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

I. The Anti-SLAPP Statute applies to this proceeding.

Petitioners make three arguments that the Anti-SLAPP Statute does not apply to their case. Those arguments all fail.

A. President Trump has standing to bring this Anti-SLAPP Challenge.

President Trump is the real party in interest in this case and therefore has standing to bring this Anti-SLAPP Motion to vindicate the rights to which Petitioners are trying to deprive him. In fact, the Colorado Court of Appeals recently stated regarding the Anti-SLAPP statute that "The statute allows a person (*usually a defendant*) to file a special motion to dismiss" under the Anti-SLAPP Statute.[1] The Court would not have included the parenthetical if it agreed with Petitioners' argument that only a defendant may bring an Anti-SLAPP motion.

Petitioners agree that courts in Colorado "look to California case law for guidance in outlining the two-step process for considering a special motion to dismiss,"[2] and a recent California case is directly on point. *Iloh v. Regents of University of California* directly holds that the real party in interest in a lawsuit can bring an Anti-SLAPP Motion.[3] In *Iloh*, the Center for Scientific Integrity ("CIS") filed an open records request with the University of California, Irvine ("UCI") seeking emails and other information related to former professor

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

[2] *Petitioners' Opposition to Respondent Trump's Anti-SLAPP Motion to Dismiss* ("Response" or "Resp.") at n.1.

[3] *Iloh v. Regents of University of California*, 94 Cal. App. 5th 947 (2023).

Constance Iloh ("Iloh"). Iloh filed an action against UCI seeking a writ of mandate, declaratory relief, and injunction preventing UCI from fulfilling the open records request. Ultimately, Iloh amended her filing and added CIS as the real party in interest. CIS filed an anti-SLAPP motion contending that Iloh's case sought to intrude on its First Amendment rights.

Iloh argued, like Petitioners here, that CIS was not entitled to file an anti-SLAPP motion because it was not a respondent and was not a named defendant, despite being an identified real party in interest.[4] In response, the court analyzed CSI's role in the case and found that because CSI was the party who would be impacted by any decision in the case (i.e., its open records request would be denied if Iloh won), CSI was entitled to bring the anti-SLAPP motion:

> Iloh's petition for writ of mandate against the Regents of the University of California seeks to prevent the disclosure of Iloh's correspondences to CSI and block the Regents from complying with CSI's CPRA request. Because CSI's ability to access the requested documents under the CPRA is the focus of this lawsuit, CSI has a direct interest in the proceedings and may seek anti-SLAPP relief.[5]

Similarly, in this case, Petitioners' petition seeks to prevent President Trump from running for President and to punish him for his prior speech. He is the real party in interest here, and therefore, he is entitled to bring an anti-SLAPP motion.

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[4] *Id.* at 955.

[5] *Id.* (quotations omitted).

Petitioners rely on an older case from California with significantly different facts to argue the converse: *Foundation for Taxpaer & Consumer Rights v. Garamendi.*[6] In *Garamendi*, the petitioners filed a lawsuit to challenge a state law that they claimed improperly amended a popularly adopted statute.[7] Mercury insurance was not a named defendant in the case, but the petitioners mentioned Mercury numerous times throughout the petition. Mercury intervened to defend and filed an anti-SLAPP motion. The trial court denied the motion. In so doing, it noted that Mercury was not a defendant, and no cause of action was asserted against Mercury—but critically, the trial court also noted that none of the claims arose from any protected activity by Mercury:

> The court determined that petitioners' claims did not "arise from" Mercury's campaign contributions; petitioners' action did not challenge Mercury's political contributions but rather the constitutionality of Sen. Bill 841. The court noted: ""That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from' that activity. *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 [124 Cal. Rptr. 2d 519, 52 P.3d 695]."[8]

The appellate court affirmed, highlighting that the petitioners there had "satisfied the requirements of subdivision (b) of section 425.17…. [and] the complaint did not defame

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[6] *Foundation for Taxpaer & Consumer Rights v. Garamendi*,132 Cal. App. 4th 1375 (2005).

[7] *Id.* at 1380.

[8] *Id.* at 1384.

Mercury."[9] In other words, the appellate court, held that the case did not challenge Mercury, *i.e.,* Mercury was not the real party in interest.

Iloh and *Garamnedi* are not in conflict. The court in *Garamendi* was not faced with the situation faced by the *Iloh* court, where the intervenor is the real party in interest and the relief sought by the petitioners impacts the First Amendment rights of the intervenor. So *Garamnedi* does not control. Like the Court in *Iloh* – decided just six weeks ago – the *Petition* here seeks to negate President Trump's First Amendment rights, and he must therefore be allowed to use the anti-SLAPP process to challenge that effort.[10]

B. The Anti-SLAPP Statute applies to this proceeding.

Nothing in C.R.S. § 1-4-1204 or § 1-1-113 prohibits filing an Anti-SLAPP motion in a proceeding brought under it. The language in Section 113 that states the section is "the exclusive method for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of an election" does not foreclose an Anti-SLAPP motion, for at least three reasons.

First, the General Assembly passed the Anti-SLAPP statute in 2019, long after it passed the other sections. When it did so, the General Assembly is presumed to know that election law controversies were governed by those statutes and that the Anti-SLAPP statute

[9] *Id.* at 1390.

[10] *Iloh*, 94 Ca. App. 5th at 955.

would have an impact on them.[11] Accordingly, it had the opportunity to address how the Anti-SLAPP statute would implicate Sections 113 and 1204, including by expressly exempting those sections from the reach of the anti-SLAPP statute. It chose not to do so.

Second, the Anti-SLAPP motion does not supplant Section 113, so Petitioners' reliance on the language that Section 113 is "the exclusive method for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of an election" raises a moot point.[12] The Anti-SLAPP motion is brought within the strictures of Section 113. Indeed, in this case, the Court can address the Anti-SLAPP issues within the contours of the case because the briefing and the hearing will be held prior to the hearing on Petitioners' claims. Because the statutes can be harmonized, there is no actual conflict.[13] To the extent the statutes are in conflict, the Anti-SLAPP statute, as the most recently passed statute, controls.[14] As such, the Anti-SLAPP statute would take precedence and apply in this situation.

Petitioners' decision to file this strategic lawsuit against public participation seeking to punish President Trump based on his exercise of his First Amendment right to speak under

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[11] *Colo. Div. of Empl. & Training v. Accord Human Res., Inc.*, 2012 CO 15 ¶ 20 *citing Lenoard v. McMorris*, 63 P.3d 323, 331 (Colo. 2003).

[12] C.R.S. § 1-1-113(4).

[13] *De Jiacomo v. Industrial Claim Appeals Office,* 817 P.2d 552, 554 (Colo. Ct. App. 1991).

[14] *Id.*

C.R.S. § 1-1-113 and § 1-4-1204 does not strip him of his right to use Colorado's anti-SLAPP statute to vindicate his constitutional rights. The General Assembly has "declare[d] that it is in the public interest to encourage continued participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process."[15] And it passed the Anti-SLAPP statute "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law."[16] Petitioners want to punish President Trump for speaking about his belief that the 2020 election was marred by fraud and by Democrats' manipulation of the process to stack the deck against him. It is his right to make those claims—even if he is wrong. Petitioners cannot be permitted to strip him of his right to challenge their anti-free speech and anti-civil liberties lawsuit through an anti-SLAPP motion merely based on their preferred choice of procedure, especially when no procedural conflict exists.[17]

Finally, Petitioners claim that allowing an anti-SLAPP motion is antithetical to the speed they demand for this matter. But this Court has scheduled both the anti-SLAPP

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[15] C.R.S. § 13-20-1101(1)(a).

[16] C.R.S. § 13-20-1101(1)(b).

[17] Indeed, by bringing this case under the Election Code, Petitioners argue that President Trump cannot receive the due process afforded every other defendant, such as discovery and a full and fair testing of the claims through the processes inherent in the American judicial system. They continue to seek to handcuff President Trump's defense by arguing he cannot challenge their claims in an anti-SLAPP motion.

briefing and hearing in such a way to permit it to go forward without harming the need to move expeditiously. There is more than sufficient time for the Court to address the anti-SLAPP Motion and the underlying issues and for the appellate courts to review the Court's decisions.

C. The Petition is not exempt from anti-SLAPP.

Petitioners' claims are not protected by Section 8 of the Anti-SLAPP Statute, because it does not apply to this lawsuit. Section 8 sets forth three criteria, all of which must be met before a court may exempt a lawsuit from the Anti-SLAPP Statute. Those are: 1) "The [petitioners] do not seek relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member"; 2) the action seeks to "enforce an important right affecting the public interest and would confer a significant benefit … on the general public or a large class of persons"; and 3) "private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter." Petitioners fail to meet the second and third criteria.

1. *Petitioners seek relief that is not to the benefit of the general public.*

One of the conceits of the anti-Trump movement is that they are acting for the benefit of the general public in their opposition to President Trump. But Section Three of the Fourteenth Amendment does not prohibit someone from running for office—it prohibits someone from holding office, and even then, only if Congress chooses not to lift the prohibition. It is not for the Secretary of State of Colorado to make this decision, as

Petitioners contend.[18] The fact is that Congress is responsible for this decision.[19] They have the ability to decide if someone should or should not be barred from holding office by voting to remove any disability.[20] The premise of Petitioners' logic is that it is the Secretary of State's obligation to determine if President Trump is prohibited from serving as President based on his alleged insurrection. This is incorrect. That determination lies with Congress by the plain language of Section Three.

Second, Petitioners claim to seek to benefit the general public, but their position is actually opposed by a significant percentage of the population. According to a poll by PBS published on October 4, 2023, 47% of the public says they would choose President Trump over President Biden.[21] It does not benefit the public to ban from the ballot a candidate that 47% of American registered voters prefer. In fact, Petitioners' argument essentially puts this Court in the position of taking a political stance when it analyzes whether Petitioners meet this element by forcing it to decide if the public is better served by President Trump being on the ballot or not being on the ballot. This is not this Court's role.

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[18] Petitioners argue that the Secretary of State is going to violate her duties by putting President Trump on the ballot. *See* Petition at ¶¶ 446-47.

[19] U.S. Const. amend. XIV, § 3, etc.

[20] *Id.*

[21] Loffman, Matt, "These new poll numbers how why Biden and Trump are stuck in a 2024 dead heat," PBS.orgOct. 4, 2023, https://www.pbs.org/newshour/politics/these-new-poll-numbers-show-why-biden-and-trump-are-stuck-in-a-2024-dead-heat, last visited October 4, 2023.

Third, Petitioners argue that they are not "seeking any sort of personal gain or relief greater than or different from relief sought for the public."[22] As noted above, however, they seek to prohibit an individual supported by almost 50% of the American public from appearing on the ballot, based on their political preference that he not be permitted to serve as President again. This personal benefit to their political preferences outweighs the benefit to the public, especially considering so many people want President Trump to be president again.[23]

2. *Petitioners are not seeking to enforce an important right.*

Petitioners do not address this element, and therefore have failed to meet their burden to prove that Section 8 exempts their petition from the anti-SLAPP Statute. This ends the analysis.

But even if Petitioners were to address this element, they would fail to meet it. The anti-SLAPP statute states, "The action, if successful, *would enforce an important right affecting the public interest and would confer a significant benefit* … on the general public or a large class of person."[24] Instead of addressing whether their petition would "enforce an important right,"

[22] Resp. at 5.

[23] Loffman, *supra* n. 19.

[24] C.R.S. § 13-20-1011 (8)(a)(II)(B)(emphasis added).

Petitioners instead argue that their Petition seeks "to vindicate public policy goals."[25] This is not what the statute requires, and therefore Petitioners' argument fails on its face.

Regardless, Petitioners cite to *Stutzman v. Armstrong* to make this argument, and in doing so, they truncate a quotation—modifying it to make it fit their argument. When read in full, the quotation proves President Trump's point that they failed to identify a right that they are seeking to enforce. The quotation used by Petitioners is, "[t]he term 'public interest' in the statute is 'used to define suits brought for the public's good or on behalf of the public.'"[26] But the quotation actually says, "To be exempt, the action must be 'brought solely in the public interest or on behalf of the general public' *and meet the three conditions set forth in section 425.17(b).*"[27] Section 425.17(b) sets forth the same elements as Section 8, including requiring a showing that "the action, if successful *would enforce an important right* affecting the public interest, and would confer a significant benefit … on the general public…."[28] Petitioners omitted this key requirement from their quotation, obviously attempting to avoid having to prove that their Petition seeks to "enforce an important right," which it does not.

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[25] Resp. at 6.

[26] Resp. at 5 *citing Stutzman v. Armstrong*, No. 2:13-CV-00116-MCE, 2013 WL 4853333, at *8 (E.D. Cal. Sept. 10, 2013).

[27] *Stutzman v. Armstrong*, 2013 U.S. Dist. LEXIS 129204, *26

[28] *Id.* at 25-26 (emphasis added).

Despite the fact that Petitioners bear the burden of proof on this issue, they do not identify which "important public right affecting the public interest" their Petition seeks to enforce. Indeed, they cannot do so, because there is no right Petitioners hold that they are seeking to enforce.

Because Petitioners are not enforcing an "important right affecting the public interest," they fail to meet this element to show their petition is exempt from the Anti-SLAPP Statute.

II. President Trump is not disqualified under Section Three of the Fourteenth Amendment.

Petitioners fail to show that President Trump is disqualified under Section Three of the Fourteenth Amendment. Petitioners bear the burden of proof on this prong to show that their claims survive this Anti-SLAPP Motion by showing that there is a reasonable likelihood that they will prevail at trial. They have failed to meet their burden and therefore, their Petition must be dismissed.

A. Section Three does not apply to President Trump.

As set forth in *Respondent Donald J. Trump's Motion to Dismiss*, filed on September 29, 2023 (the "September 29 *Motion to Dismiss*"), Section Three does not apply to President Trump.[29] Section Three disqualifies a person from holding office only if he "previously [took] an oath, as a member of Congress, or as an officer of the United States, or as a

[29] September 29 *Motion to Dismiss* at 13-19.

member of any State legislature, or as an executive or judicial officer of any State . . . ."[30] Because President Trump was never a congressman, state legislator, or state officer, Section Three applies only if he was an "officer of the United States."[31] But as that term was used in Section Three, it did not cover the President. Furthermore, Section Three can disqualify someone only if his oath includes a promise "to support the Constitution of the United States,"[32] which the Presidential oath does not.

The September 29 *Motion to Dismiss* explains why the President of the United States is not "officer of the United States."[33] And President Trump's Reply in support of that motion, due on October 13, 2023, will explain why Petitioners' arguments to the contrary fail.

The September 29th *Motion to Dismiss* also explains how Section Three does not apply to all officers of the United States, but only those who take an oath "to *support* the Constitution of the United States."[34] As explained there, the Presidential oath, which the framers of the Fourteenth Amendment surely knew, requires the President to swear to "preserve, protect and defend" the Constitution—not "to support" the Constitution. Both

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[30] U.S. Const. amend. XIV, § 3.

[31] *Id.*

[32] *Id.*

[33] September 29 *Motion to Dismiss* at 14-16.

[34] *Id.* at 16-19.

oaths put a weighty burden on an oath-taker. However, because the framers chose to define the group of people subject to Section Three by an oath to "support" the Constitution of the United States, and not by an oath to "preserve, protect and defend" the Constitution, the framers of the Fourteenth Amendment never intended for it to apply to the President. If they wanted to include the President in the reach of Section Three, they could have done so by expanding the language of which type of oath would bring an "officer" under the strictures of Section Three. They did not do so, and no number of semantical arguments will change this simple fact. As such, Section Three does not apply to President Trump.

B. Petitioners' Response to the Anti-SLAPP Motion fails to meet Petitioners' burden that they are likely to succeed in showing that the violence on January 6, 2021, was an "insurrection".

Petitioners fail to show that they have a likelihood of success in showing that the violence on January 6, 2021, was an insurrection or that President Trump engaged in that purported insurrection. First, they improperly define "insurrection," second, they fail to show that the violence that day was an insurrection, and third, they fail to show that President Trump engaged in any purported insurrection or that he can be persecuted for his speech pursuant to the *Brandenburg* standard regarding incitement.

1. *Petitioners use the wrong definition of "insurrection."*

Insurrection, as it is used in Section Three, means the taking up of arms and waging war upon the United States.[35] As set forth in the September 29th *Motion to Dismiss*, the Court

[35] September 29 *Motion to Dismiss* at 21-24.

must look to the definition of an "insurrection" as that term was understood by the drafters of the Fourteenth Amendment. The September 29 *Motion to Dismiss* explains in how the term was understood at the time. It also notes that it would make sense to define an "insurrection" as waging war when the Fourteenth Amendment and Section Three were written with a specific context in mind—the Civil War which the nation had just completed not three years previously.[36]

The definition proposed by Petitioners proves too much. Their suggested definition would make *any* violent action taken by a group to hinder the implementation of a statute or a constitutional provision an insurrection and create a disability to serve in any public office. This definition would encompass much more than a true insurrection, or war, upon the state. It would include a multitude of actions that should not bar a participant from serving in elected office thereafter. Indeed, if this were truly the definition of an insurrection, there would be convictions for insurrection of the people who actually rioted that day. None have occurred to date.

Indeed, the punishment in Section Three is radical—it prevents a person from ever holding elected office again, absent Congressional action. This type of drastic disability should be reserved for only the most heinous offenses—such as waging war against the United States. The definition proposed by Petitioners encompasses a much larger group of

[36] *Id.*

people who would be disabled from serving in public office. The definition set forth by President Trump is more appropriate for this radical punishment.

2. *The "findings" of an insurrection by other entities and persons is irrelevant to whether this Court should find that there was an insurrection.*

Petitioners' citation to *Unites States v. Greathouse*, does not stand for the proposition that the January 6 violence was an insurrection. The full quotation from *Greathouse* is, "The existence of the rebellion is a matter of public notoriety, and like matters of general and public concern to the whole country, may be taken notice of by judges and juries without that particular proof which is required of the other matters charged."[37] This quotation does not stand for the proposition that statements by President Biden, *i.e.* President Trump's opponent, carry any weight. If it did, any President could disable his opponent by pointing to a speech prior to a riot of his supporters, call it an insurrection because the supporters broke the law, and disable that opponent from serving. Similarly, the January 6th Committee was designed to find as much fault with President Trump as possible. Indeed, Nancy Pelosi refused to seat the Republican members recommended by Republican leadership, an unprecedented breach of protocol. This Court should not accept such a politically and procedurally flawed document.

The statement in *Greathouse*, was made regarding the Civil War. There is a world of difference between the Civil War, which lasted for five years and cost the lives of over 600,000 Americans, and the violence on January 6, 2021, which was an hours-long riot. It

[37] *Unites States v. Greathouse*, 26 F. Cas. 18, 23 (C.C.N.D. Cal. 1863).

was a matter of "public notoriety" that the nation had engaged in a civil war and that the Confederacy had engaged in an insurrection against the United States. Here there is much dispute about how to describe the violence on January 6th. Simply because some people have described the events as an "insurrection" does not prove the existence of an insurrection in Court. Petitioners must do more than present one side of an intense political controversy.

The quotation from President Trump's attorney for the impeachment was taken out of context and does not mean what Petitioners want it to mean – which is evidenced by the fact that they chopped up the quotation to make it say what they wanted. The full quotation by Mr. van der Veen is the following:

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

In context, the sentence, "On that point, everyone agrees" modifies the entire previous sentence and not the final clause, which is: "Yet the question before us is not whether there was a violent insurrection of the Capitol."

3. *The violence on January 6, 2021, was not an insurrection.*

Petitioners attempt to paint a lurid tale of the violence on January 6, 2021, by citing to the January 6 Report. However, the January 6 Report is not admissible because it does not bear the indicia of reliability based on how it was drafted.[38]

Even if it were admissible, and the Court were to view the purported evidence it contains, it would not show an insurrection. It would show violence. It would show a riot. But it would not show an insurrection. An insurrection is the making of war on the United States.[39] The January 6 rioters stormed the Capitol, stayed inside for a few hours, and then they left. And, ultimately, Congress counted the electoral votes. Not a single piece of evidence shows that the rioters made war on the United States or tried to overthrow the government. Petitioners can show not a single instance of anyone being shot by the rioters. Petitioners cannot show a single instance of someone being stabbed by the rioters. And the only people who died at the riot and because of the riot were protestors. The sole police officer to die, did so of natural causes—a stroke.[40]

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[38] President Trump will be filing, next week, motions in *limine* and Rule 702 motions to prohibit inadmissible evidence that Petitioners seek to introduce. He also will object at the hearing to the introduction of evidence not addressed in those motions as well. Those are all incorporated herein by reference.

[39] *See supra, pp. 13-14.*

[40] Williams, Pete, "Capitol Police Officer Biran SIcknick died of natural causes after riot, medical examiner says," NBC News, April 19, 2021, https://www.nbcnews.com/politics/politics-news/capitol-police-officer-brian-sicknick-died-natural-causes-after-riot-n1264562, last visited October 6, 2023.

4. *President Trump did not engage in an insurrection and nor did he incite one.*

Even if the riot on January 6 were to be considered an insurrection, there is no evidence that President Trump engaged in that insurrection. Petitioners do not point to any specific actions that President Trump took other than speaking or not speaking. Petitioners do cite to caselaw that holds "engaging" in an insurrection includes "incitement" through speech.[41] To qualify as "engagement" a person must actually aid in a rebellion.[42] Yet again, Petitioners cite to all manner of purported facts, but not one shows that President Trump physically engaged in an insurrection or urged people to riot or storm the Capitol. Recognizing this failing in their proof, Petitioners attempt to weave a web of prior statements that built up anger and resentment to the point that the rioters then invaded the Capitol. But not a single statement urged this.

Petitioners' citation to Professor Simi[43] to argue that President Trump, over time, created the atmosphere that led to the January 6 violence does not work either.[44] All of these alleged bad acts were speech, and, as shown below, the Supreme Court has Professor Simi's

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[41] Resp. at 13-4.

[42] September 29 Motion to Dismiss, pp. 26-28.

[43] Professors Magliocca and Simi will be subject to Rule 702 motions which will disqualify them as experts. President Trump does not repeat that argument here but incorporates it for the Court's reference. However, at this point, President Trump will address their testimony as necessary.

[44] Professor Simi's testimony is inadmissible, as President Trump will show in his forthcoming Rule 702 Motion to exclude Professor Simi. That motion is incorporated by reference herein.

sociological theories.[45] Petitioners take eight pages of their brief to recite statement after statement after statement. They do not mention a single action President Trump took other than speech. And they can point to no statement that President Trump made that urged his supporters to engage in violence or storm the Capitol.

The Petitioners then move to President Trump's speech on January 6, 2021. They cite, again, different parts of the speech that they claim constituted incitement. Importantly, not a single one of those statements urged his followers to riot. And not a single one of those statements encouraged his supporters to violently storm the Capitol building. In fact, as presented in the Anti-SLAPP Motion, he specifically called on his supporters to be peaceful and let their voices be heard.[46]

In order to get past these failings, Petitioners make unsupported statements such as, "The only way the mob could persuade the Vice President to do anything was through intimidation and violence."[47] This statement has no support in the record and no citation. In fact, President Trump specifically told the people at the rally that they should be peaceful and let their voices be heard—and a rally outside the Capitol presumably can be heard inside the Capitol, and therefore could have been heard by Vice-President Pence.

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[45] Resp. at 15-23.

[46] *See, generally, Transcript of Trump's speech at rally before US Capitol riot,* Associated Press, Jan. 13, 2021, https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-mediae79eb5164613d6718e9f4502eb471f27, last visited September 22, 2023.

[47] Resp. at 27.

Finally, because President Trump purportedly did nothing to stop the violence, Petitioners allege he therefore engaged in the violence.[48] No legal theory supports such a finding, and Petitioners' only citation to support the concept that President Trump's inaction amounted to engaging in an insurrection is to the US Constitution provisions that he "take Care that the Laws be faithfully executed" and his oath.[49] They point to no caselaw or statute that defines such inaction as culpable, either legally or constitutionally under Section Three.

None of these actions included a call, explicitly or implicitly, to his supporters to riot on January 6, let alone to enter the Capitol to stop the counting of the electoral ballots. And no amount of argumentation can change this simple fact.[50]

C. The First Amendment prevents President Trump from being disqualified under Section Three.

1. *President Trump does not argue that Section Three is unconstitutional.*

Despite Petitioners' attempt to twist his arguments to their favor, President Trump has not argued that Section Three is unconstitutional. Section Three exists in tandem with the First Amendment, as it does with other parts of the Constitution. Just as a person's statements cannot be used against them unless that use comports with the First Amendment,

[48] Resp. at 28-32.

[49] Resp. at 28

[50] Amazingly, Petitioners suggest that President Trump is arguing that "he somehow [incited the riot] accidentally." Resp. at 32. President Trump vehemently denies that he incited the riot in any way, and the section to which Petitioners refer addresses the specific elements Petitioners must prove to survive this motion.

so is the government likewise prohibited from violating the Fourth Amendment to obtain evidence to prove someone engaged in an insurrection. And *Brandenburg* and its progeny set forth the test for analyzing such speech.[51]

2. *The First Amendment applies to speech implicating Section Three.*

Recognizing the impact that *Brandenburg* has on this case, Petitioners try another path to avoid it by suggesting the First Amendment does not apply to an analysis of Section Three, claiming the First Amendment permits a number of speech regulations.[52] Without citing to a single case that holds that the First Amendment does not apply to Section Three, Petitioners at most suggest that because the Courts have identified limits on free speech, this Court may exempt *any* analysis of Section Three from First Amendment protections. The argument fails for the simple reason that no Court has made this finding. Further, the First Amendment and Section Three do not conflict. Speech that meets the *Brandenburg* test of inciting violence can be used to determine if someone may be disqualified under Section Three.

This analysis does not change if the government is the employer, as apparently suggested by Petitioners.[53] First, Petitioners provide no evidence or law that holds that the President is an employee for purposes of Section Three. Further, Section Three also applies

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[51] *Brandenburg v. Ohio*, 395 US 444 (1969).

[52] Resp. at 41-42 identifying mandated oaths, fraud, defamation, true threats, and obscenity, among others.

[53] Resp. at 43.

to non-federal government positions, and the federal government is not the employer of state elected officials. Finally, the cases to which Petitioner cites do not stand for the proposition that President Trump's speech is not protected by the First Amendment in the context of speaking about such an important public issue as the election and fraud in the election.

3. *President Trump's speech did not encourage the commission of a crime.*

Petitioners make another run at saying the First Amendment and the *Brandenburg* analysis do not apply to President Trump's speech in this context.[54] Citing to *United States v. Rahman*, Petitioners note that the state may "outlaw encouragement, inducement, or conspiracy to take violent action."[55] The *Rahman* court, however, noted that the Supreme Court followed this logic to permit the prohibition "advocacy of concrete violent action," and likened that standard to the one in *Brandenburg*.[56] As the Supreme Court in *Yates* stated, and as cited by the *Rahman* Court, "[t]hroughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken."[57] Here, President Trump, at no point advocated that his supporters take concrete action other than rallying and protesting—and,

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[54] Resp. at 44-46.

[55] *United States v. Rahman*, 189 F.3d 88, 115 (2nd Cir. 1999).

[56] *Id. citing Yates v. United States*, 354 U.S. 298, 318 (1957).

[57] *Yates*, 354 U.S. at 322 (quotations and citations omitted).

particularly, he did not advocate that his supporters storm the Capitol and stop the counting of the electoral votes. In other words, President Trump's words do not fall into the exception to the First Amendment identified in *Rahman,* which therefore provides no succor to Petitioners.

4. *Brandenburg* prohibits punishing President Trump for the speech at issue in this case.

Finally, Petitioners attempt to analyze the *Brandenburg* factors in a way that it would not prohibit this action. They fail. Once again, relying on the January 6 Report, which is inadmissible,[58] Petitioners claim President Trump "summoned a mob, including armed extremists and conspiracy theorists to Washington DC on the day the joint session of Congress was to meet. He then told that same mob to march on the U.S. Capitol and 'fight.'"[59] First, whether there were conspiracy theorists is irrelevant, as it is not unlawful nor insurrectionist to believe in conspiracies. Otherwise, anyone who believed that President Trump colluded with Russia during the 2016 election could deemed be an insurrectionist. Second, as explained in the Special Motion to Dismiss, President Trump's use of the term "fight" does not mean physical "fight" but a metaphorical fight.

To get past *Brandenburg's* requirement of incitement to imminent action, Petitioners continue to rely on their expert's analysis of President Trump's words over a four-year

[58] *See supra,* n. 40 noting that President Trump will be filing a motion in limine to preclude admission of the report.

[59] Resp. at 46.

period to suggest that he was grooming his supporters. However, that is not what *Brandenburg* requires, and the Sixth Circuit has rejected this theory:

> Even the theory of causation in this case is that persistent exposure to the defendants' media gradually undermined Carneal's moral discomfort with violence to the point that he solved his social disputes with a gun. *This glacial process of personality development is far from the temporal imminence that we have required to satisfy the Brandenburg test.*[60]

Also, while Petitioners cite to a federal district court case to argue that President Trump's words could be an incitement to action, the fact is that Court got it wrong because it found that, while President Trump did not explicitly encourage the imminent use of violence, it was plausible that he implicitly did so.[61] But in fact nothing in President Trump's speech encouraged, explicitly or implicitly, the crowd to storm the Capitol building. As explained in the Anti-SLAPP Motion, President Trump gave a political speech and exhorted his followers to continue the rally. His speech is like those of other politicians who give speeches to generate emotion and connection with their listeners. And his references to Vice-President Pence did not encourage violence, nor did his exhortation to "fight." The speech, looked at in its full context, unambiguously urged his supporters to apply political pressure and to rally and protest—not to violently storm the Capitol.[62]

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

[61] *Thomason V. Trump*, 590 F.Supp. 3d 46, 115-118 (D.D.C. 2022).

[62] *Anti-SLAPP Motion* at 11-19.

III. President Trump's additional arguments show that he should prevail on this Anti-SLAPP Motion.

As noted in the Anti-SLAPP Motion, the arguments in this section are being fully fleshed out in the briefing on the *Motion to Dismiss* President Trump filed on September 29 (the "September 29 *Motion to Dismiss*"). President Trump incorporates those arguments into this pleading.

FOR THESE REASONS, the court should grant President Trump's Special Motion to Dismiss Pursuant to C.R.S. § 13-20-1101(3)(A) and also grant Donald J. Trump all such further relief as is just, proper or appropriate.

Respectfully submitted this 6th day of October 2023,

GESSLER BLUE LLC

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

Certificate of Service

I certify that on this 6th day of October 2023, the foregoing was electronically served via e-mail or CCES on all parties and their counsel of record:

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