

DISTRICT COURT, CITY AND COUNTY OF
DENVER, COLORADO
1437 Bannock Street
Denver, CO 80203

Case Number 2023CV032577, Division/Courtroom 209

CERTIFIED STENOGRAPHER'S TRIAL TRANSCRIPT
TRIAL DAY 6: November 15, 2023

NORMA ANDERSON, MICHELLE PRIOLA,
CLAUDINE CMARADA, KRISTA KAUFER,
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, and DONALD J. TRUMP,

Intervenors.

The trial in the above-entitled matter,
commenced on Wednesday, November 15, 2023, at 3:05 p.m.,
before the HONORABLE SARAH B. WALLACE, Judge of the
District Court.

This transcript is a complete transcription
of the proceedings that were had in the above-entitled
matter on the aforesaid date.

Reported by: K. Michelle Dittmer, RPR

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I N D E X

CLOSING STATEMENTS:	PAGE
By Mr. Grimsley	9
By Mr. Kotlarczyk	48
By Mr. Sisney	55
By Mr. Gessler	65
By Mr. Grimsley	115

1 WHEREUPON, the court convened at
2 3:05 p.m., and the following proceedings were had:

3 * * * * *

4 THE COURT: Good afternoon. Welcome back.
5 We are here for the continued Colorado
6 Revised Statute 1-1-113 hearing in the matter of
7 Anderson vs. Griswold, with the intervenors, the Colorado
8 Republican State Central Committee and Donald J. Trump,
9 Case Number 2023-CV-32577.

10 May I have entries of appearances,
11 starting with the petitioners?

12 MR. GRIMSLEY: Your Honor, Sean Grimsley,
13 with Eric Olson, Jason Murray, Martha Tierney and
14 Mario Nicolais for petitioners.

15 THE COURT: Great.

16 MR. GESSLER: Afternoon, Your Honor. On
17 behalf of President Trump, Scott Gessler. With me is
18 Mr. Geoff Blue and Mr. Justin North.

19 MR. SISNEY: Good afternoon, Your Honor.
20 I'm Ben Sisney. I'm here with Nathan Moelker in person.
21 Jane Raskin, also with the American Center for Law and
22 Justice, is here remotely. Also here with Michael
23 Melito, Melito Law, and Bob Kitsmiller of Podoll &
24 Podoll.

25 THE COURT: Great. Thank you.

1 MR. KOTLARCZYK: Good afternoon,
2 Your Honor. Michael Kotlarczyk from the Attorney
3 General's Office here on behalf of respondent,
4 Jena Griswold. With me today is Secretary of State
5 Jena Griswold and Deputy Secretary of State
6 Christopher Beall.

7 THE COURT: Great.

8 Have we, among counsel, talked about the
9 order? I'm assuming we're starting with the petitioners,
10 and then what's next?

11 MR. GRIMSLEY: I would assume that the
12 Secretary of State would go next because I would imagine
13 that the intervenors would probably want to respond.

14 THE COURT: Okay. Does that work for you,
15 Mr. Gessler?

16 MR. GESSLER: That works fine, Your Honor.

17 And then we just had one question for
18 the -- for the time allotment. Do the -- does
19 President Trump and the Colorado Republican Party, do
20 they split it or does the Colorado Republican Party
21 get -- I think they have maybe 10 minutes of additional
22 time.

23 THE COURT: I'm not going to cut anybody
24 off, so let's just proceed.

25 MR. GESSLER: Okay. Well, then, with

1 that, we'll probably ask the Colorado Republican Party to
2 go first because they have some airline transportation
3 issues.

4 THE COURT: Oh.

5 MR. GESSLER: And then -- and then we'll
6 bat cleanup.

7 THE COURT: Nothing for me to decide on
8 the airline transportation issues, I hope?

9 MR. GESSLER: We could have that
10 jurisdictional discussion, but I'm not sure that would
11 work. But yeah, they have a flight to catch.

12 THE COURT: Okay.

13 MR. GRIMSLEY: And, Your Honor, may I
14 reserve time for rebuttal given that this is a closing
15 argument?

16 THE COURT: Sure. So why don't we do it
17 this way. Mr. Kotlarczyk already asked for ten minutes,
18 and we'll give approximately ten minutes to the
19 Republican Party, and then up to an hour each for
20 Intervenor Trump and the petitioners. And if you want to
21 reserve time, that's fine.

22 MR. GRIMSLEY: We'll see. We'll see where
23 I'm at at the end of the opening of the closing argument.

24 THE COURT: Do you need us to keep
25 time or --

1 MR. GRIMSLEY: I can keep it.

2 THE COURT: Okay.

3 MR. GRIMSLEY: Good afternoon, Your Honor.
4 I'm sure I speak for everybody here, but on behalf of
5 petitioners, I wanted to thank the Court and the court
6 staff for all of the time and attention that you have put
7 in on this matter, the speed and thoughtfulness with
8 which you have issued your rulings, all while under the
9 brightest of spotlights. We really thank you.

10 I wish we didn't have to be here. We're
11 here because for the first time in our nation's history,
12 a President of the United States has engaged in
13 insurrection against the Constitution. He spearheaded a
14 multifaceted scheme to stay in power by any means
15 necessary, the scheme culminating in a violent attack on
16 the Capitol on January 6, during the constitutionally
17 mandated counting of electoral votes, and now he wants to
18 be President again.

19 The Constitution does not allow that.

20 It's easy to forget that we are governed
21 by a document. There is real fragility to that. The
22 document has no weapons. It commands no armies.
23 Section 3 of the Fourteenth Amendment is one of the few
24 self-defense mechanisms that that document has.

25 And it stands for the unremarkable

1 proposition that a person who takes an oath to support
2 the Constitution and then turns around and attacks it
3 cannot be allowed to take the oath a second time.

4 Such a person has proven themselves
5 untrustworthy and incapable of ensuring that we remain a
6 country ruled by law and not by men. Through his
7 actions, and his actions alone, Donald Trump has
8 disqualified himself from ever holding office again.

9 I've got some slides here. I also have a
10 board over here, Your Honor. I'm sorry I had to put it
11 way over there. I didn't want to block anybody.

12 This is a slide that we used in opening.
13 I've tweaked it a little bit. These are the four
14 elements that we said that we would prove and that we
15 have proven. I'm going to talk about the first three
16 today. I understand the Secretary of State is going to
17 talk about the fourth one. And over here, again, we have
18 a board, and I'll be referencing that.

19 The first element, that President Trump
20 took an oath as an officer of the United States to
21 support the Constitution. There is no dispute that
22 President Trump took an oath. There's a stipulation to
23 that. We all know that.

24 Now, President Trump, I expect, is going
25 to argue that he was not, as President, an officer of the

1 United States or that his presidential oath was not one
2 to support the Constitution. I'll address those
3 incorrect arguments later.

4 Element 2. January 6 was an insurrection
5 against the Constitution. And there really isn't that
6 much in the way of dispute here, either. That's likely
7 why President Trump waited until the very end of a
8 177-page findings of fact and conclusions of law to make
9 the argument.

10 And like I said, we have a board,
11 Your Honor. Over on this board is the standard -- and
12 I'll -- for both insurrection against the Constitution
13 and engaging in that insurrection. These are the
14 standards that were put forth by our expert, Gerard
15 Magliocca.

16 So for insurrection against the
17 Constitution, that is any public use of force or threat
18 of force by a group of people to hinder or prevent the
19 execution of the Constitution.

20 Now, Trump's expert, Delahunty, offers no
21 alternative definition. He instead argues that
22 insurrection against the Constitution is somehow so
23 ambiguous that this Court needs to defer to Congress.

24 Delahunty is wrong. He is wrong that
25 ambiguity, even if it existed, would require this Court

1 to throw its hands up. It is the Court's fundamental
2 duty to interpret the Constitution and say what the law
3 is. But there is no ambiguity. The historical evidence
4 on this is clear.

5 Now, before we get to the battle of the
6 experts and what they said on the historical evidence, I
7 want to look at their qualifications because this
8 probably says all you need to know.

9 On the left we have Gerard Magliocca, who
10 was a fan of the Fourteenth Amendment Section 3 before it
11 was cool to be, and then we have Delahunty on the right.

12 On the left, we have a professor who has
13 not only been a constitutional scholar for over 22 years,
14 written books and law review articles, but he has two
15 peer-reviewed articles on Section 3 and a book on the
16 Fourteenth Amendment.

17 He has Section 3 literature that's been
18 cited by two Federal Courts, the Congressional Research
19 Service, and he has testified and been found to be an
20 expert before this case in court on Section 3 of the
21 Fourteenth Amendment.

22 Delahunty, by contrast, one of the first
23 answers on cross-examination was that he was not claiming
24 to be an expert in the history of Section 3 of the
25 Fourteenth Amendment.

1 Now, the historical evidence in support of
2 Professor Magliocca's definition is just as clear as the
3 qualifications when you look at the balance.

4 So Professor Magliocca points to a number
5 of historical sources, the Whiskey and Fries
6 Insurrection, which would have been well-known at the
7 time of the framing, dictionary definitions of
8 insurrection, jury and grand jury charges, and the code
9 of war that was used by the Union Army during the Civil
10 War.

11 And again, on the right-hand side, what do
12 we have? Delahunty asking this Court to throw its arms
13 up because insurrection is somehow too ambiguous.

14 Magliocca is correct.

15 The January 6 events easily meet the
16 definition of insurrection against the Constitution.
17 There was a large group of people that attacked the
18 Capitol on January 6.

19 This is from Officer Danny Hodges: "There
20 were thousands, I would say." "The size of the mob was
21 the greatest weapon," and that's, on the right, a photo
22 still from the video -- from the camera atop the Capitol
23 that day.

24 Here's testimony from Officer Pingeon:
25 "There were thousands of people coming towards the

1 Capitol along Pennsylvania Avenue." So it wasn't just
2 the folks who were at the Capitol to begin with. There
3 were thousands coming up from the Ellipse at the behest
4 of President Trump.

5 The mob used violence and threats of
6 violence.

7 This is from Officer Danny Hodges: "The
8 crowd attacked me in a variety of ways, punching,
9 kicking, pushing, chemical irritants, beaten in the head.
10 I was pinned and crushed with a police shield." And we
11 know what that video was.

12 (Video playing.)

13 MR. GRIMSLEY: This is from
14 Officer Hodges' body cam outside the Capitol, and this,
15 even worse, somebody's phone inside.

16 (Video playing.)

17 MR. GRIMSLEY: And this from
18 Officer Pingeon:

19 "How long were you engaged in hand-to-hand
20 combat?"

21 "For probably two to three hours."

22 "Did you think your life was in imminent
23 danger?"

24 "Yes, I did."

25 And it wasn't just violence against the

1 police officers. It was the threat of violence against
2 members of Congress and Vice President Pence.

3 Here is testimony from
4 Representative Swalwell:

5 "How concerned were you for your personal
6 safety at that moment?"

7 "It was escalating as we went from gas
8 masks to a pen in my hand to a prayer from the chaplain,
9 and it was when the chaplain read that prayer that I
10 finally texted my wife something I did not want to text
11 her."

12 And we know what the mob was doing inside
13 the Capitol. This is the mob --

14 (Video playing.)

15 MR. GRIMSLEY: -- chanting "Nancy,"
16 looking for Nancy Pelosi. That is violence and the
17 threat of violence.

18 Finally, it's clear that the mob's goal
19 and what it did, in fact, do was to disturb a
20 constitutionally mandated proceeding; namely, the
21 counting of electoral votes.

22 This is testimony from Representative
23 Ken Buck, who was President Trump's witness:

24 "The mob meant to disturb a proceeding?"

25 "Yes, the electoral vote count on the

1 House."

2 And the mob did, in fact, disturb that
3 proceeding.

4 Now, Delahunty suggests that one of the
5 reasons insurrection against the Constitution is
6 ambiguous is because "against the Constitution" is
7 somehow ambiguous. There's a slippery slope here. How
8 do we know at the end of the day what "against the
9 Constitution means."

10 But this Court doesn't have to engage in
11 fine-line-drawing exercises. There is no doubt that the
12 counting of electoral votes to ensure the peaceful
13 transfer of power under the Constitution is interfering
14 with, hindering, and preventing the execution of the
15 Constitution.

16 Now, President Trump makes a few arguments
17 about why this is not an insurrection. First, the mob
18 was not organized. Somehow that makes it not an
19 insurrection.

20 The mob was not armed with guns.

21 And, most curiously, the people at the
22 Ellipse were happy and milling around, so too at the
23 Capitol.

24 These are not credible arguments. First,
25 there is no organizational requirement in that definition

1 over there, but the mob was organized. Let's look again
2 at some testimony.

3 This from Officer Pingeon: The equipment
4 that people had on: helmets, goggles, body armor,
5 paramilitary-style gear and equipment.

6 And on the right you have photos, one from
7 Nate Gowdy and the other a still from the body camera of
8 Officer Hodges.

9 Then we have video.

10 (Video playing.)

11 MR. GRIMSLEY: Coordinated attack on the
12 Capitol working together to try and get in to the portico
13 on the right side where all of those officers are.

14 "Fight for Trump. Hand up the flag, use
15 it as a battering ram."

16 And you remember when Officer Hodges was
17 testifying about fighting with the crowd and how a person
18 came up to him and said, "You need to watch out, people
19 are coming up from the back"?

20 Here's what Officer Hodges had to say:
21 "This indicated to me that there was preplanning,
22 coordination, and that they were intentionally encircling
23 the U.S. Capitol."

24 And then finally, the January 6 Report,
25 this is Finding 367. And there are many findings like

1 this in the report, that this was an organized attack.
2 "While the Proud Boys and other extremists were
3 overwhelming law enforcement at the West Plaza, another
4 group led the attack on security barriers on the East
5 Plaza. A military-style stack of Oath Keepers entered
6 through the Columbus doors as well. This was a
7 coordinated attack."

8 Now, as to the assertion that there were
9 no arms so this shouldn't be an insurrection, again,
10 there's no requirement for there to be arms to be an
11 insurrection. But there were arms.

12 As we point out in our Proposed Findings
13 of Fact 119, the mob brought guns, knives, Tasers,
14 sharpened flagpoles, scissors, hockey sticks, pitchforks,
15 bear spray, pepper spray, chemical irritants.

16 They stole items from the Capitol to use
17 as weapons: Police barricades, scaffolding, construction
18 equipment, trash cans.

19 They took items off of police officers:
20 Batons and riot shields.

21 They were armed.

22 And third, as I said most curiously, the
23 idea that people were happy and milling around. You
24 know, there may have been some Tom Bjorklunds, or Steves,
25 at the event does not change the fact that a large group

1 of people attacked the Capitol that day.

2 The fact that Amy Kramer believed that
3 many of the people at the Ellipse were happy and festive
4 does not change the fact that, A, she didn't even go to
5 the Capitol; she went back to the Willard.

6 But even when she was at the Ellipse, she
7 could not see out beyond the magnetometers where the
8 people were not so happy.

9 (Video playing.)

10 MR. GRIMSLEY: That is almost certainly
11 why what I've just gone through, in the immediate
12 aftermath of January 6, there was bipartisan agreement in
13 both the House and the Senate that the January 6 attack
14 was a violence insurrection.

15 Indeed, President Trump's own lawyer said
16 as much at the impeachment proceeding.

17 Element 3. Trump engaged in the
18 insurrection.

19 Now, I point back to the board again, and
20 we have on it Professor Magliocca's proposed definition
21 of what constitutes engaging in an insurrection against
22 the Constitution: Any overt and voluntary act in
23 furtherance of an insurrection against the Constitution,
24 including words of incitement, done with the intent of
25 aiding and furthering the common unlawful purpose.

1 Now, here the dispute between Magliocca
2 and Delahunty is -- really comes down to one thing, and
3 that's what Delahunty says: In order to engage, you have
4 to have actually taken up arms, that incitement is not
5 enough.

6 But Magliocca again has the better of the
7 argument. Here we have the comparison, again on the
8 left, Magliocca. He's got the first and second Attorney
9 General opinions. Now, those are significant because
10 A.G. Stanbery was the person interpreting and guiding the
11 Union Army in the south on what the -- conduct would
12 satisfy the disqualification provisions of Section 3.

13 There were early Section 3 cases in which
14 this was the definition of insurrection, that it did not
15 require actually taking up arms.

16 There were the pre-Civil War cases, and
17 these are particularly instructive because there, treason
18 was at issue, levying war. In those cases, incitement
19 was sufficient.

20 And then there were the congressional
21 cases, you'll remember, where the House refused to sit
22 certain members. One of them was the man John Brown --
23 Young Brown from Kentucky who wrote an op-ed.

24 The other was, I think, Philip Thomas from
25 Maryland, who gave \$100 to his son, who was going off to

1 join the Confederate Army. There is no requirement that
2 one actually take up arms.

3 The only thing Delahunty has on his side
4 is the Confiscation Acts, which were a criminal statute
5 at the time that made it illegal to engage in or incite
6 an insurrection. He says because incite was used there,
7 wasn't used in Section 3, that it must not be part of
8 Section 3.

9 But he ignores that that's a criminal
10 statute. Those are often far more specific than the
11 Constitution, as Magliocca testified. Otherwise, we'd
12 have a 100-page-long Constitution.

13 But more than that, he provides absolutely
14 no evidence, contrary to what you see on the left, that
15 anybody who is drafting Section 3 believed that
16 incitement was somehow insufficient.

17 He's pointed to no evidence suggesting
18 that anyone drafting Section 3 was relying on the
19 Confiscation Acts.

20 And he never explains why it would make
21 sense, given the goal of Section 3, to require taking up
22 arms. The people that the framers of Section 3 were most
23 concerned with were the leaders of the Civil War, of the
24 Confederacy, Jefferson Davis, people who never took up
25 arms.

1 That's why even in 1872, when Congress
2 gave blanket amnesty from Section 3 to most Confederate
3 soldiers, it withheld that amnesty from the leaders of
4 the Confederacy, including Jefferson Davis. There's no
5 requirement that somebody actually take up arms.
6 Incitement is more than sufficient.

7 Trump's actions constitute engaging in an
8 insurrection against the Constitution. Now, there is no
9 question at all that he took many overt and voluntary
10 acts that furthered the insurrection. He summoned the
11 mob to DC.

12 This is a slide we used in opening, and it
13 shows all of the tweets that he sent out between
14 December 19, "Will be wild," and his Fight for Trump
15 video and January 6.

16 But he also gave them their common
17 purpose, and this is a slide we have not shown. And
18 believe it or not, this is not all the tweets that he
19 sent out dealing with election fraud.

20 But from November 4 to January 6, he sent
21 out all these tweets, he made numerous speeches where he
22 claimed there was election fraud, repeated assertions of
23 a stolen election.

24 Now, beyond that, he focused his
25 supporters and the mob's attention on Vice

1 President Pence. Here's just one example of a tweet.
2 This is from the morning of January 6: "States want to
3 correct their votes which they now know were based on
4 irregularities and fraud. All Mike Pence has to do is
5 send them back to the States and we win. Do it, Mike.
6 This is a time for extreme courage."

7 And we know that after that tweet,
8 President Trump spent 90 minutes on the Ellipse inflaming
9 his supporters, telling them that they needed to fight or
10 they would not have a country anymore. Telling them to
11 march down to the Capitol, where he would be there with
12 him -- with them.

13 I'm not going to play the speech. We
14 played the speech a bunch of times, but I'm just putting
15 up here some of the things that were contained in that
16 speech:

17 "You don't concede when there's theft
18 involved. Our country has had enough. We will not take
19 it anymore. Because if Mike does the right thing, we win
20 the election. If this happened to the Democrats, there'd
21 be hell all over the country going on. And we fight, we
22 fight like hell, and if you don't fight like hell, you're
23 not going to have a country anymore."

24 And most chilling of all: "And fraud
25 breaks up everything, doesn't it? When you catch

1 somebody in a fraud, you're allowed to go by very
2 different rules, so I hope Mike has the courage to do
3 what he has to do, and I hope he doesn't listen to the
4 RINOs and the stupid people that he's listening to."

5 What could that mean, other than a call to
6 lawlessness or violence. You go by very different rules.

7 Now, you don't need to take my word that
8 this was a call for violence or lawlessness.

9 Professor Simi came in and testified. He was an expert
10 and is an expert on political extremism, including how
11 extremists communicate.

12 And, in fact, this Court qualified him as
13 an expert to testify on his interpretation of January 6
14 vis-a-vis his expertise in extremism and extremist
15 communications. Here's what he had to say about the
16 Ellipse speech: "It was a call to violence."

17 Now, Trump asserts his language was not a
18 call to violence. He was just using strong political
19 rhetoric. The word "fight," even though he used it
20 20 times, was just metaphorical. He said peacefully and
21 patriotically once, so how on earth could he possibly
22 have been encouraging violence or lawlessness.

23 Well, Professor Simi explained why. Trump
24 did not conjure his rhetoric out of nowhere. He did not
25 just happen to choose language that would resonate with

1 his far-right extremist supporters. He knew precisely
2 what he was saying based on a five-year history of call
3 and response, where he would either call for violence and
4 then not condemn it, or there would be violence and he
5 would actually praise it.

6 Now, you recall that my colleague,
7 Eric Olson, during the redirect had the flip chart, and
8 he wrote up some of the episodes of the call and
9 response, and there were about five there. There are a
10 lot more than that, and we put that in our proposed
11 findings of fact. But I want to go over it quickly just
12 so Your Honor can see.

13 So 2015, October, he starts saying --
14 these are protesters -- first group, he's going to be
15 kind of nice to; second group, eh, not so nice; third
16 group, I'll be a little more violent; fourth group, "Get
17 the hell out of here."

18 November of 2015. "Get the hell out of
19 here." And that's a protester who actually then got beat
20 up, assaulted, and President Trump goes on the news, I
21 think it was the next day, and saying maybe he deserved
22 to be roughed up.

23 February 1, 2016: Somebody throws
24 tomatoes, "Knock the crap out of him. I'll pay for your
25 legal bills."

1 February 22, 2016: "Punch him in the
2 face."

3 March 11, 2016, in response to violence
4 that his supporters had committed in his name: "Violence
5 sometimes is very, very appropriate," what he said, and
6 he said, "We need a little bit more of it."

7 On August 9, 2016, he's complaining at a
8 rally about how Hillary Clinton will appoint judges who
9 will take Second Amendment rights away, telling the crowd
10 that if she does that, there's nothing that can be done,
11 except maybe the Second Amendment people can do something
12 about it.

13 And then August 15, 2017, this is the
14 "very fine people on both sides," the press conference
15 after the Unite the Right rally, where somebody was
16 killed by a far-right-wing extremist.

17 I want to stop here for a minute because
18 President Trump, I suspect, and has already, is going to
19 say that we're cherry-picking here, that we're just
20 looking at what he said at the press conference and we're
21 not pointing out what he said the day before at the
22 White House condemning these people.

23 But I want to show you what couldn't be a
24 clearer example of what Professor Simi called front-stage
25 and back-stage behavior. Front stage, you tell people

1 what you know you're supposed to say, you don't really
2 believe it. Back stage, you're telling people what you
3 really think. So let's look at these two statements.

4 (Video playing.)

5 MR. GRIMSLEY: And here's the next day.

6 (Video playing.)

7 MR. GRIMSLEY: You have what Trump really
8 believes clearly on the right and teleprompter Trump on
9 the left.

10 It's not surprising then that after the
11 press conference, leading lights in the white supremacy
12 movement actually publicly thanked Donald Trump for his
13 statements. David Duke; longtime neo-Nazi Klansman
14 Richard Spencer; Andrew Anglin, the founder of The Daily
15 Stormer, which is some horrific media board that deals in
16 anti-Semitic and other xenophobic tropes.

17 So back to the call and response. He
18 praises, in October of 2018, a politician who
19 body-slammed somebody, a reporter, I think.

20 Somebody at a rally in May of 2019 says to
21 shoot migrants. Makes a joke, says, "You can only get
22 away with that in the Florida Panhandle."

23 Michigan, some far-right extremist
24 supporters stormed the Michigan Capitol and I think were
25 squatting there. And rather than condemn them, he writes

1 a tweet: "The governor of Michigan should give a little
2 and put out the fire. These are very good people. See
3 them, talk to them, make a deal."

4 Then there were the protests in
5 Minneapolis after the George Floyd murder. And
6 President Trump says, "When the looting starts, the
7 shooting starts."

8 On September 29, 2020, "Stand back and
9 stand by," to the Proud Boys.

10 October 30, there's the Trump Train that
11 surrounds the Biden-Harris bus in Texas, slowing it down,
12 pushing it off the road, injuring people. And rather
13 than condemn it, President Trump says, "I love Texas" and
14 jokes that they were just protecting Biden's bus because
15 they're so nice.

16 And then we have, as we all remember,
17 after the election, December 1, 2020, election official
18 Gabriel Sterling making a public statement, calling on
19 President Trump to condemn his supporters who are
20 threatening election workers in Georgia.

21 He says that: "Somebody's going to get
22 hurt, somebody's going to get killed. President Trump,
23 please do something."

24 Now, did President Trump condemn them?
25 No. Did he do nothing? No. He retweets it and doubles

1 down on his claims of election fraud. He is, I wouldn't
2 even call it tacitly, approving of what his supporters
3 are doing and what prompted Gabriel Sterling to give his
4 message.

5 The Ellipse speech fits this pattern to a
6 T. As Professor Simi explained, "Trump used so many
7 right-wing extremist tropes that it's simply not credible
8 for him to assert that his words were not a call for
9 violence or lawlessness, or that Trump didn't know what
10 he was saying, or that people in the crowd didn't know
11 what he was saying."

12 And if there's any doubt about what Trump
13 was saying that day, his former campaign manager,
14 Brad Parscale, put it to rest. This is a text exchange
15 between Katrina Pierson, one of Trump's witnesses here,
16 and Brad Parscale, on January 6:

17 Parscale: "A sitting President asking for
18 a Civil War."

19 That's how people that knew Trump took
20 what he said that day.

21 Now, Trump's speech did not end his
22 involvement in the insurrection. By 1:21 p.m., he knew
23 that there was an attack on the Capitol. Rather than do
24 anything, he chose to let that attack go unimpeded.

25 Now, you heard from Professor Banks, who

1 told you all of the different things that somebody as
2 Commander in Chief could have done that day to put down
3 the attack. Trump did none of those things.

4 Instead, an hour later, he sent out this
5 tweet, 2:24: "Mike Pence didn't have the courage to do
6 what should have been done to protect our country and our
7 Constitution, giving the states a chance to certify a
8 corrected set of facts, not the fraudulent or inaccurate
9 ones which they were asked to previously certify. USA
10 demands the truth."

11 Now, remarkably, nowhere in his 177-page
12 findings of fact and conclusions of law does
13 President Trump mention this tweet. Certainly doesn't
14 give an innocent explanation for it. Because there is
15 none.

16 But simply ignoring the evidence won't
17 make it go away. The tweet had its predictable effect.
18 It caused the crowd to surge. This is Finding 150 from
19 the January 6 Report, and immediately after
20 President Trump sent his tweet, the violence escalated.

21 And on the right we have a time-lapse
22 photo or video from the top of the Capitol. This is
23 2:24, 2:34, ten minutes later, 2:44, 2:45. And then I
24 think that's 2:57.

25 Given all of this, there's no question

1 that Trump committed overt acts in furtherance of the
2 insurrection.

3 Oh, these are the two tweets that he does
4 cite in his findings of fact and conclusions of law.
5 This is the 3:38 -- or the 2:38 tweet and the 3:13 tweet,
6 which he says somehow absolve him of his conduct that day
7 because he says, "Stay peaceful, remain peaceful."

8 There are a lot of problems with that
9 argument. First, it doesn't change the 2:24 tweet.

10 Second, there's nothing in either of those
11 tweets telling his supporters to actually go home, and
12 while he does say "Support law enforcement," he doesn't
13 say support the people that he had sicced the mob on,
14 namely, the Vice President or Congress.

15 And not surprisingly, those two tweets had
16 absolutely no effect on the mob. Finding 134 from the
17 January 6 Report: "Neither of these tweets had any
18 appreciable impact on the violent rioters."

19 Given all of this, there is no question
20 that Trump engaged in overt and voluntary acts in
21 furtherance of the insurrection. As Professor Simi
22 testified:

23 "How confident are you in the conclusion
24 that Donald Trump played a central role leading these
25 events?"

1 "Very confident."

2 The only dispute that really may exist on
3 this is whether Trump acted with the requisite intent
4 that day.

5 Now, the parties disagree about what the
6 intent requirement is for engaging in insurrection and
7 whether -- what -- to what extent Brandenburg applies
8 coming in from the First Amendment. We addressed those
9 in our briefing, so I'm not going to talk about that
10 today.

11 I'm just going to assume, for purposes of
12 today's argument, that President Trump's intent standard
13 applies, that the Brandenburg incitement intent standard
14 applies, and the reason I'm comfortable doing that is
15 because the evidence of intent is so overwhelming here.

16 Trump did not give his Ellipse speech that
17 day in a vacuum. It was the last step in a multipronged
18 attempt to stay in power by any means necessary.

19 It started back in August of 2020 when the
20 polls didn't look like they were going his way. He
21 starts saying, "The only way we're going to lose is if
22 the election is rigged."

23 Election night, after Fox News calls
24 Arizona for President Biden, President Trump, rather than
25 go out and concede gracefully, tells America that the

1 election is being stolen.

2 He then turns to the courts, where he
3 files bogus lawsuit after bogus lawsuit, using lawyers
4 like Rudy Giuliani and Sidney Powell to lead the charge.
5 He lost 61 out of 62 lawsuits. The only one that he won
6 in Pennsylvania had no appreciable effect on the outcome
7 of the election.

8 And he did it all while knowing from his
9 top advisors -- this is Finding 36 -- that the election
10 fraud allegations were nonsense.

11 Now, when he summoned the mob on
12 December 19, with his "Will be wild" tweet, he had run
13 out of court challenges. His only hope was this fake
14 elector scheme and stopping the certification of
15 electoral votes.

16 He hoped Pence would go long. He needed
17 him to go along -- that's the only way the scheme
18 works -- on January 6, but he needed the mob in DC on
19 January 6 in case Pence was not willing to play ball, in
20 case, to quote Trump from the Ellipse, he needed some
21 courage. Better to have a mob and not need one than to
22 need a mob and not have one.

23 By late morning January 6 when Trump
24 stepped onto the stage to give his speech, he knew that
25 Vice President Pence was not going to go along. This is

1 Finding 321. There was a call in the morning between
2 Vice President Pence and President Trump where Pence told
3 him, "I'm not going along."

4 Now, given that call, you'd think that
5 maybe President Trump would have revised his speech to
6 focus on the accomplishments of his administration,
7 because at that point, the gig is up, Vice
8 President Pence isn't going to do what he needs to do.

9 Trump did just the opposite. He amped up
10 his speech. He added stuff to it to inflame the crowd.
11 He added stuff to it to inflame the crowd against
12 Mike Pence.

13 We've submitted the teleprompter version
14 of the speech, and you can compare it to what he actually
15 said that day. It is a remarkable difference.

16 This is some of the stuff that President
17 Trump added after speaking with Pence. And most
18 chillingly, again, the last one. "And fraud breaks up
19 everything, doesn't it? When you catch somebody in a
20 fraud, you're allowed to go by very different rules."

21 At this point, Trump's only hope of
22 remaining in office was violence and intimidation. That
23 was the only thing that was going to stop certification
24 of the electoral votes that day.

25 Making matters worse, Trump knew that many

1 in the crowd were armed. This is Finding 105.
2 President Trump was briefed on the risk of violence that
3 morning. And this is testimony below from Tim Heaphy
4 that came in unobjected to.

5 "We had testimony that he was told about
6 weaponry, that he actually asked that the magnetometers
7 be moved and saying, 'These people aren't here to hurt
8 me,'" that he waited -- "aren't here to hurt me."

9 He also knew at the time that his
10 supporters would listen to him. This wasn't a lark. He
11 admitted just earlier this year on CNN how his supporters
12 listen.

13 (Video playing.)

14 MR. GRIMSLEY: If there was any, again,
15 doubt about his intent that day, you need look no further
16 than what he did after the speech. On the left we have
17 things that Professor Banks say Trump could have done as
18 Commander in Chief to deal with the riot or the attack
19 that day. He did none of them. That was intentional.
20 That was deliberate inaction.

21 How do we know it was deliberate inaction?
22 This is a tweet he sent out just the day before,
23 January 5, warning Antifa to stay out of Washington:
24 "Law enforcement is watching you very closely." And then
25 he tags the Department of Defense and all of those

1 federal law enforcement authorities.

2 The fact that he did not mobilize those
3 same authorities when it was his supporters attacking the
4 Capitol makes clear that he supported them and intended
5 for what they were doing -- intended for them to do what
6 they were doing.

7 Now, there was the 2:24 tweet. We've
8 already talked about that. And I want to repeat again,
9 on the 2:24 tweet, there is no innocent explanation for
10 that tweet. Why, when the Capitol is under attack,
11 Congress and Vice President Pence are in that Capitol
12 under duress, you send out that tweet?

13 He waited another two hours almost before
14 he sent anything telling his supporters to go home, and
15 that was a statement at 4:17 p.m.

16 Did he condemn -- oh, and by the way, it
17 was not until it was obvious to him that the attack would
18 actually fail that he put out this statement. He waited
19 three hours to tell people to go home, and this is a
20 finding from the January 6 Report, Finding 331: "It was
21 not until it was obvious that the riot would fail that he
22 told people to go home."

23 The fact that he waited until it was
24 obvious that his plan would not succeed tells you
25 everything you need to know about his intent. And when

1 he finally did, he didn't condemn the attackers; he
2 praised them.

3 (Video playing.)

4 MR. GRIMSLEY: This fits the five-year
5 call-and-response pattern that Professor Simi talked
6 about to a T. Two hours, almost, later, he sends out a
7 tweet -- again, not condemning -- saying, "Go home with
8 love and in peace, remember this day forever." That's
9 intent.

10 And I forgot to add earlier that Trump
11 also, while all of this was going on, the attack, rather
12 than do anything to call it off or stop it, he was
13 calling members of Congress to lobby for them to object
14 to the certification of the election. He was taking
15 advantage of the duress he had created by summoning that
16 mob on the Capitol. This is intent.

17 And if that all were not enough, look no
18 further than what he was telling people while he was at
19 the Capitol that day. This is Finding 150 from the
20 J6 Report:

21 "Chief of Staff, Mark Meadows, told White
22 House Counsel, Pat Cipollone, that the President doesn't
23 want to do anything to stop the violence. Evidence
24 developed in the Committee's investigation showed that
25 the President, when told the crowd was chanting, 'Hang

1 Mike Pence,' responded that 'Perhaps the Vice President
2 deserved to be hanged.' "

3 And President Trump rebuffed pleas from
4 Leader McCarthy to ask that his supporters leave the
5 Capitol, stating, "Well, Kevin, I guess these people are
6 more upset about the election than you are."

7 The only reasonable inference from all of
8 this is that Trump intended to incite the attack on the
9 Capitol on January 6 as the final desperate attempt to
10 hold on to power in violation of the Constitution.

11 Do we really think that somebody who had
12 engaged in that four-month-long scheme, unlawful scheme
13 to prevent the peaceful transfer of power, suddenly found
14 religion that day, that he would somehow stop short of
15 lawlessness and violence?

16 He had already decided the Constitution
17 was not an obstacle, telling his supporters they could go
18 by very different rules.

19 And even years later, Trump continues to
20 express his disdain for the Constitution when it stands
21 in the way of his exerting political power.

22 This is a Truth Social post from December
23 of 2022, where he's still complaining about the fraud.
24 "Massive fraud of this type and magnitude allows for the
25 termination of all rules, regulations, and articles, even

1 those found in the Constitution."

2 This tweet is exactly why we have
3 Section 3 of the Fourteenth Amendment. People who have
4 violated their oath by engaging in insurrection have
5 shown themselves to be untrustworthy and unworthy of
6 taking the oath again. This right here is what four more
7 years of Trump will look like.

8 Now, I want to turn briefly to Trump's
9 remaining defenses, and I say "remaining defenses"
10 because Trump argues a lot of the -- reargues a lot of
11 the issues that Your Honor has already decided. I'm
12 certainly not going to address those today, and I'm not
13 going to address all these either.

14 I'm not going to address whether the
15 January 6 Report is admissible. You've gotten a lot of
16 briefing on that. You conditionally admitted it. The
17 testimony during the hearing did not change the predicate
18 requirements for admissibility.

19 I'm also not going to talk about Trump's
20 inaction, whether it could constitute engagement, but to
21 say we agree that Courts generally should not be
22 second-guessing the Chief Executive and whether he or she
23 uses force.

24 But this was no normal situation.
25 President Trump lit the fire that was the attack on the

1 Capitol. He alone had the powers and authorities to put
2 that attack down. He violated his duty, which
3 Professor Banks pointed out, to protect this country's
4 national security.

5 But even if inaction could not constitute,
6 itself, engagement -- we've got many other acts on his
7 part -- it certainly bears directly on President Trump's
8 intent that day.

9 So I want to start with the argument that
10 Section 3 somehow does not apply to the President because
11 he's not an officer or because the oath is not one to
12 support the Constitution.

13 First, Delahunty never explains why it
14 would make sense to exempt the most powerful and, hence,
15 most dangerous of all elected officials from Section 3's
16 reach.

17 And that's because it doesn't make sense.
18 And the historical evidence, again, is clear: Section 3
19 was meant to apply to a President.

20 And this, again, is Professor Magliocca
21 versus Professor Delahunty.

22 We have the Attorney General opinions,
23 early Section 3 cases, 19th century proclamations,
24 congressional debates, grand jury charges, dictionary
25 definitions; and Delahunty relies instead on a technical

1 understanding of what President of the United States or
2 officer of the United States may have meant in the
3 original Constitution, pointing almost exclusively to the
4 appointments clause, which really doesn't apply because
5 that clause talks about other officers of the United
6 States.

7 And I want again to look at what
8 Attorney General Stanbery said because this bears
9 directly on the question. He said, "An officer of the
10 United States is used in its most general sense and
11 without any qualification."

12 In his second opinion: "The language is
13 without limitation. The person who has held any office,
14 civil or military, under the United States and has taken
15 an official oath is subject to disqualification."

16 Now, the thing is there's really no
17 dispute about all of the historical evidence that
18 Professor Magliocca relies on. There's no dispute that
19 at the time of the framing of Section 3, the President
20 was considered to be an officer, no dispute that the
21 39th Congress regularly referred to the President as an
22 officer, no dispute that the Courts and contemporary jury
23 charges did the same.

24 No dispute that Attorney General Stanbery
25 thought so. No dispute that the common understanding of

1 the word "defend" in the oath to protect -- "preserve,
2 protect, and defend" meant support. There's no dispute
3 that the presidential oath itself in the Constitution
4 requires swearing to faithfully execute the office of the
5 President of the United States.

6 And there's also no dispute that when
7 Trump's not in this courtroom but a different courtroom
8 in New York where it suits his interest there, he argues
9 that the President is an officer of the United States.

10 This is from the briefing that
11 President Trump submitted in the New York case regarding
12 an issue of removal.

13 It says: "The President is an officer of
14 the United States, but while this argument that elected
15 officials, including the President, are not officers of
16 the United States has been advocated by these
17 professors," and he cites Tillman and Blackman, the very
18 ones that now Delahunty cites, "to our knowledge, it has
19 never been accepted by any Court."

20 And as to this argument about the
21 appointments clause cases somehow suggesting that the
22 President is not an officer of the United States, here's
23 what Trump argued in a different courtroom:

24 "The Supreme Court was not deciding the
25 meaning of officer of the United States as used in every

1 clause in the Constitution, let alone every statute in
2 the U.S. Code. Obviously the President cannot appoint
3 himself, so other officers of the United States must be a
4 reference to nonelected officials. This stray line in
5 Free Enterprise Fund" -- the recent Justice Roberts
6 case -- "says nothing about the meaning of officer of the
7 United States in other contexts."

8 And finally, before he was a paid expert
9 for Trump in this case, in August, Delahunty wrote an
10 op-ed, and he says:

11 "Although Section 3 does not explicitly
12 refer to Presidents or Presidential candidates,
13 comparison with other constitutional texts referring to
14 officers supports the interpretation that it applies to
15 the Presidency, too."

16 The next defense is a First Amendment
17 defense. And I'm not going to spend a lot of time on
18 that. The only reason I'm addressing it at all is that
19 President Trump seems to think that that is a Get Out of
20 Jail Free card.

21 And like I said, we have a lot of
22 arguments about why the First Amendment doesn't apply in
23 the way that Trump says it does here. The
24 Fourteenth Amendment is a coequal amendment to the
25 Constitution. If you engage in insurrection, that's

1 sufficient. The First Amendment has nothing to say about
2 it.

3 There are other First Amendment exceptions
4 that apply here. The employment exception, which, oh, by
5 the way, is the one that allows you to require people to
6 take oaths. The speech in furtherance of a crime
7 exception, that would apply here.

8 But as I said, we'll just assume that
9 Brandenburg applies. And there are three requirements
10 for Brandenburg: Speech explicitly or implicitly
11 encourage violence or lawless action. It doesn't have to
12 be violence, lawless action. We've already shown that,
13 I've talked about it.

14 Speaker intends speech will result in
15 violence or lawless action. We've already talked about
16 that.

17 The only one left is that imminent use of
18 violence or lawless action is the likely result of the
19 speech. Of course it was. Not only is that what
20 actually happened, but he was giving the speech as
21 Congress was beginning to count the electors. He sent
22 people at the speech down to the Capitol to give
23 congresspeople some courage.

24 And finally, I want to address the
25 argument that it's not for Courts to decide

1 disqualification; it's for Congress to decide only after
2 an election.

3 Now, this argument takes a number of forms
4 that -- and, sorry, I turned that off because I'm going
5 to get to that.

6 The argument takes a number of forms; that
7 Section 3 is about holding office, not running for
8 office; that the Twentieth Amendment somehow comes in and
9 says this is for Congress alone; that Congress has the
10 power under Section 3 to remove a disability, and if you
11 disqualify somebody now, that disables Congress from
12 being able to do that.

13 These arguments are all wrong.

14 First, it would make no sense to require
15 waiting until millions of Americans had cast their votes
16 and elected an unqualified candidate to say, "Oops, we
17 need a do-over here." Applying the "framers aren't
18 stupid" canon of construction disposes, I think, of this
19 argument.

20 Second, the fact that Section 3 requires a
21 two-thirds supermajority of Congress to remove the
22 disability is a textual commitment taking away from
23 Congress the ability to impose the disqualification. How
24 could it be that Congress, by a simple majority, decides
25 whether the qualification or disqualification exists in

1 the first place, but it has to vote by two-thirds
2 supermajority in order to remove it?

3 The disqualification exists at the time
4 Section 3 was ratified without any action from Congress.
5 It exists at the time somebody engages in an
6 insurrection, and Congress has to remove it by a
7 two-thirds supermajority vote.

8 Trump's argument also ignores that in the
9 context of presidential elections, states' powers are at
10 their apex. States' powers to appoint electors, select
11 the time, manner, and place of electors appointed is left
12 to the discretion of the states.

13 This is from a recent case, Chiafalo v.
14 Washington. It was the faithless elector case.
15 "Article 2, Section 1's appointment powers give the
16 states far-reaching authority over presidential electors.
17 The Court has described that clause as conveying the
18 broadest power of determination over who becomes an
19 elector. Given the textual commitment of choosing
20 electors to states, states are well within their rights
21 to protect against wasting their electoral votes by
22 keeping a disqualified candidate on the ballot."

23 And then now Justice Neil Gorsuch said as
24 much in Hassan. He said, "A state's legitimate interest
25 in protecting the integrity and practical functioning of

1 the political process permits it to exclude from the
2 ballot candidates who are constitutionally prohibited
3 from assuming office."

4 Fourth, the historical evidence is not
5 with Trump. As I said, the disability existed at the
6 instant Section 3 was ratified. That's why people began
7 applying for amnesty right away. That's why courts began
8 right away enforcing it.

9 And Trump's argument again would prove too
10 much. Courts in Colorado, California, other states, have
11 long ruled that presidential and other candidates are
12 ineligible because of federal constitutional requirements
13 such as being too young, not being a natural-born
14 citizen.

15 And then finally, the Twentieth
16 Amendment -- the Twentieth Amendment is not about this.
17 The Twentieth Amendment is about a very peculiar
18 situation that there was no remedy for before, and that
19 is if a disqualification came to be after the President
20 was elected or was only discovered afterwards.

21 That was what the Twentieth Amendment was
22 about, and that's why the only Court to have addressed
23 this issue rejected the very argument that Trump makes
24 here. Nothing in its text or history suggests that it
25 precludes state authorities from excluding a candidate

1 with a known ineligibility from the presidential ballot.

2 And finally, if Congress wants to remove
3 the disqualification, they are free to do that at any
4 time for President Trump. Colorado is not required to
5 put a disqualified candidate on the ballot and risk
6 disenfranchising millions of its voters on the off chance
7 that supermajorities of both Houses of Congress might
8 remove that disability in the future. And let's be
9 honest. It's not going to happen.

10 I'll reserve the remainder of my time.

11 MR. KOTLARCZYK: Good afternoon,
12 Your Honor. May it please the Court. Michael Kotlarczyk
13 on behalf of Colorado Secretary of State Jena Griswold.

14 I want to start in a similar place to
15 where Mr. Grimsley started, which is thanking the Court
16 on behalf of the Secretary for the Court's tremendous and
17 the court staff's tremendous investment of time and
18 resources in deciding this matter.

19 As the Court is well aware, the Election
20 Code requires the Secretary to certify the primary
21 presidential candidates on January 5, 2024, and I'm
22 pretty confident, like everyone else in this courtroom,
23 we fully expect that some appellate process is going to
24 play forward from whatever this Court decides. So in
25 light of that, the urgency with which the Court has

1 treated this matter is deeply appreciated.

2 Fundamentally, Your Honor, this case poses
3 two questions:

4 Number one, did former President Trump
5 incite an insurrection on January 6, 2021, within the
6 meaning of the Fourteenth Amendment such that he is
7 disqualified from holding that same office again.

8 And, number two, if so, does the Colorado
9 Election Code permit him to appear on the presidential
10 primary ballot.

11 As we have stated throughout these
12 proceedings, the Secretary has presented no evidence or
13 argument concerning the first question as to whether
14 President Trump incited an insurrection on January 6.
15 The Secretary has deferred to the other parties to
16 present their evidence on that issue and leaves that
17 matter in the Court's capable hands to resolve.

18 Instead, as Colorado's chief election
19 official, the Secretary, in this proceeding, has focused
20 on the second question and sought to provide the Court
21 with guidance as to the meaning of the Colorado Election
22 Code in this unprecedented situation. And it is to that
23 matter that I'll direct my brief remarks today.

24 In his proposed findings, former
25 President Trump argues that neither the Secretary nor the

1 Court have the authority to keep disqualified candidates
2 off the ballot. We disagree.

3 And to understand why he is wrong,
4 Your Honor, we need to start with the ballot itself. The
5 purpose of a ballot is to elect candidates to office, as
6 the Supreme Court held in the Timmons case that we cited
7 in our papers. And this is true for presidential
8 primaries as well.

9 In the case of a presidential primary,
10 ballots serve to allocate delegates for a party
11 nominating convention, but in either case, ballots are
12 what voters use to select their candidate. Having
13 candidates who are ineligible to serve in the office they
14 seek frustrates that purpose.

15 As the Supreme Court stated in *Anderson v.*
16 *Celebrezze* at 460 U.S. 780, "As a practical matter, there
17 must be a substantial regulation of elections if they are
18 to be fair and honest and if some sort of order, rather
19 than chaos, is to accompany the democratic process."

20 The voters of Colorado recognized these
21 principles when they adopted Proposition 107, creating
22 the statewide presidential primary in 2016.

23 Section 1-4-1201 of -- which was enacted in
24 Proposition 107, states that the presidential primary
25 process should, quote, conform to the requirements of

1 federal law. This, of course, includes all of the
2 requirements of the United States Constitution.

3 And Section 1-4-1203(2)(a) states that,
4 quote, Each political party that has a qualified
5 candidate entitled to participate in the presidential
6 primary election pursuant to this section is entitled to
7 participate in the Colorado presidential primary
8 election.

9 So to conform Colorado's presidential
10 primary process to federal constitutional requirements,
11 if the Court concludes that former President Trump is
12 disqualified from holding the office of President under
13 the Fourteenth Amendment, the Court should order him to
14 be excluded from the ballot.

15 The contrary view expressed by former
16 President Trump would produce an unreasonable outcome and
17 would disenfranchise Colorado's voters, both of which
18 outcomes are disfavored by Colorado law. According to
19 his view, neither the Secretary nor the Court could
20 exclude, for example, an 18-year-old who submits the
21 necessary paperwork to be President or someone who is not
22 a native-born citizen. But such candidates could never
23 serve as President, so no valid purpose is furthered by
24 including them on a ballot.

25 As then Judge Gorsuch stated in the Hassan

1 case, "Colorado has a legitimate interest in ensuring
2 that only qualified candidates are certified to that
3 ballot" -- "to the ballot," and it's the legitimate
4 interest that we seek resolution of in this matter,
5 Your Honor.

6 So from the perspective of the Election
7 Code, and specifically Section 1-1-113, the question is
8 whether it would be a breach or neglect of duty or other
9 wrongful act if the Secretary certifies a disqualified
10 candidate to the ballot and whether the Court can enter
11 an order directing the exclusion of such a candidate.

12 Under 1-4-1204(1), the Secretary is
13 responsible for certifying names to the presidential
14 primary ballot, and the code clearly imposes a duty on
15 the Secretary to exclude certain candidates from the
16 presidential primary ballot. And I'm citing here,
17 Your Honor, to Section 1-4-501, which is made applicable
18 to the presidential primary process through 1203.

19 The Secretary has to exclude any candidate
20 from the ballot who fails to swear or affirm under oath
21 that he or she will fully meet the qualifications of the
22 office if elected. A candidate who is unable to provide
23 proof that he or she meets any of the requirements of the
24 office related to residency, or who the Secretary herself
25 determines is not qualified to hold the office based on

1 residency requirements.

2 Importantly, a presidential primary
3 candidate who is disqualified under Section 3 of the
4 Fourteenth Amendment is no more entitled to appear on the
5 ballot than one who fails to meet any affirmative
6 qualification for the office of President.

7 To hold otherwise would be contrary to the
8 electorates' and the General Assemblies' express intent
9 that only qualified candidates may participate in
10 Colorado's presidential primary, and that the Secretary
11 of State's certification of such candidates must conform
12 to the requirements of federal law.

13 To effectuate that intent, the Election
14 Code creates an express cause of action under 1-4-1204(4)
15 for any challenge to the listing of any candidate on the
16 primary election ballot under Section 1-1-113.

17 And that's the provision, of course, that
18 the petitioners here have invoked.

19 When these provisions of Colorado law are
20 read together and harmonized, as they must be, they
21 authorize this Court to act if an election official
22 breaches or neglects a duty or commits or is about to
23 commit another wrongful act.

24 Now, as the Colorado Supreme Court has
25 recognized, "other wrongful act" is broader than just

1 those acts that are breaches of duty.

2 Former President Trump is thus wrong when
3 he says, on page 37 of his proposed findings, that the
4 Court only has jurisdiction under 113 if the Secretary
5 has a mandatory duty to act in a particular way under the
6 Election Code.

7 "Other wrongful act" is broader than a
8 mandatory duty to act in a particular way. And in light
9 of the need for the presidential primary process to
10 conform to federal law and for only qualified candidates
11 to participate in the primary, it would be a wrongful
12 act, within the meaning of 113, for the Secretary of
13 State to certify a candidate to the ballot who is
14 disqualified under Section 3 of the Fourteenth Amendment.

15 In his proposed findings, the former
16 President also makes much of the lack of historical
17 precedent for the Secretary to exclude a candidate from
18 the ballot for failing to meet constitutional
19 requirements.

20 Your Honor, the Secretary readily concedes
21 that this is an unprecedented situation. But the absence
22 of evidence on this point is by no means evidence of
23 absence. The Secretary frequently must confront
24 unprecedented situations when administering Colorado's
25 elections.

1 Before the 2016 presidential election, the
2 Secretary of State had never been confronted with rogue
3 presidential electors in the Electoral College, but when
4 the former Secretary was, a division of this Court
5 decided that the provisions of the Election Code that
6 binds the votes of such electors was valid and
7 enforceable.

8 Before the 2020 presidential election,
9 election officials in Colorado and across our nation had
10 never before confronted widespread, baseless claims of a
11 stolen election. But when they were, those claims were
12 heard and disposed of by numerous state and federal
13 courts.

14 To be sure, Your Honor, we live in
15 unprecedented times, but the rule of law still controls.
16 And that rule gives courts of general jurisdiction, like
17 this one, empowered by the Colorado Election Code, the
18 full power and authority to consider and decide legal
19 disputes like the one presented here.

20 For these reasons, Your Honor, the
21 Secretary of State respectfully requests that the Court
22 decide the merits of petitioners' claim under the
23 Election Code.

24 Thank you.

25 MR. SISNEY: Good afternoon, Your Honor.

1 This Court's heard a lot. This Court's
2 been through a lot. So has the court staff. We also
3 appreciate that.

4 The petitioners, and even the Secretary,
5 with due respect, have complicated things. I would like
6 to bring the Court back to the basics.

7 More than anything else, this is a case
8 about the law. This is a Section 113 proceeding,
9 intentionally and expressly limited in scope by the
10 Colorado legislature. The only relief available is for
11 this Court to order the Secretary to comply with the
12 Election Code, or substantially comply.

13 This is also about Section 1204. We've
14 heard some of that this afternoon. That contains a
15 finite and enumerated list of shalls, ministerial duties
16 with which the Secretary must comply. She has no
17 discretion with that list.

18 The Colorado Election Code does not
19 contemplate -- actually, it does not even allow a
20 discretionary role for the Secretary in determining
21 extra-statutory qualifications in usurpation of the major
22 political party's will.

23 It includes no vesting of such authority.
24 It gives her no budget for such a pursuit. It sets no
25 guardrails. Her duty is the shalls.

1 Here's some more of what the law says.
2 According to Section 1203(2)(a), and I quote: Each
3 political party that has a qualified candidate entitled
4 to participate in a presidential primary election -- I'd
5 like to emphasize -- pursuant to this section is entitled
6 to participate in the Colorado presidential primary
7 election.

8 In other words, Your Honor, qualifications
9 are still based on what the party, the political party
10 determines.

11 Section 1201 provides that a legislative
12 intent, the intent behind the provision -- the provisions
13 of this Part 12 conform to the requirements of federal
14 law. We just heard that. What I think was omitted --
15 well, it was omitted: "and national political party rules
16 governing presidential primary elections."

17 Those are in the record, Your Honor.

18 But conforming to federal law does not
19 give rise to an independent right, let alone a duty on
20 the part of a state official, to enforce Section 3 of the
21 Fourteenth Amendment. This is distinct from some of the
22 residential requirements we heard about that apply to
23 state candidates.

24 In fact, the Secretary's representative,
25 Ms. Rudy, acknowledged that the Secretary's role in the

1 ballot qualification process has been, as a practical
2 matter, ministerial. Lawyers know what ministerial means
3 as opposed to discretionary for state officials.

4 Her responsibility under the Election Code
5 is to either confirm that a candidate is affiliated with
6 a major political party according to the statute and is a
7 bona fide candidate, pursuant to that party's rules; or,
8 alternatively, to confirm that the candidate submitted a
9 properly notarized candidate statement of intent.

10 Ministerial. Nothing else. Just that.

11 That's uncontroverted evidence from the
12 Secretary's representative. It is the political party
13 that is vested with the power to determine its bona fide
14 candidate, not the Secretary.

15 I run the risk of belaboring that point,
16 Your Honor, but that's a very important point in this
17 case.

18 I'd like to direct the Court -- I won't
19 read it all for the sake of time -- Day 3, direct
20 examination of Hilary Rudy, page 116, lines 3 through
21 7 [sic]. This one I'd like to read:

22 "Question: What does it mean to be a bona
23 fide candidate?"

24 "Answer: I don't know what that means to
25 the party."

1 "From our perspective, it means that the
2 party approves that that candidate represents the party."

3 Day 3, direct examination of Hilary Rudy,
4 page 97, lines 17 through 21 [sic], quote:

5 "Our office looks at the information
6 provided in the affidavit itself. And if the affidavit
7 is complete and we have no affirmative knowledge that any
8 of the information is incorrect, then we would qualify
9 that candidate to the ballot."

10 Later Ms. Rudy confirms, "The ballot
11 access team doesn't do" -- that's does not do -- "any
12 investigation beyond the review of the paperwork to
13 ensure it's accurate and complete, and to review the
14 party's paperwork to ensure that the 'Approved' box, as
15 opposed to the 'Disapprove' box, is checked."

16 That's Day 3, page 108, lines 10 through
17 13 [sic].

18 There's a few more that the Court heard
19 that I'll move past for now.

20 The Secretary's representative conceded
21 the role for the office is ensuring that the required
22 paperwork is completed, not determining whether
23 substantive affirmations of constitutional qualifications
24 are accurate.

25 Again, nothing in the statute gives her

1 that authority. Such a pursuit certainly requires
2 guardrails, standards, a budget, restraints, due process
3 protections. It's not in the code. It's not in the code
4 that 113 authorizes this Court to order that the
5 Secretary can substantially comply with the code. That's
6 it.

7 Obviously the question this Court is
8 grappling with today are at issue in other states around
9 the country. It's not a secret. While, of course, not
10 binding on this Court, Your Honor, both Minnesota and
11 Michigan courts have recognized the same principles.
12 We're submitting to you here today the limitations of
13 Election Code, state Election Code.

14 Grove v. Simon, this is the Minnesota
15 Supreme Court, issued an order last week rejecting
16 efforts to keep former President Trump off the ballot in
17 that state, and I'd like to quote.

18 "Although the Secretary of State and other
19 election officials administer the mechanics of the
20 election, this is an internal party election to serve
21 internal party purposes."

22 That opinion has been filed of record as a
23 notice of supplemental authority. That -- that code, the
24 Election Code of Minnesota, is substantially the same as
25 the code that we're dealing with here.

1 To the argument that the Secretary's
2 oath -- this is an argument we've heard -- that the
3 Secretary's oath to defend the Constitution vests her
4 with the power to enforce by barring candidates from
5 ballots to enforce Section 3 of the Fourteenth Amendment.

6 According to Wayne County, Michigan,
7 Monday night, just dismissed a similar case explaining,
8 and I quote: "There is no support for the Plaintiff's
9 position that an oath to support the Constitution of the
10 United States incorporates a duty to enforce a provision
11 such as Section 3 of the Fourteenth Amendment."

12 I submit to the Court respectfully,
13 nothing in the Election Code of Colorado does, either.

14 That Court also held that imposing legal
15 duties on the State Election Commission, the relevant
16 office in Michigan, that are, quote, beyond the scope of
17 the plain language of the statute, close quote, failed to
18 state a claim upon which relief could be granted.

19 They were asking the Court to infer
20 something into the Election Code so that the state
21 official could enforce it.

22 This Court has heard the same argument
23 here. I just would like to emphasize, Your Honor, beyond
24 the scope of the plain language of the statute.

25 I recall in the Secretary's brief, the

1 omnibus brief, the Secretary admitted that the statute
2 does not explicitly vest her with the independent
3 authority, I believe, is the -- is how it went, but
4 instead, they're asking the Court to infer it into the
5 code.

6 Then, even more recently, the Michigan
7 Court of Claims -- this opinion, I think, was also filed,
8 just dismissed similar cases last night. That court
9 noted that the Michigan Election Code was such that --
10 and I'd like to quote -- "such that the Secretary has
11 neither the affirmative duty nor the authority to
12 separately" -- I'm going to back up -- the authority --
13 "the affirmative duty nor the authority to separately
14 decide whether Donald J. Trump will be placed on the
15 Michigan presidential primary ballot on the ground that
16 he's disqualified under Section 3."

17 I submit to the Court that that Election
18 Code provision that's at issue -- was at issue in that
19 case before it was dismissed was substantially similar to
20 the code before this Court today.

21 That Court declined to read something into
22 the statute, something very monumental, borrowing --
23 barring a candidate that a major state political party
24 has decided to place on its primary ballot.

25 Now, even if this Court were to find a way

1 past the limitations of Section 113, 1204 -- neither the
2 Minnesota nor Michigan Courts did when they faced an
3 analogous state law framework -- this Court will still be
4 faced with the issue of interpreting the Fourteenth
5 Amendment.

6 As we briefed extensively -- I won't
7 repeat it all here certainly -- it is black letter law
8 that constitutional provisions can be self-executing as a
9 defense, not as a cause of action. Very different.

10 To start, the Fourteenth Amendment as a
11 whole does not create a cause of action. I'd like to
12 refer the Court to the United States Supreme Court
13 opinions cited on pages 68 and 69 of our proposed
14 findings and conclusions. There's one I'd like to read,
15 for example.

16 Ownbey v. Morgan, 256 U.S. 94 at 112,
17 ". . . it cannot rightly be said that the Fourteenth
18 Amendment furnishes a universal and self-executing
19 remedy."

20 Section 5 of the Fourteenth Amendment
21 confers the enforcement power on Congress to determine,
22 and I quote, "whether and what legislation is needed to,"
23 close quote, enforce the Fourteenth Amendment. That's
24 Katzenbach v. Morgan, 384 U.S. 641 at 651.

25 There's a series of circuit cases we

1 cited --

2 THE COURT: Mr. Sisney, I specifically
3 said at the end of -- at the end of the last hearing that
4 if the -- if the State party wanted to have time at the
5 oral arguments, to ask for it.

6 Secretary of State's asked for it. The
7 Colorado Republican Party didn't. Then at the beginning
8 of this hearing, you did, and I said you could speak, and
9 I said it would be limited to ten minutes, which is what
10 the Secretary of State did.

11 You're now at 13, and I -- it's just
12 getting late, and I think Mr. Gessler has a lot of time,
13 and all of this has been briefed. And so if you wouldn't
14 just mind wrapping up, I really appreciate it.

15 MR. SISNEY: Yes, Your Honor, I apologize.
16 Thank you. Certainly.

17 In Bush v. Gore, the United States Supreme
18 Court held that a state court's order to determine the
19 intent of a voter violated the Equal Protection Clause,
20 in part because, I quote: the absence of specific
21 standard to ensure its equal application.

22 That absence rings loudly here. What
23 standards will guide the Secretary's pursuit that they
24 are asking this Court to order her to do.

25 Republican Party of Colorado respectfully

1 urges this Court to deny all the relief sought by the
2 petitioners, to dismiss their petition, and enter an
3 order declaring that the Secretary must comply with the
4 code as written, not as certain people wish it to be.
5 This is the law.

6 Thank you, Your Honor.

7 THE COURT: Thank you. I appreciate it.

8 Mr. Gessler, we're just going to -- let's
9 start up at 35 after since we've already been going for
10 almost an hour and a half. Let's just take a quick
11 bathroom break, okay?

12 We'll start with you at 4:35, and you'll
13 get your full amount of time.

14 MR. GESSLER: Thank you, Your Honor.

15 (Recess taken from 4:27 p.m. until
16 4:35 p.m.)

17 THE COURT: You may be seated.

18 Go ahead.

19 MR. GESSLER: If I may stay standing,
20 Your Honor.

21 So, Your Honor, thank you very much for
22 the ample time here, and we certainly respect all of the
23 hard work that's gone into this.

24 I don't think I've ever filed such a long
25 brief in my life, 120 pages -- or 170-plus pages.

1 THE COURT: 177, to be precise.

2 MR. GESSLER: 177. Well, and I felt like,
3 my gosh, we did 177 and they only did 75, but then theirs
4 is single-spaced --

5 THE COURT: Yeah.

6 MR. GESSLER: -- so it's equivalent.

7 So let me talk a little bit about the case
8 here. What this case -- after we've looked at the
9 evidence, after we've completed this five-day hearing, I
10 think what this case comes down to is whether or not the
11 Court is going to follow the January 6 Report.

12 This case is about the January 6 Report,
13 to be frank, and what the petitioners have done is they
14 have taken the January 6 Report and tried to get this
15 Court to accept it as evidence, to accept its
16 conclusions, to accept its logic into this case.

17 Basically, they took the January 6 Report,
18 they pulled a handful of witnesses from the
19 January 6 Report to testify. They pulled curated and,
20 frankly in some instances, edited videos from the
21 January 6 Report. They had Professor Simi rely on the
22 January 6 Report. They had Professor Magliocca rely on
23 the January 6 Report in some of his application.

24 They cited the January 6 Report, they've
25 relied on it 67 times in their findings of fact, and then

1 they refer to it another 4 times. And they've asked this
2 Court to endorse 96 findings.

3 "Findings," I would almost say, is a
4 somewhat, shall we say, charitable -- a charitable
5 characterization. It's 96 conclusions, it's 96 opinions,
6 it's 96 pieces of reasoning that the January 6 presented.

7 And so what I would say is that the
8 petitioners' case, the foundation of it is -- it is
9 rotted, it is a rotten foundation.

10 The January 6 Report was originally used
11 for political purposes to -- as, you know, sort of an
12 election issue, and that has failed. I mean, like it or
13 not, for the authors, President Trump remains a viable
14 and, in many instances, considered leading candidate for
15 the presidency.

16 They -- the authors of the
17 January 6 Report attempted to use it to get criminal
18 charges, certain criminal charges filed against
19 President Trump. That failed. Those criminal charges,
20 for example, incitement of an insurrection, those were
21 never filed, and now the petitioners are trying to use
22 the January 6 Report to get it into evidence.

23 Excuse me one moment, Your Honor. I need
24 to turn on my timer, of all things. I'll subtract a few
25 minutes, don't worry.

1 MR. GRIMSLEY: No, 35, so it's right
2 there.

3 MR. GESSLER: Okay.

4 And, really, at the end of the day, it is
5 a rotted foundation, and it is another attempt at the
6 January 6 -- using the January 6 Report to limit people's
7 ability to vote.

8 The other technique that they've used, of
9 course, is talking about violence. Anything that smells
10 of violence, that smacks of violence, is all sort of in
11 cahoots with one another, it's violence. Violence is
12 insurrection, that's bad, and so President Trump is
13 responsible for all of it.

14 The third tool they use is relying on
15 Professor Simi at length, and I'll discuss that. You
16 know, he studied far right-wing extremists, and the goal
17 is to take that -- that small group of people and apply
18 to everyone and infer intent to President Trump, frankly
19 without evidence, especially when Professor Simi
20 specifically disavowed that he addressed
21 President Trump's intent. But they want to rely on that
22 anyway.

23 So I'm going to talk a bit about the
24 January 6 Report. Petitioners didn't, but I think it's
25 pretty important, and we will talk about that, because

1 this Court has conditionally admitted it. And so
2 although the decision of admission has already taken
3 place, this Court should not place weight upon these
4 findings absent, absent evidence at this hearing to
5 support those findings.

6 And there's a lot of those problems where
7 there's these sort of "findings," as I put in scare
8 quotes, without evidence to support it.

9 I'm going to talk a little bit about the
10 legal standards, and I will lightly revisit the
11 jurisdictional arguments. We briefed those, obviously,
12 pretty thorough. I'll try and be brief on those, but I
13 will say this.

14 The petitioners are asking this Court to
15 do something that has never been done in the history of
16 the United States. It has not been done when Horace
17 Greeley ran for President, it's not been done when Eugene
18 Debs ran for President. It's not been done for any
19 presidential candidate in the history of our Republic,
20 and the evidence doesn't come close to allowing the Court
21 to do it this time as well.

22 And with respect to this Court's
23 jurisdiction, I would note that since this case has been
24 filed, there have been three directly on point cases, one
25 from New Hampshire, the Supreme Court, one from

1 Minnesota's Supreme Court, and one from a court in
2 Michigan. This is in addition to all of the other courts
3 that have dismissed this, and those cases have directly
4 addressed or refuted -- or I should say ruled directly
5 against -- several of the petitioner's jurisdictional
6 arguments.

7 So I think the Court should look at that
8 reasoning and consider what perhaps I think was fairly
9 characterized as an emerging consensus here within the
10 judiciary across the United States.

11 And then finally I would ask this Court to
12 step back. At the end of the day, there are serious
13 questions about this Court's jurisdiction. We've raised
14 those and briefed those, okay, but we also -- I would
15 also submit that we're talking about whether a
16 presidential candidate of the United States committed an
17 insurrection, engaged in an insurrection. And we're
18 going to try and decide this issue based on a five-day
19 hearing, and you've heard our concerns about the
20 procedures of this hearing.

21 But at the end of the day, it's a five-day
22 hearing with 17 1/2 hours or so per side, which is
23 basically papered over or underpinned, as one may
24 describe it, with the January 6 Report to determine
25 constitutional rights, issues of first impression in the

1 history of the United States with consequences.

2 I submit that this Court, as the Michigan
3 court said, no matter -- you know, no matter how well
4 meaning, no matter how fair, no matter how thoughtful and
5 well intentioned, evenhanded, fair and learned, a court
6 cannot in any manner or form possibly embody the
7 represented quality -- concerns and qualities of every
8 citizen in the nation as in this case the Michigan court
9 referred to the House of Representatives or the Senate.
10 And also noted that judicial officers in states are not
11 empowered.

12 So we would submit that this Court
13 should -- should look at that with a different set of
14 eyes than it has to date.

15 Let's talk about the January 6 Commission.
16 So we've cited the standards, the legal standards for
17 when a court should consider or admit congressional
18 reports. And among those considerations are whether
19 there is a hearing along the lines of an adversarial
20 hearing and motivational problems that a congressional
21 committee may have.

22 And the courts have specifically
23 highlighted the fact that for congressional commissions
24 and committees and committee reports, there are partisan
25 considerations. They have said election officials have a

1 tendency to grandstand -- I don't know where they got
2 that from -- a big issue is whether or not the minority
3 joins in the majority, and the court's pointed out that
4 when there are bitter divisions arising from that, that's
5 evidence that it's less -- that it's more politics versus
6 policy or truth-seeking, that truly reliable -- that a
7 report that's truly reliable on methodological and on
8 procedural levels are unlikely to create these bitter
9 divisions.

10 So that's all things that this Court
11 should look at.

12 The January 6 Committee was biased from
13 the start, heavily biased, in fact, overwhelmingly
14 biased. And I know this Court and the petitioners have
15 pointed out there were two Republicans on the Committee.

16 But that's not the standard. This is not
17 a Republican/Democrat issue that we are looking at here
18 today. The issue we're looking at is whether
19 President Trump engaged in an insurrection. That's the
20 issue.

21 That was the issue that the January 6
22 Committee investigated as well. The two Republicans on
23 that committee, along with all of the Democrats on the
24 Committee, were unified in their belief, in their vote,
25 every member had voted that President Trump had incited

1 an insurrection. Every one of them voted on that, every
2 one of them said that, every one of them believed it.

3 And Mr. Heaphy, he testified that for them
4 it was an obvious fact, an obvious fact is what he said.
5 Every member voted on that obvious fact.

6 Now, if you look at the -- and I've -- the
7 petitioners will repeatedly cite that, "Well, it was a
8 bipartisan vote on the impeachment."

9 Well, if you look at the impeachment vote
10 in the House of Representatives, it was a 54 to
11 46 percent split. And the 46 percent did not -- they
12 voted against incitement, that President Trump incited an
13 insurrection. And the number of people that were on the
14 Committee representing 46 percent of the House of
15 Representatives, that viewpoint was zero, none. It was
16 stacked. Lots versus zero was -- was the lineup.

17 Everyone on that committee started from
18 the proposition that it was an obvious fact that
19 President Trump incited an insurrection. They then spent
20 a year and a half looking at it, and lo and behold they
21 came up with a conclusion that he incited an
22 insurrection. No surprise there.

23 Let us look at the witnesses that talked
24 about the January 6 Committee. So we presented
25 Congressman Buck. I jokingly say Congressman Buck was,

1 for us, a witness out of Central Casting. He was a
2 credible witness. He was not and is not and you heard
3 nothing about him being a fan of President Trump. He's
4 not a President Trump lover, so he wasn't here to cast
5 love upon President Trump.

6 He is on good terms with Representatives
7 Cheney and Kinzinger. He had worked for Representative
8 Cheney's father and knew the family and knew her. So he
9 didn't consider himself a close friend, but he was not
10 someone who demonized those two Republicans.

11 He had announced the day before his
12 testimony that he would not seek reelection, so he was a
13 man liberated from political concerns. And, in fact, in
14 many ways, he testified to certain facts the same as
15 Representative Swalwell. He wasn't trying to spin
16 things.

17 Other things that Representative Buck
18 brought to the table was, he's a member of Congress,
19 obviously, but just as importantly, he is a former
20 staffer of the Iran-Contra commission that investigated
21 the Iran-Contra controversies, and so he knows what a
22 proper investigation looks like.

23 And if you remember -- I was a young adult
24 when this happened, very young adult -- but the
25 Iran-Contra was when President Reagan was accused of

1 selling arms to Iran so that he could have money to,
2 like, give arms to the Sandinista -- to the people
3 fighting the Sandinistas in Nicaragua, so that was the
4 Iran-Contra controversy.

5 And there were claims and beliefs that
6 President Reagan should be impeached, very -- great
7 controversy. Just as much of a hothouse controversy as
8 what the -- what Congress faced in early 2021.

9 And Representative Buck said: Look, we
10 had a majority and we had a minority, and witnesses were
11 fully examined. And more importantly, the minority was
12 able to call witnesses to -- whether bring in new
13 evidence or rebut or to point out the irrelevancy, or
14 whatever those arguments may be, of the majority's
15 witnesses. And not only witnesses, but to obtain facts
16 and documents that -- and develop facts and obtain
17 documents that contradicted the majority narrative.

18 On top of that, Representative Buck was a
19 former prosecutor for about 20 -- more than 20 years, and
20 so he knows what an investigation looks like. And he
21 likened the January 6 as him taking witnesses and whatnot
22 and going into court without the defense present, without
23 the defendant and without defense counsel even present.
24 That's how one-sided he viewed it.

25 He also testified that Congress's goal is

1 political, it is political.

2 And now look, we have this Madisonian
3 government of checks and balances, and that's designed so
4 that, as Madison said in Federalist Number 10, that
5 certain factions and balances will cancel one another
6 out.

7 And so you even have those checks and
8 balances built into congressional investigations. In
9 other words, you have a majority and you have a minority.
10 And they each bring in their evidence, and then they
11 present their own reports.

12 Sometimes they agree and when they agree,
13 the courts have said, Well, we're going to give that more
14 credence, far more credence, and we're probably not going
15 to give any credence when they don't agree because
16 then -- particularly when there's bitter and sharp
17 divisions, as there have been here.

18 So there were no checks and balances in
19 that process.

20 The adversarial process. How do we -- how
21 do we have checks and balances in the court procedures?
22 Through an adversarial process. That did not exist in
23 the January 6 Report.

24 So when you receive a conclusion that the
25 January 6 Report said this happened, that's not part of

1 a -- that's not part of an adversarial process. In fact,
2 the, quote, judges in that instance, there's the people
3 who decided that, were all very biased from the start.

4 And, of course, you have the checks and
5 balances of the judicial versus the political process.
6 This is a judicial process. The reason people have faith
7 in courts, the reason we do, the reason we devote our
8 lives to this, is because we have an adversarial process
9 and we believe that with the adversarial process is the
10 best opportunity to determine what the truth of the
11 matter is.

12 What the petitioners are asking you is to
13 import into this judicial proceeding something that was
14 the antithesis of the adversarial process, was the
15 antithesis of a fair and balanced approach. It was the
16 antithesis of having decision-makers look at this with an
17 open set of eyes. It was the antithesis of that.

18 And they're asking to import that into
19 what should not ever be a process that has those types of
20 infirmities.

21 Second, you have Mr. Heaphy. He
22 confirmed, frankly, very critical facts. He confirmed
23 that there was no minority staff. He confirmed that
24 there was no minority report. He confirmed that everyone
25 on the Committee had voted on impeachment to -- that

1 President Trump incited an insurrection.

2 He admitted that the Committee was very
3 unusual, and it was basically stacked with prosecutors.
4 He admitted that it was very unusual, the process,
5 because the members themselves -- remember, the members
6 who had already decided what had happened, who already
7 viewed as an operative fact incitement to insurrection --
8 that those members took a leading role and were heavily
9 involved in the processes.

10 So this was not an instance where a
11 professional staff was allowed to go forward. This was
12 an instance in which they were heavily directed by the
13 members. In fact, not only were they so heavily
14 directed, but one of the staff members represented, as an
15 attorney -- and I just don't know how this happens -- but
16 as an attorney, he represented Representative Kinzinger
17 as his attorney while also serving as an investigator on
18 the Committee.

19 So his loyalty was directly to make sure
20 that that Congressman's will was taken care of. If
21 you're an attorney, you've got that duty to your client.
22 And yet he had two duties, which he viewed apparently as
23 didn't -- not conflicting as one duty.

24 Mr. Heaphy also admitted that the volume,
25 the number of documents or the number of witnesses, does

1 not equal fairness because he pointed out how, you know,
2 he's done grand jury investigations with lots of
3 documents, but in order -- but those still have to be
4 subject to the adversarial process, which, of course,
5 they weren't in the January 6.

6 And he himself readily admitted he was a
7 Democrat, he's been fired by a Republican, and that he's
8 viewed himself as a partisan and was a political
9 appointee.

10 We walked through, or I walked through
11 during that cross-examination the -- not only the
12 impeachment vote, but the fact that the Committee members
13 had made up their minds. And I certainly respect
14 Mr. Heaphy for working to defend his -- the process
15 there, but he used -- he -- when I confronted him with
16 those comments, the public comments, he sort of said a
17 few things.

18 One, he said, Well, it was an operative
19 fact that -- or an obvious fact was his -- was his
20 testimony, that the -- that every one of the Committee
21 members started out with.

22 Second, he said, Well, it was really sort
23 of a hypothesis, and they really had an open mind. I
24 just don't think that's credible or believable.

25 And then thirdly, he said, you know, they

1 had made some preliminary determinations, hypotheses
2 based on what they saw, but again wanted us to plug into
3 and test that against the evidence we were finding. And
4 then he says, "So I don't believe Mr. Aguilar" -- he was
5 referring to Mr. Aguilar, one of the Committee members --
6 "or any of the others made any conclusion other than that
7 preliminary one informing that impeachment veto."

8 In other words, he viewed the vote that
9 they made as a preliminary conclusion. Well, I disagree
10 with that as well, and here's why. I would submit to the
11 Court that congressmen and congresswomen spend a lot of
12 effort, blood, sweat -- maybe not blood -- but sweat and
13 tears getting into Congress. It's a big deal. It's hard
14 work. You sacrifice a lot.

15 And then they get to Congress, and their
16 main job is to vote on things, and this was a seminal
17 vote everyone is looking at. This isn't some
18 preliminary. This is one of the most important votes
19 they took in Congress during that time. In fact, two,
20 Ms. Cheney and Mr. Kinzinger, are no longer in Congress
21 primarily because of these votes they took, I would
22 submit.

23 So this wasn't some light, preliminary
24 vote that they took. This was something they were
25 committed to, that they were representing their

1 constituents on, and that they believed in, and that's
2 why they took that vote.

3 They took the vote, they control the
4 investigation, and they came up with a conclusion that
5 matches exactly how they voted.

6 And then, of course, you have Congressman
7 Nehls' affidavit. He basically testified to, I think,
8 some procedural, relatively obvious things.

9 But at the end of the day, you have bias,
10 you have a committee full of prosecutors, no minority
11 staff, no minority report, no witnesses or evidence that
12 were introduced by anyone who disagreed with the obvious
13 facts that the -- that the members -- and you have
14 members that were highly involved.

15 And you had political grandstanding. Much
16 of the video was edited, and Mr. Heaphy admitted that.
17 Much of it was produced for TV production. The timing
18 was suspect. And this report in general was highly
19 controversial, very controversial.

20 And I'll submit, you know, I mean, I had
21 never read it before. I was shocked at just how bad it
22 was, how shallow it was. I mean, there's lots of
23 conclusory statements there, not a lot of evidence
24 backing them up.

25 And let's look at a few other things.

1 There are factual findings, the evidence in this hearing
2 showed factual findings are suspect based on the evidence
3 in this hearing, based on evidence in this Court.

4 So stuff that didn't make it in. Mr. Kash
5 Patel, he testified that President Trump authorized, not
6 ordered, but authorized 10- to 20,000 National Guard
7 troops. And not only -- and he didn't say, Oh, that's
8 just something I overheard, you know, once. He talked to
9 Secretary of the Army with it, he followed up, he made
10 sure that there were conversations with the mayor. That
11 was his job, and he testified about that process at
12 length.

13 Ms. Pierson, she also testified that
14 President Trump talked to about 10- to -- wanted 10- to
15 20,000 National Guard troops to prevent violence. And
16 she said that he -- President Trump specifically struck
17 names as far as the speakers.

18 This is all stuff that didn't make it into
19 the report at all. And that -- and that she had security
20 concerns, and much of her interview -- and Mr. Patel
21 talked about this as well -- never made it in to the
22 January 6 Report.

23 I think on the National Guard issue,
24 what's really interesting is the -- oh, and also
25 Representative Buck testified that Congressman Jordan had

1 a much different story that he had presented about
2 whether -- his willingness to testify than what showed up
3 in the report.

4 And this wasn't something that Congressman
5 Buck sort of remembered offhand in the missives of time.
6 He specifically asked Representative Jordan because, you
7 know, Representative Buck was concerned about the
8 election issue. He disagrees with President Trump on
9 that, showing again, his credibility.

10 And it was just the last week or so before
11 his testimony because he was talking to Representative
12 Jordan about the controversy as -- and whether or not
13 Buck could vote for Jordan for Speaker of the House.
14 That was a pretty important conversation and fresh in his
15 mind, and he specifically drilled in to whether or not
16 that happened on the January 6 Report and there was that
17 conflict there.

18 None of that stuff made it into the
19 January 6 Report.

20 Then you have a couple others. For
21 example, in the -- that was actually refuted, some of the
22 conclusions that were refuted by evidence at the hearing.

23 So, for example, one of the proposed
24 findings of facts from the petitioners is that Trump also
25 regularly endorsed incendiary figures connected with

1 far-right extremists like Alex Jones, Ali Alexander,
2 Steve Bannon, Roger Stone. That's what the finding says.

3 Well, Professor Simi admitted, recognized,
4 endorsed the fact that President Trump had fired
5 Mr. Bannon. And Ms. Pierson testified that
6 President Trump, when he was striking names off of the
7 list of people to speak, didn't even know who
8 Ali Alexander was and that President Trump specifically
9 struck Roger Stone off the speaker list as well, as well
10 as Mr. -- as well as Mr. Giuliani.

11 So -- so the findings of fact are used to
12 sort of create this close collaboration, when the actual
13 evidence in this hearing refuted that, refuted that
14 finding very directly.

15 Then we have a finding where the Committee
16 says that, you know, Trump knew his claims of election
17 fraud were false. You've heard that argument.

18 Well, the petitioners' witness,
19 Mr. Swalwell, okay, Mr. Swalwell said, testified that --
20 and I quote him, he said, "It was well-known among myself
21 and my colleagues and the public that President Trump
22 believed that Pence had -- that Vice President Pence had
23 the ability to essentially reject the electoral ballots
24 that were sent from the states." That's what Mr. --
25 Representative Swalwell said.

1 And then another thing about -- the
2 Commission says about 25,000 additional attendees
3 purposely remained outside the Secret Service perimeter
4 at the Ellipse -- this is on January 6 -- and avoided the
5 magnetometers, okay, and that Trump knew that they were
6 armed.

7 There is no evidence of that. And, in
8 fact, the evidence that you did hear was -- and I admit
9 it's one person, because that's all I had time to find --
10 but it was one person, Mr. Bjorklund, who said, "I don't
11 like being in the middle of crowds. I didn't want to go
12 through the magnetometers and I stayed back." That's
13 what he specifically said.

14 And, you know -- and that's also suspect.
15 I mean, you have Amy Kremer saying -- I mean, she
16 couldn't tell whether people were armed or not. She had
17 no idea. And yet somehow they're inferring that
18 President Trump was all-knowing and all-seeing and knew
19 all of this, apparently, which no one else did.

20 Talking about the videos very quickly.
21 They are curated and highly edited videos. Curated
22 means, in the scientific speech, they suffer from
23 selection bias. Cherry-picked. You pick and choose what
24 supports your case.

25 And they had a TV producer behind it and

1 that, in fact, this Court saw there's a recent lawsuit --
2 and I'm not saying that lawsuit's absolutely correct,
3 okay -- but the person who sought to intervene said,
4 "Look, I'm suing the petitioners' attorneys" -- good luck
5 with that, folks -- "I'm suing them because they produced
6 this edited document that had me -- that they said I made
7 this speech earlier and it took it out of context and" --
8 yada, yada, yada, they said all that.

9 So at least we have some evidence about
10 the curation process. It's evidence, of course, we
11 weren't able to explore fully because of the compressed
12 timelines, but that should at least give the Court pause
13 that maybe not all this stuff should be taken at face
14 value.

15 And, in fact, we're talking taking things
16 at face value. I'll use the example of Professor Simi.
17 So Professor Simi had that photo of Charlottesville and
18 he said, "Well, that shows right-wing violence."

19 And I questioned him about it. And I
20 said, "Well, it looks as though there's two people who
21 have -- one's sort of got this garb and the other's got a
22 gas mask. Can you tell which one is the far right-wing
23 extremist?" And he couldn't, he couldn't.

24 I asked him if he could tell who was
25 attacking whom, and -- and he couldn't. I asked him,

1 "Well, is one, like, stabbing the other or is one
2 grabbing that flagpole from the other or does one hit the
3 other in -- in the process of doing" -- and he didn't
4 know. He didn't know who was committing violence. He
5 didn't know who was on which side.

6 And I think that's an example of curated
7 videos, curated photos, absent personal testimony saying,
8 "Yeah, that was me," or "That's something I took."

9 So when Hodges says, "That's -- that's a
10 video that I took," that deserves credibility. I'll give
11 him that. But when you have a video that just says,
12 "This is what it is and this is what happened and this
13 represents what was going on that day," without the
14 opportunity to cross-exam, without the ability to
15 identify the context of it, without the time to look at
16 other -- other explanations, that is suspect, and this
17 Court should not place much weight on that.

18 At the end of the day, we have tests for
19 congressional reports for a reason. Sometimes
20 congressional reports pass those tests and they should be
21 admitted by the Court, and sometimes they fail those
22 tests.

23 I submit to you that if this one doesn't
24 fail that test for -- well, we've already ruled on
25 admissibility. But if the Court places great weight on

1 this, then there's no congressional report that ever
2 should be kept out or reduced because -- or with little
3 reliance placed on it because this is about as biased and
4 unprecedented and controversial of a process as you can
5 possibly have, and yet that's what the petitioners are
6 relying on.

7 The second pillar of their case is
8 basically Professor Simi's testimony. And he talked
9 about far-right extremists, and what he did is he
10 described the Proud Boys and the Oath Keepers and the
11 Three Percenters. And I learned a lot, I learned a lot.
12 I will submit that I've spent a lot of time probably
13 talking to groups that may have included those people.

14 I had heard of the Proud Boys once before
15 or a few times. I knew they were sort of hard core, but
16 I didn't know much. Oath Keepers, I sort of thought they
17 were a vaguely religious group. And I had never heard of
18 the Three Percenters.

19 Now, my experience is not evidence before
20 this Court, but what I am -- the reason I'm saying it is
21 because I was very keenly interested, very keenly
22 interested in how Professor Simi was going to link
23 President Trump to these far right-wing groups because
24 I've -- I will submit for the record I've run for a
25 number of public offices and held office, I didn't really

1 know about these groups at all. And so I wanted to know
2 how this President all of a sudden knew about everyone,
3 maybe not all of a sudden. And so I was very keenly
4 focused on that.

5 And Professor Simi certainly implied, and
6 in some instances almost said that, you know,
7 President Trump was sort of in cahoots with these groups.

8 But there was no evidence, and I was --
9 there is no evidence, there's no evidence that he
10 intended to speak to them. There's no evidence that he
11 knew how widespread they were. There's no evidence that
12 he didn't even know who they were. There's no evidence
13 to even make those inferences.

14 And so you look through this and, sure,
15 people can say things, but there's got to be evidence.
16 In fact, the evidence introduced at this hearing is that
17 President Trump did not know of them.

18 So let's take that debate exchange where
19 President Trump said, "Proud Boys, stand back and stand
20 by." Remember that. And, in fact, the petitioners were
21 questioning Professor Simi about it, and they showed the
22 exchange. And -- and I will tease them a little bit.

23 At one point the question was to
24 Professor Simi, "Proud Boys" -- and this is the
25 question -- "was he" -- referring to President Trump --

1 "was he asked a question about the Proud Boys, or did he
2 pick that out of his own brain?"

3 That was a question to Professor Simi.
4 And that was a false choice. He wasn't asked the
5 question, and he didn't pick it out of his own brain.
6 And to his credit, Professor Simi didn't take the bait on
7 that. He said, "Well, there was some cross-talk and then
8 he used the word 'Proud Boys.'"

9 Well, what was that crosstalk? The
10 moderator said, "Will you tell these white supremacists
11 and these people to stand down?"

12 So it was the moderator who used that
13 formulation, "stand down." And I know President Trump
14 used "stand back," but pretty similar, the "stand"
15 formulation. And President says, "Well, it's Antifa's
16 fault," and there's all this back-and-forth, and it's Joe
17 Biden who suggests Proud Boys are the people. That's why
18 we included the transcript, and you're welcome to listen
19 to the video. It's Joe Biden who uses the word "Proud
20 Boys."

21 And so Trump -- President Trump says:
22 Well, Wallace, thinks Wallace says stand down, so I say
23 stand by. And then former Vice President, President Joe
24 Biden says "Proud Boys," so he does what the two of them
25 ask him to do. That's how he came up with Proud Boys.

1 And the next day -- and we include the
2 transcript of that press conference at Marine One, you
3 know, at the helicopter there, he says, "Look, these
4 white supremacists, I condemn them completely. I don't
5 even know who the Proud Boys are, but there has to be
6 peace and" -- along those lines. So he specifically
7 disavows knowledge of Proud Boys at that time.

8 Now, the other thing that Professor Simi
9 relies upon, he says, "You know, look, I mean, I
10 observed" -- well, let me back up.

11 Professor Simi is very clear. He says,
12 "My report did not address President Trump's intent. I'm
13 not in President Trump's head." He said that a couple
14 times.

15 What he did say is, he says, "Well, what
16 President Trump did was characteristic of sort of the
17 speech patterns and methods of speaking that -- that are
18 part of far right-wing extreme conversations and speech."

19 And we talked at length about, you know,
20 the use of the 1776, and I asked him these hypotheticals,
21 which, frankly, were a little personal because I've used
22 that phrase, and I didn't know I was talking of Proud
23 Boys or Three Percenters or whoever the heck they were.

24 And so Professor Simi talked about how --
25 these sort of methods of speech and -- and on cross-exam,

1 he admitted very readily, he's not hiding anything, he
2 said, "Look, these characteristics, whether it's front
3 stage/back stage, or doublespeak," he says, "we all do
4 it."

5 And, in fact, politically, people do it
6 regularly all the time. And conspiracy theorists, he
7 agreed with me, sort of the -- you know, Hofstadter, the
8 paranoid -- the Paranoid Style in American Politics,
9 there have been conspiracy theorists and -- floating
10 around political discourse for a very long time in U.S.
11 politics.

12 And he said: So all these methods, all
13 these appearance are common to political discourse. So
14 if you're looking at a politician who uses common
15 political discourse and that common political discourse
16 is similar to what far right-wing extremists use for
17 their political discourse, it's not a difficult logical
18 leap.

19 But it's also a false one. There's no
20 causality. President Trump is not using these types of
21 speeches that Simi identify, these methods, to
22 communicate with Proud Boys, or whoever. He's using them
23 because everyone else does, and that's how people talk.
24 And that's why we included the video where we have lots
25 of folks, President Biden, Senator Warren,

1 representatives, all using the word "fight," "fight like
2 hell," "take it to the streets," all of that stuff.

3 So that's one example of, frankly, what
4 could be many.

5 Now, Professor Simi, from that, says:
6 Well, President Trump and far-right extremists had a
7 relationship. And my effort to cross-examine him on the
8 Dumb and Dumber movie didn't work out too well, but you
9 still get to hear that on cross -- on closing argument
10 now.

11 So there's this scene in this movie played
12 by Jim Carrey, sort of one of the -- the protagonists,
13 and he has a crush on a woman. And he travels to meet
14 her and he says to her -- and I'm quoting, so pardon the
15 language. He says, "What do you think the chances are of
16 a girl like you and a guy like me, I traveled a long way,
17 at least you can level with me." He says that to her.
18 He says, "What are my chances?"

19 She looks at him and she says, "Not good."

20 And then he says, "You mean not good as in
21 1 out of 100?"

22 And then she looks at him with sort of a
23 mixture of pity and sorrow and perhaps disgust and says,
24 "I'd say more like 1 out of a million."

25 And then the character -- and a long

1 pause, and he smiles and he's very happy and he says, "So
2 you're telling me there's a chance."

3 That's what he says. And he just gives
4 out this big whoop, and she's just astonished. That's
5 sort of the scene.

6 And so to say that President Trump had a
7 relationship with the far right-wing extremists would be
8 analogous to saying that this character had a
9 relationship with this woman or vice versa. There was no
10 relationship except in one person's head, and that was
11 the character played by Jim Carrey.

12 A more sinister analogy, more sinister,
13 that's not humorous would sort of be John Hinkley and
14 Jodie Foster. If you remember, John Hinkley was the
15 person who tried to assassinate President Reagan, and the
16 reason he did that is because he had this obsession, this
17 crush on Jodie Foster and wanted to sort of prove himself
18 and do something great.

19 It would be like saying that they had a
20 relationship. No, there was no relationship there. It
21 was John Hinkley's obsession and Jodie Foster had no
22 relationship with him.

23 So when Professor Simi says there is a
24 relationship there or there's involvement there with
25 President Trump, no, that's at best unrequited love on

1 behalf of the far right-wing extremists who may like
2 President Trump, may be inspired by President Trump, but
3 there's no evidence that it ever went the other way. And
4 to call that a relationship is like calling a stalker and
5 their victim having a relationship. It is just wrong.

6 Now, let me talk about some of the legal
7 standards and whatnot. Let me start with engage. So
8 engage does not equal incite. They -- and we've not --
9 I'm going to phrase this a little bit different. I'm
10 going to try and be a little bit different than our
11 briefings because you've read all that stuff, all right?
12 So -- so please pay attention. I'm not just going to
13 repeat myself, I hope.

14 Engage and incite are two fundamentally
15 different activities. Engage means to participate in an
16 activity, to be involved in it. Incite means to provoke
17 and urge on, to move others to action. They are
18 different activities.

19 So when you say engage includes incite,
20 you're actually saying that engage includes a
21 fundamentally different activity than the normal meaning
22 of incite, the normal meaning today and, frankly, the
23 normal meaning back then.

24 And when I say "back then," during the --
25 during that, I mean, there wasn't an issue about

1 launching an insurrection when the Fourteenth Amendment
2 came about. The insurrection had occurred, the
3 rebellion, the enemies, the war between the states.

4 And so Congress, I submit, was looking at
5 engage. And the reason why Professor Delahunty talked
6 about the Confiscation Act of 1862 is because Congress
7 specifically used the word "incite," as well as "engage,"
8 and then used a much different formulation for Section 3.

9 Oh, by the way, the experts. Okay. They
10 are testifying to law, and I'm hopeful that they were
11 helpful for this Court. And they're testifying to the
12 history, and that's what judges do.

13 And so for them to say: Well, our experts
14 got a bigger resume than your expert, and our experts are
15 really smart and yours isn't, whatever. Okay? We need
16 to look at the actual sources and the reasoning behind
17 it. Okay?

18 And I like Professor Magliocca. I'm
19 teasing a little bit there.

20 But when Magliocca testified about what
21 incite -- why incite means engage, let's actually -- I'm
22 going to zero in on this a little bit. He said, The
23 Reconstruction Acts were -- the language was identical to
24 Section 3. And then he looked at Stanbery's opinion, and
25 he -- and in that opinion, that AG opinion, he said,

1 Stanbery said, "Disloyal sentiments, opinions, or
2 sympathies would not disqualify. But when a person has,
3 by speech or writing, incited others to engage in
4 rebellion, he must come under the disqualification." So
5 that's what he said.

6 Let's break that down and put it in
7 context. First he said "incite others to engage."
8 That's a little bit different than inciting an
9 insurrection. He's motivating others to engage in what
10 is already an ongoing insurrection, not to start some
11 one. Well, why would he have that strange formulation?

12 Here's why. That shows up in paragraph 16
13 of the Stanbery report of his advisory opinion, okay?
14 And in that advisory opinion, it's 12 Attorney General
15 Opinions, 460, I think it's page 41 and it's
16 paragraph 16.

17 And in paragraph 16, he is talking about
18 two types of officials that come under the
19 disqualification. He says -- because remember when
20 Delahunty was talking about official, people in their
21 official capacity and individual capacity, and Magliocca
22 was talking about that a little bit, and everybody's eyes
23 were glazing over?

24 This is why it's important, because in the
25 advisory opinion, what happened is, Stanbery is talking

1 about two types of officials. He says one type of
2 official is an official whose duties are -- duties of the
3 office necessarily had relation to the support of the
4 rebellion.

5 So what's that? A naval officer or
6 military officer or a state senator who voted for this or
7 an executive branch. I mean, someone whose job was to
8 further the rebellion.

9 And then he said there's a second type of
10 official. And that type of official is someone who
11 discharges their official duties not incident to war,
12 only such duties as belong to a state of peace and were
13 necessary to preservation of order in the administration
14 of law.

15 So that could be a sheriff or a police
16 officer or a Secretary of State, someone who does their
17 thing whether there is a war or not.

18 And in the second category is where he
19 makes the statement because there's a lot of other
20 advisory opinions that Stanbery talks about insurrection
21 and what engage is, and this is the only time he uses
22 that formulation.

23 And the reason he uses that formulation is
24 because then he makes an exception to the second
25 category. He says if you're a Secretary of State -- I'm

1 teasing -- or a sheriff, all right, or a constable and
2 you're using your office as part of your duties, you're
3 inciting others to engage in the rebellion.

4 In other words, what you're doing is using
5 your official position to urge them to go forth and do
6 things. Then you no longer fall under that category of
7 duties that are not incident to war but, rather, you're
8 disqualified.

9 That's the context he uses that in. And
10 that's why this whole official and not official and types
11 of official is important.

12 The next way, this second piece of
13 evidence, the second reason that Magliocca relied upon is
14 he said, Look, there were these examples, John Young
15 Brown, which petitioners mentioned, and Philip Thomas.
16 And what they did is, you know, John Young Brown, he --
17 or one of them, wrote a letter, wrote a letter to the
18 editor, remember that?

19 In fact, you used that to deny our motion
20 to -- our half-time motion. I'm teasing obviously.

21 But what happened there is he wrote that
22 letter. And Magliocca's testimony shifts. He shifts.
23 And two things are important to know. One is, the House
24 of Representatives is what disqualified. The House of
25 Representatives said, No, we're not going to seat you,

1 using their authority.

2 But the second thing is that what
3 Magliocca said, and his shift is, they did it because he
4 had provided aid to the Confederacy. A much different
5 standard than incite. The Confederacy is already -- the
6 war between the states is ongoing and this is aid.

7 And that's why -- I think it was Philip
8 Thomas who wrote the \$100 check to his son who marched
9 off to Shenandoah Valley or whatever. That was aid.

10 So it's a different prong, and so now
11 we're shifting these prongs. That's the sum total of
12 Professor Magliocca's testimony.

13 And compared to that, you have sort of the
14 ordinary meanings, the difference of types of behavior,
15 and you have the Confiscation Act of 1862 where Congress
16 specifically used incite but didn't use engage.

17 There is no case law supporting
18 Professor Magliocca's interpretation. There's not a lot
19 of case law supporting any of this, to be honest with
20 you.

21 But -- but if you look at some of these
22 recent decisions on justiciability and sort of what's
23 going on there, there's a skepticism of the application,
24 and rightfully so. I mean, towards the end, the
25 petitioners said: Well, you know, the Secretary has all

1 of these -- this authority and states have all of these
2 authorities based on the Fourteenth Amendment.

3 The Fourteenth Amendment was passed to
4 limit state authority, not to increase state authority.
5 It was passed to limit, and that's the framework.

6 Now, for incite, now we'll step back.
7 Engage doesn't equal incite. Let us assume for purposes
8 of argument only and all of these, you know, statements
9 I'll make to say no, we're not bound by that. Let's
10 assume incite is the standard, okay?

11 What we've -- what I want to point out is
12 there is no case law on -- or very little on
13 insurrection, pretty much none since -- since it was
14 passed. I mean, there's definitions, there's a grand
15 jury charge over there, but, I mean, are there rulings on
16 this? No.

17 And same with engage. This Court is
18 wading into a brave new world, but the Court is not
19 wading into a brave new world when it comes to standards
20 for incite. Under the Brandenburg standards, there's
21 lots of that.

22 And we're not saying that the First
23 Amendment, pardon my pun, trumps the Fourteenth Amendment
24 or vice versa. What we are saying, and this we've talked
25 in our brief, the Court is required to harmonize the two,

1 when possible, to find a construction that harmonizes the
2 two.

3 And the Brandenburg standards are what
4 harmonizes it. And Brandenburg standards say: This is
5 when incitement to violence takes place, and this is when
6 incitement doesn't take place. That's what the
7 Brandenburg standards talk about.

8 And so there's a couple important things.
9 I mean, the Brandenburg standard, the Sixth Circuit has
10 specifically rejected, it's not how a speaker interprets
11 the speech.

12 All of Simi's approach doesn't find any
13 solace -- it's another way of saying it's been
14 rejected -- by case law. It's not that the Proud Boys
15 said, "Oh, my gosh, he's speaking to me, so you're
16 telling me there's a chance." That's not the standard.
17 The standard is the intent and the objective words that
18 are used. It's a plain word meaning.

19 Now, look, I get it. You know, there
20 could be a code that if there was evidence that
21 President Trump sat down with the Proud Boys and said,
22 "Look, I'm going to give this speech. And when I say the
23 Eagle has landed, go launch your attack." Okay? I mean,
24 there could be a prearranged code. But absent that,
25 which doesn't exist here, it's the plain objective words,

1 the objective meaning of the speech.

2 Let me talk a little bit about causality
3 as well. Unengaged, it has to be -- or incite, has to be
4 causality. Look, even the January 6 Report says this,
5 that the violence began well before President Trump
6 finished his speech. So it's difficult to see how the
7 January 6 speech caused this.

8 Now, I know they've argued, well, then it
9 increased, that 2:24 tweet, and I'll get to that in a
10 second. But the speech itself, there was not causality.

11 And all of the stuff pre-6, it fails the
12 imminence test, the objective words. And you can say
13 "will be wild" means this, that, or the other. It
14 doesn't mean violence. The objective words do not
15 incite. They simply don't.

16 Let's talk a little bit about specific
17 intent. There was no intent on President Trump's behalf
18 whatsoever, general or specific. The most one can
19 discern is that he pressured and he wanted other people
20 to pressure Vice President Pence to send the electoral
21 count back to states for ten days.

22 That's what he said, and you heard him in
23 the January 6 speech: Send it back for ten days. I'm
24 sure it will change. You know, let's do the right thing.
25 That's what he wanted to do.

1 I want to talk about the National Guard
2 when it comes to specific intent. Now, the National
3 Guard is important for a couple of reasons because it,
4 frankly, I think destroys their argument that
5 President Trump did a failure to act.

6 But let's talk about intent. The evidence
7 on National Guard is, frankly, overwhelming. We have two
8 witnesses, Kash Patel, we have Katrina Pierson. And it's
9 corroborated -- and this is important -- it's
10 corroborated by the text from Max Miller, the petitioners
11 introduced, in which Max Miller says, "Boy" -- he says to
12 Katrina Pierson -- "it's a good thing we killed that
13 National Guard thing."

14 Well, why would he say "we killed that
15 National Guard thing"? Well, because it came up in the
16 conversation because President Trump wanted and my -- I'm
17 inferring that it freaked everyone out because no one
18 wanted President Trump to mobilize the National Guard
19 because he would be accused of being a dictator and all
20 of this other stuff.

21 But he certainly authorized it. How can a
22 President who authorizes the National Guard to be used,
23 not on one occasion but on two in front of two audiences,
24 enough to give his staff concern that he's actually going
25 to, you know, push it really hard, he authorizes it and

1 Kash Patel follows up on it to prevent violence, how is
2 that an intent to incite?

3 It is the antithesis. In fact, you know,
4 the mayor of DC put out this letter saying, Don't give me
5 any more National Guard. Well, why would she do that?
6 Well, the reason she would do that is because the
7 Secretary of the Army talked to her and she was like, No,
8 I don't want this.

9 In fact, the Capitol Police didn't want
10 it. I think the evidence shows that President Trump was
11 the only political leader in DC that wanted substantial
12 protections to prevent the type of violence that happened
13 on January 6. He's the only one who wanted to sort of
14 flood the zone with troops to make sure that there
15 wouldn't be any violence. Everyone else resisted,
16 everyone else resisted until it started.

17 And then, of course, the National Guard
18 was mobilized and -- because they already had
19 President Trump's authorization. In fact, the National
20 Guard was already -- according to Kash Patel, was one of
21 the fastest mobilizations. It happened within a couple
22 of hours of the mayor asking for the National Guard.

23 I don't know if you know a lot about the
24 National Guard. I used to serve in the Reserves. And
25 mobilizing part-time soldiers, Marines -- I'll be

1 respectful to Mr. North, who served there -- is -- is
2 just a hot mess. It doesn't happen in two hours. Unless
3 there has been substantial time pre-positioning people,
4 getting them ready to go to staging points, making sure
5 you have the transportation and equipment and logistics
6 in place, so you can mobilize part-time soldiers from a
7 disparate area in two hours.

8 That is pretty amazing. And it shows that
9 there were actual steps taken by the military with
10 President Trump's authorization to mobilize the National
11 Guard.

12 So lots of evidence that he wanted to do
13 that. Eyewitness evidence, confirmed by the tweet that
14 the petitioners themselves brought in that shows
15 President Trump did not have an intent for violence, but
16 had an intent to make sure there wasn't violence.

17 All right. I don't have a lot of time
18 left.

19 Insurrection. I said earlier on that
20 they're just picking something out of the hat for a
21 definition of insurrection, and they point to this
22 definition. If you look at that definition, it differs
23 fundamentally from the definition they put in their
24 Complaint. Paragraph 369, I believe it was.

25 That was an assembly of persons -- and an

1 assembly means a group organized for a purpose -- acting
2 with a purpose to oppose the continuing authority of the
3 United States Constitution -- that's the continuing
4 authority, not ten days -- by force. Okay?

5 So that's a different definition than the
6 one they proposed with Professor Magliocca. And I would
7 urge the Court to follow what the -- what the Michigan
8 court just said recently. And the Michigan court -- and
9 we filed the supplementary authority just the other
10 day -- Michigan court said a lot of great things,
11 rejected a lot of the petitioners' arguments, rejected
12 the Secretary's arguments.

13 But one of the things that the Court said
14 was: Look, you -- we really don't know what insurrection
15 is. There's lots of definitions. In fact, there's as
16 many definitions -- I'm trying to find it and I can't --
17 but there are many definitions, as people who want to
18 think deep thoughts about them.

19 Professor Magliocca is a smart guy, and
20 I'm not saying that his definition is crazy, but it has
21 no authority, it's him making it up, just like anyone
22 else would make it up.

23 Yeah, the Court said: The short answer is
24 there are as many answers and gradations of answers to
25 each of these proffered examples -- one of which was

1 insurrection -- as there are people called upon to decide
2 them.

3 The violence at the Capitol. No, the --
4 wasn't armed, the mob wasn't armed. We have Professor
5 Hodges -- we had Mr. Hodges -- Officer Hodges talking
6 about how the gun unit was looking for firearms. There
7 were no firearms. No one found them.

8 There's no evidence that Trump knew they
9 were armed. There's no evidence beyond -- so there were
10 some -- I admit, there are brass knuckles and some pepper
11 spray. But deadly arms? People coming armed to actually
12 cause an insurrection?

13 That's not a bunch of flagpoles. The way
14 it was used and the way President Lincoln used it when he
15 defined it as an armed insurrection is weapons of war to
16 create force, not makeshift weapons.

17 And I understand violence is inexcusable.
18 It's really hard to say, Well, you know, there's such
19 violence, but there's not a lot. But that's what the job
20 of the court is to do, to say, Look, this may constitute
21 a riot, but it does not constitute an insurrection.

22 And that's why we said insurrection needs
23 to be grounded in the context and the understanding at
24 the day when it was drafted and when it was ratified, and
25 that is in the context of a Civil War. You can't ignore

1 the fact that 620,000 people were killed, that there was
2 a massive armed conflict, and say, Well, what they really
3 meant by insurrection was intimidation to prevent a law.

4 No. They were looking at the Civil War,
5 and it was a response to that.

6 All right. Real quick, Hilary Rudy. As
7 the Colorado Republican Party correctly noted, the
8 Secretary has never enforced anything like this. The
9 Secretary has no administrative procedures in place to
10 make these determinations. It is, in fact, a
11 ministerial.

12 Look, referring to the form, the Major
13 Party Candidate Statement of Intent for Presidential
14 Primary, remember those three boxes. The title on the
15 form says: Qualifications for office, and in
16 parentheses, you must check each box to affirm that you
17 meet all qualifications of the office, close paren.
18 Okay?

19 I was surprised -- and I'll admit I have a
20 basis for being surprised -- that apparently that's just
21 advisory, that's just guidance. And when the Secretary
22 says: All qualifications -- and refers to these three
23 boxes -- it means something different than when the
24 person signs it and says: I meet all qualifications as
25 prescribed by law.

1 So apparently when a person signs that
2 form, they mean all the Federal Constitution and that
3 apparently gives the Secretary authority and apparently
4 imports all of the constitutional requirements of the
5 Colorado Election Code.

6 But when the Secretary said "all
7 qualifications," it's really just advisory for those
8 three boxes. There really could be more.

9 That does not bear credibility. And
10 that's because the Fourteenth Amendment is a
11 disqualification. It's not a qualification.

12 I don't have time to quote from the
13 Michigan case. You're certainly capable of reading it.
14 I'd urge you to take a look at that because that is good
15 persuasive authority on what's going on and how people
16 are looking at this.

17 I would also urge you to take a look at
18 the Minnesota court, which rejected the Secretary's
19 authority. And I would urge you to take a look at the
20 New Hampshire decision, which basically said this is a
21 political question.

22 On the justiciability issue.
23 Self-executing. Look, there's some disagreement before,
24 there's one exchange in the U.S. Senate about whether or
25 not it was self-executing.

1 But when Supreme Court Chief Justice Chase
2 in the Griffins case says, It is nonself-executing, and
3 Congress immediately responds, there is no further debate
4 in the historical record. Justice Chase's view is
5 dispositive and it is viewed as dispositive.

6 Very quickly, we have not argued this at
7 length. I think we referred to it slightly, the Amnesty
8 Act of 1812 [sic], I want to at least preserve that
9 argument. The fact of the matter is, Congress did, in
10 fact, provide amnesty going forward, and that law has not
11 been overruled.

12 Let me end with two last points. I would
13 submit to this Court that the initial framework that the
14 courts used has sort of led it astray on some of these
15 procedural, these jurisdictional arguments.

16 And the Court early on said that -- that
17 it was preparing this case for Supreme Court review, and
18 I think that's laudable. But I think it created a bias
19 to allowing -- to reaching a factual hearing because you
20 don't want to dismiss something on a jurisdictional and
21 then it has to go -- it comes back and then it has to go
22 back for a factual hearing, it bounces back and forth.
23 You get everything at once.

24 And then also I think the Court's exchange
25 with Professor Simi -- I'm sorry, not -- with

1 Professor Delahunty, when you were concerned that
2 Professor Delahunty's interpretation would render the
3 Fourteenth Amendment Section 3 a dead letter, and you
4 talked about that a couple times.

5 It's not a dead letter if this Court
6 doesn't make a decision. It's not appropriate for this
7 Court's -- for this Court to exercise jurisdiction. And
8 stepping back, look, this was a five-day hearing,
9 17 1/2 hours, importing this whole January 6 stuff.

10 This is a big issue, and that's a small
11 hearing, as much as I worked at it and the petitioners
12 and yourself did. It does not create a good, thorough,
13 factual record, an adversarial process, nor does it flesh
14 out what these standards are to be able to apply to that.
15 So I think there's some real concerns there.

16 At the end of the day -- and remember I
17 talked about the rule of democracy. I want to turn back
18 to Attorney General Stanbery. And in his advisory
19 opinions, Advisory 12 -- Volume 12, 141, page 160 in
20 1867, the same language.

21 He said: Where from the generality of
22 terms of description or for any other reason a reasonable
23 doubt arises, that doubt is to be resolved against the
24 operation of the law, against the operation of
25 disqualification. That's what he said.

1 Two important things. His belief was that
2 it has to be, the standard is beyond a reasonable doubt.
3 So if there's a reasonable doubt, you have to resolve it
4 in favor of holding an election, the democracy canon.

5 And the second point was, any ambiguity
6 get resolved that way, because that's, frankly, what we
7 are as a country. We vote on these issues.

8 Just because, you know, I mean -- I guess
9 to put it more crudely, you know, look, when you have a
10 hammer, when the Court system is the hammer, not every
11 problem is a nail. The fact of the matter is that the
12 people get to decide on this.

13 I would submit that the petitioners'
14 evidence relies -- it relies on the January 6 Report. It
15 relies on inferences drawn from the January 6 Report. It
16 relies on the conclusions and the characterizations from
17 the January 6 Report. None of which meet the objective
18 standards of certainly the Brandenburg line of cases as
19 far as what incitement actually means.

20 None of that meets it unless you buy into
21 the January 6 Report's conclusions. And that ain't
22 evidence. It shouldn't be evidence before this Court.

23 I think I've come up with my full hour
24 here. Thank God I was able to actually fill it and
25 hopefully intelligently.

1 I want to thank the Court for its time. I
2 want to thank the Court's staff for its time as well. I
3 know it's been a lot of work. Obviously, as petitioners
4 began, we will end, we're not happy to be here and we
5 don't think we should be.

6 We would ask the Court to review and
7 reconsider its jurisdictional arguments, but certainly
8 recognize that the easiest way, the most straightforward
9 way is looking at the well-developed Brandenburg
10 standards and saying that President Trump came nowhere
11 near towards engaging in violence, insurrection, or
12 anything approaching lawless activity.

13 Thank you very much, Your Honor.

14 THE COURT: So I'm going to give you a
15 little bit of guidance.

16 I have no intention of revisiting my prior
17 decisions. I'm -- Mr. Gessler may be right and I may be
18 wrong, but that's not what I plan on doing.

19 I plan on issuing a decision on what was
20 in the hearing, and so to the -- I only say that so that
21 you don't spend time addressing some of these things that
22 I've already decided.

23 MR. GRIMSLEY: And, Your Honor, I don't
24 intend to. I guess one question is, with regard to the
25 J6 Report and admissibility of that, is that one that's

1 off the table, or should I address it?

2 THE COURT: I consider that to be
3 conditionally admitted. When I say conditionally, that
4 meant and always meant that I may reverse myself on --
5 after the hearing.

6 MR. GRIMSLEY: So I'll keep that brief,
7 and I'll keep these remarks, I think, brief.

8 There's been consistent complaints about
9 the January 6 Report and the methodology that went into
10 coming up with the findings. The problem is, they
11 haven't come in here and really challenged the veracity
12 of actually many of those findings. They just complain
13 about the process.

14 President Trump could have come in here
15 and testified. There are other people who could have
16 come in here and testified, but they don't really
17 question, again, any of the findings that we're relying
18 on.

19 Now, they tried to do it for a couple, I
20 think, during the closing here, but we're not the ones
21 who made up that President Trump knew Ali Alexander and
22 Alex Jones. This is from Katrina Pierson:

23 "I want to talk with you about, you
24 mentioned a couple of times Ali Alexander and Alex Jones.
25 Do you refer to them as 'the crazies'?"

1 Yep.

2 "Okay. And you know that -- or you said
3 that Trump likes the crazies, right?"

4 "Yes, and I also define 'crazies' as being
5 those who viciously defend him in public."

6 And Professor Simi testified that
7 President Trump went on Alex Jones's show right after
8 announcing his candidacy for President in 2015. We're
9 not making this stuff up. So that finding is not
10 impugned at all.

11 And then as far as 10- to 20,000 troops?
12 That testimony was not credible. There was no
13 documentation they could point to to support the idea
14 that 10- to 20,000 troops had been authorized.

15 And you heard Professor Banks say, Yeah,
16 that's a pretty big authorization of troops. You would
17 think you might see some documentation.

18 And when confronted about it, Mr. Patel
19 said: You know, it's kind of hiding back in the
20 Department of Defense. I didn't have it with me. I
21 couldn't bring it to the January 6 Committee.

22 It wasn't hiding back at the Department of
23 Defense. The January 6 Committee asked for documents
24 from the Department of Defense. Mr. Heaphy testified
25 that the Department of Defense complied, that the request

1 would have covered any such document.

2 There were no such documents. Mr. Patel's
3 testimony was not credible.

4 Now, as far as the criticisms of
5 Professor Simi, yeah, he's not inside President Trump's
6 mind. He admitted that. But when pressed repeatedly by
7 my esteemed colleague here --

8 MR. GESSLER: Mr. Gessler.

9 MR. GRIMSLEY: -- Mr. -- I didn't -- I was
10 taught never to say opposing counsel's name on the
11 record. I don't know if that's right or wrong.

12 But my esteemed colleague pressed him, and
13 he said: Yeah, I'm not in his mind, but I have looked at
14 these patterns of communication for my entire career, and
15 these patterns of communication back and forth between
16 President Trump and these right-wing extremists fits that
17 to a T.

18 And it wasn't just on January 6. It was
19 five years leading up to January 6. And he wouldn't have
20 been allowed to testify on what Trump's intent was or
21 meaning. That's for this Court to decide.

22 But it's certainly more than a reasonable
23 inference, given the information and the patterns that
24 Professor Simi identified for this Court, to infer that
25 Trump knew exactly what he meant. He knew who he was

1 talking to, and he knew what the result of what he said
2 that day was going to be.

3 And as far as Michigan goes, Your Honor
4 has made your decision on this already. I addressed it
5 without calling it the political question doctrine at the
6 end of my earlier remarks.

7 I think Michigan just got it wrong. There
8 are not committed textual reasons to think this was left
9 to Congress. It's exactly the opposite. As I said
10 before, it cannot make any sense to say that Congress by
11 a simple majority has to approve the disqualification,
12 but it takes a two-thirds supermajority to disable it.
13 It just does not make sense.

14 And finally, they just keep wanting to
15 ignore the 2:24 tweet and what Trump did after the
16 speech. Wasn't in the findings of fact and conclusions
17 of law and despite the promise, they never came back to
18 it in closing.

19 There is no innocent explanation for that
20 tweet given what President Trump knew was going on.

21 So petitioners have proven their case on
22 the facts and the law. And as I close, I want to address
23 two rhetorical points that Trump continues to make.

24 First, Trump argues that petitioners'
25 claims must be wrong because they're unprecedented. They

1 point out that no court in the history of the U.S. has
2 disqualified a presidential candidate under Section 3 of
3 the Fourteenth Amendment. They point out that no court
4 in Colorado has disqualified any candidate under
5 Section 3 of the Fourteenth Amendment.

6 There's a reason for that. Never before
7 in the history of the United States has somebody who
8 engaged in insurrection against the Constitution run for
9 President after having taken an oath to protect that
10 document. Never before in the history of the United
11 States has a sitting President sicced a mob on the
12 Capitol while they were counting electoral votes.

13 Section 3 of the Fourteenth Amendment was
14 put in place precisely for this reason, that no President
15 before Trump has tested it tells you all we need to know
16 about Trump.

17 Second, Trump asserts that applying
18 Section 3 is somehow antidemocratic, that it will deprive
19 people the ability to vote for the candidate of their
20 choice, a candidate who they say is leading in the polls.

21 Now, qualifications by definition prevent
22 people from voting for who they want. There are probably
23 30-year-olds out there, probably foreign citizens, maybe
24 an Arnold Schwarzenegger, maybe a Barack Obama or a
25 George W. Bush who's already been President two times,

1 but it doesn't matter.

2 And the argument that Section 3 should not
3 apply because Trump is popular could not be more
4 dangerous. Our founders have made clear time and again
5 that a candidate's popularity does not supersede the
6 Constitution. The rule of law must apply whether a
7 candidate has no chance of winning election or is a
8 potential front runner.

9 The application of Section 3 is at its
10 most urgent when a person who has desecrated their oath
11 to support the Constitution seeks the highest office in
12 the land. That is when the protection is needed the
13 most.

14 And enforcing the Constitution does not
15 defy the will of the people. The Constitution itself
16 enables, embodies the will of the people. It is the
17 supreme law of the land and must be enforced even against
18 popular political candidates.

19 Here's a news flash. President Trump lost
20 the 2020 election. Rather than peacefully hand over
21 power to his successor, as every single outgoing
22 President in the history of our country has done,
23 President Trump chose to do everything he could, say
24 anything he could to hold onto that power unlawfully.

25 President Trump violated his oath to

1 preserve, protect, and defend the Constitution.

2 President Trump engaged in insurrection against the
3 Constitution.

4 The Constitution is clear. He cannot be
5 President again.

6 THE COURT: I want to again thank
7 everybody for their high quality presentations and for
8 their professionalism, and I am now officially ending the
9 Section 1-113 proceeding.

10 Everybody have a great night.

11 MR. GRIMSLEY: Thank you, Your Honor.

12 MR. GESSLER: Thank you.

13 (WHEREUPON, the within proceedings were
14 adjourned at the approximate hour of 5:45 p.m. on the
15 15th day of November, 2023.)

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\$100 20:25 100:8	11 26:3	177 66:1,2,3	
<hr/> 1 <hr/>	112 63:16	177-page 11:8 30:11	2021 49:5 75:8
1 25:23 28:17 93:21,24	113 54:4,12 56:8 60:4 63:1	1776 91:20	2022 38:23
1's 46:15	116 58:20	18-year-old 51:20	2023 121:15
1-1-113 6:6 52:7 53:16	119 18:13	1812 111:8	2023-CV-32577 6:9
1-113 121:9	12 57:13 97:14 112:19	1862 96:6 100:15	2024 48:21
1-4-1201 50:23	120 65:25	1867 112:20	21 59:4
1-4-1203(2)(a) 51:3	1201 57:11	1872 22:1	22 12:13 26:1
1-4-1204(1) 52:12	1203 52:18	19 22:14 33:12	25,000 85:2
1-4-1204(4) 53:14	1203(2)(a) 57:2	19th 40:23	256 63:16
1-4-501 52:17	1204 56:13 63:1	1:21 29:22	29 28:8
1/2 70:22 112:9	13 59:17 64:11	<hr/> 2 <hr/>	2:24 30:5,23 31:9 36:7,9 103:9 118:15
10 7:21 59:16 76:4	134 31:16	2 11:4 46:15	2:34 30:23
10- 82:6,14 116:11,14	141 112:19	20 24:20 75:19	2:38 31:5
100 93:21	15 26:13	20,000 82:6,15 116:11,14	2:44 30:23
100-page-long 21:12	150 30:18 37:19	2015 25:13,18 116:8	2:45 30:23
105 35:1	15th 121:15	2016 25:23 26:1, 3,7 50:22 55:1	2:57 30:24
107 50:21,24	16 97:12,16,17	2017 26:13	<hr/> 3 <hr/>
	160 112:19	2018 27:18	3 9:23 12:10, 15,17,20,24 19:17 20:12, 13 21:7,8, 15,18,21,22
	17 59:4 70:22 112:9	2019 27:20	
	170-plus		

22:2 39:3 40:10,18,23 41:19 43:11 45:7,10,20 46:4 47:6 53:3 54:14 57:20 58:19, 20 59:3,16 61:5,11 62:16 96:8, 24 112:3 119:2,5,13, 18 120:2,9		72:12,21 73:24 75:21 76:23,25 79:5 82:22 83:16,19 85:4 103:4, 7,23 105:13 112:9 113:14,15, 17,21 115:9 116:21,23 117:18,19	96 67:2,5,6 97 59:4
3's 40:15 30 28:10 30-year-olds 119:23 321 34:1 331 36:20 35 65:9 68:1 36 33:9 367 17:25 369 106:24 37 54:3 384 63:24 39th 41:21 3:05 6:2 3:13 31:5 3:38 31:5	<hr/> 4 <hr/> 4 22:20 67:1 41 97:15 46 73:11,14 460 50:16 97:15 4:17 36:15 4:27 65:15 4:35 65:12,16 <hr/> 5 <hr/> 5 35:23 48:21 63:20 54 73:10 5:45 121:14 <hr/> 6 <hr/> 6 9:16 11:4 13:15,18 17:24 19:12, 13 22:15,20 23:2 24:13 29:16 30:19 31:17 33:18, 19,23 36:20 38:9 39:15 49:5,14 66:11,12,14, 17,19,21,22, 23,24 67:6, 10,17,22 68:6,24 70:24 71:15	61 33:5 62 33:5 620,000 109:1 641 63:24 651 63:24 67 66:25 68 63:13 69 63:13 <hr/> 7 <hr/> 7 58:21 75 66:3 780 50:16 <hr/> 9 <hr/> 9 26:7 90 23:8 94 63:16	<hr/> A <hr/> A.G. 20:10 ability 45:23 68:7 84:23 87:14 119:19 able 45:12 75:12 86:11 112:14 113:24 absence 54:21,23 64:20,22 absent 69:4 87:7 102:24 absolutely 21:13 31:16 86:2 absolve 31:6 accept 66:15,16 accepted 42:19 access 59:11 accompany 50:19 accomplishmen ts 34:6 accurate 59:13,24 accused 74:25 104:19 acknowledged 57:25 across 55:9 70:10

act 19:22 52:9 53:21,23,25 54:5,7,8,12 96:6 100:15 104:5 111:8	addressing 43:18 114:21	advisory 97:13,14,25 98:20 109:21 110:7 112:18,19	airline 8:2,8
acted 32:3	adjourned 121:14	advocated 42:16	Alex 84:1 115:22, 24 116:7
acting 107:1	administer 60:19	affidavit 59:6 81:7	Alexander 84:1,8 115:21,24
action 44:11,12,15, 18 46:4 53:14 63:9, 11 95:17	administering 54:24	affiliated 58:5	Ali 84:1,8 115:21,24
actions 10:7 22:7	administratio n 34:6 98:13	affirm 52:20 109:16	all-knowing 85:18
activities 95:15,18	administrativ e 109:9	affirmations 59:23	all-seeing 85:18
activity 95:16,21 114:12	admissibility 39:18 87:25 114:25	affirmative 53:5 59:7 62:11,13	allegations 33:10
acts 21:4,19 22:10 31:1, 20 40:6 54:1 96:23	admissible 39:15	aftermath 19:12	allocate 50:10
actual 84:12 96:16 106:9	admission 69:2	afternoon 6:4,16,19 7:1 9:3 48:11 55:25 56:14	allotment 7:18
add 37:10	admit 71:17 85:8 108:10 109:19	afterwards 47:20	allow 9:19 56:19
added 34:10,11,17	admitted 35:11 39:16 62:1 69:1 78:2,4,24 79:6 81:16	AG 96:25	allowed 10:3 24:1 34:20 78:11 117:20
addition 70:2	admission 84:3 87:21 92:1 115:3 117:6	agree 39:21 76:12, 15	allowing 69:20 111:19
additional 7:21 85:2	adopted 50:21	agreed 92:7	allows 38:24 44:5
address 11:2 39:12, 13,14 44:24 91:12 115:1 118:22	adult 74:23,24	agreement 19:12	alternative 11:21
addressed 32:8 47:22 68:20 70:4 118:4	advantage 37:15	Aguilar 80:4,5	alternatively 58:8
	adversarial 71:19 76:20, 22 77:1,8,9, 14 79:4 112:13	ahead 65:18	amazing 106:8
	advisors 33:9	aid 100:4,6,9	ambiguity 11:25 12:3 113:5
		aiding 19:25	ambiguous 11:23 13:13 16:6,7
		ain't 113:21	amendment 9:23 12:10, 16,21,25 26:9,11 32:8

39:3 43:16, 22,24 44:1,3 45:8 47:16, 17,21 49:6 51:13 53:4 54:14 57:21 61:5,11 63:5,10,18, 20,23 96:1 101:2,3,23 110:10 112:3 119:3,5,13	anti-semitic 27:16 antidemocrati c 119:18 Antifa 35:23 Antifa's 90:15 antithesis 77:14,15,16, 17 105:3 anybody 7:23 10:11 21:15 anymore 23:10,19,23 anyone 21:18 81:12 107:21 apex 46:10 apologize 64:15 apparently 78:22 85:19 109:20 110:1,3 appearance 92:13 appearances 6:10 appellate 48:23 applicable 52:17 application 64:21 66:23 100:23 120:9 applies 32:7,13,14 43:14 44:9 apply 40:10,19 41:4 43:22 44:4,7 57:22 68:17 112:14	120:3,6 applying 45:17 47:7 119:17 appoint 26:8 43:2 46:10 appointed 46:11 appointee 79:9 appointment 46:15 appointments 41:4 42:21 appreciable 31:18 33:6 appreciate 56:3 64:14 65:7 appreciated 49:1 approach 77:15 102:12 approaching 114:12 appropriate 26:5 112:6 approve 118:11 Approved 59:14 approves 59:2 approving 29:2 approximate 121:14 approximately 8:18 area 106:7 argue 10:25 argued 42:23 103:8	111:6 argues 11:21 39:10 42:8 49:25 118:24 argument 8:15,23 11:9 20:7 31:9 32:12 40:9 42:14,20 44:25 45:3, 6,19 46:8 47:9,23 49:13 61:1, 2,22 84:17 93:9 101:8 104:4 111:9 120:2 arguments 11:3 16:16, 24 43:22 45:13 64:5 69:11 70:6 75:14 107:11,12 111:15 114:7 arises 112:23 arising 72:4 Arizona 32:24 armed 16:20 18:21 35:1 85:6,16 108:4,9,11, 15 109:2 armies 9:22 armor 17:4 arms 13:12 18:9, 10,11 20:4, 15 21:2,22, 25 22:5 75:1,2 108:11
---	---	---	--

Army 13:9 20:11 21:1 82:9 105:7	10	August 26:7,13 32:19 43:9	85:12 89:19 90:14 91:10 95:23,24 101:6 103:21,23 111:21,22 112:8,17 116:19,22 117:15 118:17
Arnold 119:24	assuming 7:9 47:3	authorities 36:1,3 40:1 47:25 101:2	back-and-forth 90:16
around 10:2 16:22 18:23 60:8 92:10	astonished 94:4	authority 46:16 50:1 55:18 56:23 60:1,23 62:3,11,12, 13 100:1 101:1,4 107:2,4,9,21 110:3,15,19	back-stage 26:25
Article 46:15	astray 111:14	authorization 105:19 106:10 116:16	backing 81:24
articles 12:14,15 38:25	atop 13:22	authorize 53:21	bad 68:12 81:21
asked 8:17 30:9 35:6 64:6 67:1 83:6 86:24,25 90:1,4 91:20 116:23	attack 9:15 17:11 18:1,4,7 19:13 29:23, 24 30:3 35:18 36:10, 17 37:11 38:8 39:25 40:2 102:23	authorized 82:5,6 104:21 116:14	bait 90:6
asking 13:12 29:17 61:19 62:4 64:24 69:14 77:12,18 105:22	attacked 13:17 14:8 19:1	authorizes 60:4 104:22, 25	balance 13:3
assassinate 94:15	attackers 37:1	authors 67:13,16	balanced 77:15
assaulted 25:20	attacking 36:3 86:25	available 56:10	balances 76:3,5,8,18, 21 77:5
Assemblies' 53:8	attacks 10:2	Avenue 14:1	ball 33:19
assembly 106:25 107:1	attempt 32:18 38:9 68:5	avoided 85:4	ballot 46:22 47:2 48:1,5 49:10 50:2,4,5 51:14,24 52:3,10,14, 16,20 53:5, 16 54:13,18 58:1 59:9,10 60:16 62:15, 24
assert 29:8	attempted 67:17	aware 48:19	ballots 50:10,11 61:5 84:23
assertion 18:8	attendees 85:2	B	Banks 29:25 35:17 40:3 116:15
assertions 22:22	attention 9:6 22:25 95:12	back 6:4 17:19 19:5,19 23:5 27:2,17 28:8 32:19 56:6 62:12 70:12	
asserts 24:17 119:17	attorney 7:2 20:8 40:22 41:8, 24 78:15,16, 17,21 97:14 112:18		
assume 7:11 32:11 44:8 101:7,	attorneys 86:4		
	audiences 104:23		

Bannon	114:4	bias	blanket
84:2,5	begin	81:9 85:23	22:2
Barack	14:2	111:18	block
119:24	beginning	biased	10:11
barricades	44:21 64:7	72:12,13,14	blood
18:17	behalf	77:3 88:3	80:12
barriers	6:17 7:3 9:4	Biden	Blue
18:4	48:13,16	32:24 90:17,	6:18
barring	95:1 103:17	19,24 92:25	board
61:4 62:23	behavior	Biden's	10:10,18
based	26:25 100:14	28:14	11:10,11
23:3 25:2	behest	Biden-harris	19:19 27:15
52:25 57:9	14:3	28:11	Bob
70:18 80:2	behind	big	6:23
82:2,3 101:2	57:12 85:25	72:2 80:13	body
baseless	96:16	94:4 112:10	14:14 17:4,7
55:10	behold	116:16	body-slammed
basically	73:20	bigger	27:19
66:17 70:23	belaboring	96:14	bogus
78:3 81:7	58:15	bills	33:3
88:8 110:20	belief	25:25	bona
basics	72:24 113:1	binding	58:7,13,22
56:6	beliefs	60:10	book
basis	75:5	binds	12:15
109:20	believable	55:6	books
bat	79:24	bipartisan	12:14
8:6	believe	19:12 73:8	borrowing
bathroom	22:18 27:2	bit	62:22
65:11	62:3 77:9	10:13 26:6	bounces
Batons	80:4 106:24	66:7 68:23	111:22
18:20	believed	69:9 89:22	bound
battering	19:2 21:15	95:9,10	101:9
17:15	73:2 81:1	96:19,22	box
battle	84:22	97:8,22	59:14,15
12:5	believes	103:2,16	109:16
Beall	27:8	114:15	boxes
7:6	belong	bitter	109:14,23
bear	98:12	72:4,8 76:16	110:8
18:15 110:9	below	Bjorklund	Boy
bears	35:3	85:10	104:11
40:7 41:8	Ben	Bjorklunds	Boys
beat	6:20	18:24	18:2 28:9
25:19	best	black	88:10,14
beaten	77:10 94:25	63:7	89:19,24
14:9	better	Blackman	90:1,17,20,
began	20:6 33:21	42:17	24,25 91:5,
47:6,7 103:5			7,23 92:22

102:14,21	76:10 116:21	calling	Capitol
Boys.'	broader	28:18 37:13	9:16 13:18,
90:8	53:25 54:7	95:4 118:5	22 14:1,2,14
Brad	broadest	calls	15:13 16:23
29:14,16	46:18	32:23	17:12,23
brain	brought	cam	18:16 19:1,5
90:2,5	18:13 74:18	14:14	23:11 27:24
branch	106:14	camera	29:23 30:22
98:7	Brown	13:22 17:7	36:4,10,11
Brandenburg	20:22,23	campaign	37:16,19
32:7,13	99:15,16	29:13	38:5,9 40:1
44:9,10	Buck	cancel	44:22 105:9
101:20	15:23 73:25	76:5	108:3 119:12
102:3,4,7,9	74:17 75:9,	candidacy	card
113:18 114:9	18 82:25	116:8	43:20
brass	83:5,7,13	candidate	care
108:10	budget	45:16 46:22	78:20
brave	56:24 60:2	47:25 48:5	career
101:18,19	built	50:12 51:5	117:14
breach	76:8	52:10,11,19,	Carrey
52:8	bunch	22 53:3,15	93:12 94:11
breaches	23:14 108:13	54:13,17	case
53:22 54:1	bus	57:3 58:5,7,	6:9 12:20
break	28:11,14	8,9,14,23	33:19,20
65:11 97:6	Bush	59:2,9 62:23	42:11 43:6,9
breaks	64:17 119:25	67:14 69:19	46:13,14
23:25 34:18	buy	70:16 109:13	49:2 50:6,9,
brief	113:20	119:2,4,19,	11 52:1 56:7
49:23 61:25		20 120:7	58:17 61:7
62:1 65:25	C	candidate's	62:19 66:7,
69:12 101:25		120:5	8,10,12,16
115:6,7	cahoots	candidates	67:8 69:23
briefed	68:11 89:7	43:12 47:2,	71:8 85:24
35:2 63:6	California	11 48:21	88:7 100:17,
64:13 69:11	47:10	50:1,5,13	19 101:12
70:14	call	51:22 52:2,	102:14
briefing	24:5,8,16,18	15 53:9,11	110:13
32:9 39:16	25:2,3,8	54:10 57:23	111:2,17
42:10	27:17 29:2,8	61:4 120:18	118:21
briefings	34:1,4 37:12	canon	cases
95:11	75:12 95:4	45:18 113:4	20:13,16,18,
briefly	call-and-	cans	21 40:23
39:8	response	18:18	42:21 62:8
brightest	37:5	capable	63:25 69:24
9:9	called	49:17 110:13	70:3 113:18
bring	26:24 108:1	capacity	cast
56:6 75:12		97:21	45:15 74:4

<p>Casting 74:1</p> <p>catch 8:11 23:25 34:19</p> <p>category 98:18,25 99:6</p> <p>causality 92:20 103:2, 4,10</p> <p>caused 30:18 103:7</p> <p>Celebrezze 50:16</p> <p>Center 6:21</p> <p>central 6:8 31:24 74:1</p> <p>century 40:23</p> <p>certain 20:22 52:15 65:4 67:18 74:14 76:5</p> <p>certainly 19:10 30:13 39:12 40:7 60:1 63:7 64:16 65:22 79:13 89:5 104:21 110:13 113:18 114:7 117:22</p> <p>certification 33:14 34:23 37:14 53:11</p> <p>certified 52:2</p> <p>certifies 52:9</p> <p>certify 30:7,9 48:20 54:13</p>	<p>certifying 52:13</p> <p>challenge 53:15</p> <p>challenged 115:11</p> <p>challenges 33:13</p> <p>chance 30:7 48:6 94:2 102:16 120:7</p> <p>chances 93:15,18</p> <p>change 18:25 19:4 31:9 39:17 103:24</p> <p>chanting 15:15 37:25</p> <p>chaos 50:19</p> <p>chaplain 15:8,9</p> <p>character 93:25 94:8, 11</p> <p>characteristi c 91:16</p> <p>characteristi cs 92:2</p> <p>characterizat ion 67:5</p> <p>characterizat ions 113:16</p> <p>characterized 70:9</p> <p>charge 33:4 101:15</p> <p>charges 13:8 40:24 41:23 67:18, 19</p>	<p>charitable 67:4</p> <p>Charlottesvil le 86:17</p> <p>chart 25:7</p> <p>Chase 111:1</p> <p>Chase's 111:4</p> <p>check 100:8 109:16</p> <p>checked 59:15</p> <p>checks 76:3,7,18,21 77:4</p> <p>chemical 14:9 18:15</p> <p>Cheney 74:7 80:20</p> <p>Cheney's 74:8</p> <p>Cherry-picked 85:23</p> <p>cherry- picking 26:19</p> <p>Chiafalo 46:13</p> <p>chief 30:2 35:18 37:21 39:22 49:18 111:1</p> <p>chilling 23:24</p> <p>chillingly 34:18</p> <p>choice 90:4 119:20</p> <p>choose 24:25 85:23</p> <p>choosing 46:19</p> <p>chose 29:24 120:23</p>	<p>Christopher 7:6</p> <p>Cipollone 37:22</p> <p>circuit 63:25 102:9</p> <p>cite 31:4 73:7</p> <p>cited 12:18 50:6 63:13 64:1 66:24 71:16</p> <p>cites 42:17,18</p> <p>citing 52:16</p> <p>citizen 47:14 51:22 71:8</p> <p>citizens 119:23</p> <p>civil 13:9 21:23 29:18 41:14 108:25 109:4</p> <p>claim 55:22 61:18</p> <p>claimed 22:22</p> <p>claiming 12:23</p> <p>claims 29:1 55:10, 11 62:7 75:5 84:16 118:25</p> <p>clause 41:4,5 42:21 43:1 46:17 64:19</p> <p>cleanup 8:6</p> <p>clear 12:4 13:2 15:18 36:4 40:18 91:11 120:4 121:4</p>
--	---	---	---

clearer 26:24	20 8:1 47:10 48:4,13	committed 26:4 31:1 70:16 80:25 118:8	completed 59:22 66:9
clearly 27:8 52:14	49:8,21 50:20 51:7, 18 52:1	committee 6:8 71:21,24 72:12,15,22, 23,24 73:14, 17,24 77:25 78:2,18 79:12,20 80:5 81:10 84:15 116:21,23	completely 91:4
client 78:21	53:19,24 55:9,17 56:10,18 57:6 61:13 64:7,25 109:7 110:5 119:4	Committee's 37:24	complicated 56:5
Clinton 26:8	Colorado's 49:18 51:9, 17 53:10 54:24	committees 71:24	complied 116:25
close 61:17 63:23 69:20 74:9 84:12 109:17 118:22	Columbus 18:6	committing 87:4	comply 56:11,12,16 60:5 65:3
closely 35:24	combat 14:20	common 19:25 22:16 41:25 92:13, 14,15	compressed 86:11
closing 8:14,23 93:9 115:20 118:18	come 69:20 97:4, 18 113:23 115:11,14,16	Committee's 37:24	concede 23:17 32:25
CNN 35:11	comes 20:2 45:8 66:10 101:19 104:2 111:21	committees 71:24	conceded 59:20
code 13:8 43:2 48:20 49:9, 22 52:7,14 53:14 54:6 55:5,17,23 56:12,18 58:4 60:3,5, 13,23,24,25 61:13,20 62:5,9,18,20 65:4 102:20, 24 110:5	comfortable 32:14	communication 117:14,15	concedes 54:20
coequal 43:24	Commander 30:2 35:18	communication s 24:15	concern 104:24
collaboration 84:12	commands 9:22	compare 34:14	concerned 15:5 21:23 83:7 112:1
colleague 25:6 117:7, 12	comments 79:16	compared 100:13	concerns 70:19 71:7 74:13 82:20 112:15
colleagues 84:21	commission 61:15 71:15 74:20 85:2	communication s 24:15	concludes 51:11
College 55:3	commissions 71:23	communication s 24:15	conclusion 31:23 73:21 76:24 80:6,9 81:4
Colorado 6:5,7 7:19,	commit 53:23	complain 115:12	conclusions 11:8 30:12 31:4 63:14 66:16 67:5 83:22 113:16,21 118:16
	commitment 45:22 46:19	complaining 26:7 38:23	conclusory 81:23
	commits 53:22	Complaint 106:24	condemn 25:4 27:25 28:13,19,24 36:16 37:1
		complaints 115:8	
		complete 59:7,13	

91:4	Congress	consideration	construction
condemning	11:23 15:2	s	18:17 45:18
26:22 37:7	22:1 31:14	71:18,25	102:1
conditionally	36:11 37:13	considered	contained
39:16 69:1	41:21 44:21	41:20 67:14	23:15
115:3	45:1,9,11,	consistent	contains
conduct	21,23,24	115:8	56:14
20:11 31:6	46:4,6 48:2,	conspiracy	contemplate
Confederacy	7 63:21	92:6,9	56:19
21:24 22:4	74:18 75:8	constable	contemporary
100:4,5	80:13,15,19,	99:1	41:22
Confederate	20 96:4,6	constituents	context
21:1 22:2	100:15	81:1	46:9 86:7
conference	111:3,9	constitute	87:15 97:7
26:14,20	118:9,10	22:7 39:20	99:9 108:23,
27:11 91:2	Congress's	40:5 108:20,	25
confers	75:25	21	contexts
63:21	congressional	constitutes	43:7
confident	12:18 20:20	19:21	continued
31:23 32:1	40:24 71:17,	Constitution	6:5
48:22	20,23 76:8	9:13,19	continues
confirm	87:19,20	10:2,21	38:19 118:23
58:5,8	88:1	11:2,5,12,	continuing
confirmed	Congressman	17,19,22	107:2,3
77:22,23,24	73:25 81:6	12:2 13:16	contradicted
106:13	82:25 83:4	16:5,6,9,13,	75:17
confirms	Congressman's	15 19:22,23	contrary
59:10	78:20	21:11,12	21:14 51:15
Confiscation	congressmen	22:8 30:7	53:7
21:4,19 96:6	80:11	38:10,16,20	contrast
100:15	congresspeople	39:1 40:12	12:22
conflict	e	41:3 42:3	control
83:17 109:2	44:23	43:1,25 51:2	81:3
conflicting	congresswomen	61:3,9 107:3	controls
78:23	80:11	110:2 119:8	55:15
conform	conjure	120:6,11,14,	controversial
50:25 51:9	24:24	15 121:1,3,4	81:19 88:4
53:11 54:10	connected	constitutiona	controversies
57:13	83:25	l	74:21
conforming	consensus	12:13 43:13	controversy
57:18	70:9	47:12 51:10	75:4,7 83:12
confront	consequences	54:18 59:23	convened
54:23	71:1	63:8 70:25	6:1
confronted	consider	110:4	convention
55:2,10	55:18 70:8	constitutiona	50:11
79:15 116:18	71:17 74:9	lly	conversation
	115:2	9:16 15:20	83:14 104:16
		47:2	

conversations 82:10 91:18	courage 23:6 24:2	101:17,18,25	creates 53:14
conveying 46:17	30:5 33:21	107:7,8,10, 13,23 108:20	creating 50:21
cool 12:11	44:23	110:18	credence 76:14,15
coordinated 17:11 18:7	course 44:19 51:1	111:1,13,16, 17 112:5,7	credibility 83:9 87:10
coordination 17:22	53:17 60:9	113:10,22	110:9
core 88:15	68:9 77:4	114:1,6,14	credible 16:24 29:7
correct 13:14 23:3	79:4 81:6	115:2	74:2 79:24
86:2	86:10 105:17	117:21,24	116:12 117:3
corrected 30:8	court 6:1,4,15,25	119:1,3	credit 90:6
correctly 109:7	7:7,14,23	121:6	crime 44:6
corroborated 104:9,10	8:4,7,12,16, 24 9:2,5	court's 12:1 48:16	criminal 21:4,9
counsel 7:8 37:22	11:23,25	49:17 56:1	67:17,18,19
75:23	12:20 13:12	64:18 69:22	critical 77:22
counsel's 117:10	16:10 24:12	70:13 72:3	criticisms 117:4
count 15:25 44:21	33:13 42:19, 24 46:17	111:24 112:7	cross 93:9
103:21	47:22 48:12, 15,17,19,24, 25 49:20	114:2	cross-exam 87:14 91:25
counting 9:17 15:21	50:1,6,15	courtroom 42:7,23	cross- examination 12:23 79:11
16:12 119:12	51:11,13,19	48:22	cross-examine 93:7
country 10:6 23:10, 18,21,23	52:10 53:21, 24 54:4	courts 12:18 33:2	cross-talk 90:7
30:6 60:9	55:4,21	39:21 41:22	crosstalk 90:9
113:7 120:22	56:2,6,11	44:25 47:7, 10 55:13,16	crowd 14:8 17:17
country's 40:3	58:18 59:18	60:11 63:2	26:9 29:10
County 61:6	60:4,7,10,15	70:2 71:22	30:18 34:10, 11 35:1
couple 83:20 91:13	61:12,14,19, 22 62:4,7,8, 17,20,21,25	76:13 77:7	37:25
102:8 104:3	63:3,12	111:14	crowds 85:11
105:21 112:4	64:2,18,24	covered 117:1	crudely 113:9
115:19,24	65:1,7,17	crap 25:24	
	66:1,5,11,15	crazies 116:3,4	
	67:2 69:1,3, 14,20,25	crazies' 115:25	
	70:1,7,11	crazy 107:20	
	71:2,3,5,8, 12,17 72:10, 14 75:22	create 63:11 72:8	
	76:21 80:11	84:12 108:16	
	82:3 86:1,12	112:12	
	87:17,21,25	created 37:15 111:18	
	88:20 96:11		

crush 93:13 94:17	87:13,18 91:1 107:10	decision 69:2 110:20 112:6 114:19 118:4	definitions 13:7 40:25 101:14 107:15,16,17
crushed 14:10	108:24 112:16 118:2 121:15	decision- makers 77:16	defy 120:15
culminating 9:15	days 103:21,23 107:4	decisions 100:22 114:17	Delahunty 11:20,24 12:11,22 13:12 16:4 20:2,3 21:3 40:13,21,25 42:18 43:9 96:5 97:20 112:1
curated 66:19 85:21 87:6,7	DC 22:11 33:18 105:4,11	declaring 65:3	Delahunty's 112:2
curation 86:10	dead 112:3,5	declined 62:21	delegates 50:10
curiously 16:21 18:22	deadly 108:11	deep 107:18	deliberate 35:20,21
cut 7:23	deal 28:3 35:18 80:13	deeply 49:1	demands 30:10
<hr/> D <hr/>			
Daily 27:14	dealing 22:19 60:25	defend 42:1,2 61:3 79:14 116:5 121:1	democracy 112:17 113:4
danger 14:23	deals 27:15	defendant 75:23	Democrat 79:7
dangerous 40:15 120:4	debate 89:18 111:3	defense 35:25 43:16, 17 63:9 75:22,23 116:20,23, 24,25	democratic 50:19
Danny 13:19 14:7	debates 40:24	defenses 39:9	Democrats 23:20 72:23
date 71:14	Debs 69:18	defer 11:23	demonized 74:10
David 27:13	December 22:14 28:17 33:12 38:22	deferred 49:15	deny 65:1 99:19
Davis 21:24 22:4	decide 8:7 44:25 45:1 55:18, 22 62:14 70:18 108:1 113:12 117:21	define 116:4	Department 35:25 116:20,22, 24,25
day 13:23 16:8 19:1 25:21 26:21 27:5 29:13,20 30:2 31:6 32:4,17 34:15,24 35:15,19,22 37:8,19 38:14 40:8 58:19 59:3, 16 68:4 70:12,21 74:11 81:9	decided 38:16 39:11 55:5 62:24 77:3 78:6 114:22	defined 108:15	deprive 119:18
	decides 45:24 48:24	definition 11:21 13:2, 16 16:25 19:20 20:14 106:21,22,23 107:5,20 119:21	Deputy 7:5
	deciding 42:24 48:18		describe 70:24
			described 46:17 88:10

description 112:22	10 107:5 109:23	discovered 47:20	disqualificat ion 20:12 41:15 45:1,23,25 46:3 47:19 48:3 97:4,19 110:11 112:25 118:11
desecrated 120:10	differs 106:22	discretion 46:12 56:17	
deserved 25:21 38:2	difficult 92:17 103:6	discretionary 56:20 58:3	
deserves 87:10	direct 49:23 58:18, 19 59:3	discuss 68:15	
designed 76:3	directed 78:12,14	discussion 8:10	disqualified 10:8 46:22 48:5 49:7 50:1 51:12 52:9 53:3 54:14 62:16 99:8,24 119:2,4
desperate 38:9	directing 52:11	disdain 38:20	
destroys 104:4	directly 40:7 41:9 69:24 70:3,4 78:19 84:14	disenfranchis e 51:17	
determination 46:18	disability 45:10,22 47:5 48:8	disenfranchis ing 48:6	disqualify 45:11 97:2
determination s 80:1 109:10	disable 118:12	disfavored 51:18	distinct 57:21
determine 58:13 63:21 64:18 70:24 77:10	disables 45:11	disgust 93:23	disturb 15:19,24 16:2
determines 52:25 57:10	disagree 32:5 50:2 80:9	Disloyal 97:1	division 55:4
determining 56:20 59:22	disagreed 81:12	dismiss 65:2 111:20	divisions 72:4,9 76:17
develop 75:16	disagreement 110:23	dismissed 61:7 62:8,19 70:3	do-over 45:17
developed 37:24	disagrees 83:8	disparate 106:7	doctrine 118:5
devote 77:7	Disapprove 59:15	disposed 55:12	document 9:21,22,24 86:6 117:1 119:10
dictator 104:19	disavowed 68:20	disposes 45:18	documentation 116:13,17
dictionary 13:7 40:24	disavows 91:7	dispositive 111:5	documents 75:16,17 78:25 79:3 116:23 117:2
difference 34:15 100:14	discern 103:19	dispute 10:21 11:6 20:1 32:2 41:17,18,20, 22,24,25 42:2,6	doing 15:12 29:3 32:14 36:5,6 87:3 99:4 114:18
different 24:2,6 30:1 34:20 38:18 42:7,23 63:9 71:13 83:1 95:9,10,15, 18,21 96:8 97:8 100:4,	discharges 98:11	disputes 55:19	
	discourse 92:10,13,15, 17		

Donald 6:8 10:7 27:12 31:24 62:14		election 22:19,22,23 23:20 28:17, 20 29:1 32:22,23 33:1,7,9 37:14 38:6 45:2 48:19 49:9,18,21 51:6,8 52:6 53:13,16,21 54:6 55:1,5, 8,9,11,17,23 56:12,18 57:4,7 58:4 60:13,19,20, 24 61:13,15, 20 62:9,17 67:12 71:25 83:8 84:16 110:5 113:4 120:7,20	19:3,6 23:8 24:16 29:5 32:16 33:20 85:4
doors 18:6	E		embodies 120:16
doubles 28:25	Eagle 102:23		embody 71:6
doublespeak 92:3	earlier 35:11 37:10 86:7 106:19 118:6		emerging 70:9
doubt 16:11 29:12 35:15 112:23 113:2,3	early 20:13 40:23 75:8 111:16		emphasize 57:5 61:23
drafted 108:24	earth 24:21		employment 44:4
drafting 21:15,18	easiest 114:8		empowered 55:17 71:11
drawn 113:15	easily 13:15		enables 120:16
drilled 83:15	East 18:4		enacted 50:23
due 56:5 60:2	easy 9:20	elections 46:9 50:17 54:25 57:16	encircling 17:22
Duke 27:13	edited 66:20 81:16 85:21 86:6	elector 33:14 46:14, 19	encourage 44:11
Dumb 93:8	editor 99:18	electoral 9:17 15:21, 25 16:12 33:15 34:24 46:21 55:3 84:23 103:20 119:12	encouraging 24:22
Dumber 93:8	effect 30:17 31:16 33:6	electorates' 53:8	end 8:23 11:7 16:8 29:21 64:3 68:4 70:12,21 81:9 87:18 100:24 111:12 112:16 114:4 118:6
duress 36:12 37:15	effectuate 53:13	electors 44:21 46:10, 11,16,20 55:3,6	ending 121:8
duties 56:15 61:15 78:22 98:2, 11,12 99:2,7	effort 80:12 93:7	element 10:19 11:4 19:17	endorse 67:2
duty 12:2 40:2 52:8,14 53:22 54:1, 5,8 56:25 57:19 61:10 62:11,13 78:21,23	efforts 60:16	elements 10:14	endorsed 83:25 84:4
	either 11:6 25:3 31:10 39:13 50:11 58:5 61:13	Ellipse 14:3 16:22	enemies 96:3
	elect 50:5		enforce 57:20 61:4, 5,10,21
	elected 40:15 42:14 45:16 47:20 52:22		

63:23	entire	105:15,16	excluded
enforceable	117:14	evidence	51:14
55:7	entitled	12:3,6 13:1	excluding
enforced	51:5,6 53:4	21:14,17	47:25
109:8 120:17	57:3,5	30:16 32:15	exclusion
enforcement	entries	37:23 40:18	52:11
18:3 31:12	6:10	41:17 47:4	exclusively
35:24 36:1	enumerated	49:12,16	41:3
63:21	56:15	54:22 58:11	Excuse
enforcing	episodes	66:9,15	67:23
47:8 120:14	25:8	67:22 68:19	execute
engage	equal	69:4,8,20	42:4
16:10 20:3	64:19,21	72:5 75:13	execution
21:5 43:25	79:1 95:8	76:10 80:3	11:19 16:14
95:7,8,14,	101:7	81:11,23	executive
15,19,20	equipment	82:1,2,3	39:22 98:7
96:5,7,21	17:3,5 18:18	83:22 84:13	exempt
97:3,7,9	106:5	85:7,8 86:9,	40:14
98:21 99:3	equivalent	10 88:19	exercise
100:16	66:6	89:8,9,10,	112:7
101:7,17	Eric	11,12,15,16	exercises
engaged	6:13 25:7	95:3 99:13	16:11
9:12 14:19	escalated	102:20 104:6	exerting
19:17 31:20	30:20	105:10	38:21
38:12 70:17	escalating	106:12,13	exist
72:19 119:8	15:7	108:8,9	32:2 76:22
121:2	essentially	113:14,22	102:25
engagement	84:23	exactly	existed
39:20 40:6	esteemed	39:2 81:5	11:25 47:5
engages	117:7,12	117:25 118:9	exists
46:5	Eugene	58:20 59:3	45:25 46:3,5
engaging	69:17	examined	expect
11:13 19:21	evenhanded	75:11	10:24 48:23
22:7 32:6	71:5	examples	experience
39:4 114:11	event	99:14 107:25	88:19
ensure	18:25	exception	expert
16:12 59:13,	events	44:4,7 98:24	11:14,20
14 64:21	13:15 31:25	exceptions	12:20,24
ensuring	everybody	44:3	24:9,10,13
10:5 52:1	9:4 121:7,10	exchange	43:8 96:14
59:21	everybody's	29:14 89:18,	expertise
enter	97:22	22 110:24	24:14
52:10 65:2	everyone	111:24	experts
entered	48:22 68:18	exclude	12:6 96:9,
18:5	73:17 77:24	47:1 51:20	13,14
Enterprise	80:17 89:2	52:15,19	explained
43:5	92:23 104:17	54:17	24:23 29:6

explaining 61:7		19	far-right-wing 26:16
explains 21:20 40:13		failing 54:18	fastest 105:21
explanation 30:14 36:9 118:19	F	fails 52:20 53:5 103:11	father 74:8
explanations 87:16	face 26:2 86:13, 16	failure 104:5	fault 90:16
explicitly 43:11 44:10 62:2	faced 63:2,4 75:8	fair 50:18 71:4,5 77:15	favor 113:4
explore 86:11	fact 11:8 15:19 16:2 18:13, 25 19:2,4	fairly 70:8	February 25:23 26:1
express 38:20 53:8, 14	24:12 25:11 30:12 31:4 36:2,23	fairness 79:1	federal 12:18 36:1 47:12 51:1, 10 53:12 54:10 55:12 57:13,18 110:2
expressed 51:15	45:20 57:24 66:25 71:23 72:13 73:4, 5,18 74:13 77:1 78:7,13	faith 77:6	Federalist 76:4
expressly 56:9	79:12,19 80:19 84:4, 11 85:8 86:1,15 89:16,20 92:5 99:19 105:3,9,19 107:15 109:1,10 111:9,10 113:11 118:16	faithfully 42:4	felt 66:2
extensively 63:6	factious 76:5	faithless 46:14	festive 19:3
extent 32:7	facts 30:8 74:14 75:15,16 77:22 81:13 83:24 118:22	fake 33:13	fide 58:7,13,23
extra-statutory 56:21	factual 82:1,2 111:19,22 112:13	fall 99:6	fight 17:14 22:14 23:9,21,22 24:19 93:1
extreme 23:6 91:18	fail 36:18,21 87:21,24	false 84:17 90:4 92:19	fighting 17:17 75:3
extremism 24:10,14	failed 61:17 67:12,	family 74:8	figures 83:25
extremist 24:14 25:1 26:16 27:23 29:7 86:23		fan 12:10 74:3	filed 60:22 62:7 65:24 67:18, 21 69:24 107:9
extremists 18:2 24:11 68:16 84:1 88:9 92:16 93:6 94:7 95:1 117:16		far 21:10 68:16 76:14 82:17 86:22 88:23 91:18 92:16 94:7 95:1 113:19 116:11 117:4 118:3	files 33:3
eyes 71:14 77:17 97:22		far-reaching 46:16	fill 113:24
Eyewitness 106:13		far-right 25:1 27:23 84:1 88:9 93:6	final 38:9

finally 15:10,18 17:24 37:1 43:8 44:24 47:15 48:2 70:11 118:14	10:15,19 12:22 16:17, 24 20:8 25:14 31:9 32:8 40:13 43:16,22 44:1,3 45:14 46:1 49:13 70:25 97:7 101:22 118:24	89:4 folks 14:2 86:5 92:25 follow 66:11 107:7 followed 82:9 following 6:2 follows 105:1 force 11:17,18 39:23 107:4 108:16 foreign 119:23 forever 37:8 forget 9:20 forgot 37:10 form 71:6 109:12, 15 110:2 forms 45:3,6 formulation 90:13,15 96:8 97:11 98:22,23 forth 11:14 99:5 111:22 117:15 forward 48:24 78:11 111:10 Foster 94:14,17,21 found 12:19 38:13 39:1 108:7 foundation 67:8,9 68:5	founder 27:14 founders 120:4 four 10:13 39:6 four-month-long 38:12 Fourteenth 9:23 12:10, 16,21,25 39:3 43:24 49:6 51:13 53:4 54:14 57:21 61:5, 11 63:4,10, 17,20,23 96:1 101:2, 3,23 110:10 112:3 119:3, 5,13 fourth 10:17 25:16 47:4 Fox 32:23 fragility 9:21 framers 21:22 45:17 framework 63:3 101:5 111:13 framing 13:7 41:19 frank 66:13 frankly 66:20 68:18 77:22 91:21 93:3 95:22 104:4,7 113:6 fraud 22:19,22 23:4,24 24:1
find 62:25 85:9 102:1,12 107:16	fits 29:5 37:4 117:16 five 25:9 117:19 five-day 66:9 70:18, 21 112:8 five-year 25:2 37:4 flag 17:14 flagpole 87:2 flagpoles 18:14 108:13 flash 120:19 flesh 112:13 flight 8:11 flip 25:7 floating 92:9 flood 105:14 Florida 27:22 Floyd 28:5 focus 34:6 focused 22:24 49:19	finding 17:25 30:18 31:16 33:9 34:1 35:1 36:20 37:19 80:3 84:2, 14,15 116:9 findings 11:8 17:25 18:12 25:11 30:12 31:4 49:24 54:3, 15 63:14 66:25 67:2,3 69:4,5,7 82:1,2 83:24 84:11 115:10,12,17 118:16 fine 7:16 8:21 26:14 fine-line-drawing 16:11 finished 103:6 finite 56:15 fire 28:2 39:25 firearms 108:6,7 fired 79:7 84:4 first 8:2 9:11	

29:1 33:10	furthering	getting	34:3,8,23
34:18,20	19:25	64:12 80:13	37:11 39:12,
38:23,24	future	106:4	13,14,19
84:17	48:8	gig	43:17 45:4
fraudulent		34:7	48:9,23
30:8		girl	62:12 65:8,9
freaked	G	93:16	66:11 68:23
104:17	Gabriel	Giuliani	69:9 70:18
free	28:18 29:3	33:4 84:10	75:22 76:13,
43:5,20 48:3	garb	give	14 87:13
frequently	86:21	8:18 28:1	88:22 95:9,
54:23	gas	29:3 30:14	10,12 96:22
fresh	15:7 86:22	32:16 33:24	99:25 100:23
83:14	gave	44:22 46:15	102:22
friend	20:25 22:2,	57:19 75:2	104:24
74:9	16	76:13,15	110:15
Fries	gear	86:12 87:10	111:10
13:5	17:5	102:22	114:14
front	general	104:24 105:4	118:2,20
26:25 92:2	20:9 40:22	114:14	good
104:23 120:8	41:8,10,24	given	6:4,19 7:1
front-stage	53:8 55:16	8:14 21:21	9:3 28:2
26:24	81:18 97:14	30:25 31:19	48:11 55:25
frustrates	103:18	34:4 46:19	74:6 86:4
50:14	112:18	117:23	93:19,20
full	General's	118:20	104:12
55:18 65:13	7:3	giving	110:14
81:10 113:23	generality	30:7 44:20	112:12
fully	112:21	glazing	Gore
48:23 52:21	generally	97:23	64:17
75:11 86:11	39:21	goal	Gorsuch
functioning	Geoff	15:18 21:21	46:23 51:25
46:25	6:18	68:16 75:25	gosh
Fund	George	God	66:3 102:15
43:5	28:5 119:25	113:24	governed
fundamental	Georgia	goes	9:20
12:1	28:20	25:20 118:3	governing
fundamentally	Gerard	goggles	57:16
49:2 95:14,	11:14 12:9	17:4	government
21 106:23	Gessler	going	76:3
furnishes	6:16,17	7:23 10:15,	governor
63:18	7:15,16,25	16,24 20:25	28:1
furtherance	8:5,9 64:12	23:13,21,23	Gowdy
19:23 31:1,	65:8,14,19	25:14 26:18	17:7
21 44:6	66:2,6 68:3	28:21,22	grabbing
furthered	114:17 117:8	32:9,11,20,	87:2
22:10 51:23	121:12	21 33:25	gracefully

highest 120:11	holding 10:8 45:7 49:7 51:12 113:4	hours 14:21 36:13, 19 37:6 70:22 105:22 106:2,7 112:9	imagine 7:12
highlighted 71:23	home 31:11 36:14, 19,22 37:7	House 16:1 19:13 20:21 26:22 37:22 71:9 73:10,14 83:13 99:23, 24	immediate 19:11
highly 81:14,18 85:21	honest 48:9 50:18 100:19	Houses 48:7	immediately 30:19 111:3
Hilary 58:20 59:3 109:6	Honor 6:12,16,19 7:2,16 8:13 9:3 10:10 11:11 25:12 39:11 48:12 49:2 50:4 52:5,17 54:20 55:14, 20,25 57:8, 17 58:16 60:10 61:23 64:15 65:6, 14,20,21 67:23 114:13,23 118:3 121:11	humorous 94:13	imminence 103:12
Hillary 26:8		hurt 28:22 35:7,8	imminent 14:22 44:17
hinder 11:18		hypotheses 80:1	impact 31:18
hindering 16:14		hypothesis 79:23	impeached 75:6
Hinkley 94:13,14		hypotheticals 91:20	impeachment 19:16 73:8,9 77:25 79:12 80:7
Hinkley's 94:21			implicitly 44:10
historical 12:3,6 13:1, 5 40:18 41:17 47:4 54:16 111:4			implied 89:5
history 9:11 12:24 25:2 47:24 69:15,19 71:1 96:12 119:1,7,10 120:22			import 77:13,18
hit 87:2	hope 8:8 24:2,3 33:13 34:21 95:13	<hr/> I <hr/>	important 58:16 68:25 80:18 83:14 97:24 99:11, 23 102:8 104:3,9 113:1
hockey 18:14	hoped 33:16	idea 18:23 85:17 116:13	importantly 53:2 74:19 75:11
Hodges 13:19 14:7 17:8,16,20 87:9 108:5	hopeful 96:10	identical 96:23	importing 112:9
Hodges' 14:14	Horace 69:16	identified 117:24	imports 110:4
Hofstadter 92:7	horrific 27:15	identify 87:15 92:21	impose 45:23
hold 38:10 52:25 53:7 120:24	hot 106:2	ignore 108:25 118:15	imposes 52:14
	hothouse 75:7	ignores 21:9 46:8	imposing 61:14
	hour 8:19 30:4 65:10 113:23 121:14	ignoring 30:16	impression 70:25
		illegal 21:5	

impugned 116:10	incorporates 61:10	innocent 30:14 36:9 118:19	intelligently 113:25
inaccurate 30:8	incorrect 11:3 59:8	inside 14:15 15:12 117:5	intend 114:24
inaction 35:20,21 39:20 40:5	increase 101:4	inspired 95:2	intended 36:4,5 38:8 89:10
incapable 10:5	increased 103:9	instance 77:2 78:10, 12	intends 44:14
incendiary 83:25	Indeed 19:15	instances 66:20 67:14 89:6	intent 19:24 32:3, 6,12,13,15 35:15 36:25 37:9,16 40:8 53:8,13 57:12 58:9 64:19 68:18, 21 91:12 102:17 103:17 104:2,6 105:2 106:15,16 109:13 117:20
incident 98:11 99:7	independent 57:19 62:2	instant 47:6	intention 114:16
incite 21:5,6 38:8 49:5 95:8, 14,16,19,22 96:7,21 97:7 100:5,16 101:6,7,10, 20 103:3,15 105:2	indicated 17:21	instructive 20:17	intentional 35:19
incited 49:14 72:25 73:12,19,21 78:1 97:3	individual 97:21	insufficient 21:16	intentionally 17:22 56:9
incitement 19:24 20:4, 18 21:16 22:6 32:13 67:20 73:12 78:7 102:5,6 113:19	ineligibility 48:1	insurrection 9:13 11:4, 12,13,16,22 13:6,8,13,16 16:5,17,19 18:9,11 19:14,18,21, 23 20:14 21:6 22:8,10 29:22 31:2, 21 32:6 39:4 43:25 46:6 49:5,14 67:20 68:12 70:17 72:19 73:1,13,19, 22 78:1,7 96:1,2 97:9, 10 98:20 101:13 106:19,21 107:14 108:1,12,15, 21,22 109:3 114:11 119:8 121:2	intentioned 71:5
inciting 97:8 99:3	ineligible 47:12 50:13	integrity 46:25	interest 42:8 46:24 52:1,4
include 91:1	inexcusable 108:17		interested 88:21,22
included 88:13 90:18 92:24	infer 61:19 62:4 68:18 117:24		interesting 82:24
includes 51:1 56:23 95:19,20	inference 38:7 117:23		interfering 16:13
including 19:24 22:4 24:10 42:15 51:24	inferences 89:13 113:15		internal 60:20,21
	inferring 85:17 104:17		interpret 12:2
	infirmities 77:20		
	inflame 34:10,11		
	inflaming 23:8		
	information 59:5,8 117:23		
	informing 80:7		
	initial 111:13		
	injuring 28:12		

interpretatio n 24:13 43:14 100:18 112:2	irregularitie s 23:4	66:11,12,14, 17,19,21,22, 23,24 67:6, 10,17,22	Jones 84:1 115:22, 24
interpreting 20:10 63:4	irrelevancy 75:13	68:6,24	Jones's 116:7
interprets 102:10	irritants 14:9 18:15	70:24 71:15	Jordan 82:25 83:6, 12,13
intervene 86:3	issue 20:18 42:12	72:12,21	Judge 51:25
Intervenor 8:20	47:23 49:16	73:24 75:21	judges 26:8 77:2 96:12
intervenors 6:7 7:13	60:8 62:18	76:23,25	judicial 71:10 77:5, 6,13
interview 82:20	63:4 67:12	79:5 82:22	judiciary 70:10
intimidation 34:22 109:3	70:18 72:2, 17,18,20,21	83:16,19	jurisdiction 54:4 55:16 69:23 70:13 112:7
introduced 81:12 89:16 104:11	82:23 83:8	85:4 103:4, 7,23 105:13 112:9	jurisdictiona l 8:10 69:11 70:5 111:15, 20 114:7
investigated 72:22 74:20	95:25 110:22	113:14,15, 17,21 115:9	jury 13:8 40:24 41:22 79:2 101:15
investigation 37:24 59:12 74:22 75:20 81:4	112:10	116:21,23 117:18,19	Justice 6:22 43:5 46:23 111:1, 4
investigation s 76:8 79:2	issued 9:8 60:15	Jason 6:13	justiciabilit y 100:22 110:22
investigator 78:17	issues 8:3,8 39:11 70:25 113:7	Jefferson 21:24 22:4	Justin 6:18
investment 48:17	issuing 114:19	Jena 7:4,5 48:13	
invoked 53:18	items 18:16,19	Jim 93:12 94:11	
involved 23:18 78:9 81:14 95:16		job 80:16 82:11 98:7 108:19	
involvement 29:22 94:24		Jodie 94:14,17,21	
Iran 75:1		Joe 90:16,19,23	
Iran-contra 74:20,21,25 75:4		John 20:22 94:13, 14,21 99:14, 16	
		join 21:1	
		joins 72:3	
		joke 27:21	
		jokes 28:14	
		jokingly 73:25	
	J		
	J6 37:20 114:25		
	Jail 43:20		
	Jane 6:21		
	January 9:16 11:4 13:15,18 17:24 19:12, 13 22:15,20 23:2 24:13 29:16 30:19 31:17 33:18, 19,23 35:23 36:20 38:9 39:15 48:21 49:5,14		
			K
			Kash 82:4 104:8 105:1,20

Katrina 29:15 104:8, 12 115:22	11 108:8 115:21 117:25 118:1,20	Kotlarczyk 7:1,2 8:17 48:11,12	101:12 102:14 109:3,25 111:10 112:24 118:17,22 120:6,17
Katzenbach 63:24	knives 18:13	Kramer 19:2	lawless 44:11,12,15, 18 114:12
keenly 88:21 89:3	Knock 25:24	Kremer 85:15	lawlessness 24:6,8,22 29:9 38:15
keep 8:24 9:1 50:1 60:16 115:6,7 118:14	know 10:23 12:8 14:11 15:12 16:8 18:24 23:3,7 27:1 29:9,10 35:21 36:25 58:2,24 67:11 68:16 71:3 72:1,14 78:15 79:1, 25 81:20 82:8 83:7 84:7,16 85:14 87:4,5 88:16 89:1, 6,12,17 90:13 91:3, 5,9,19,22 92:7 99:16, 23 100:25 101:8 102:19 103:8,24 104:25 105:3,23 107:14 108:18 113:8,9 114:3 116:2, 19 117:11 119:15	<hr/> L <hr/>	lawsuit 33:3 86:1
Keepers 18:5 88:10, 16	known 48:1	lack 54:16	lawsuit's 86:2
keeping 46:22	knuckles 108:10	land 120:12,17	lawsuits 33:5
Ken 15:23		landed 102:23	lawyer 19:15
Kentucky 20:23		language 24:17,25 41:12 61:17, 24 93:15 96:23 112:20	lawyers 33:3 58:2
kept 88:2		large 13:17 18:25	lead 33:4
Kevin 38:5		lark 35:10	leader 38:4 105:11
kicking 14:9		late 33:23 64:12	leaders 21:23 22:3
killed 26:16 28:22 104:12,14 109:1		laudable 111:18	leading 27:11 31:24 67:14 78:8 117:19 119:20
kind 25:15 116:19		launch 102:23	
Kinzinger 74:7 78:16 80:20		launching 96:1	
Kitsmiller 6:23		law 6:21,23 10:6 11:8 12:2,14 18:3 30:12 31:4,12 35:24 36:1 51:1,18 53:12,19 54:10 55:15 56:8 57:1, 14,18 63:3,7 65:5 96:10 98:14 100:17,19	
Klansman 27:13			learned 71:5 88:11
knew 25:1 29:19, 22 33:24 34:25 35:9 74:8 84:16 85:5,18 88:15 89:2,			leave 38:4
			leaves 49:16
			led 18:4 111:14
			left 12:9,12 20:8 21:14 27:9

35:16 44:17	limitation	lo	92:14 96:4
46:11 106:18	41:13	73:20	108:6 109:4
118:8	limitations	lobby	110:16 114:9
legal	60:12 63:1	37:13	looks
25:25 55:18	limited	logic	59:5 74:22
61:14 69:10	56:9 64:9	66:16	75:20 86:20
71:16 95:6	Lincoln	logical	93:19,22
legislation	108:14	92:17	looting
63:22	line	logistics	28:6
legislative	43:4 113:18	106:5	lose
57:11	lines	long	32:21
legislature	58:20 59:4,	14:19 33:16	lost
56:10	16 71:19	47:11 65:24	33:5 120:19
legitimate	91:6	92:10 93:16,	lot
46:24 52:1,3	lineup	25	25:10 31:8
length	73:16	longer	39:10,15
68:15 82:12	link	80:20 99:6	43:17,21
91:19 111:7	88:22	longtime	56:1,2 64:12
let alone	list	27:13	69:6 80:11,
43:1 57:19	56:15,17	look	14 81:23
letter	84:7,9	12:7 13:3	88:11,12
63:7 99:17,	listen	17:1 27:3	98:19 100:18
22 105:4	24:3 35:10,	32:20 35:15	105:23
112:3,5	12 90:18	37:17 39:7	106:17
level	listening	41:7 70:7	107:10,11
93:17	24:4	71:13 72:11	108:19 114:3
levels	listing	73:6,9,23	lots
72:8	53:15	75:9 76:2	73:16 79:2
levying	lit	77:16 81:25	81:22 92:24
20:18	39:25	86:4 87:15	101:21
liberated	literature	89:14 91:3,9	106:12
74:13	12:17	92:2 96:16	107:15
life	little	99:14 100:21	loudly
14:22 65:25	10:13 25:16	102:19,22	64:22
light	26:6 28:1	103:4 106:22	love
48:25 54:8	66:7 69:9	107:14	28:13 37:8
80:23	88:2 89:22	108:20	74:5 94:25
lightly	91:21 95:9,	109:12	lover
69:10	10 96:19,22	110:14,17,	74:4
lights	97:8,22	19,23 112:8	loyalty
27:11	101:12	113:9	78:19
likened	103:2,16	looked	luck
75:21	114:15	66:8 96:24	86:4
likes	live	117:13	
116:3	55:14	looking	
limit	lives	15:16 26:20	
68:6 101:4,5	77:8	72:17,18	
		73:20 80:17	

M	28:3 30:17 40:14,17 45:14 78:19 82:4,18 89:13 101:9 105:14 106:16 107:22 109:10 112:6 118:10,13,23	mask 86:22	meanings 100:14
made 21:5 22:21 52:17 79:13 80:1,6,9 82:9,21 83:18 86:6 115:21 118:4 120:4	makes 16:16,18 27:21 36:4 47:23 54:16 98:19,24	masks 15:8	means 9:14 16:9 32:18 54:22 58:2,24 59:1 85:22 95:15, 16 96:21 103:13 107:1 109:23 113:19
Madison 76:4		massive 38:24 109:2	
Madisonian 76:2		matches 81:5	
Magliocca 11:15 12:9 13:4,14 20:1,6,8 21:11 40:20 41:18 66:22 96:18,20 97:21 99:13 100:3 107:6, 19	makeshift 108:16	matter 6:6 9:7 48:18 49:1, 17,23 50:16 52:4 58:2 71:3,4 77:11 111:9 113:11 120:1	
Magliocca's 13:2 19:20 99:22 100:12,18	making 28:18 34:25 106:4 107:21 116:9	matters 34:25	meant 15:24 40:19 41:2 42:2 109:3 115:4 117:25
magnetometers 19:7 35:6 85:5,12	man 20:22 74:13	Max 104:10,11	mechanics 60:19
magnitude 38:24	manager 29:13	mayor 82:10 105:4, 22	mechanisms 9:24
main 80:16	mandated 9:17 15:20	Mccarthy 38:4	media 27:15
major 56:21 58:6 62:23 109:12	mandatory 54:5,8	me, ' 35:8	meet 13:15 52:21 53:5 54:18 93:13 113:17
majority 45:24 72:3 75:10,17 76:9 118:11	manner 46:11 71:6	Meadows 37:21	meet all 109:17,24
majority's 75:14	march 23:11 26:3	mean 24:5 58:22 67:12 81:20, 22 85:15 91:9 93:20 95:25 98:7 100:24 101:14,15 102:9,23 103:14 110:2 113:8	meets 52:23 113:20
make 11:8 21:20	marched 100:8	meaning 42:25 43:6 49:6,21 54:12 71:4 95:21,22,23 102:18 103:1 117:21	Melito 6:23
	Marine 91:2		member 72:25 73:5 74:18
	Marines 105:25		members 15:2 20:22 37:13 78:5, 8,13,14 79:12,21 80:5 81:13, 14
	Mario 6:14		men 10:6
	Mark 37:21		mention 30:13
	Martha 6:13		
	Maryland 20:25		

mentioned 99:15 115:24	milling 16:22 18:23	mob's 15:18 22:25	murder 28:5
merits 55:22	million 93:24	mobilizations 105:21	Murray 6:13
mess 106:2	millions 45:15 48:6	mobilize 36:2 104:18 106:6,10	N
message 29:4	mind 64:14 79:23 83:15 117:6, 13	mobilized 105:18	nail 113:11
metaphorical 24:20	minds 79:13	mobilizing 105:25	name 26:4 117:10
methodologica l 72:7	ministerial 56:15 58:2, 10 109:11	moderator 90:10,12	names 52:13 82:17 84:6
methodology 115:9	Minneapolis 28:5	Moelker 6:20	Nancy 15:15,16
methods 91:17,25 92:12,21	Minnesota 60:10,14,24 63:2 110:18	moment 15:6 67:23	narrative 75:17
Michael 6:22 7:2 48:12	Minnesota's 70:1	Monday 61:7	Nate 17:7
Michigan 27:23,24 28:1 60:11 61:6,16 62:6,9,15 63:2 70:2 71:2,8 107:7,8,10 110:13 118:3,7	minority 72:2 75:10, 11 76:9 77:23,24 81:10,11	money 75:1	Nathan 6:20
middle 85:11	minute 26:17	monumental 62:22	nation 55:9 71:8
migrants 27:21	minutes 7:21 8:17,18 23:8 30:23 64:9 67:25	Morgan 63:16,24	nation's 9:11
Mike 23:4,5,19 24:2 30:5 34:12 38:1	missives 83:5	morning 23:2 33:23 34:1 35:3	national 40:4 57:15 82:6,15,23 104:1,2,7, 13,15,18,22 105:5,17,19, 22,24 106:10
military 41:14 98:6 106:9	mixture 93:23	motion 99:19,20	native-born 51:22
military- style 18:5	mob 13:20 14:5 15:12,13,24 16:2,17,20 17:1 18:13 22:11 31:13, 16 33:11,18, 21,22 37:16 108:4 119:11	motivating 97:9	natural-born 47:13
Miller 104:10,11		motivational 71:20	naval 98:5
		move 59:19 95:17	necessarily 98:3
		moved 35:7	necessary 9:15 32:18 51:21 98:13
		movement 27:12	need 8:24 12:8 17:18 24:7
		movie 93:8,11	
		multifaceted 9:14	
		multipronged 32:17	

26:6 33:21, 22 35:15 36:25 45:17 50:4 54:9 67:23 96:15 119:15	nonelected 43:4	object 37:13	officer 10:20,25 13:19,24 14:7,14,18 17:3,8,16,20 40:11 41:2, 9,20,22 42:9,13,22, 25 43:6 98:5,6,16 108:5
needed 23:9 33:16, 18,20 63:22 120:12	nonsel- executing 111:2	objective 102:17,25 103:1,12,14 113:17	officers 15:1 17:13 18:19 41:5 42:15 43:3, 14 71:10
needs 11:23 34:8 108:22	nonsense 33:10	observed 91:10	offices 88:25
neglect 52:8	normal 39:24 95:21, 22,23	obsession 94:16,21	official 28:17 41:15 49:19 53:21 57:20 61:21 97:20,21 98:2,10,11 99:5,10,11
neglects 53:22	North 6:18 106:1	obstacle 38:17	officially 121:8
Nehls' 81:7	notarized 58:9	obtain 75:15,16	officials 40:15 42:15 43:4 55:9 58:3 60:19 71:25 97:18 98:1
Neil 46:23	note 69:23	obvious 36:17,21,24 73:4,5,18 79:19 81:8, 12	okay 7:14,25 8:12 9:2 65:11 68:3 70:14 84:19 85:5 86:3 96:9, 15,17 97:13 101:10 102:23 107:4 109:18 116:2
neo-nazi 27:13	noticed 62:9 71:10 109:7	obviously 43:2 60:7 69:11 74:19 99:20 114:3	Olson 6:13 25:7
never 21:20,24 40:13 42:19 51:22 55:2, 10 67:21 69:15 81:21 82:21 88:17 109:8 117:10 118:17 119:6,10	notice 60:23	occasion 104:23	omitted 57:14,15
news 25:20 32:23 120:19	November 22:20 25:18 121:15	occurred 96:2	
Nicaragua 75:3	number 6:9 13:4 45:3,6 49:4, 8 73:13 76:4 78:25 88:25	October 25:13 27:18 28:10	
nice 25:15 28:15	numerous 22:21 55:12	offers 11:20	
Nicolais 6:14		offhand 83:5	
night 32:23 61:7 62:8 121:10	O	office 7:3 10:8 34:22 41:13 42:4 45:7,8 47:3 49:7 50:5,13 51:12 52:22, 24,25 53:6 59:5,21 61:16 88:25 98:3 99:2 109:15,17 120:11	
nominating 50:11	oath 10:1,3,20,22 11:1 18:5 39:4,6 40:11 41:15 42:1,3 52:20 61:2, 3,9 88:10,16 119:9 120:10,25		
	oaths 44:6		
	Obama 119:24		

omnibus 62:1	Oops 45:16	organizational 16:25	pages 63:13 65:25
once 24:21 82:8 88:14 111:23	op-ed 20:23 43:10	organized 16:18 17:1 18:1 107:1	paid 43:8
one 7:17 9:23 10:17 11:1 12:22 16:4 17:6 20:2,22 21:2 23:1 29:15 33:5, 21,22 34:18 40:11 44:5, 17 49:4 53:5 55:17,19 58:21 63:14 67:23 68:11 69:24,25 70:1,23 73:1,2 76:5 78:14,23 79:18,20 80:5,7,18 83:23 85:9, 10,19 86:22 87:1,2,23 89:23 91:2 92:19 93:3, 12 94:10 97:11 98:1 99:17,23 103:18 104:17,23 105:13,20 107:6,13,25 108:7 110:24 114:24,25	open 77:17 79:23	original 41:3	Panhandle 27:22
	opening 8:23 10:12 22:12	originally 67:10	papered 70:23
	operation 112:24	other's 86:21	papers 50:7
	operative 78:7 79:18	outcome 33:6 51:16	paperwork 51:21 59:12, 14,22
	opinion 41:12 60:22 62:7 96:24, 25 97:13,14, 25	outcomes 51:18	paragraph 97:12,16,17 106:24
	opinions 20:9 40:22 63:13 67:5 97:1,15 98:20 112:19	outgoing 120:21	paramilitary- style 17:5
	opportunity 77:10 87:14	outside 14:14 85:3	paranoid 92:8
	oppose 107:2	overheard 82:8	pardon 93:14 101:23
	opposed 58:3 59:15	overruled 111:11	paren 109:17
	opposing 117:10	overt 19:22 22:9 31:1,20	parentheses 109:16
	opposite 34:9 118:9	overwhelming 18:3 32:15 104:7	Parscale 29:14,16,17
	oral 64:5	overwhelmingl y 72:13	part 21:7 40:7 57:13,20 64:20 76:25 77:1 91:18 99:2
	order 7:9 20:3 46:2 50:18 51:13 52:11 56:11 60:4, 15 64:18,24 65:3 79:3 98:13	Ownbey 63:16	part-time 105:25 106:6
one's 86:21		P	participate 51:5,7 53:9 54:11 57:4,6 95:15
one-sided 75:24		p.m. 6:2 29:22 36:15 65:15, 16 121:14	particular 54:5,8
ones 30:9 42:18 115:20		page 54:3 58:20 59:4,16 97:15 112:19	parties 32:5 49:15
ongoing 97:10 100:6	ordered 82:6		partisan 71:24 79:8
	ordinary 100:14		

party 7:19,20 8:1, 19 50:10 51:4 57:3,9, 15 58:6,12, 25 59:2 60:20,21 62:23 64:4, 7,25 109:7, 13	peculiar 47:17	people's 68:6	89:20 99:15 100:25 104:10 106:14 112:11 114:3 118:21
party's 56:22 58:7 59:14	peer-reviewed 12:15	pepper 18:15 108:10	petitioners' 55:22 67:8 84:18 86:4 107:11 113:13 118:24
pass 87:20	Pelosi 15:16	percent 73:11,14	Philip 20:24 99:15 100:7
passed 101:3,5,14	pen 15:8	Percenter's 88:11,18 91:23	phone 14:15
past 59:19 63:1	Pence 15:2 23:1,4 30:5 33:16, 19,25 34:2, 8,12,17 36:11 84:22 103:20	perimeter 85:3	photo 13:21 30:22 86:17
Pat 37:22	Pence, ' 38:1	permit 49:9	photos 17:6 87:7
Patel 82:5,20 104:8 105:1, 20 116:18	Pennsylvania 14:1 33:6	permits 47:1	phrase 91:22 95:9
Patel's 117:2	people 11:18 13:17, 25 16:21 17:4,18 18:23 19:1, 3,8 21:22,24 24:4 26:11, 14,22,25 27:2 28:2,12 29:10,19 31:13 35:7 36:19,22 37:18 38:5 39:3 44:5,22 47:6 65:4 68:17 73:13 75:2 77:2,6 84:7 85:16 86:20 88:13 89:15 90:11, 17 92:5,23 97:20 103:19 106:3 107:17 108:1,11 109:1 110:15 113:12 115:15 119:19,22 120:15,16	person 6:20 10:1,4 17:17 20:10 41:13 85:9, 10 86:3 94:15 97:2 109:24 110:1 120:10	pick 85:23 90:2,5
patriotically 24:21		person's 94:10	picking 106:20
pattern 29:5 37:5		personal 15:5 87:7 91:21	piece 99:12
patterns 91:17 117:14,15,23		persons 106:25	pieces 67:6
pause 86:12 94:1		perspective 52:6 59:1	Pierson 29:15 82:13 84:5 104:8, 12 115:22
pay 25:24 95:12		persuasive 110:15	pillar 88:7
peace 37:8 91:6 98:12		petition 65:2	Pigeon 13:24 14:18 17:3
peaceful 16:12 31:7 38:13		petitioner's 70:5	pinned 14:10
peacefully 24:20 120:20		petitioners 6:11,14 7:9 8:20 9:5 53:18 56:4 65:2 66:13 67:21 68:24 69:14 72:14 73:7 77:12 83:24 88:5	pitchforks 18:14
			pity 93:23

place 46:1,11 48:14 62:24 69:3 87:17 102:5,6 106:6 109:9 119:14	116:13 119:1,3	position 61:9 99:5	precedent 54:17
places 87:25	pointed 21:17 40:3 72:3,15 79:1	possible 102:1	precise 66:1
plain 61:17,24 102:18,25	pointing 26:21 41:3	possibly 24:21 71:6 88:5	precisely 25:1 119:14
Plaintiff's 61:8	points 13:4 106:4 111:12 118:23	post 38:22	precludes 47:25
plan 36:24 114:18,19	police 14:10 15:1 18:17,19 98:15 105:9	potential 120:8	predicate 39:17
play 23:13 33:19 48:24	policy 72:6	Powell 33:4	predictable 30:17
played 23:14 31:24 93:11 94:11	political 24:10,18 38:21 47:1 51:4 56:22 57:3,9,15 58:6,12 62:23 67:11 74:13 76:1 77:5 79:8 81:15 92:10, 13,15,17 105:11 110:21 118:5 120:18	power 9:14 16:13 32:18 38:10, 13,21 45:10 46:18 55:18 58:13 61:4 63:21 120:21,24	preliminary 80:1,7,9,18, 23
playing 14:12,16 15:14 17:10 19:9 27:4,6 35:13 37:3	politically 92:5	powerful 40:14	preparing 111:17
Plaza 18:3,5	politician 27:18 92:14	powers 40:1 46:9, 10,15	preplanning 17:21
pleas 38:3	politics 72:5 92:8,11	practical 46:25 50:16 58:1	prescribed 109:25
please 28:23 48:12 95:12	polls 32:20 119:20	praise 25:5	present 49:16 75:22, 23 76:11
plug 80:2	popular 120:3,18	praised 37:2	presentations 121:7
Podoll 6:23,24	popularity 120:5	praises 27:18	presented 49:12 55:19 67:6 73:24 83:1
point 18:12 19:19 34:7,21 54:22 58:15, 16 69:24 75:13 89:23 101:11 106:21 113:5	portico 17:12	prayer 15:8,9	preservation 98:13
	poses 49:2	pre-6 103:11	preserve 42:1 111:8 121:1
		pre-civil 20:16	presidency 43:15 67:15
		pre- positioning 106:3	President 6:17 7:19 9:12,18 10:19,22,24, 25 11:7 14:4 15:2,23 16:16 19:15 23:1,8 25:20 26:18 28:6, 13,19,22,24
		prearranged 102:24	

29:17 30:13, 20 31:14 32:12,24 33:25 34:2, 5,8,16 35:2 36:11 37:22, 25 38:1,3 39:25 40:7, 10,19 41:1, 19,21 42:5, 9,11,13,15, 22 43:2,19 47:19 48:4 49:4,14,25 51:11,12,16, 21,23 53:6 54:2,16 60:16 67:13, 19 68:12,18, 21 69:17,18 72:19,25 73:12,19 74:3,4,5,25 75:6 78:1 82:5,14,16 83:8 84:4,6, 8,21,22 85:18 88:23 89:2,7,17, 19,25 90:13, 15,21,23 91:12,13,16 92:20,25 93:6 94:6, 15,25 95:2 102:21 103:5,17,20 104:5,16,18, 22 105:10,19 106:10,15 108:14 114:10 115:14,21 116:7,8 117:5,16 118:20 119:9,11,14, 25 120:19, 22,23,25	121:2,5 presidential 11:1 42:3 43:12 46:9, 16 47:11 48:1,21 49:9 50:7,9,22,24 51:5,7,9 52:13,16,18 53:2,10 54:9 55:1,3,8 57:4,6,16 62:15 69:19 70:16 109:13 119:2 Presidents 43:12 press 26:14,20 27:11 91:2 pressed 117:6,12 pressure 103:20 pressured 103:19 pretty 48:22 68:25 69:12 83:14 90:14 101:13 106:8 116:16 prevent 11:18 38:13 82:15 105:1, 12 109:3 119:21 preventing 16:14 previously 30:9 primaries 50:8 primarily 80:21 primary 48:20 49:10 50:9,22,24	51:6,7,10 52:14,16,18 53:2,10,16 54:9,11 57:4,6,16 62:15,24 109:14 principles 50:21 60:11 prior 114:16 probably 7:13 8:1 12:8 14:21 76:14 88:12 119:22,23 problem 113:11 115:10 problems 31:8 69:6 71:20 procedural 72:8 81:8 111:15 procedures 70:20 76:21 109:9 proceed 7:24 proceeding 15:20,24 16:3 19:16 49:19 56:8 77:13 121:9 proceedings 6:2 49:12 121:13 process 47:1 48:23 50:19,25 51:10 52:18 54:9 58:1 60:2 76:19, 20,22 77:1, 5,6,8,9,14, 19 78:4	79:4,14 82:11 86:10 87:3 88:4 112:13 115:13 processes 78:9 proclamations 40:23 produce 51:16 produced 81:17 86:5 producer 85:25 production 81:17 professional 78:11 professionalism 121:8 professor 12:12 13:2,4 19:20 24:9, 23 26:24 29:6,25 31:21 35:17 37:5 40:3, 20,21 41:18 66:21,22 68:15,19 84:3 86:16, 17 88:8,22 89:5,21,24 90:3,6 91:8, 11,24 93:5 94:23 96:5, 18 100:12,18 107:6,19 108:4 111:25 112:1,2 116:6,15 117:5,24 professors 42:17 proffered
--	--	--	--

107:25	protests	purpose	qualified
prohibited	28:4	19:25 22:17	24:12 51:4
47:2	Proud	50:5,14	52:2,25 53:9
promise	18:2 28:9	51:23 107:1,	54:10 57:3
118:17	88:10,14	2	qualify
prompted	89:19,24	purposely	59:8
29:3	90:1,8,17,	85:3	qualities
prong	19,24,25	purposes	71:7
100:10	91:5,7,22	32:11 60:21	quality
prongs	92:22	67:11 101:7	71:7 121:7
100:11	102:14,21	pursuant	question
proof	prove	51:6 57:5	7:17 22:9
52:23	10:14 47:9	58:7	30:25 31:19
proper	94:17	pursuit	41:9 49:13,
74:22	proven	56:24 60:1	20 52:7
properly	10:4,15	64:23	58:22 60:7
58:9	118:21	push	89:23,25
proposed	provide	104:25	90:1,3,5
18:12 19:20	49:20 52:22	pushing	110:21
25:10 49:24	111:10	14:9 28:12	114:24
54:3,15	provided	put	115:17 118:5
63:13 83:23	59:6 100:4	9:6 10:10	questioned
107:6	provides	11:14 25:10	86:19
proposition	21:13 57:11	28:2 29:14	questioning
10:1 50:21,	provision	30:2 36:18	89:21
24 73:18	53:17 57:12	40:1 48:5	questions
prosecutor	61:10 62:18	69:7 97:6	49:3 70:13
75:19	provisions	105:4 106:23	quick
prosecutors	20:12 53:19	113:9 119:14	65:10 109:6
78:3 81:10	55:5 57:12	putting	quickly
protagonists	63:8	23:14	25:11 85:20
93:12	provoke		111:6
protect	95:16	Q	quote
30:6 40:3	public		33:20 50:25
42:1,2 46:21	11:17 28:18	qualification	51:4 57:2
119:9 121:1	79:16 84:21	41:11 45:25	59:4 60:17
protecting	88:25 116:5	53:6 58:1	61:8,16,17
28:14 46:25	publicly	110:11	62:10 63:22,
protection	27:12	qualification	23 64:20
64:19 120:12	pulled	s	77:2 84:20
protections	66:18,19	12:7 13:3	110:12
60:3 105:12	pun	52:21 56:21	quotes
protester	101:23	57:8 59:23	69:8
25:19	Punch	109:15,17,	quoting
protesters	26:1	22,24 110:7	93:14
25:14	punching	119:21	
	14:8		

R	112:22 119:6,14	redirect 25:7	related 52:24
raised 70:13	reasonable 38:7 112:22 113:2,3 117:22	reduced 88:2	relation 98:3
rally 26:8,15 27:20	reasoning 67:6 70:8 96:16	reelection 74:12	relationship 93:7 94:7,9, 10,20,22,24 95:4,5
ram 17:15	reasons 16:5 55:20 104:3 118:8	refer 43:12 63:12 67:1 115:25	relevant 61:15
ran 69:17,18	rebellion 96:3 97:4 98:4,8 99:3	reference 43:4	reliable 72:6,7
Raskin 6:21	rebuffed 38:3	referencing 10:18	reliance 88:3
ratified 46:4 47:6 108:24	rebut 75:13	referred 41:21 71:9 111:7	relied 66:25 99:13
reach 40:16	rebuttal 8:14	referring 43:13 80:5 89:25 109:12	relief 56:10 61:18 65:1
reaching 111:19	recall 25:6 61:25	refers 109:22	relies 40:25 41:18 91:9 113:14, 15,16
read 15:9 53:20 58:19,21 62:21 63:14 81:21 95:11	receive 76:24	refused 20:21	religion 38:14
readily 54:20 79:6 92:1	recent 43:5 46:13 86:1 100:22	refuted 70:4 83:21, 22 84:13	religious 88:17
reading 110:13	recently 62:6 107:8	regard 114:24	rely 66:21,22 68:21
ready 106:4	recess 65:15	regarding 42:11	relying 21:18 68:14 88:6 115:17
Reagan 74:25 75:6 94:15	recognize 114:8	regularly 41:21 83:25 92:6	remain 10:5 31:7
real 9:21 109:6 112:15	recognized 50:20 53:25 60:11 84:3	regulation 50:17	remainder 48:10
reargues 39:10	reconsider 114:7	regulations 38:25	remained 85:3
reason 32:14 43:18 77:6,7 87:19 88:20 94:16 96:5 98:23 99:13 105:6	Reconstructio n 96:23	reject 84:23	remaining 34:22 39:9
	record 57:17 60:22 88:24 111:4 112:13 117:11	rejected 47:23 102:10,14 107:11 110:18	remains 67:13
		rejecting 60:15	remarkable 34:15
			remarkably 30:11

remarks 49:23 115:7 118:6	97:13 103:4 113:14,15,17 114:25 115:9	requests 55:21	resources 48:18
remedy 47:18 63:19	Report's 113:21	require 11:25 20:15 21:21 44:5 45:14	respect 56:5 65:22 69:22 79:13
remember 17:16 20:21 28:16 37:8 74:23 78:5 89:20 94:14 97:19 99:18 109:14 112:16	reporter 27:19	required 48:4 59:21 101:25	respectful 106:1
remembered 83:5	reports 71:18,24 76:11 87:19, 20	requirement 16:25 18:10 21:1 22:5 32:6	respectfully 55:21 61:12 64:25
remotely 6:22	representative 15:4,22 57:24 58:12 59:20 74:7, 15,17 75:9, 18 78:16 82:25 83:6, 7,11 84:25	requirements 39:18 44:9 47:12 50:25 51:2,10 52:23 53:1, 12 54:19 57:13,22 110:4	respond 7:13
removal 42:12	representatives 71:9 73:10, 15 74:6 93:1 99:24,25	requires 42:4 45:20 48:20 60:1	responded 38:1
remove 45:10,21 46:2,6 48:2, 8	represented 71:7 78:14, 16	requisite 32:3	respondent 7:3
render 112:2	representing 73:14 80:25	Research 12:18	responds 111:3
repeat 36:8 63:7 95:13	represents 59:2 87:13	reserve 8:14,21 48:10	response 25:3,9 26:3 27:17 109:5
repeated 22:22	Republic 69:19	Reserves 105:24	responsibility 58:4
repeatedly 73:7 117:6	Republican 6:8 7:19,20 8:1,19 64:7, 25 79:7 109:7	residency 52:24 53:1	responsible 52:13 68:13
report 17:24 18:1 30:19 31:17 36:20 37:20 39:15 66:11, 12,14,17,19, 21,22,23,24 67:10,17,22 68:6,24 70:24 72:7 76:23,25 77:24 81:11, 18 82:19,22 83:3,16,19 88:1 91:12	Republican/ democrat 72:17	residential 57:22	rest 29:14
	Republicans 72:15,22 74:10	resisted 105:15,16	restraints 60:2
	request 116:25	resolution 52:4	result 44:14,18 118:1
		resolve 49:17 113:3	resume 96:14
		resolved 112:23 113:6	retweets 28:25
		resonate 24:25	reverse 115:4
			review 12:14 59:12, 13 111:17 114:6
			revised 6:6 34:5
			revisit 69:10

revisiting 114:16	rise 57:19		104:11
rhetoric 24:19,24	risk 35:2 48:5		109:15,22,24
rhetorical 118:23	58:15	<hr/> s <hr/>	111:2
Richard 27:14	road 28:12	sacrifice 80:14	scaffolding 18:17
rigged 32:22	Roberts 43:5	safety 15:6	scare 69:7
right 12:11 13:21	Roger 84:2,9	sake 58:19	scene 93:11 94:5
17:6,13	rogue 55:2	Sandinista 75:2	scheme 9:14,15
23:19 26:15	role 31:24 56:20	Sandinistas 75:3	33:14,17
27:8 30:21	57:25 59:21	sat 102:21	38:12
39:6 47:7,8	78:8	satisfy 20:12	scholar 12:13
57:19 68:1	rotted 67:9 68:5	saying 25:2,13,21	Schwarzenegger r 119:24
95:11 99:1	rotten 67:9	29:10,11,13	scientific 85:22
103:24	roughed 25:22	32:21 35:7	scissors 18:14
106:17 109:6	Rudy 33:4 57:25	37:7 85:15	scope 56:9 61:16, 24
114:17	58:20 59:3,	86:2 87:7	Scott 6:17
116:3,7	10 109:6	88:20 94:8, 19 95:20	Sean 6:12
117:11	rule 55:15,16	101:22,24	seat 99:25
right-hand 13:11	112:17 120:6	102:13 105:4	seated 65:17
right-wing 29:7 68:16	ruled 10:6 47:11	107:20	second 10:3 20:8
86:18,22	70:4 87:24	114:10	25:15 26:9, 11 31:10
88:23 91:18	rules 24:2,6 34:20	says 12:8 20:3	41:12 45:20
92:16 94:7	38:18,25	21 28:6,13, 21 31:6,7	49:20 77:21
95:1 117:16	57:15 58:7	42:13 43:6, 10,23 45:9	79:22 88:7
rightfully 100:24	rulings 9:8 101:15	54:3 57:1	98:9,18,24
rightly 63:17	run 33:12 58:15	80:4 84:2,16	99:12,13
rights 26:9 46:20	88:24 119:8	85:2 87:9,11	100:2 103:10
70:25	runner 120:8	90:15,21,22, 24 91:3,9, 11,15 92:3	113:5 119:17
rings 64:22	running 45:7	93:5,14,15, 17,18,19,20, 23 94:1,3,23	second-guessing 39:22
RINOS 24:4		97:19 98:1, 25 103:4	
riot 18:20 35:18			
36:21 108:21			
rioters 31:18			

secret 60:9 85:3	112:3 119:2, 5,13,18	sentiments 97:1	100:11
Secretary 7:4,5,12	120:2,9 121:9	separately 62:12,13	shifts 99:22
10:16 48:13, 16,20 49:12, 15,19,25	security 18:4 40:4 82:19	September 28:8	shocked 81:21
51:19 52:9, 12,15,19,24	see 8:22 19:7 21:14 25:12 28:2 103:6 116:17	series 63:25	shoot 27:21
53:10 54:4, 12,17,20,23	seek 50:14 52:4 74:12	serious 70:12	shooting 28:7
55:2,4,21	seeks 120:11	serve 50:10,13 51:23 60:20 105:24	short 38:14 107:23
56:4,11,16, 20 58:14	select 46:10 50:12	served 106:1	show 26:23 116:7
60:5,18	selection 85:23	Service 12:19 85:3	showed 37:24 82:2 83:2 89:21
62:1,10	self-defense 9:24	serving 78:17	showing 83:9
64:6,10 65:3	self-executing 63:8,18 110:23,25	set 30:8 71:13 77:17	shown 22:17 39:5 44:12
82:9 98:16, 25 100:25	selling 75:1	sets 56:24	shows 22:13 86:18 97:12 105:10 106:8,14
105:7 109:8, 9,21 110:3,6	senatorial 80:16	several 70:5	sic 58:21 59:4, 17 111:8
Secretary's 57:24,25	Senate 19:13 71:9 110:24	shallow 81:22	sicced 31:13 119:11
58:12 59:20	senator 92:25 98:6	shalls 56:15,25	side 13:11 17:13 21:3 70:22 87:5
61:1,3,25	send 23:5 36:12 103:20,23	sharp 76:16	sides 26:14
64:23 107:12	sends 37:6	sharpened 18:14	Sidney 33:4
110:18	sense 21:21 40:14, 17 41:10 45:14 118:10,13	Shenandoah 100:9	significant 20:9
section 9:23 12:10, 15,17,20,24		sheriff 98:15 99:1	signs 109:24 110:1
20:12,13		shield 14:10	Simi 24:9,23 26:24 29:6 31:21 37:5 66:21 68:15,
21:7,8,15, 18,21,22		shields 18:20	
22:2 39:3		shift 100:3	
40:10,15,18, 23 41:19		shifting	
43:11 45:7, 10,20 46:4, 15 47:6			
50:23 51:3,6			
52:7,17			
53:3,16			
54:14 56:8, 13 57:2,5, 11,20 61:5, 11 62:16			
63:1,20			
96:8,24			

19 84:3	slide	22 94:5,13,	22 103:1,6,
86:16,17	10:12 22:12,	17 100:13,22	7,10,23
88:22 89:5,	17	105:13	118:16
21,24 90:3,6	slides	111:14	speeches
91:8,11,24	10:9	sought	22:21 92:21
92:21 93:5	slightly	49:20 65:1	speed
94:23 111:25	111:7	86:3	9:7
116:6 117:5,	slippery	sources	Spencer
24	16:7	13:5 96:16	27:14
Simi's	slope	south	spend
88:8 102:12	16:7	20:11	43:17 80:11
similar	slowing	speak	114:21
48:14 61:7	28:11	9:4 64:8	spent
62:8,19	smacks	84:7 89:10	23:8 73:19
90:14 92:16	68:10	speaker	88:12
Simon	small	44:14 83:13	spin
60:14	68:17 112:10	84:9 102:10	74:15
simple	smart	speakers	split
45:24 118:11	96:15 107:19	82:17	7:20 73:11
simply	smells	speaking	spotlights
29:7 30:16	68:9	34:17 91:17	9:9
103:15	smiles	102:15	spray
single	94:1	spearheaded	18:15 108:11
120:21	Social	9:13	squatting
single-spaced	38:22	specific	27:25
66:4	solace	21:10 64:20	stabbing
sinister	102:13	103:16,18	87:1
94:12	solders	104:2	stack
Sisney	106:6	specifically	18:5
6:19,20	soldiers	52:7 64:2	stacked
55:25 64:2,	22:3 105:25	68:20 71:22	73:16 78:3
15	somebody's	82:16 83:6,	staff
sit	14:15 28:21,	15 84:8	9:6 37:21
20:21	22	85:13 91:6	56:2 77:23
sitting	son	96:7 100:16	78:11,14
29:17 119:11	20:25 100:8	102:10	81:11 104:24
situation	sorrow	speech	114:2
39:24 47:18	93:23	23:13,14,16	staff's
49:22 54:21	sort	24:16 29:5,	48:17
situations	50:18 67:11	21 32:16	staffer
54:24	68:10 69:7	33:24 34:5,	74:20
Sixth	79:16,22	10,14 35:16	stage
102:9	83:5 84:12	44:6,10,14,	26:25 27:2
size	86:21 88:15,	19,20,22	33:24 92:3
13:20	16 89:7	85:22 86:7	stage/back
skepticism	91:16,25	91:17,18,25	92:3
100:23	92:7 93:12,	97:3 102:11,	

staging 106:4	starts 25:13 28:6,7 32:21	states' 46:9,10	stopping 33:14
stalker 95:4	state 6:8 7:4,5,12 10:16 47:25 48:13 54:13 55:2,12,21 57:20,23 58:3 60:13, 17,18 61:15, 18,20 62:23 63:3 64:4, 10,18 98:6, 12,16,25 101:4	statewide 50:22	stormed 27:24
Stanbery 20:10 41:8, 24 97:1,13, 25 98:20 112:18	state's 46:24 53:11 64:6	stating 38:5	Stormer 27:15
Stanbery's 96:24	stated 49:11 50:15 51:25	statute 6:6 21:4,10 43:1 58:6 59:25 61:17, 24 62:1,22	story 83:1
stand 28:8,9 89:19 90:11,13,14, 22,23	statement 28:18 36:15, 18 58:9 98:19 109:13	stay 9:14 31:7 32:18 35:23 65:19	straightforwa rd 114:8
standard 11:11 32:12, 13 64:21 72:16 100:5 101:10 102:9,16,17 113:2	statements 27:3,13 81:23 101:8	stayed 85:12	strange 97:11
standards 11:14 60:2 64:23 69:10 71:16 95:7 101:19,20 102:3,4,7 112:14 113:18 114:10	states 9:12 10:20 11:1 23:2,5 30:7 41:1,2, 6,10,14 42:5,9,14, 16,22,25 43:3,7 46:12,16,20 47:10 50:24 51:2,3 60:8 61:10 63:12 64:17 69:16 70:10,16 71:1,10 84:24 96:3 100:6 101:1 103:21 107:3 119:7,11	step 32:17 70:12 101:6	stray 43:4
standing 65:19		stepped 33:24	streets 93:2
stands 9:25 38:20		stepping 112:8	striking 84:6
start 40:9 48:14 50:4 63:10 65:9,12 72:13 77:3 95:7 97:10		steps 106:9	strong 24:18
started 32:19 48:15 73:17 79:21 105:16		Sterling 28:18 29:3	struck 82:16 84:9
starting 6:11 7:9		Steve 84:2	studied 68:16
		Steves 18:24	stuff 34:10,11,16 82:4,18 83:18 86:13 93:2 95:11 103:11 104:20 112:9 116:9
		sticks 18:14	stupid 24:4 45:18
		stipulation 10:22	style 92:8
		stole 18:16	subject 41:15 79:4
		stolen 22:23 33:1 55:11	submit 61:12 62:17 70:15 71:2, 12 80:10,22 81:20 87:23 88:12,24 96:4 111:13 113:13
		Stone 84:2,9	
		stop 26:17 34:23 37:12,23 38:14	

submits 51:20	supermajorities 48:7	sure 8:10,16 9:4 55:14 78:19	22:5 23:18 24:7 26:9 44:6 65:10
submitted 34:13 42:11 58:8	supermajority 45:21 46:2,7 118:12	82:10 89:14 103:24 105:14 106:4,16	68:17 89:18 90:6 93:2 102:6 110:14,17,19
submitting 60:12	supersede 120:5	surge 30:18	taken 20:4 41:14 65:15 66:14 69:2 78:20 86:13 106:9 119:9
substantial 50:17 105:11 106:3	supplemental 60:23	surprise 73:22	takes 10:1 45:3,6 102:5 118:12
substantially 56:12 60:5, 24 62:19	supplementary 107:9	surprised 109:19,20	taking 20:15 21:21 37:14 39:6 45:22 75:21 86:15
substantive 59:23	support 10:1,21 11:2 13:1 31:12, 13 40:12 42:2 61:8,9 69:5,8 98:3 116:13 120:11	surprising 27:10	talk 10:15,17 28:3 32:9 39:19 66:7 68:23,25 69:9 71:15 92:23 95:6 102:7 103:2, 16 104:1,6 115:23
subtract 67:24	supported 36:4	surprisingly 31:15	talked 7:8 36:8 37:5 44:13, 15 73:23 82:8,14,21 88:8 91:19, 24 96:5 101:24 105:7 112:4,17
succeed 36:24	supporters 22:25 23:9 25:1 26:4 27:24 28:19 29:2 31:11 35:10,11 36:3,14 38:4,17	surrounds 28:11	talking 68:9 70:15 83:11 85:20 86:15 88:13 91:22 97:17, 20,22,25 108:5 118:1
successor 120:21	supporting 100:17,19	suspect 26:18 81:18 82:2 85:14 87:16	
sudden 89:2,3	supports 43:14 85:24	Swalwell 15:4 74:15 84:19,25	
suddenly 38:13	supposed 27:1	swear 52:20	
suffer 85:22	supporting 100:17,19	swearing 42:4	
sufficient 20:19 22:6 44:1	supremacists 90:10 91:4	sweat 80:12	
suggesting 21:17 42:21	supremacy 27:11	sympathies 97:2	
suggests 16:4 47:24 90:17	supreme 42:24 50:6, 15 53:24 60:15 63:12 64:17 69:25 70:1 111:1, 17 120:17	system 113:10	
suing 86:4,5			
suits 42:8		T	
sum 100:11		table 74:18 115:1	
summoned 22:10 33:11		tacitly 29:2	
summoning 37:15		tags 35:25	
		take 10:3 21:2	

talks 41:5 98:20	103:12	114:1,2,13	112:15
Tasers 18:13	tested 119:15	121:6,11,12	113:23 114:5
taught 117:10	testified 12:19 21:11 24:9 31:22 73:3 74:14 75:25 81:7 82:5,11,13, 25 84:5,19 96:20 115:15,16 116:6,24	thanked 27:12	115:7,20 116:17 118:7,8
team 59:11	testify 24:13 66:19 83:2 117:20	thanking 48:15	thinks 90:22
tears 80:13	testifying 17:17 96:10, 11	theft 23:17	third 18:22 25:15 68:14
tease 89:22	testimony 13:24 15:3, 22 17:2 35:3,5 39:17 74:12 79:20 83:11 87:7 88:8 99:22 100:12 116:12 117:3	theorists 92:6,9	thirdly 79:25
teasing 96:19 99:1, 20	tests 87:18,20,22	there'd 23:20	Thomas 20:24 99:15 100:8
technical 40:25	Texas 28:11,13	thing 20:2 21:3 23:19 34:23 41:16 85:1 91:8 98:17 100:2 103:24 104:12,13,15	thorough 69:12 112:12
technique 68:8	text 15:10 29:14 47:24 104:10	things 23:15 30:1,3 35:17 56:5 67:24 72:10 74:16,17 79:17 80:16 81:8,25 86:15 89:15 99:6,23 102:8 107:10,13 113:1 114:21	thought 41:25 88:16
teleprompter 27:8 34:13	texted 15:10	think 7:21 14:22 20:24 25:21 27:3,19,24 30:24 34:4 38:11 43:19 45:18 57:14 62:7 64:12 65:24 66:10 68:24 70:7,8 79:24 81:7 82:23 87:6 93:15 97:15 100:7 104:4 105:10 107:18 111:7,18,24	thoughtful 71:4
tell 26:25 36:19 85:16 86:22, 24 90:10	texts 43:13		thoughtfulness 9:7
telling 23:9,10 26:9 27:2 31:11 36:14 37:18 38:17 94:2 102:16	textual 45:22 46:19 118:8		thoughts 107:18
tells 32:25 36:24 119:15	thank 6:25 9:5,9 55:24 64:16 65:6,7,14,21 113:24		thousands 13:20,25 14:3
ten 8:17,18 30:23 64:9 103:21,23 107:4			threat 11:17 15:1, 17
tendency 72:1			threatening 28:20
termination 38:25			threats 14:5
terms 74:6 112:22			three 10:15 14:21 36:19 44:9 69:24 88:11, 18 91:23 109:14,22 110:8
test 80:3 87:24			throw 12:1 13:12
			throws 25:23

Tierney 6:13	49:23 60:8, 12 62:20	true 50:7	115:14,21 116:3,7
Tillman 42:17	72:18 95:22	Trump 6:8,17 7:19	117:16,25 118:15,20, 23,24
Tim 35:3	today's 32:12	8:20 10:7, 19,22,24	119:15,16,17 120:3,19,23, 25 121:2
time 7:18,22 8:14,21,25 9:6,11 10:3 13:7 21:5 23:6 35:9 41:19 43:17 46:3,5,11 48:4,10,17 58:19 64:4, 12 65:13,22 69:21 80:19 83:5 85:9 87:15 88:12 91:7 92:6,10 98:21 106:3, 17 110:12 114:1,2,21 120:4	told 30:1 34:2 35:5 36:22 37:21,25	11:7 14:4 16:16 17:14 19:17 22:14 23:8 24:17, 23 25:20 26:18 27:7, 8,12 28:6, 10,13,19,22, 24 29:6,9, 12,19 30:3, 13,20 31:1, 20,24 32:3, 16,24 33:20, 23 34:2,5,9, 17,25 35:2, 17 37:10 38:3,8,19 39:7,10,25 42:11,23 43:9,19,23 47:5,23 48:4 49:4,14,25 51:11,16 54:2 60:16 62:14 67:13, 19 68:12,18 72:19,25 73:12,19 74:3,4,5 78:1 82:5, 14,16 83:8, 24 84:4,6,8, 16,21 85:5, 18 88:23 89:7,17,19, 25 90:13,21 91:16 92:20 93:6 94:6,25 95:2 102:21 103:5 104:5, 16,18 105:10 106:15 108:8 114:10	Trump's 11:20 15:23 19:15 22:7 29:15,21 32:12 34:21 39:8,19 40:7 42:7 46:8 47:9 68:21 91:12,13 103:17 105:19 106:10 117:5,20
time-lapse 30:21	Tom 18:24	trumps 101:23	truth 30:10 38:22 77:10
timelines 86:12	tomatoes 25:24	truth-seeking 72:6	try 17:12 69:12 70:18 95:10
timer 67:24	tool 68:14	trying 67:21 74:15 107:16	turn 39:8 67:24 112:17
times 23:14 24:20 55:15 66:25 67:1 88:15 91:14 112:4 115:24 119:25	top 30:22 33:9 75:18	turned 45:4	turns 10:2 33:2
timing 81:17	total 100:11	TV 81:17 85:25	tweaked 10:13
Timmons 50:6	Train 28:10	tweet 23:1,7 28:1	
title 109:14	transcript 90:18 91:2		
today 7:4 10:16 32:10 39:12	transfer 16:13 38:13		
	transportatio n 8:2,8 106:5		
	trash 18:18		
	traveled 93:16		
	travels 93:13		
	treason 20:17		
	treated 49:1		
	tremendous 48:16,17		
	troops 82:7,15 105:14 116:11,14,16		
	tropes 27:16 29:7		

30:5,13,17, 20 31:5,9 33:12 35:22 36:7,9,10,12 37:7 39:2 103:9 106:13 118:15,20	110:24 119:1	unprecedented 49:22 54:21, 24 55:15 88:4 118:25	value 86:14,16
tweets 22:13,18,21 31:3,11,15, 17	unable 52:22	unqualified 45:16	variety 14:8
Twentieth 45:8 47:15, 16,17,21	uncontroverte d 58:11	unreasonable 51:16	veracity 115:11
two 12:14,18 14:21 27:3 31:3,15 36:13 37:6 49:3,8 72:15,22 74:10 78:22 80:19 86:20 90:24 95:14 97:18 98:1 99:23 101:25 102:2 104:7, 23 106:2,7 111:12 113:1 118:23 119:25	underpinned 70:23	unremarkable 9:25	versa 94:9 101:24
two-thirds 45:21 46:1,7 118:12	understand 10:16 50:3 108:17	unrequited 94:25	version 34:13
type 38:24 98:1, 9,10 105:12	understanding 41:1,25 108:23	untrustworthy 10:5 39:5	versus 40:21 72:5 73:16 77:5
types 77:19 92:20 97:18 98:1 99:10 100:14	Unengaged 103:3	unusual 78:3,4	vest 62:2
	unified 72:24	unworthy 39:5	vested 58:13
	unimpeded 29:24	upset 38:6	vesting 56:23
	Union 13:9 20:11	urge 95:17 99:5 107:7 110:14,17,19	vests 61:3
	unit 108:6	urgency 48:25	veto 80:7
	Unite 26:15	urgent 120:10	viable 67:13
	United 9:12 10:20 11:1 41:1,2, 5,10,14 42:5,9,14, 16,22,25 43:3,7 51:2 61:10 63:12 64:17 69:16 70:10,16 71:1 107:3 119:7,10	urges 65:1	vice 15:2 22:25 31:14 33:25 34:2,7 36:11 38:1 84:22 90:23 94:9 101:24 103:20
	universal 63:18	USA 30:9	viciously 116:5
	unlawful 19:25 38:12	usurpation 56:21	victim 95:5
	unlawfully 120:24		video 13:22 14:11, 12,16 15:14 17:9,10 19:9 22:15 27:4,6 30:22 35:13 37:3 81:16 87:10,11 90:19 92:24
	unobjected 35:4	v	
U			
U.S. 17:23 43:2 50:16 63:16, 24 92:10			

videos 66:20 85:20, 21 87:7	68:7 72:24 73:8,9 79:12 80:8,16,17, 24 81:2,3 83:13 113:7 119:19	68:21 85:11 101:11 104:1 105:8,9 107:17 111:8,20 112:17 114:1,2 115:23 118:22 119:22 121:6	93:16 95:3 96:9 99:12 102:13 108:13,14 113:6 114:8, 9
view 51:15,19 111:4			
viewed 75:24 78:7, 22 79:8 80:8 111:5	voted 72:25 73:1, 5,12 77:25 81:5 98:6		Wayne 61:6
viewpoint 73:15	voter 64:19	wanted 9:5 64:4 80:2 82:14 89:1 94:17 103:19,25 104:16,18 105:11,13 106:12	ways 14:8 74:14
violated 39:4 40:2 64:19 120:25	voters 48:6 50:12, 20 51:17	war 13:9,10 20:16,18 21:23 29:18 96:3 98:11, 17 99:7 100:6 108:15,25 109:4	weapon 13:21
violation 38:10	votes 9:17 15:21 16:12 23:3 33:15 34:24 45:15 46:21 55:6 80:18, 21 119:12	warning 35:23	weaponry 35:6
violence 14:5,6,25 15:1,16,17 19:14 24:6, 8,16,18,22 25:3,4 26:3, 4 29:9 30:20 34:22 35:2 37:23 38:15 44:11,12,15, 18 68:9,10, 11 82:15 86:18 87:4 102:5 103:5, 14 105:1,12, 15 106:15,16 108:3,17,19 114:11	voting 119:22	Warren 92:25	weapons 9:22 18:17 108:15,16
violent 9:15 25:16 31:18	wading 101:18,19	Washington 35:23 46:14	week 60:15 83:10
vis-a-vis 24:14	waited 11:7 35:8 36:13,18,23	wasting 46:21	weight 69:3 87:17, 25
volume 78:24 112:19	waiting 45:15	watch 17:18	well-
voluntary 19:22 22:9 31:20	walked 79:10	watching 35:24	developed 114:9
vote 15:25 46:1,7	Wallace 90:22	way 8:17 10:11 11:6 32:20, 21 33:17 36:16 38:21 43:23 44:5 54:5,8 62:25	well-known 13:6 84:20
	want 7:13 8:20 10:11 12:7 15:10 23:2 25:11 26:17, 23 36:8 37:23 39:8 40:9 41:7 44:24 48:14		went 15:7 19:5 62:3 95:3 115:9 116:7
	W		West 18:3
			whatnot 75:21 95:7
			whatsoever 103:18
			Whiskey 13:5
			white 26:22 27:11 37:21 90:10 91:4
			whoop 94:4
			widespread 55:10 89:11

wife 15:10	working 17:12 79:14	year 35:11 73:20
wild 22:14 33:12 103:13	works 7:16 33:18	years 12:13 38:19 39:7 75:19 117:19
Willard 19:5	world 101:18,19	York 42:8,11
willingness 83:2	worry 67:25	young 20:23 47:13 74:23,24 99:14,16
win 23:5,19	worse 14:15 34:25	
winning 120:7	wrapping 64:14	
withheld 22:3	writes 27:25	<hr/> Z <hr/>
witness 15:23 74:1,2 84:18	writing 97:3	zero 73:15,16 96:22
witnesses 29:15 66:18 73:23 75:10, 12,15,21 78:25 81:11 104:8	written 12:14 65:4	zone 105:14
woman 93:13 94:9	wrong 11:24 45:13 50:3 54:2 95:5 114:18 117:11 118:7,25	
won 33:5	wrongful 52:9 53:23, 25 54:7,11	
word 24:7,19 42:1 90:8,19 93:1 96:7 102:18	wrote 20:23 25:8 43:9 99:17, 21 100:8	
words 19:24 29:8 57:8 76:9 80:8 99:4 102:17,25 103:12,14	<hr/> X <hr/>	
work 7:14 8:11 65:23 80:14 93:8 114:3	xenophobic 27:16	
worked 74:7 112:11	<hr/> Y <hr/>	
workers 28:20	yada 86:8	
	yeah 8:11 66:5 87:8 107:23 116:15 117:5,13	