from functioning at all, to stop our democratic process - - and it worked, at least for a period of time. They are not comparable**.

U.S. v. Croy, No. 21-cr-162, ECF No. 63 at pp. 57-58 (D.D.C. Nov. 5, 2021) (attached as Exhibit "A") (emphasis added).

Similarly, another court stated:

> Now, there are some people who have compared the riots of January 6 with other protests that took place throughout the country over the past year and who have suggested that the Capitol rioters are somehow being treated unfairly. I flatly disagree.
>
> People gathered all over the country last year to protest the violent murder by the police of an unarmed man. Some of those protesters became violent. **But to compare the actions of people protesting, mostly peacefully, for civil rights, to those of a violent mob seeking to overthrow the lawfully elected government**

> **is a false equivalency and ignores a very real danger that the January 6 riot posed to the foundation of our democracy**.

U.S. v. Mazzocco, No. 21-cr-54, ECF No. 32 at pp. 25-26 (D.D.C. Oct. 4, 2021) (attached as Exhibit "B") (emphasis added). *See also U.S. v. Jackson*, No. 22-cr-00230-RC-1, ECF No. 40 at pp. 20-22 (D.D.C. Sept. 26, 2022) (rejecting defendant's effort to compare January 6 insurrection to Black Lives Matters protests, court stated that "One involved the attempt to delay or subvert the peaceful transfer of power. The other did not.") (attached as Exhibit "C").

Yet another judge rejected a January 6th defendant's argument that he was "the victim of selective prosecution" because he was treated more harshly than protesters in Portland, Oregon who were protesting against police brutality in the Summer of 2020. The court stated:

> [T]here are obvious differences between those, like Miller, who stormed the Capitol on January 6, 2021, and those who rioted in the streets of Portland in the summer of 2020. The Portland rioters' conduct, while obviously serious, did not target a proceeding prescribed by the Constitution and established to ensure a peaceful transition of power … The circumstances between the riots in Portland and the uprising in the Nation's capital differ in kind and degree.

U.S. v. Miller, No. 21-cr-119, ECF No. 67 at p. 3 (D.D.C. Dec. 21, 2021) (attached as Exhibit "D"). *Accord United States v. Judd*, 579 F.Supp.3d 1, 7-8 (D.D.C. 2021) ("January 6 rioters sought to tear down our system of government" and

"endangered hundreds of federal officials in the Capitol complex. Members of Congress cowered under chairs while staffers blockaded themselves in offices, fearing physical attacks from the rioters… The action in Portland, though destructive and ominous, caused no similar threat to civilians.").

Also relevant here is *U.S. v. Little*, 590 F.Supp.3d 340 (D.D.C. 2022), where the Court found that a sentence of 60 days imprisonment was warranted for a defendant's "participation in the unsuccessful insurrection at the United States Capitol on January 6, 2021" and noted that the defendant "continued to deflect responsibility for the violence onto Antifa [and] Black Lives Matter. . ." *Id*. at 342, 344. The Court stressed:

> [C]ontrary to his Facebook post and the statements he made to the FBI, the riot was not "patriotic" or a legitimate "protest"… **[I]t was an insurrection aimed at halting the functioning of our government**.

Id. at 344 (emphasis added).

A recent law review article by two conservative law professors also rejected the effort to analogize the insurrection to the protests after the killing of George Floyd: "What about other disruptive, disorderly, even violent protests during the same year? For instance, the many such events that erupted during the summer of 2020 in the wake of the police killing of George Floyd? So far as we can tell, none of these were covered by Section Three. **Of course mere protest is not**

insurrection. Some of these protests devolved into riots, but even a riot is not necessarily an insurrection." William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. at 113 note 407 (forthcoming 2024) (hereinafter "Baude and Paulsen")[2] (emphasis added).

The effort by Trump and the RNC amici to equate the insurrection on January 6 with protests by civil rights supporters is both unfounded and morally offensive. Indeed, the mob that Trump incited to travel to Washington and commit insurrection included scores of neo-Nazis and white supremacists, who attacked and spewed racist insults at Black police officers defending the Capitol and even paraded a Confederate flag inside the Capitol – something never achieved during the Civil War.[3]

Janai Nelson, who is the President and Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc., submitted written testimony to the House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol, and stated:

---

[2] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751

[3] https://www.yahoo.com/video/capitol-cop-recalls-racist-abuse-160719054.html;

https://www.nbcnews.com/politics/justice-department/kevin-seefried-confederate-flag-capitol-jan-6-sentenced-rcna69784

[I]t is essential to the security and endurance of our democracy that this committee understand the January 6th attack in its full context: as a manifestation of broad white supremacist backlash against robust democratic participation by people of color. This backlash has been fueled in part by the false narrative that rampant voter fraud occurred in communities of color and also by a deep-seated fear that the changing racial and ethnic demographics in the United States and the increasing racial and ethnic diversity of the electorate threaten the existing power structure premised on white supremacy.

* * *

After challenging election results in communities of color, the next step in the violence and votes backlash was the January 6th Insurrection – just one day after Black voters asserted their power in Georgia [in the January 5, 2021 Senate run-off election won by Senator Raphael Warnock]. The violent attack on the Capitol on January 6th was a brazen, virulent, and deadly manifestation of the concerted effort to undermine our democracy, to overthrow the government, and to negate the votes cast by our communities.

* * *

This attempt to thwart the peaceful transfer of power – the very hallmark of a functioning democracy – was the natural conclusion of years of rhetoric inciting and condoning racism and white supremacy, expanding the proliferation of conspiracy theories, and flouting the rule of law. More specifically, it was the direct result of false rhetoric regarding stolen elections that tapped into existing racial anxiety.

Nelson Testimony at pp. 2, 14, 15.[4]

B. Courts Have Repeatedly Held That The January 6 Insurrectionists' Actions Were Not Protected Under the First Amendment

Trump is barred by the Disqualification Clause in Section Three of the Fourteenth Amendment to the Constitution from holding public office because, as the district court correctly held, he incited, fomented, promoted, encouraged, and supported the insurrection on January 6, 2021. By his actions, inactions, and incendiary statements, which are not protected by the First Amendment, he "engaged in insurrection" against the Constitution of the United States, and is therefore disqualified from any public office.

In *Thompson v. Trump*, 590 F.Supp.3d 46 (D.D.C. 2022), the court carefully analyzed whether Trump's January 6 rally speech was protected under the First Amendment, as he had argued, or fell within the incitement exception to the First Amendment adopted in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). After setting forth the various inflammatory statements made by Trump in his January 6 rally speech and the context in which they were made, the court concluded that they "are plausibly words of incitement not protected by the First Amendment. It is plausible that those words were implicitly 'directed to inciting or producing

[4] https://www.naacpldf.org/wp-content/uploads/NAACP-LDF-Statement-for-Select-Committee-to-investigate-January-6-Attack-on-the-Capitol-FINAL-05.03.2022.pdf

imminent lawless action and [were] likely to produce such action." 590 F.Supp. 3d at 115, *quoting Brandenburg*, 395 U.S. at 447. The court found that Trump had made "an implicit call for imminent violence or lawlessness. He called for thousands 'to fight like hell' immediately before directing an unpermitted march to the Capitol, where the targets of their ire were at work, knowing that militia groups and others among the crowd were prone to violence." *Id*. at 117.

Indeed, Cassidy Hutchinson, who was a Special Assistant to President Trump and an advisor to former Trump Chief of Staff Mark Meadows, testified to the January 6 Committee that Trump knew on the morning of January 6 that some participants at the rally on the Mall were armed but was unconcerned because "[t]hey're not here to hurt me."[5]

For purposes of disqualification from public office under Section Three of the Fourteenth Amendment, which was not at issue in the *Thompson v. Trump* case, it matters not whether Trump's speech at the January 6 rally fell within the incitement exception to the First Amendment set forth in *Brandenburg*. As explained in the previously cited Baude and Paulsen law review article:

---

[5] Hearing Before the Select Committee to Investigate the January 6th Attack on the United States Capitol, House of Representatives, June 28, 2022, Testimony of Cassidy Hutchinson at p. 10. https://www.govinfo.gov/content/pkg/CHRG-117hhrg49354/pdf/CHRG-117hhrg49354.pdf

> [T]he *Brandenburg* question is beside the point. Section Three of the Fourteenth Amendment does not enact the legal standard of *Brandenburg v. Ohio*. It enacts the standard of having "engage[d] in insurrection," or given "aid or comfort" to those doing so, and qualifies, modifies, or simply satisfies the First Amendment to the extent of any conflict between these constitutional principles. First Amendment or no, the speech was part of Trump's participation in and support for the insurrection.

Baude and Paulsen at pp. 119-120.

These conservative constitutional law scholars concluded that because Section Three of the Fourteenth Amendment was ratified 77 years after the First Amendment, Section Three must take precedence:

> *[T]o the extent of any inconsistency between them, Section Three overrides, supersedes, or satisfies the free speech principles reflected in the First Amendment*. That is: Whatever the correct meaning of Section Three as applied to conspiracies, attempts, incitements, and advocacy that meet the description of "engag[ing] in insurrection or rebellion" or of giving of "aid or comfort" to enemies of the constitutional government of the United States, the constitutional meaning of Section Three of the Fourteenth Amendment modifies or qualifies what otherwise might have been thought the dictates of the First Amendment.

Id. at pp. 52-53 (emphasis in original).

Trump's brief argues that there was no insurrection on January 6 and the district court's "overbroad" definition of insurrection would encompass "[a]ny generic riot or violent protest" that "hindered the execution of a function under the

Constitution." (Trump Br. at 41). But numerous courts have had no trouble recognizing the obvious distinction between riots or violent protests, on the one hand, and the insurrectionists' unprecedented assault on the Capitol on January 6, 2021 when electoral votes were being counted. As explained by one court:

> **What happened on that day [January 6] was nothing less than the attempt of a violent mob to prevent the orderly and peaceful certification of an election as part of the transition of power from one administration to the next . . . That mob was trying to overthrow the government . . . That was no mere protest**.

U.S. v. Mazzocco, supra, Exhibit "B" at 24.

Similarly, in *New Mexico ex rel. White, supra*, the court held that "the January 6 attack on the United States Capitol and the surrounding planning, mobilization, and incitement constituted an 'insurrection' within the meaning of Section Three of the Fourteenth Amendment." 2022 N.M. Dist. LEXIS 1, at *49. It stated as follows:

> [E]ach branch of the federal government has referred to the January 6 Attack as an "insurrection" and the participants as "insurrectionists," including bipartisan majorities of both chambers of Congress, more than a dozen federal courts, President Biden, and the Department of Justice under former President Trump. Former President Trump's own impeachment defense lawyers acknowledged "everyone agrees" there was "a violent insurrection of the Capitol" on January 6. 167 Cong. Rec. S729 (Feb. 13, 2021).

Id. at *53-54.

Numerous other courts have likewise recognized that the conduct at the Capitol on January 6 constituted an "insurrection." *See, e.g., United States v. Munchel*, 991 F.3d 1273, 1285 (D.C. Cir. 2021) (characterizing events of January 6 as an "insurrection"); *U.S. v. Krauss*, No. 23-cr-34, 2023 U.S. Dist. LEXIS 201271, at *1 (D.D.C. Nov. 9, 2023) ("Krauss was part of the mob that stormed the Capital during the insurrection on January 6, 2021"); *U.S. v. Grider*, 617 F.Supp.3d 42, 46 (D.D.C. 2022) ("This criminal case is one of several hundred arising from the insurrection at the United States Capitol on January 6, 2021").[6]

In *New Mexico ex rel. White*, even though Griffin did not enter the Capitol building, "did not personally engage in violence," was not charged with the crime of insurrection under 18 U.S.C. § 2383, and was acquitted of engaging in disorderly conduct on January 6, the court nevertheless held that "[o]ne need not personally commit acts of violence to 'engage in' insurrection … Engagement thus

[6] *See also* Pub. Law. 117-32 (Aug. 5, 2021), 135 Stat. 322, section 1(1) ("On January 6, 2021, a mob of *insurrectionists* forced its way into the U.S. Capitol building and congressional office buildings and engaged in acts of vandalism, looting, and violently attacked Capitol Police officers.") (emphasis added). Also, a majority of both the House of Representatives and Senate approved an article of impeachment charging Trump with "incitement of insurrection." H. Res. 24 (117th Cong., 1st Sess.); 167 Cong. Rec. H165, H191 (Jan. 13, 2021); 167 Cong. Rec. S733 (Feb. 13, 2021).

can include non-violent overt acts or words in furtherance of the insurrection." 2022 N.M. Dist. LEXIS 1, at *55, 58, 67. In words that apply equally to Trump's engagement in the insurrection, the court stated that "Griffin voluntarily aided the insurrectionists' cause by helping to mobilize and incite thousands across the country to join the mob in Washington, D.C. on January 6;" "[t]he pre-January 6 mob mobilization and incitement efforts by Mr. Griffin and others helped make the insurrection possible;" "Griffin's actions normalized and incited violence;" "[a]fter the attack, Mr. Griffin took to social media to justify and normalize the violence;" Griffin "repeatedly aligned himself with the insurrectionists;" and "Griffin's encouragement and normalization of other insurrectionists' violent activities were additional overt acts in support of the insurrection." *Id*. at *59-61.

In sum, "[p]olitical violence predictably occurred at the Capitol on January 6 and Griffin helped make that happen." *Id.* at *61. And no one "helped make that happen" more than Trump, who not only "engaged" in the insurrection, but was its "central cause" and "[n]one of the events of January 6th would have happened without him." *Final Report of the U.S. House Select Committee to Investigate the January 6th Attack on the United States Capitol*, H. Rep. 117-663, 117th Cong., 2d Sess., at 8 (Dec. 22, 2022).[7] *See also id*. at 690 (recommending enforcement of

[7] https://perma.cc/CZ82-EHJR

Section Three of the Fourteenth Amendment against public officials who engaged in the January 6th insurrection).

C. Disqualifying Trump Under Section Three of the Fourteenth Amendment Is Not "Antidemocratic" and Does Not Disenfranchise His Supporters

In his opening statement at trial, Trump's attorney argued that this lawsuit brought by a group of Republican and unaffiliated voters is "antidemocratic" and that it seeks to deny "the right for [sic] the people of Colorado to vote for someone for office" and "the right of Donald J. Trump to be able to run for office." (Oct. 30, 2023 Tr. at 36, 56, 60). Similarly, the RNC amici argue that they have a right to "nominate the candidate of their choice." (RNC Amici Br. at 13). But, as demonstrated at trial, Trump's promotion, incitement, encouragement, and support of the January 6 insurrection renders him constitutionally unqualified to run for the Presidency. Under our Constitution, voters and political parties do not have a "right" to vote for or nominate a constitutionally-unqualified candidate. Trump has repeatedly argued that his popularity should prevent his disqualification under Section Three, but our nation's founders were quite clear that popularity does not supersede the Constitution's mandates. Popular or not, no candidate is above the law.

In *Greene v. Raffensberger*, 599 F.Supp.3d 1283, 1317 (N.D. Ga. 2022), the court stated that "federal appellate courts have held that states have the power to

exclude from the ballot constitutionally unqualified or ineligible candidates." The court also stated as follows:

> Plaintiffs' counsel also suggested at oral argument that the challenge proceeding [under Section 3 of the Fourteenth Amendment] could infringe upon the rights of Plaintiff's supporters to cast their votes for Plaintiff as the candidate of their choice… Plaintiff's voters still would not have a First Amendment right to vote for a disqualified candidate… "The right to vote does not include the right to vote in any manner, or the right to vote for a specific individual" … *see Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998) (finding that "[a] voter has no right to vote for a specific candidate").

Id. at 1309 n. 18. *See also NAACP v. Jones,* 131 F.3d 1317, 1324 (9th Cir. 1997) ("Candidates do not have a fundamental right to run for public office"); *Thournir v. Meyer*, 909 F.2d 408, 412 (10th Cir. 1990) ("Candidacy itself is not a fundamental [constitutional] right which is comparable to the right to vote; therefore, burdens inflicted upon candidates are not to be measured by the same yardstick applied to burdens affecting voters.").

In *New Mexico ex rel. White*, the court squarely rejected a disenfranchisement argument made by the county commissioner it removed from office pursuant to the Disqualification Clause. The court held as follows:

> Section Three affects the qualified right to run for political office – a right that has always been limited by qualifications such as age, citizenship, and residency. *See Thournir v. Meyer*, 909 F.2d 408, 412 (10th Cir.

> 1990) ("Candidacy itself is not a fundamental right…"); *Griffin [v. White]*, 2022 WL 2315980, at *12 [D.N.M. June 28, 2022] ("Section Three of the Fourteenth Amendment narrows the First Amendment right to run for office.").

2022 N.M. Dist. LEXIS 1, at *65. As then-Judge Gorsuch wrote for the Tenth Circuit, a "state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan v. Colorado*, 495 F. App'x. 947, 948 (10th Cir. 2012).

The court in the New Mexico disqualification case pointed out the "irony" of the commissioner's argument that the court should defer to the will of the voters who elected him to office, inasmuch as he participated in an insurrection whose goal "was to set aside the results of a free, fair and lawful election by a majority of the people of the entire country." 2022 N.M. Dist. LEXIS 1, at *6. *See also id*. at *69-70 ("he overlooks that his own insurrectionary conduct on January 6 sought to subvert the results of a free and fair election, which would have disenfranchised millions of voters"); Brief NAACP New Mexico State Conference and NAACP Otero County Branch as Amicus Curiae Supporting Plaintiffs, New Mexico ex rel. White, 2022 N. M. Dist. LEXIS 1, at *13 ("Throughout its 113-year existence, one of the NAACP's core missions has been to protect minorities' right to vote and to combat voter disenfranchisement and suppression. Thus, the NAACP is acutely

aware of what constitutes voter disenfranchisement, which bears no resemblance to what is at issue here.").

The argument by Trump that this lawsuit is "antidemocratic" (Oct. 30, 2023 Tr. at 36, 60) is even more ironic, since he bears by far the most responsibility for attempting to *subvert* democracy on January 6. As emphasized by Baude and Paulsen:

> Importantly, it is also wrong to shrink from applying Section Three on grounds of "democracy," whether on the premise that Section Three should be ignored or narrowly construed because it limits who voters may choose, or on the premise that only the voters should enforce Section Three. It is true, as we have said, that limiting democratic choice is not something to be done lightly, but it is something the Constitution does, and for serious reasons. The Constitution cannot be overruled or disregarded by ordinary election results. (And we note that there is particular irony in invoking democracy to shrink from applying Section Three to the insurrectionists of 2020-21, who refused to abide by election results and instead sought to overthrow them).

Baude and Paulsen, *supra*, at p. 125.

It also bears emphasis that when Trump unlawfully sought to overturn the results of the 2020 Presidential election, he falsely claimed voter fraud in a number of cities and counties with large numbers of Black and Brown voters, including Philadelphia, Detroit, Milwaukee, Fulton County, Georgia, Maricopa County, Arizona, and Clark County, Nevada, and thus sought to disenfranchise those

legitimate voters. *See Verified Petition, Anderson v. Griswold*, No. 2023-CV-32577 (Dist. Ct. of Denver Colo., filed Sept. 6, 2023) at 17, 94. As set forth in the testimony of the President of the NAACP Legal Defense and Educational Fund to the House of Representatives' January 6 Committee:

> [T]he backlash to historic 2020 voter turnout among people of color has been swift and severe. As with past reactions to racial progress the post-2020 backlash has featured both violence and legal regression – in this case in the form of efforts to restrict the franchise. Based on the false narrative of voter fraud, this violence and votes backlash began with campaign operatives questioning vote totals in Black and Brown communities. It continued through a violent insurrection at the U.S. Capitol focused on invalidating the election results and thus the political power exercised by the Black and Brown communities and accelerated through both successful efforts to erect barriers to the ballot and a regressive redistricting cycle that severely constricts the ability of voters of color to assert their full strength at the polls.

Nelson Testimony, *supra*, at pp. 12, 14.

Similarly, the NAACP and others filed a lawsuit against Trump alleging violations of the Voting Rights Act and Ku Klux Klan Act (18 U.S.C. § 241) based on his efforts to disenfranchise Black voters with false allegations of voter fraud:

> [Trump] sought to overturn the result of the election by disenfranchising voters, in particular voters of color in several major metropolitan areas. Former President Trump and the Trump Campaign did this by attempting to slow and stop vote counting efforts in tightly contested states; by pressuring state and local election officials not

> to certify election results, as required by law, or to take other measures to overturn the will of the voters; by raising baseless challenges to the validity of ballots; and, on January 6, 2021, by inciting followers to use violence and the threat of violence in and around the United States Capitol building to disrupt the Congress' certification of the states' electoral votes.

Michigan Welfare Rights Organization, et al. v. Trump, No. 20-cv-3388 at Doc. No. 60 ¶ ¶ 1, 3 (D.D.C.).

It is noteworthy that the Special Counsel's federal indictment of Trump in the District of the District of Columbia alleges a violation of the Ku Klux Klan Act, which was enacted shortly after the Civil War to protect newly-freed Blacks from political violence, intimidation, and "conspiracies against civil rights." In particular, the indictment alleges that Trump made knowingly false claims of voter fraud in Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin. *See United States v. Trump*, No. 23-cr-257 (D.D.C.) at Doc. No. 1 ¶ ¶ 14-52, 129-130. Similarly, the indictment of Trump in Georgia alleges that he made knowingly false claims of voter fraud in Fulton County, and that his co-conspirators harassed and intimidated a Black election worker named Ruby Freeman and falsely accused her of committing election fraud. *State of Georgia v. Donald Trump, et al*., No. 23SC188947 (Fulton Co. Superior Court).

III. CONCLUSION

For the reasons set forth above, the Court should hold that Trump is disqualified from the Colorado presidential primary ballot for President pursuant to Section Three of the Fourteenth Amendment by reason of his engagement in insurrection against the United States.

Respectfully submitted,

/s/ Matthew A. Morr

Matthew A. Morr, Atty. Reg. #35913
Ballard Spahr LLP
[redacted]

OF COUNSEL:

Burt M. Rublin*
Ballard Spahr LLP
[redacted]
*Pro hac vice motion pending

CERTIFICATE OF SERVICE

I certify that on this 29th day of November 2023, a copy of this amicus curiae brief was electronically served via email or via e-filing on all counsel and parties of record.

Mario Nicolais, Atty. Reg. # 38589
KBN Law, LLC
[redacted]

Martha M. Tierney, Atty. Reg. # 27521
Tierney Lawrence Stiles LLC
[redacted]

Eric Olson, Atty. Reg. # 36414
Sean Grimsley, Atty. Reg. # 36422
Jason Murray, Atty. Reg. # 43652
Olson Grimsley Kawanabe Hinchcliff & Murray LLC
[redacted]

Donald Sherman
Nikhel Sus
Jonathan Maier
Citizens for Responsibility and Ethics in Washington
[redacted]

[redacted]
Attorneys for Petitioners

Michael T. Kotlarczyk
Grant T. Sullivan
LeeAnn Morrill
Colorado Attorney General's Office
[redacted]
Attorneys for Secretary of State Jean Griswold in her official capacity as Colorado Secretary of State

Scott E. Gessler
Geoffrey N. Blue
Justin T. North
Gessler Blue LLC
[redacted]

Jonathan Shaw
Mark P. Meuser
Jacob Roth
Dhillon Law Group, Inc.
[redacted]
Attorneys for Intervenor Donald J. Trump

Michael William Melito
Melito Law LLC
[redacted]

Robert Alan Kitsmiller
Podoll & Podoll, P.C.
[redacted]

Benjamin Sisney
Nathan J. Moelker
Jordan A. Sekulow
Jay Alan Sekulow
American Center for Law and Justice
[redacted]

Andrew J. Ekonomou
[redacted]
Attorneys for Intervenor Colorado Republican State Central Committee

/s/ Sherri L. Clark
Sherri L. Clark

Legal Administrative Assistant

DATE FILED: November 29, 2023 9:59 AM
FILING ID: DEF9CD03C2C41
CASE NUMBER: 2023SA300

EXHIBIT "A"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * * * * * * * * * * * * * * *

UNITED STATES OF AMERICA,	)	Criminal Action
	)	No. 21-162
vs.	)	
	)	
GLENN WES LEE CROY,	)	November 5, 2021
	)	9:24 a.m.
Defendant.	)	Washington, D.C.
	)	

* * * * * * * * * * * * * * * * * *

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE BERYL A. HOWELL,
UNITED STATES DISTRICT COURT CHIEF JUDGE

APPEARANCES:

FOR THE GOVERNMENT: CLAYTON HENRY O'CONNOR
DOJ-CRM
1301 New York Ave NW
Washington, DC 20530
(202) 616-3308
Email: clayton.Oconnor@usdoj.gov

JORDAN ANDREW KONIG
U.S. Department of Justice
P.O. Box 55
Ben Franklin Station
Washington, DC 20044
(202) 305-7917
Email: jordan.a.konig@usdoj.gov

FOR THE DEFENDANT: KIRA ANNE WEST
NICOLE ANN CUBBAGE
712 H Street, Northeast
Washington, DC 20002
(202) 236-2042
Email: kiraannewest@gmail.com

ALSO PRESENT: CRYSTAL LUSTIG, Pretrial Officer

Court Reporter: Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

briefing, Ms. West. And I -- you know that old motto that moms tell their kids: Two wrongs don't make a right.

MS. WEST: Yes.

THE COURT: So if he's offended by what he saw in terms of some of the protests in the summer of 2020 because of the violence and criminal conduct that occurred with looting businesses, burning buildings -- which is what he describes in his letter -- you know, okay, well, why should he go and repeat that behavior if he thought it was so wrong?

MS. WEST: As I said --

THE COURT: That argument -- that comparison makes little sense to me, so I wasn't even going to talk about it, because it makes so little sense to me, until you brought it up. And I know your papers are replete with it, as is his letter; but two wrongs don't make a right, it's as simple as that.

My experience with prosecutions in the summer of 2020 -- I only speak from my experience -- is that -- is that people were brought to me facing felony charges.

MS. WEST: I understand, Your Honor.

THE COURT: And not that many cases I think, as most of them were processed in superior court.

Anyway -- so I don't know that there is much more to be said. I do think that the goal of a lot of the

protests in 2020 were to hold police accountable and politicians accountable for police brutality and murder, in George Floyd's case; and it was to improve our political system.

What happened on January 6th is in a totally different category.

MS. WEST: I agree. I agree.

THE COURT: That protest was to stop the government from functioning at all, to stop our democratic process -- and it worked, at least for a period of time. They are not comparable.

So -- but let's go back to this case.

MS. WEST: There are two videos, Your Honor, that you mentioned.

The first one, Exhibit No. 3, you talked about the two windows that were broken, and that he went into the doors when he first entered the Capitol. I watched that video multiple times. There were at least 400 -- I think I put 700 in my brief; and then I went back and said I better start counting. There were at least 400 people ahead of him.

According to Mr. Croy, he did not understand or see the violence until weeks later of what really happened at the Capitol; and even today we're seeing more things about the violence. And there is a --

DATE FILED: November 29, 2023 9:59 AM
FILING ID: DEF9CD03C2C41
CASE NUMBER: 2023SA300

EXHIBIT "B"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
	.	
Plaintiff,	.	CR No. 21-0054 (TSC)
	.	
v.	.	
	.	
MATTHEW CARL MAZZOCCO,	.	Washington, D.C.
	.	Monday, October 4, 2021
Defendant.	.	10:05 a.m.
. . . . .		

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE TANYA S. CHUTKAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	KIMBERLEY C. NIELSEN, AUSA U.S. Attorney's Office 555 Fourth Street NW Washington, DC 20530 (202) 252-7566
For the Defendant:	ROBBIE L. WARD, ESQ. 530 Lexington Avenue San Antonio, TX 78215 (210) 758-2200
Court Reporter:	BRYAN A. WAYNE, RPR, CRR U.S. Courthouse, Room 4704-A 333 Constitution Avenue NW Washington, DC 20001 (202) 354-3186

Proceedings reported by stenotype shorthand.
Transcript produced by computer-aided transcription

In addition to the guidelines and policy statements, I must also consider the nature and circumstances of the offense, the history and characteristics of the defendant, the types of sentences available, the need to avoid sentence disparity, and the need to or provide restitution. And I've considered all these factors at length in preparation for this sentencing.

These cases arising out of the riots of the Capitol on January 6 are particularly difficult because, although many of the defendants like Mr. Mazzocco were charged with and pleaded guilty to misdemeanors, the Court, like many others in this district, does not view the crimes that were committed on that day as anything petty.

Many of my colleagues have spoken eloquently -- and now I'm going to talk about the nature and circumstances of the offense. Many of my fellow judges have spoken out about the gravity of the violent riot that took place on January 6. I add my voice to theirs.

What happened on that day was nothing less than the attempt of a violent mob to prevent the orderly and peaceful certification of an election as part of the transition of power from one administration to the next, something that has happened with regularity over the history of this country. That mob was trying to overthrow the government.

They erected hangman's scaffolding. They broke down doors

and barriers. They destroyed property in Congress. They fought law enforcement, who were outnumbered that day, resulting in the injury and death of police officers. They broke down doors and barriers. They paced the hallways, calling out and searching for the Speaker of the House and the Vice President, and one can only surmise what they were going to do with them had they found them. They soiled and defaced the halls of the Capitol and showed their contempt for the rule of law.

That was no mere protest. And even though Mr. Mazzocco was not fighting with the officers, even though he was telling people not to steal stuff, he was inside and his presence was part of the mob. A mob isn't a mob without the numbers. The people who were committing those violent acts did so because they had the safety of numbers, one of whom was Mr. Mazzocco.

Now, there are some people who have compared the riots of January 6 with other protests that took place throughout the country over the past year and who have suggested that the Capitol rioters are somehow being treated unfairly. I flatly disagree.

People gathered all over the country last year to protest the violent murder by the police of an unarmed man. Some of those protesters became violent. But to compare the actions of people protesting, mostly peacefully, for civil rights, to those of a violent mob seeking to overthrow the lawfully elected government is a false equivalency and ignores a very real danger

that the January 6 riot posed to the foundation of our democracy.

The actions that took place on January 6 were watched with horror, not just by citizens of the District of Columbia, who were terrified, but citizens of the United States, people living in this country, and people all over the world who look to this country as an example of the rule of law.

In this Court's opinion, the treatment has been far more lenient than other defendants who regularly appear in our courts. To start with, the majority of the rioters, including Mr. Mazzocco, were allowed to leave the scene of their crime, unarrested and unharmed, and return to their homes, where, once they realized the trouble they were in, they immediately commenced -- he immediately commenced to conceal, destroy, or minimize his participation in his wrongdoing.

Then Mr. Mazzocco, like hundreds of others who participated in the riots, was charged with petty misdemeanors, despite his deliberate, premeditated decision to come to the District to try and stop the transfer of power.

And once he was charged, Mr. Mazzocco was released and allowed to remain in his home, to be with his family, to continue to work or look for work, and go about his daily life because of the COVID pandemic. He has never even had to come to this court to answer for his crimes. And, finally, although he was charged with four counts, Mr. Mazzocco was allowed to plead

DATE FILED: November 29, 2023 9:59 AM
FILING ID: DEF9CD03C2C41
CASE NUMBER: 2023SA300

EXHIBIT "C"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America,	)	Criminal Action
	)	No. 1:22-cr-00230-RC-1
Plaintiff,	)	
	)	
vs.	)	**Bond Hearing**
	)	
Brian Scott Jackson (1),	)	Washington, D.C.
	)	**September 26, 2022**
Defendant.	)	Time: 2:30 p.m.

Transcript of Bond Hearing
Held Before
The Honorable Rudolph Contreras
United States District Judge

A P P E A R A N C E S

For the Government: **Barry K. Disney**
UNITED STATES ATTORNEY'S OFFICE
FOR THE DISTRICT OF COLUMBIA
601 D Street, Northwest
Washington, D.C. 20579

For the Defendant Brian Scott Jackson:
John L. Machado
LAW OFFICE OF JOHN MACHADO
503 D Street, Northwest, Suite 310
Washington, D.C. 20001

Also Present: Masharia Holman, Pretrial Services Officer

Stenographic Official Court Reporter:
Nancy J. Meyer
Registered Diplomate Reporter
Certified Realtime Reporter
333 Constitution Avenue, Northwest
Washington, D.C. 20001
202-354-3118

Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

an item, I just want to share a personal anecdote. And the fact of the matter is, I've practiced here and I've practiced in Superior Court.

THE COURT: Uh-huh.

MR. MACHADO: In Superior Court I happened -- during the time that the Black Lives Matter protests were happening, I had an individual I was representing where there was similar protests in Lafayette park right across the street from the White House. And the fact of the matter is, I had a client who threw a projectile at a police officer, just like Mr. Jackson is alleged to have occurred.

In that case, the government -- not only did they not ask for him to be held, but that client eventually ended up walking away having to do only community service on a deferred prosecution agreement where you just had to do -- I believe it was 32 hours' community service.

And so I -- I understand that the Court is saying that, you know, throwing something at a police officer, that's a different category. The problem is that I compare that with my -- with my other -- Mr. Jackson's actions with my other client. And I should mention that police officers were not armed with riot and police gear. They were just in standard -- you know, it wasn't -- they weren't -- at least to my knowledge, they weren't in riot gear from that fact.

And I find myself having difficulty reconciling how that

was a situation where my client -- the one with the Black Lives Matters was a situation whereby, basically, the government said: That's not a problem.

THE COURT: I -- I assume that he did not have violent priors.

MR. MACHADO: That -- that is correct. I am -- I am not going to dispute that, Your Honor. And -- and I'm just talking more about the charges. I understand, you know -- I mean, there's a lot that comes -- factors in, and we are looking at the factors, as -- as the Court knows.

But the fact that my -- that my client in the Black Lives Matter was charged with a misdemeanor and -- and -- you know, he didn't have to worry about being locked up in prison. And yet I have a client who, very similar, like presumably 60 other people who threw things at police officers, are looking at sitting at a jail and being detained for an extended period of time, even before they get their day in court. And I have difficulty reconciling that they are being treated fairly or being treated equally. And I'm just talking about the charges.

I mean, I understand. I -- I don't dispute the fact that my client had a different criminal record, but the fact that the government chose, even before deciding whether to hold him or not hold him, just to charge him with a misdemeanor, which is, you know, a separate decision, and have my client

with a -- with a pile of felonies and misdemeanor is just difficult to understand how that can be fair treatment of -- of -- of our citizenship.

And it's -- and it's just a situation whereby Mr. Jackson is -- I guess he -- you know, he chose the wrong -- you know, he's being charged by an administration that does not agree with their -- with his positions. And so he ends up being locked up while, on the other hand, my -- my other client ends up not having that situation and was able to walk away, not even with a criminal record. It's just difficult to -- to reconcile.

THE COURT: Except one involved --

MR. MACHADO: What that's?

THE COURT: One involved the attempt to delay or subvert the peaceful transfer of power. The other one did not.

MR. MACHADO: Well, Your Honor -- and, I mean, I am drawing the distinction on the fact that my client -- nor is there any way the government suggesting that he was trying to delay that. He was -- he was -- essentially -- and I'm trying to, you know, compare apples to apples here. He was in a place that he shouldn't have been protesting, and he threw something at a police officer.

The government is not in any way suggesting that he was charging up there, which I think is -- is -- you know, puts them more in the same category. I understand what the Court is

DATE FILED: November 29, 2023 9:59 AM
FILING ID: DEF9CD03C2C41
CASE NUMBER: 2023SA300

EXHIBIT "D"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, v. GARRET MILLER, *Defendant.*	Criminal Action No. 1:21-cr-00119 (CJN)

ORDER

Garret Miller, a January 6 defendant, claims that he is the victim of selective prosecution. Pointing to the Department of Justice's charging decisions (or lack thereof) for rioters in Portland, Oregon, he asks the Court to compel discovery and grant an evidentiary hearing on his claim. *See* Motion for Discovery and for an Evidentiary Hearing ("Mot."), ECF No. 32. But the evidence Miller points to is not enough. The Court will thus deny his Motion.

The Executive Branch has "broad discretion" in "enforc[ing] the Nation's criminal laws." *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quotation omitted); *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016). But that discretion has its limits. The Fifth Amendment prohibits the federal government from pursuing criminal charges against a citizen that amount to a "'practical denial' of equal protection of law." *Armstrong*, 517 U.S. at 465 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)). A claim of "selective prosecution" guards against this illegality. *Id.*

Miller must make two showings, each by "clear evidence," to establish his claim of selective prosecution. *See Att'y Gen. of U.S. v. Irish People, Inc.*, 684 F.2d 928, 932 (D.C. Cir. 1982). He must demonstrate both that the prosecution had a "discriminatory effect" and that it arose from "discriminatory intent." *Armstrong*, 517 U.S. at 465. Producing evidence of such

discriminatory effect and discriminatory intent often requires discovery. *See* Jonathan J. Marshall, *Selective Civil Rights Enforcement and Religious Liberty*, 72 Stan. L. Rev. 1421, 1448 (2020).

To get discovery on his claim, Miller must offer "some evidence" tending to show both a discriminatory effect and discriminatory intent. *United States v. Bass*, 536 U.S. 862, 863 (2002). If the standard sounds familiar to the one for *proving* a selective-prosecution claim, it should. The Supreme Court has adopted this "correspondingly rigorous" standard to guard against costly resource allocation and the disclosure of sensitive information. *Armstrong*, 517 U.S. at 468; *United States v. Khanu*, 664 F. Supp. 2d 28, 31 (D.D.C. 2009). The some-evidence standard "is only slightly lower" than the clear-evidence standard. *United States v. Hare*, 820 F.3d 93, 99 (4th Cir. 2016) (quoting *United States v. Venable*, 666 F.3d 893, 900 (4th Cir. 2012)) (quotation marks omitted); *United States v. Sellers*, 906 F.3d 848, 852 (9th Cir. 2018) (noting that the some-evidence "standard was intentionally hewn closely to the claim's merits requirements"); *United States v. Alameh*, 341 F.3d 167, 173 (2d Cir. 2003) ("The standard for discovery is correspondingly rigorous, . . . but of course not identical to the standard applied to the merits."); *United States v. Lewis*, 517 F.3d 20, 25 (1st Cir. 2008) ("The evidentiary threshold that a defendant must cross in order to obtain discovery in aid of a selective prosecution claim is somewhat below 'clear evidence,' but it is nonetheless fairly high.").

Miller submits that he "has become familiar with how the Department of Justice has handled the bulk of the 18 U.S.C. § 231(a)(3) and 18 U.S.C. § 111 charges arising out of the Portland riots, which took place during the summer of 2020," Mot. at 5, and suggests that his treatment on identical charges, *see* Superseding Indictment, ECF No. 30, at 2–3, is discriminatory. In support of his position, he points to Portland cases that were either dismissed, are headed towards dismissal, or have received "extremely favorable plea agreements." *Id.* at 8–16. Yet

despite his efforts, Miller has produced inadequate evidence of either discriminatory effect or discriminatory intent to obtain discovery here.

As to discriminatory effect, a defendant like Miller who seeks discovery must adduce "some evidence that similarly situated defendants . . . could have been prosecuted, but were not." *Armstrong*, 517 U.S. at 469; *Branch Ministries v. Rossotti*, 211 F.3d 137, 144 (D.C. Cir. 2000). Whether others qualify as similarly situated hinges on whether the "circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect" to the comparator. *Rossotti*, 211 F.3d at 145 (quoting *Irish People, Inc.*, 684 F.2d at 946). But there are obvious differences between those, like Miller, who stormed the Capitol on January 6, 2021, and those who rioted in the streets of Portland in the summer of 2020. The Portland rioters' conduct, while obviously serious, did not target a proceeding prescribed by the Constitution and established to ensure a peaceful transition of power. Nor did the Portland rioters, unlike those who assailed America's Capitol in 2021, make it past the buildings' outer defenses. And Miller has failed to point to any Portland case that is similar to this one and in which the government made a substantially different prosecutorial decision. The circumstances between the riots in Portland and the uprising in the Nation's capital differ in kind and degree, and the Portland cases (and the government's prosecutorial decisions) are therefore not sufficiently similar to this case to support Miller's request for discovery.

As for improper prosecutorial motive, Miller must present a credible showing that the Government chose to prosecute "at least in part because of, not merely in spite of," his protected characteristic. *Wayte v. United States*, 470 U.S. 598, 610 (1985); *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006) ("[T]he discriminatory-purpose element requires a showing that discriminatory intent was a 'motivating factor in the decision' to enforce the

criminal law against the defendant," which can be "shown by either direct or circumstantial evidence."). Yet Miller points to no evidence of discriminatory intent other than "personal conclusions based on anecdotal evidence." *Armstrong*, 517 U.S. at 470. He contends that the government treated the Portland rioters favorably once President Biden assumed office. Mot. at 19. But speculation is not enough. That the government allegedly dismissed cases against some (but not all) Portland rioters, or offered others (but not all) favorable plea deals, does not without more show the federal government is pursuing its claims against Miller and others like him because of a difference in politics. The government also has pointed to substantial differences in the evidence available to it with respect to the two groups. The January 6 attack happened in broad daylight, and much of what occurred was captured on video (whether from the Capitol, law enforcement officers, or the rioters themselves). In Portland, much of the illegal activity occurred at night and there is substantially less video evidence of what unfolded during the assault.

Accordingly, it is

ORDERED that the Motion for Discovery and for an Evidentiary Hearing, ECF No. 32, is **DENIED**.

DATE: December 21, 2021

CARL J. NICHOLS
United States District Judge