DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, CO 80203	
Petitioners: NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN, v. **Respondents:** JENA GRISWOLD, in her official capacity as Colorado Secretary of State, and DONALD J. TRUMP, and **Intervenor:** COLORADO REPUBLICAN STATE CENTRAL COMMITTEE.	▲ COURT USE ONLY ▲
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PETITIONERS' OPPOSITION TO RESPONDENT TRUMP'S ANTI-SLAPP MOTION TO DISMISS

Table of Contents

Donald Trump summoned and incited a mob to violently stop the constitutionally mandated transfer of presidential power on January 6, 2021, and then hamstrung any coordinated federal effort to repel the mob. Spearheading a violent insurrection is not, as Trump would have it, "protected speech." Mot. at 2. Trump engaged in conduct that section 3 of the Fourteenth Amendment forbids, disqualifying him from holding any future public office.

But the Court need not reach the merits of Trump's motion because the Anti-SLAPP statute does not apply here. First, the motion is moot: to streamline the case, Petitioners have conceded to Trump's motion to dismiss their claim for declaratory relief, and, therefore, Trump lacks standing under the Anti-SLAPP statute to seek dismissal of the remaining claim asserted solely against the Secretary. Second, the expedited election procedures under § 1-1-113 are the "exclusive method for the adjudication of controversies" to which that statute applies, displacing other conflicting procedures such as the Anti-SLAPP statute. *See* C.R.S. § 1-1-113(4). Third, the Anti-SLAPP statute exempts public interest lawsuits, like this one, that seek no damages or other particularized relief for the plaintiffs.

The Court should reject Trump's motion on these clear threshold grounds rather than reach the merits of Trump's motion, to avoid triggering the right to any interlocutory appeal that Trump may file and that may disrupt the trial schedule of this § 1-1-113 proceeding. But should the Court reach the merits, Petitioners have made out a clear prima facie case.

Argument

I. Colorado's Anti-SLAPP Statute Does Not Apply

A. Trump Lacks Standing to Bring This Anti-SLAPP Challenge to Count I

The Anti-SLAPP statute permits a motion to dismiss "[a] cause of action *against a person* arising from any act *of that person*[.]" C.R.S. § 13-20-1101(3)(a) (emphasis added). Count I asserts a claim under the Colorado Election Code only against Respondent Secretary Griswold. *See*

Verified Petition, 100-03. Count I is not asserted "against" Trump, so he lacks standing to invoke the Anti-SLAPP procedures to seek its dismissal. And as Petitioners have explained in more detail in their response to Trump's other motion to dismiss, Petitioners have acceded to Trump's motion to dismiss Count II for declaratory relief. Thus, Trump's Anti-SLAPP motion is moot. Even if Trump moves to intervene on the remaining Count I, the Anti-SLAPP procedures may not be invoked by an intervenor on a claim that is not brought against them. *See Found. for Taxpayer & Consumer Rights v. Garamendi*, 34 Cal. Rptr. 3d 368, 381 (Cal. Ct. App. 2023) ("We reject Mercury's claim that its status as an intervener on the side of the defense placed it in the shoes of a defendant and as such gave it the same right to bring an anti-SLAPP motion as a defendant.").[1]

B. Anti-SLAPP Procedures Cannot Apply in a § 1-4-1204(4) Proceeding

Petitioners brought this action under § 1-4-1204(4), which provides that any "challenge to the listing of any candidate on the presidential primary election ballot must be made in writing and filed with the district court in accordance with section 1-1-113(1) no later than five days after the filing deadline for candidates." Section 1-1-113(1) allows eligible electors, like Petitioners, to file a petition when "a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act" to comply with the provisions of the Election Code. And § 1-1-113(4) states, "[e]xcept as otherwise provided in this part 1, the procedure specified in this section *shall be 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.*" § 1-1-113(4) (emphasis added). In light of that express command, the adjudicative process set out in the Anti-SLAPP statute (which conflicts with the procedures in § 1-1-113) does not apply here.

[1] Because "few cases have applied Colorado's anti-SLAPP statute, and because it closely resembles California's anti-SLAPP statute," courts in Colorado "look to California case law for guidance in outlining the two-step process for considering a special motion to dismiss." *L.S.S. v. S.A.P.*, 2022 COA 123, ¶ 20, *cert. denied*, No. 22SC880, 2023 WL 4568488 (Colo. July 17, 2023).

Because of the tight timelines needed to resolve ballot access challenges, § 1-4-1204 sets out expedited procedures. It requires that "[n]o later than five days after the challenge is filed, a hearing must be held" and that "[t]he district court shall issue findings of fact and conclusions of law no later than forty-eight hours after the hearing." § 1-4-1204(4). It provides that "[a]ny order entered by the district court may be reviewed in accordance with section 1-1-113(3)," *id*., which in turn provides that "proceedings may be reviewed and finally adjudicated by the supreme court of this state, if either party makes application to the supreme court within three days after the district court proceedings are terminated, unless the supreme court, in its discretion, declines jurisdiction of the case," § 1-1-113(3). As the Colorado Supreme Court has recognized, "[g]iven the tight deadlines for conducting elections, section 1-1-113 is a summary proceeding designed to quickly resolve challenges brought by electors, candidates, and other designated plaintiffs against state election officials prior to election day." *Frazier v. Williams*, 2017 CO 85, ¶ 11. For that reason, § 1-1-113 proceedings "generally move at a breakneck pace." *Id*.

These expedited procedures are inconsistent with the Anti-SLAPP statute, which gives much more time to defendants to act—allowing them to wait to file a special motion to dismiss "within sixty-three days after service of the complaint," and then calling for a hearing "not more than twenty-eight days after service of the motion unless the docket conditions of the court require a later hearing." § 13-20-1101(5). The expedited proceedings under § 1-1-113 are usually completed well before any of the Anti-SLAPP deadlines.

And the appellate procedures directly conflict. The Anti-SLAPP statute provides that "an order granting or denying a special motion to dismiss is appealable to the Colorado [C]ourt of [A]ppeals pursuant to section 13-4-102.2." § 13-20-1101(7). By contrast, §§ 1-1-113 and 1-4-1204 impose much tighter deadlines, do not allow for interlocutory appeals, and require that the Colorado Supreme Court conduct any appellate review (which is discretionary).

Applying the Anti-SLAPP statute to ballot access challenges like this one would also serve no discernible purpose. Anti-SLAPP challenges are meant to provide defendants an opportunity to "seek[] an early end to litigation based, essentially, on the assertion that the plaintiff will ultimately, and inevitably, lose." *Salazar v. Pub. Tr. Inst.*, 2022 COA 109M, ¶ 15, *as modified on denial of reh'g* (Oct. 13, 2022) (discussing Colorado's Anti-SLAPP statute). But §§ 1-1-113 and 1-4-1204 require a much more expedited hearing, decision, and appellate procedures. They do not provide for any discovery. Allowing a respondent in a ballot access challenge to file a special motion to dismiss will only slow things down and, in so doing, frustrate the parties' and the courts' ability to resolve such challenges before ballots are printed and sent out to voters.

This is a real concern here. As explained below, Petitioners show that Trump is disqualified under Section 3 of the Fourteenth Amendment. Yet under the Anti-SLAPP statute, an order *denying* the special motion to dismiss because a plaintiff has presented a prima facie case is appealable to the Colorado Court of Appeals.[2] If Trump is allowed to appeal a denial of its Anti-SLAPP motion, holding the October 30 hearing as scheduled will present significant challenges. And any delay in the hearing will impede Petitioners' ability to have their ballot access challenge, including appeals, fully resolved before primary ballots are printed in January.

C. Petitioners' Claim Is Exempt from the Anti-SLAPP Statute Under the Public Interest Exception

Colorado's Anti-SLAPP statute does not apply to claims, like this one, that satisfy the statute's "public interest exception." That exception—which is nowhere mentioned in Trump's motion—exempts "[a]ny action brought solely in the public interest or on behalf of the general public" where three conditions are met:

[2] As discussed below, Petitioners believe that the Anti-SLAPP statute does not apply here because Petitioners' claim falls within the statute's "public interest exception." If a court denies a special motion to dismiss because the claim falls within the "public interest exception," there is no right to appeal. §13-20-1101(9).

(1) "[t]he plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which plaintiff is a member";

(2) "[t]he action, if successful, would enforce an important right affecting the public interest and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons"; and

(3) "[p]rivate enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter."

§ 13-20-1101(8)(A)(II).

"[T]he public interest exception is a threshold issue based on the nature of the allegations and scope of relief sought in the prayer." *People ex rel. Strathmann v. Acacia Rsch. Corp.*, 148 Cal. Rptr. 3d 361, 369 (Cal. Ct. App. 2012). Where a court denies an Anti-SLAPP motion because the public interest exception applies, there is no immediate right to appeal. § 13-20-1101(9).

It would be hard to imagine a claim falling more squarely within the public interest exception. As to the first condition, Petitioners brought this case "solely in the public interest and on behalf of the general public" and do "not seek any relief greater than or different from the relief sought for the general public." The term "public interest" in the statute is "'used to define suits brought for the public's good or on behalf of the public.'" *Stutzman v. Armstrong*, No. 2:13-CV-00116-MCE, 2013 WL 4853333, at *8 (E.D. Cal. Sept. 10, 2013) (quoting *Strathmann,* 148 Cal. Rptr. 3d at 369). An action that "seeks a more narrow advantage for a particular plaintiff" is not "solely" in the public interest. *Club Members for an Honest Election v. Sierra Club*, 196 P.3d 1094, 1098 (Cal. 2008). Petitioners here are not seeking any sort of personal gain or relief greater than or different from relief sought for the public. They seek only to prevent the Secretary of State from placing an unqualified candidate for president on the ballot.

Petitioners' also satisfy the second condition, because they "'seek[] to vindicate public policy goals.'" *Martinez v. Zoominfo Technologies, Inc.*, --- F.4th ---, 2023 WL 6153577, at *5 (9th Cir. 2023) (quoting *Tourgeman v. Nelson & Kennard*, 166 Cal. Rptr. 3d 729, 743 (Cal. Ct.

App. 2014)). Ensuring that those who the Constitution forbids from holding office do not appear on the ballot is an important public policy goal. So too is preventing the disenfranchisement of Colorado voters that would result if the Secretary of State allowed an ineligible candidate on the ballot or if the state's voters nominated or elected a candidate who is constitutionally barred from assuming office.

As for the third condition, private enforcement is necessary here. The Secretary of State made clear she will not keep Trump off the ballot absent a court order. Ex. 71, News Release (Sept. 6, 2023). "[I]f no public entity has sought to enforce the right plaintiff seeks to vindicate in the lawsuit, '[t]his fact alone is a sufficient basis to conclude the action is "necessary," within the meaning of the public interest exception.'" *Martinez*, 2023 WL 6153577, at *6 (quoting *Inland Oversight Comm. V. Cnty. Of San Bernardino*, 190 Cal. Rptr. 3d 884, 887 (Cal. Ct. App. 2015)).

Finally, "[o]n the relative financial cost, a case is disproportionately burdensome if 'the cost of [plaintiffs'] legal victory transcends [their] personal interest.'" *Martinez*, 2023 WL 6153577, at *6 (quoting *Tourgeman*, 166 Cal. Rptr. 3d at 744). "A plaintiff who does not seek '*any* financial benefit from the lawsuit' will generally satisfy the statute's "disproportionate financial burden" requirement." *San Diegans for Open Gov't v. Har Constr., Inc.*, 192 Cal. Rptr. 3d 559, 572 (Cal. Ct. App. 2015) (quoting *Tourgeman,* 166 Cal. Rptr. 3d at 745). Petitioners here will bear a disproportionate financial burden as they (and their lawyers) are footing the costs of bringing this case while seeking no personal pecuniary or other type of gain.[3]

Under Colorado's Anti-SLAPP statute, the "public interest" exception does not apply, even

[3] Importantly, courts do not consider whether a plaintiff is paying legal fees or is instead being represented on a pro bono or contingency fee basis. *Id*. at 573 (holding "the fact that another person or entity may ultimately bear the plaintiff's litigation costs or fees does not preclude a disproportionate financial burden finding" and that "[a] party that has *no* possibility of personally benefiting from the litigation generally need not prove it will personally bear the potential cost and attorney fee burden of the litigation"); *see also Tourgeman*, 166 Cal. Rptr. 3d at 1466 n.15 (finding irrelevant that plaintiff on contingency basis and might not have to pay legal fees).

if otherwise satisfied, to:

> (I) Any publisher, editor, reporter, or other person connected with or employed by a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed; or a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed; or any person engaged in the dissemination of ideas or expression in any book or academic journal while engaged in the gathering, receiving, or processing of information for communication to the public; or
>
> (II) Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including but not limited to a motion picture, television program, or an article published in a newspaper or magazine of general circulation.

§ 13-20-1101(8)(b). Neither exception applies.

As to the first category, Trump was not "connected with or employed by" any periodical publication, press association, wire service, radio or television station, nor was he "engaged in the dissemination of ideas or expression in any book or academic journal while engaged in gathering, receiving, or processing of information for communication to the public." *Id*.

As to the second category, Petitioners have not "based" their action on any particular statement by Trump, but a course of conduct over more than five years leading to the attack on the Capitol on January 6, 2021, followed by Trump's complete dereliction of duty for three hours (which Trump's motion wrongly claims was a "lack of speech"). Even if Petitioners' action were "based upon" a specific statement or set of statements, none would constitute a "dramatic, literary, musical, political, or artistic work" akin to a "motion picture, television program, or an article published in a newspaper or magazine of general circulation." *Id*.

If the Court concludes that an Anti-SLAPP motion is permissible in a § 1-1-113(1) proceeding, Petitioners request that the Court deny Trump's motion under the public interest exception without deciding whether Petitioners have made out a prima facie case. Doing so will prevent Trump from asserting a right to immediately appeal, which would upset the trial schedule.

II. Petitioners Will Show that Trump is Disqualified Under Section 3

An anti-SLAPP motion must be denied if, based on "the pleadings and supporting and opposing affidavits," the Court determines "there is a reasonable likelihood that the plaintiff will prevail on the claim." § 13-20-1101(3). This is "a summary judgment-like procedure in which the court reviews the pleadings and the evidence to determine 'whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment.'" *L.S.S.*, ¶ 23 (quoting *Baral v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016)). "[T]he court does not weigh evidence or resolve conflicting factual claims' but simply 'accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law." *Id*. This burden is not high: courts refer to it as the "minimal merit prong." *Navellier v. Sletten*, 52 P.3d 703, 713 n. 11 (Cal. 2002).

Petitioners easily clear this low bar. To show that Trump is disqualified under Section 3 of the Fourteenth Amendment, Petitioners must show three things: (1) that Trump had "previously taken an oath, as . . . an officer of the United States . . . to support the Constitution of the United States"; (2) that there has been an "insurrection or rebellion against" the Constitution of the United States; and (3) that Trump "engaged in" that insurrection. *See* U.S. CONST. amend. XIV § 3; *see also* Ex. 54, *New Mexico ex rel. White v. Griffin*, No. D-101-CV-2022-00473, at 27, 2022 WL 4295619 (N.M. Dist. Ct. Sep. 6, 2022) ("*Griffin*"). The first two are matters of public record which Trump's motion does not dispute. And Trump's own admissions and deeds show his engagement in the insurrection. Trump not only "engaged in" the insurrection—he was its chief architect.[4]

A. Trump Took an Oath of Office to "Preserve, Protect and Defend" the Constitution

On January 20, 2017, Trump took the oath of office to "preserve, protect and defend the

[4] As explained in Petitioners' Response to Respondent Trump's Motion to Dismiss, filed simultaneously with this brief, Petitioners have brought a valid cause of action under Colorado state law to prevent the Secretary of State from placing Trump on the presidential primary ballot.

Constitution of the United States" when he became president. *See* U.S. CONST. art. II, § 1; Ex. 32 (video of Trump swearing oath) at 0:17-1:00. This is a matter of public record of which the Court may take judicial notice. *See One Hour Cleaners v. Indus. Claim Appeals Off. of State of Colo.*, 914 P.2d 501, 504 (Colo. App. 1995). When Trump took the oath, he was an "officer of the United States." Ex. 53, Magliocca Rep. at 27–33. The Constitution refers to the President as holding an "office" 25 times, including in the Oath of Office clause. *See* U.S. CONST. art. I, § 3, art. II, §§ 1, 4, amends. XII, XXII, XV. And for purposes of Section 3 of the Fourteenth Amendment, anyone who holds a position of public trust that requires an oath to the Constitution is an "officer." Ex. 53, Magliocca Rep. at 27–33; *see also Worthy v. Barrett*, 63 N.C. 199, 202 (1869) (the court knew of no way "better to draw the distinction between an officer and a mere placeman than by making his oath the test. Every officer is required to take not only an oath of office, but an oath to support the Constitution"), *appeal dismissed sub nom. Worthy v. Comm'rs*, 76 U.S. 611 (1869).[5]

B. The January 6, 2021, Attack on the United States Capitol Was an Insurrection Against the Constitution

The January 6 attack on the Capitol, and associated mobilization and incitement, was an "insurrection" against the Constitution. When the Fourteenth Amendment was adopted, an "insurrection" against the Constitution would have been understood to mean "any public use of violence by a group to prevent or hinder the execution of the Constitution." Ex. 53, Magliocca Rep. at 14–20; *see also, e.g., John Catron, Robert W. Wells & Samuel Treat, Charge to the Grand Jury By the Court*, July 10, 1861 (1861) (insurrection "must be to effect something of a public nature concerning the United States . . .to nullify and totally hinder the execution of some U. S. law or the U. S. Constitution, or some part thereof; or to compel its abrogation, repeal, modification

[5] Should Trump assert in a subsequent motion that the President is somehow not an "officer" for purposes of Section 3, Petitioners will address that issue more fully.

or change, by a resort to violence"); *Case of Fries*, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800) (Chase, J.) (similar). The events that our Nation watched unfold that day—and which have now been detailed by public records, legislative and judicial findings, extensive witness testimony, and video footage—fits the definition of "insurrection."

Many public bodies have found that the events of January 6, 2021, were an insurrection against the Constitution. Bipartisan federal legislation granting awards to members of the Capitol police found that "[o]n January 6, 2021, *a mob of insurrectionists* forced its way into the U.S. Capitol building and congressional office buildings and engaged in acts of vandalism, looting, and violently attacked Capitol Police officers." Ex. 55, Pub. L. 117-32 § 1(2) (Aug. 5, 2021) (emphasis added). Bipartisan majorities of both houses of Congress during Trump's second impeachment found that January 6 was an "insurrection," as have many public statements by the president, various resolutions of the House and Senate, decisions of over a dozen federal courts, and the U.S. Department of Justice during Trump's presidency. Pet., ¶ 361 & nn. 191–94 (citing public sources). Trump's own impeachment counsel admitted "everyone agrees" there was "'a violent insurrection of the Capitol" on January 6th. Cong. Rec., 117th Cong., Vol. 167, No. 28, S717, S733 (Feb. 13, 2021) (statement of Michael van der Veen). The only court to expressly decide this issue in the context of a Section 3 challenge found that "the January 6, 2021 attack on the United States Capitol and the surrounding planning, mobilization, and incitement constituted an 'insurrection' within the meaning of Section Three of the Fourteenth Amendment." Ex. 54, *Griffin* at 30.

These "public documents," such as "proclamations of the president" and "acts of Congress," are themselves "sufficient proof" of the existence of an insurrection against the Constitution. *United States v. Greathouse*, 26 F. Cas. 18, 23 (C.C.N.D. Cal. 1863) (Field, J.) (taking judicial notice based on such materials of the existence of the Confederate secession and that it constituted "rebellion" for purposes of prosecution under the Second Confiscation Act, 12

Stat. 589 (July 17, 1862)). Even still, these findings are also confirmed by indisputable evidence.

A mob of thousands of people descended on the Capitol building. Ex. 4, Excerpted Findings of January 6 Committee Report ("J6 Findings")[6] #118–120, 334–335; Ex. 56, GAO report (Feb. 2023) at 1; Ex. 18 (J6 Committee Video Ex. 812) at 2:54–4:51, 5:45–7:45, 8:14–9:05, 9:35–11:01; Ex. 51, Simi Rep. ¶ 8.1n. Many carried weapons (including guns, knives, pepper spray, tasers, cattle prods, and more), and donned body armor, gas masks, or other tactical gear. Ex. 4, J6 Findings #337–40; Ex. 37, Hodges testimony at 150–51, 154, 165, 172–73; Ex. 18 at 2:54–3:00, 3:17–4:00; 8:14–9:05; Ex. 51, Simi Rep. ¶¶ 8.1h, 8.1n. Body camera and security camera footage show members of the mob engaging in coordinated and violent attacks against police officers defending the Capitol, destroying security barricades, and smashing windows of the Capitol building to gain entry by force. Ex. 38–47, Hodges' body camera footage; Ex. 18 at 2:54–4:51, 5:45–7:45, 8:14–9:05, 9:35–11:01; Ex. 4, J6 Findings #378–82. Outside, the mob erected a scaffold and a noose, chanting "hang Mike Pence." Ex. 4, J6 Findings #54; Ex. 18 at 5:00–5:35. More than 2,000 attackers unlawfully entered the Capitol building, threatening the lives of Vice President Pence and members of Congress. Ex. 56, GAO Report (Feb. 2023) at 1. They surged in unison to chants of "Heave! Ho!," acting as a massive human battering ram against the police officers guarding the West Terrace Tunnel. Ex. 51, Simi Rep. ¶ 8.1i. The attackers inside hunted for House Speaker Nancy Pelosi, menacingly chanting "Nancy! Nancy! Nancy!" Ex. 4, J6 Findings #374; Ex. 18 at 7:46–8:13. The violence on January 6 was not spontaneous—it resulted from Trump's call to action coordinated by extremist groups, including his exhortation to gather in Washington, D.C., on January 6. *See* Ex. 4, J6 Findings #271–289, 334–36; Ex. 51, Simi Rep. ¶¶ 4, 5, 7 (discussing history of right-wing extremist groups like the Oath Keepers, Proud Boys,

[6] As explained in Appendix 1, Petitioners have excerpted at Exhibit 4 specific factual findings from the January 6th Report, which are admissible evidence under Rule 803(8)(C). For reference and completeness, Petitioners have also included the full report at Exhibit 3.

and Three Percenters, and Trump's coordination with them developing a call and response pattern before January 6).

The attack caused seven deaths and injured over 140 law enforcement officers. Ex. 4, J6 Findings #119; Ex. 56, GAO Report (Feb. 2023) at 1; Ex. 55, Pub. L. L 117-32 § 2 (August 5, 2021). As of September 2022, more than 870 individuals had faced criminal charges (including assault and seditious conspiracy) from the attack. Ex. 56, GAO Report (Feb. 2023) at 1.

The mob's purpose (and effect) was to stop the execution of a constitutionally-mandated function: the counting of electoral votes mandated by the Twelfth Amendment. As explained further below, Trump focused his incendiary rhetoric in the leadup to and on January 6 on Vice President Pence, who the Twelfth Amendment tasked with the ministerial act of "open[ing] all the certificates" from each state's electors so that the joint session of Congress could count the votes from each state's certified presidential electors. U.S. Const. amend. XII. At Trump's direction, the crowd descended on the Capitol to demand, by violence and threats of violence, that Pence reject the lawful electoral votes cast for President-elect Joe Biden and nullify the results of the election. Ex. 4, J6 Findings #81–82, 150–151, 347; Ex. 37, Hodges testimony at TR-150–57, 162–82; Ex. 48, Pingeon Decl. ¶¶ 6–15; Ex. 51, Simi Rep. ¶¶ 8.2e, 8.2g. If the insurrection prevailed, "it would have permanently ended the peaceful transition of power, undermining American democracy and the Constitution." *Eastman*, 594 F. Supp. 3d at 1198.

The mob left no doubt what their goal was. In posts and speeches in days and weeks before the event, they declared their goals to prevent the transfer of presidential power, by violence if necessary. Ex. 51, Simi Rep. ¶¶ 7.1g, 8.2b. During the attack, they waved Trump flags, wore MAGA hats, claimed that Trump sent them, and referenced Vice President Pence and "stopping the steal" by derailing the certification of the electoral count. Ex. 37, Hodges testimony at TR-156–57, 162, 169–71; Ex. 48, Pingeon Decl. ¶¶ 6, 9, 13; Ex. 4, J6 Findings # 54, 81–82, 277, 335–

36, 354–362; Ex. 20 (J6 Video Exhibit VC1); Ex. 27–30 (Fox News video); Ex. 51, Simi Rep. ¶¶ 8.1d–f. Petitioners' expert in political extremism, Professor Peter Simi, explains how many members of the crowd, and particularly the leaders from the Oath Keepers, Proud Boys, and Three Percenters, focused on disrupting the certification. Ex. 51, Simi Rep. ¶ 8. Even afterwards, some promised to return to continue the fight if Biden became president. *See, e.g., Griffin*, 2022 WL 4295619, at *67 (threatening to return and make "blood run[] out of that [Capitol] building"); Ex. 51, Simi Rep. ¶ 8.2j.

The mob succeeded, at least temporarily, in stopping the constitutionally mandated counting of electoral votes. Both houses of Congress were forced into recess shortly after 2 p.m. that afternoon after the attacking mob confronted Capitol police officers inside the Crypt, and Congress could not reconvene until after 8 p.m. that night, once the insurrection was subdued. Ex. 4, J6 Findings #253, 374, 377; *see also* Ex. 72 (1/6/2021 House and Senate records). Members of Congress, as well as Vice President Pence, were forced to hide for hours in secure locations within the Capitol. Ex. 4, J6 Findings #386–87.

This is not a close case. The attack on January 6 falls within any plausible reading of a Section 3 "insurrection" "against the Constitution." Ex. 53, Magliocca Rep. at 37–38.

C. Trump Engaged in the Insurrection against the Constitution

At the time the Fourteenth Amendment was adopted, the phrase "engaged in" insurrection under Section 3 was "broadly understood to refer to any voluntary act in furtherance of an insurrection against the Constitution of the United States." Ex. 53, Magliocca Rep. at 20–27; *see, e.g., Worthy*, 63 N.C. at 203; *United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D.N. Cal. 1871). This could be "by words, as well as deeds, so long as the words voluntarily encouraged insurrection[.]" Ex. 53, Magliocca Rep. at 21. Although "[d]isloyal sentiments, opinions, or sympathies would not disqualify," "when a person has, by speech or by writing, incited others to

engage in rebellion, he must come under the disqualification." *Id.* at 22 (*quoting* 12 U.S. Op. Att'y Gen. 182, 205 (1867)); *see also, e.g., In re Charge to Grand Jury- Treason*, 30 F. Cas. 1047, 1048–49 (C.C.E.D. Pa. 1851) ("Though he be absent at the time of its actual perpetration, yet if he directed the act . . . instigating others to perform it, he shares their guilt."); *In re Charge to Grand Jury – Neutrality L. & Treason*, 30 F. Cas. 1024, 1026 (C.C.D. Mass. 1851) (similar). Modern authorities have employed a similar standard for "engagement" under Section 3. *See* Ex. 54, *Griffin*, 2022 WL 4295619, at **34–45 (applying *Worthy-Powell* standard); *Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot, at 13–14 (Ga. Off. Admin. Hr'gs May 6, 2022), https://perma.cc/M93H-LA7X (same).

Trump was no minor participant in the January 6 insurrection—he was its ringleader. He cultivated a relationship and common language with violent supporters over the course of his presidency, perpetuated a false narrative that the 2020 election would be and then had been stolen, used that false narrative to summon an angry mob of thousands to the Capitol on January 6, incited that mob to anger with violent rhetoric, convinced them that Vice President Pence had the power to overturn the election, directed them to march on the Capitol knowing that they were armed and willing to commit violence on his behalf, poured fuel on the fire with incendiary tweets against the Vice President when he knew the Capitol was under siege, and violated his constitutional duty to "preserve, protect and defend the Constitution of the United States" by refusing to act to protect the Capitol or to call off his mob for a full three hours during the attack. These acts, when taken together, make clear that Trump "engaged in" insurrection against the Constitution and that, by doing so, he disqualified himself from holding public office.

i. Trump Laid the Groundwork for Insurrection by Encouraging Political Violence and Spreading False Claims of Election Fraud

As Professor Simi explains, "a series of events foreshadowed, influenced, and helped produce the insurrection," including Trump's longstanding symbiotic relationship with far-right

extremists. Ex. 51, Simi Rep. Decl. ¶ 7.1a. Professor Simi identifies twelve clear examples over the five years leading up to the 2020 election where Trump either called for political violence or praised those that committed it. *Id.* ¶ 6.1h. This practiced "call and response" provided Trump a ready mechanism for inciting his supporters to violence using a "communication strategy" where interpretations are reinforced in an iterative process: leaders "identify grievances and groups to be targeted," and supporters then "carry out attacks on their own initiative and then wait to judge the reaction from leadership." *Id.* ¶¶ 6.1h, 8.1e. "Reactions that are perceived to be approving then encourage even more violence," permitting leaders to "direct attacks . . . while maintaining a degree of plausible deniability." *Id*. This strategy is combined with the use of "empty negations" like "don't hurt 'em" or to be "peaceful" that supporters know to disregard as insincere based on this repeated interaction. *Id.*

Trump made repeated efforts before the election "to influence his supporters' lack of confidence in the integrity of the 2020 election" in a way that "aligned with far right extremists' existing views regarding alleged political corruption." *Id.* ¶¶ 7.1c, 7.1d. And even before election day in 2020, Trump and his advisors hatched a "premeditated" decision to make "a false declaration of victory." Ex. 4, J6 Findings #26–29. On election night Trump did just that, falsely insisting, among other things: "This is a fraud on the American public. This is an embarrassment to our country. We were getting ready to win this election. Frankly, we did win this election. We did win this election." Ex. 35 (Trump speech 11/5/2020) at 7:45–8:00.

In the days and weeks that followed, Trump's advisors (within the administration, his campaign, and his own legal team) told him that he had nearly no chance of victory, and then no chance of victory, and that there was no evidence of widespread election fraud sufficient to overturn the election results. Ex. 4, J6 Findings #1–2, 30–36, 142; *see also* Ex. 25, Attorney General Barr testimony at 6–8, 18–19, 21, 24–33, 37, 40–41, 49–50, 55, 57, 61, 65–66; Ex. 26,

Cipollone testimony at 11, 161 (White House counsel agreeing with Barr's assessment that there was no evidence of election fraud);[7] Ex. 58, Cybersecurity & Infrastructure Security Agency Report (Nov. 12, 2020) (the election "was the most secure in American history"); Ex. 59, Washington Post (Dec. 1, 2014) (quoting Attorney General Barr saying that he had "not seen fraud on a scale that could have effected a different outcome in the election"). Rather than listen to the chorus of credible voices telling him there was no widespread fraud sufficient to change the election result, Trump fired or sidelined them, in favor of radical yes-men (and yes-women) willing to assert claims of voter fraud that lacked any factual basis. Ex. 4, J6 Findings #153.

Instead of conceding defeat, Trump "continued to purposely and maliciously make false claims" that the election was stolen. *Id.* #40–41; *see also id.* #1–2. He issued scores of tweets containing such allegations and made them repeatedly in speeches to his supporters. *See* Ex. 64 (Trump tweets) at 1–24, 26–30, 32; Ex. 66–67 (Trump Dec. 2 and Dec. 22, 2020 speech excerpts). He filed dozens of meritless lawsuits seeking to overturn the results of the election in various states. Ex. 4, J6 Findings #164. Of these 62 lawsuits, courts across the country soundly rejected 61 of them, and Trump's partial victory on a procedural issue in the remaining case had no impact on the outcome of any election. *Id.*[8]

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[7] This brief attaches excerpts from depositions and interviews of three witnesses before the January 6 Committee: former Attorney General Bill Barr, former White House Counsel Pat Cipollone, and former advisor to the Chief of Staff Cassidy Hutchinson. Exs. 23-26. They are admissible under Rule 807. Some are sworn statements under oath, and all are statements before Congress by witnesses who had been admonished of criminal penalties for lying to Congress. Ex. 1, Heaphy Decl. ¶ 18. Each was a member of Trump's own administration in the months leading up to January 6 and had no discernable motivation to lie—particularly given that testimony against Trump has often triggered campaigns of harassment and intimidation by his followers.

[8] *See, e.g.,* Ex. 60, *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 906 (M.D. Pa. Nov. 21, 2020) (Trump presented the court with "strained legal arguments without merit and speculative accusations" of voter fraud); Ex. 61, *Ward v. Jackson*, No. CV-20-0343-AP/EL, 2020 WL 8617817, at *2 (Ariz. Dec. 8, 2020) ("[T]he challenge fails to present any evidence of 'misconduct,' 'illegal votes' or that the Biden Electors 'did not in fact receive the

President Trump also sought to corruptly overturn the election results through direct pressure on Republican officeholders in various states. Ex. 4, J6 Findings #5, 183–208; Ex. 64 at 5–7, 17, 20–23 (Trump tweets); Ex. 51, Simi Rep. ¶ 7.1c. This included Trump's infamous call to Georgia Secretary of State Brad Raffensperger, in which he demanded that Raffensperger "find 11,780 votes, which is one more than we have," and insisted that his refusal to throw the election to Trump would be a "criminal offense." Ex. 5 (Video of Raffensperger Call); Ex. 4, J6 Findings #180, 203. It also included efforts to pressure public officials in other states, including Pennsylvania, Michigan, and Arizona. *Id.* # 193–204. Many of the state officials who were the target of Trump's campaign of intimidation were subject to vicious campaigns of violent threats by Trump's supporters—prompting one Georgia official to issue a public warning to Trump to "stop" or "[s]omeone's going to get killed," which Trump saw and retweeted with a message repeating the very rhetoric the official warned would cause violence. *Id.* #66–74; Ex. 64 at 1; Ex. 51, Simi Rep. ¶ 7.1e.

ii. Trump Summoned the Mob on January 6

By December 14, 2020, the certified electors in each state voted, officially securing the presidency for Joe Biden. Ex. 4, J6 Findings #39, 208–10. By that point, all possible avenues for challenge had run their course—all that was left was the act of counting these votes in Congress on January 6, 2021. 3 U.S.C. §§ 7, 15. All of Trump's lawsuits had been rejected, including a last-ditch effort at obtaining U.S. Supreme Court review, and there were no further means for Trump to challenge the results. This was the end of the line. Ex. 4, J6 Findings #142.

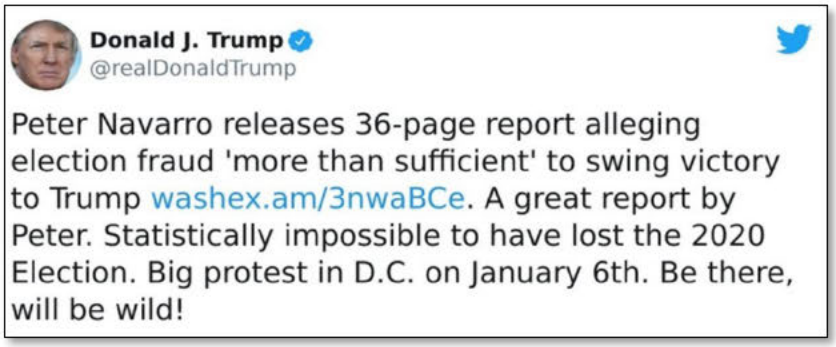
But Trump did not stop. He and his allies prepared their own fake slates of electors in seven

highest number of votes for office[.]'"); Ex. 62, *Law v. Whitmer*, No. 92178, 2020 WL 7240299, at *19 (Nev. 2020) (attaching and affirming district court decision) (Trump's allies "did not prove under any standard of proof that illegal votes were cast and counted, or legal votes were not counted at all, due to voter fraud").

states that Trump lost, and those fake electors also met on December 14, 2020, to cast putative "votes" for Trump. Ex. 4, J6 Findings #208–10. Trump's scheme to overturn the election shifted focus to the never-before-suggested idea that Vice President Pence, during the ceremonial counting of electoral votes on January 6, 2021, could simply choose to reject the true electors who had voted for Joe Biden and instead recognize Trump's fake slate of electors or return the slates to states for further proceedings. *Id.*; Ex. 64 at 34, 39 (Trump tweets).

Of course, this plan was illegal—"a coup in search of a legal theory." *Eastman v. Thompson*, 594 F. Supp. 3d 1156, 1198 (C.D. Cal. 2022). The lawyer who hatched this theory (John Eastman) admitted that the Vice President lacked legal authority to reject the states' certified slates of electors in favor of false slates—and he made that clear to Trump. Ex. 4, J6 Findings #3, 45–50, 223, 227–238. If the Vice President had such power, every Vice President—from Al Gore to Dick Cheney—would be tempted to reject electoral votes whenever the opposing party might retake the White House. Not surprisingly, no President or Vice President ever suggested the possibility before.

At 1:42 a.m. on December 19, 2020, Trump sent out the following tweet:



Ex. 64 at 2. This tweet set off a firestorm of activity among extremist groups and galvanized supporters to go to Washington, DC, on January 6 prepared for the possibility of violence. Ex. 4, J6 Findings #81–82, 255–258; Ex. 51, Simi Rep. ¶ 8.2b. Alex Jones of InfoWars told his viewers that Trump's tweet earlier that day was "one of the most historic events in American history," that

it was "the most important call to action on American soil since Paul Revere and his ride in 1776," and asked "[w]here were you when history called?" Ex. 6 (J6 Committee Video Ex. 604) at 0:00–:22, 0:55–1:04, 2:17–2:19. Another InfoWars personality, Matt Bracken, told viewers on December 31, 2020: "We're only going to be saved by millions of Americans moving to Washington, occupying the entire area, if, if necessary, storming right into the Capitol," pointing out that "if you have enough people, you can push down any kind of a fence or a wall." *Id*. at 1:05–1:27. Followers of the website TheDonald.win reposted the tweet, and over the next three weeks discussed, among other things: surrounding and occupying the Capitol, cutting off access tunnels used by members of Congress, the types of weapons they should bring, and how to build a hangman's gallows. Ex. 4, J6 Findings #257, 293. There were similar reactions across the internet. *Id.* #255–262; Ex. 51, Simi Rep. ¶ 8.2b. Trump's tweet focused the actions of his extremist followers, known to Trump as willing and able to use force, selecting the time and place to deploy them where their combined force would have the most direct impact: while Congress met to certify the election.

Trump's December 19, 2020 tweet was not a one-off mistake regrettably sent at 2 a.m. Trump continued to send tweet after tweet, a constant drumbeat urging his followers to come to Washington, DC, on January 6. On December 27, 2020, he sent a tweet saying, "See you in Washington, DC, on January 6th. Don't miss it. Information to follow." Ex. 64 at 14. On December 30, 2020, he sent out a tweet saying: "JANUARY SIXTH, SEE YOU IN DC!" *Id*. at 21. On January 1, 2021, he reposted a tweet from Kylie Jane Kremer, the organizer of March for Trump on January 6, saying "The calvary is coming, Mr. President! JANUARY 6th, Washington, DC." *Id*. at 25. Trump added, "A great honor!" *Id*. The same day, Trump tweeted: "The BIG Protest Rally in Washington, D.C., will take place at 11:00 A.M. on January 6th. Locational details to follow. StopTheSteal!" and "[m]assive amounts of evidence will be presented on the 6th. We won,

BIG!" *Id*. at 23–24. On January 3, 2021, Trump sent a tweet in response to another March for Trump tweet, saying "I will be there. Historic day!" *Id*. at 31. On January 5, 2021, he sent a tweet saying, "See you in D.C.," another saying, "Washington is being inundated with people who don't want to see an election victory stolen by emboldened Radical Left Democrats. Our country has had enough, they won't take it anymore! We hear you (and love you) from the Oval Office. MAKE AMERICA GREAT AGAIN!", and another saying, "I will be speaking at the SAVE AMERICA RALLY tomorrow on the Ellipse at 11AM Eastern. Arrive early—doors open at 7AM Eastern. BIG CROWDS!" *Id*. at 34–37.[9]

Interspersed with these tweets were others accusing Democrats and government officials of committing fraud, asserting the Supreme Court was ignoring its duties when it denied hearing his claims, pressuring Republicans (who he derided as "RINOs") to help him steal the election, accusing election workers of conjuring fake ballots, and claiming repeatedly that Vice President Pence could refuse to certify electoral votes on January 6. *Id*. Just a sampling below:

- "GREATEST ELECTION FRAUD IN THE HISTORY OF OUR COUNTRY!!!" (Dec. 19, 2020);
- "THE DEMOCRATS DUMPED HUNDREDS OF THOUSANDS OF BALLOTS IN SWING STATES LATE IN THE EVENING. IT WAS A RIGGED ELECTION!!!" (Dec, 22, 2020);
- "This was the most corrupt election in the history of our Country, and it must be closely examined!" (Dec. 23, 2020);
- "VOTER FRAUD IS NOT A CONSPIRACY THEORY, IT IS A FACT!!!" (Dec, 24, 2020);
- "If a Democrat Presidential Candidate had an Election Rigged & Stolen, with proof of such acts at a level never seen before, the Democrat Senators would consider it an act of war, and fight to the death. Mitch & the Republicans do NOTHING, just want to let it pass. NO FIGHT!" (Dec. 26, 2020);

[9] There is no doubt Trump intended to send these tweets. Nobody could send any tweet from Trump's personal Twitter account with his express sign off. Ex. 31, Grisham Decl. ¶ 17.

- "The U.S. Supreme Court has been totally incompetent and weak on the massive Election Fraud that took place in the 2020 Presidential Election. We have absolute PROOF, but they don't want to see it – No 'standing', they say. If we have corrupt elections, we have no country!" (Dec. 26, 2020);

- "The United States had more votes than it had people voting, but a lot. This travesty cannot be allowed to stand. It was a Rigged Election, one not even fit for third world countries!" (Dec. 30, 2020);

- "An attempt to steal a landslide win. Can't let it happen!" (Jan. 2, 2021);

- "The swing states did not even come close to following the dictates of State Legislatures. These States "election laws" were made up by local judges & politicians, not by their Legislatures, & are therefore, before even getting to irregularities & fraud, UNCONSTITUTIONAL!" (Jan. 3, 2021);

- "The Vice President has the power to reject fraudulently chosen electors." (Jan. 5, 2021);

- "I hope the Democrats, and even more importantly, the weak and effective RINO section of the Republican Party, are looking at the thousands of people pouring into D.C. They won't stand for a landslide election victory to be stolen." (Jan. 5, 2021);

- "If Vice President Pence comes through for us, we will win the Presidency. Many states want to decertify the mistake they made in certifying incorrect & even fraudulent numbers in a process NOT approved by their State Legislatures (which it must be). Mike can send it back! (Jan. 5, 2021);

- "States want to correct their votes, which they now know were based on irregularities and fraud, plus corrupt process never received legislative approval. All Mike Pence has to do is send it back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!" (Jan. 5, 2021);

- "The States want to redo their votes. They found out they voted on FRAUD. Legislatures never approved. Let them do it. BE STRONG!" (Jan. 5, 2021).

Id. at 4, 7–10, 22, 29, 32, 34–35, 39–40. These tweets coincided with Trump's speeches, amplifying his false narrative that the election was stolen, that the country would be lost. *See* Ex. 66, Trump Dec. 2, 2020 speech ("This may be the most important speech I've ever made. I want to provide an update on our ongoing efforts to expose the tremendous voter fraud and irregularities which took place during the ridiculously long November 3rd elections. If we don't root out the

fraud, the tremendous and horrible fraud that's taken place in our 2020 election, we don't have a country anymore."); Ex. 67, Trump Dec. 22, 2020 speech ("The truth is we won the election by a landslide. We won it big. [Biden winning] is historically, mathematically, politically, and logically impossible. It did not happen. He did not win. We won by a landslide. If this egregious fraud is not fully investigated and addressed, the 2020 election will forever be regarded as illegitimate and the most corrupt election in the history of our country.").

Many of the violent extremist groups who supported Trump viewed Trump's tweets and other statements as a call to arms and violence. Ex. 4, J6 Findings #254–305; Ex. 51, Simi Rep. ¶¶ 8.2b-c. Professor Simi explains how Trump developed a strong relationship with these violent extremist groups. Trump referred to them in debates, praised their actions on social media, and used the power of his office to endorse their activities, including driving to a rally Washington, DC, in November and circling over another in December in Marine One—which extremists understandably, and as expected, interpreted as Trump supporting their actions. Ex. 51, Simi Rep. ¶ 7.1e. Members of these groups amplified Trump's message of violence in rallies and social media posts. *Id.* ¶¶ 7.1g–h.

There is no doubt Trump knew and intended the effect his tweets and other actions would have—and were having—on his supporters, including that many would respond by preparing for violence on January 6. According to one of his senior staff: "I heard President Trump say numerous times that his supporters would do anything for him and that he could make them emotional and angry with his statements or tweets. When I told President Trump that one of his planned public statements would make his supporters angry, he told me that he wanted his supporters that way." Ex. 31, Grisham Decl. ¶ 14. She witnessed other members of the staff, including Social Media Director Dan Scavino, tell Trump that the Proud Boys and Oath Keepers, who were supporters that attended Trump's rallies, were violent. *Id*. ¶ 19. Rather than condemn these groups, Trump

praised them as "fighters," one of the highest compliments he gave people. *Id*. Despite being told by aides and advisors to condemn violent extremists during a September 2020 debate with President Biden, Trump instead told the Proud Boys to "stand back and stand by." *Id*. ¶ 20.

Indeed, Trump regularly used extreme violent rhetoric at his rallies to rile up and encourage his supporters to use violence, which they did. *Id*. ¶ 23. Over time Trump developed a clear understanding of how the far-right extremist groups would act after his statements, developing a familiar call and response where Trump's statements would lead to political violence. Ex. 51, Simi Rep. ¶ 6.1h; *see also Farmer v. Brennan*, 511 U.S. 825, 842 (1994 (*mens rea* may be "infer[red] from circumstantial evidence" including "the fact that the risk was obvious"); *People v. Donald*, 2020 CO 24, ¶ 37, 461 P.3d 4, 10 (same).

iii. Trump's Ellipse Speech Incited the Mob to Violence

The violent mob assembled on January 6, 2021, was Trump's last, desperate gamble to overturn the results of the election. By then, he had lost repeatedly in the courts, state officials had rejected his intimidation campaign, the valid electors had voted, and Vice President Pence had made clear to Trump that he did not believe he had authority to decertify the results of the election. Ex. 4, J6 Findings #121. Trump had just one thing in his favor—a violent mob, which he hoped could intimidate the Vice President and members of Congress into unconstitutionally declaring him the victor of an election he had lost. *Id.*

By the time January 6 arrived, Washington, D.C., was a powder keg that Trump had primed to explode. Intelligence reports demonstrated "a growing number of warnings both that January 6th was likely to be violent, and specifically that the Capitol would likely be the target." *Id.* #88–102; Ex. 56, GAO Report (Feb. 2023), at 24; Ex. 51, Simi Rep. ¶ 8.1a. Agencies relayed some of these threats to the White House and the Secret Service. Ex. 4, J6 Findings #88–102. What intelligence officers did not know, and could not have predicted, was that Trump would exacerbate

the crowd's anger and then direct them to march on the Capitol building "to fight like hell" while the entirety of Congress and the Vice President were there counting electoral votes. *Id.* #104; Ex. 51, Simi Rep. ¶ 8.2g. And while Trump's advisors had repeatedly asked Trump before January 6th to make clear that any protests should remain peaceful, Trump refused. *Id.* #317.

On the morning of January 6, Trump was briefed on the risk of violence that day, and he knew that the assembled crowd was both angry and armed. *Id.* #10, 104–09, 311–13. Backstage while he was preparing to speak, Trump "looked out onto the crowd of approximately 53,000 supporters and became enraged" because nearly "half of those gathered" had "refused to walk through the magnetometers and be screened for weapons, leaving the venue looking half-empty to the television audience at home." *Id.* # 323. Trump's chilling reaction shows he knew that the crowd was armed and dangerous, but was unconcerned because they were not dangerous *to him*:

> When we were in the off-stage announce area tent behind the stage, he was very concerned about the shot. Meaning the photograph that we would get because the rally space wasn't full. One of the reasons, which I've previously stated, was because he wanted it to be full and for people to not feel excluded because they had come far to watch him at the rally. And he felt the mags were at fault for not letting everybody in, but another leading reason and likely the primary reasons is because he wanted it full and he was angry that we weren't letting people through the mags with weapons—what the Secret Service deemed as weapons, and are, are weapons. But when we were in the off-stage announce tent, I was a part of a conversation, I was in the vicinity of a conversation where **I overheard the President say something to the effect of, "You know, I don't F'ing care that they have weapons. They're not here to hurt me. Take the F'ing mags away. Let my people in. They can march to the Capitol from here. Let the people in. Take the F'ing mags away**."

Ex. 23, Hutchinson testimony at 9–10 (emphasis added).

Any person remotely concerned about the prospect of political violence would have cancelled the rally at the Ellipse, or at a minimum cancelled any plans to call on the crowd to march to the Capitol. Ex. 4, J6 Findings #109. Instead, Trump used his more than hour-long speech to repeatedly hammer known falsehoods about election fraud, pressure Vice President Pence to overturn the election results, and whip the crowd into a frenzy with violent and incendiary

language. *Id.* #111–115, 312–313. His speech used the word "fight," or a variant, twenty times. *Id.*

The overall purpose and effect of Trump's incendiary speech was to incite the mob to political intimidation and violence. His speech repeatedly claimed that Democrats had stolen the election, that "RINOs" in Congress were letting them get away with it, that the crowd could "never give up," and that "we" (referring to himself and to the assembled crowd of thousands) could stop the "steal" by descending on the Capitol:

- "All of us here today do not want to see our election victory stolen by emboldened radical-left Democrats, which is what they're doing. And stolen by the fake news media. That's what they've done and what they're doing. *We will never give up, we will never concede. It doesn't happen. You don't concede when there's theft involved*." Ex. 68 at 2:22–2:44.

- "*Our country has had enough. We will not take it anymore* and that's what this is all about. And to use a favorite term that all of you people really came up with: We will stop the steal. Today I will lay out just some of the evidence proving that we won this election and we won it by a landslide. This was not a close election." *Id.* at 2:44–3:15.

- "Because *if Mike Pence does the right thing, we win the election*. All he has to do, all this is, this is from the number one, or certainly one of the top, Constitutional lawyers in our country. He has the absolute right to do it." *Id.* at 6:13–6:32.

- "And I actually, I just spoke to Mike. I said: "Mike, that doesn't take courage. What takes courage is to do nothing. That takes courage." And then we're stuck with a president who lost the election by a lot and we have to live with that for four more years. *We're just not going to let that happen*." *Id.* at 7:09–7:29.

- "We want to go back and we want to get this right because we're going to have somebody in there that should not be in there and *our country will be destroyed and we're not going to stand for that*." *Id.* at 10:23–10:34.

- "For years, *Democrats have gotten away with election fraud and weak Republicans*. And that's what they are. There's so many weak Republicans. And we have great ones. Jim Jordan and some of these guys, they're out there fighting. The House guys are fighting." *Id.* at 10:35–10:52.

- *If this happened to the Democrats, there'd be hell all over the country going on*. There'd be hell all over the country. But just remember this: You're stronger, you're smarter, you've got more going than anybody. And they try and demean everybody having to do with us. *And you're the real people, you're the people that built this nation. You're not the people that tore down our nation*. *Id.* at 11:20–11:46.

- Republicans are, Republicans are constantly fighting like a boxer with his hands tied

behind his back. It's like a boxer. And we want to be so nice. We want to be so respectful of everybody, including bad people. And *we're going to have to fight much harder*. *Id.* at 14:55–15:17.

- "And *Mike Pence is going to have to come through for us*, and if he doesn't, that will be a, a sad day for our country because you're sworn to uphold our Constitution." *Id.* at 15:17–15:48.

- "Now, it is up to Congress to confront this egregious assault on our democracy. And after this, *we're going to walk down, and I'll be there with you, we're going to walk down, we're going to walk down*." *Id.* at 15:33–15:48.

- "Anyone you want, but I think right here, *we're going to walk down to the Capitol*, and we're going to cheer on our brave senators and congressmen and women, *and we're probably not going to be cheering so much for some of them*. *Because you'll never take back our country with weakness. You have to show strength and you have to be strong. We have come to demand that Congress do the right thing* and only count the electors who have been lawfully slated, lawfully slated." *Id.* at 15:49–16:30.

- "But think of what happens. Let's say they're stiffs and they're stupid people, and they say, well, we really have no choice. . . You will have a president who lost all of these states. Or you will have a president, to put it another way, who was voted on by a bunch of stupid people who lost all of these states. You will have an illegitimate president. That's what you'll have. And *we can't let that happen*." *Id.* at 38:13–19:15.

- "The radical left knows exactly what they're doing. They're ruthless and it's time that somebody did something about it. *And Mike Pence, I hope you're going to stand up for the good of our Constitution and for the good of our country. And if you're not, I'm going to be very disappointed in you. I will tell you right now. I'm not hearing good stories*." *Id.* at 49:31–49:54.

- "*The Republicans have to get tougher*. You're not going to have a Republican Party if you don't get tougher. They want to play so straight. They want to play so, sir, yes, the United States. The Constitution doesn't allow me to send them back to the States. Well, I say, yes it does, because the Constitution says you have to protect our country and you have to protect our Constitution, and you can't vote on fraud. *And fraud breaks up everything, doesn't it? When you catch somebody in a fraud, you're allowed to go by very different rules*. *So I hope Mike has the courage to do what he has to do. And I hope he doesn't listen to the RINOs and the stupid people that he's listening to*." *Id.* at 1:02:21–1:03:02.

- "We won in a landslide. This was a landslide. They said it's not American to challenge the election. *This the most corrupt election in the history, maybe of the world*. You know, you could go third-world countries, but I don't think they had hundreds of thousands of votes and they don't have voters for them. I mean no matter where you go, nobody would think this. In fact, it's so egregious, it's so bad that a lot of people don't even believe it. It's so crazy that people don't even believe it. It can't be true. So they don't believe it. This is not just a matter of domestic politics — *this is a matter of national security*." *Id.* at 1:03:38–

1:04:20.

- "*And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore*." *Id.* at 1:10:15–1:10:22.

Finally, after exhorting the assembled crowd that they had to "fight like hell" to stop the election from being "stolen," that the future of the country was at stake, that fraud allows "a very different set of rules," and that "we're not going to take it anymore," Trump ended by encouraging the crowd to march on the Capitol—where, he had previously said, he would be joining them:

> So we're going to, we're going to walk down Pennsylvania Avenue. I love Pennsylvania Avenue. And we're going to the Capitol, and we're going to try and give. The Democrats are hopeless — they never vote for anything. Not even one vote. But we're going to try and give our Republicans, the weak ones because the strong ones don't need any of our help. We're going to try and give them the kind of pride and boldness that they need to take back our country.

Id. at 1:10:45–1:11:35.

Trump's exhortation to march on the Capitol was "no off-the-cuff remark; it was the culmination of a carefully planned scheme many weeks in the making." Ex. 4, J6 Findings #211. Trump's declaration that he would "win the election" if the mob could somehow convince Vice President Pence to "do the right thing" created "a desperate and false expectation in President Trump's mob" that incited the mob to violently storm the Capitol. *Id.* #149. The only way the mob could persuade the Vice President to do anything was through intimidation and violence.

Trump's claim that his comments "did not explicitly encourage violence or lawless action," Mot. at 8, ignores what actually happened. Professor Simi explains that Trump spent years cultivating a "call and response" pattern with far-right extremist groups to engage in political violence. Ex. 51, Simi Rep. ¶¶ 6.1h, 8.2e. From endorsing supporters' violence against counter-

protesters, to telling the Proud Boys to "stand by," to praising the violence at Charlottesville,[10] to blessing the November and December extremist rallies with his presence, Trump validated his violent supporters. *Id.* ¶¶ 6.1h, 7.1e, 7.1g, 8.2g. And he spoke using the familiar "front stage and back stage" language of far-right extremists—using coded language to call extremists to action, despite empty gestures for "peace" that his supporters would have understood was insincere. *Id.* ¶ 5.1b. Trump cannot now argue that his statements in the lead-up to January 6 are innocent when viewed in isolation. They are part of a long-standing pattern of calling on his supporters to commit violence in words his supporters understood and acted upon.

iv. Trump's Conduct During the Attack Incited and Aided the Insurrection

Trump's words and actions had predictably explosive effect. Just after Trump's speech ended, when Vice President Pence announced that he would not prevent Congress from counting the electoral votes, the crowd erupted with anger toward the Vice President. Ex. 4, J6 Findings #54. Thousands of people marched from Trump's rally at the Ellipse to the Capitol building, dramatically intensifying the insurrection that had just begun to unfold. *Id.* #315; Ex. 36, Hodges Decl. ¶ 4 (incorporating testimony that "the size of the mob was the mob's greatest weapon"). Right after returning to the White House, Trump knew the Capitol was under attack. He was told of the attack no later than 1:21 p.m.—just eleven minutes after he concluded his speech at the Ellipse. Ex. 4, J6 Findings #316.

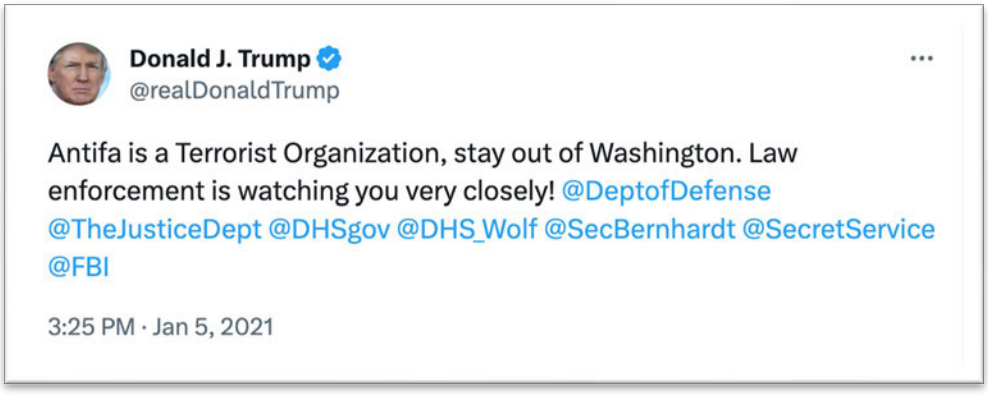
Yet for roughly three hours, Trump did nothing to stop the violence, despite the constitutional duty and the means to do so. *Id.* #36, 149; U.S. Const. art. I §§ 1, 3 (mandating the President "take Care that the Laws be faithfully executed" and that he swear an oath to "preserve,

[10] Trump praised the extremists in Charlottesville despite his advisors' repeated pleas to condemn violence and extremism. Ex. 31, Grisham Decl ¶ 27. Indeed, in private, Trump complained that his critics were "making too big of a deal out of what happened at the Unite the Right rally and that he was upset his supporters were being treated unfairly by the press." *Id.*

protect, and defend the Constitution of the United States"). Trump did not give orders or place a single call to relevant law enforcement agencies, the Secretary of Defense, the Attorney General, or the Secretary of Homeland Security. *Id.* #17, 326. He refused repeated requests from family, staff, Congresspeople, and other allies to instruct his mob to stand down. Ex. 4, J6 Findings #120, 124–129, 149, 326. Of course, he could have done this at any time—it was a short walk to the White House Press Briefing Room from the Oval Office, where he could have almost immediately broadcast a message for the mob to stand down. *Id.* #125, 330; Ex. 31, Grisham Decl. ¶ 13.

Trump was like the security guard who leaves the door unlocked so that his co-conspirators can rob the building he was tasked with guarding. He unleashed a mob on the Capitol, and defanged his administration's law enforcement and security apparatus to preclude any effective response despite his legal duty to act. That is engagement in insurrection. If that were not enough, Trump's White House suppressed any official record of what Trump did during the three hours after he learned of the attack on the Capitol. Ex. 4, J6 Findings #325. This fact alone demonstrates Trump's consciousness of guilt and effort to conceal his wrongdoing during that pivotal moment.

Of course, Trump had a host of government agencies at his disposal who he could have directed to aid in putting down the insurrection. Ex. 49, Banks Decl. ¶¶ 18–26. And Trump knew as much, as shown by his contrasting warnings to Antifa in a tweet just the day prior:



Ex. 64 at 36. Rather than do something—anything—to stop the insurrection, Trump sat in the

White House dining room, watching his mob's insurrection unfold on television. Ex. 4, J6 Findings #326. And even as members of Congress were forced into hiding, Trump continued his efforts to pressure members of Congress to decertify Joe Biden's electoral victory. *Id.* #326.

While the violence unfolded, Trump also used Twitter to continue pouring fuel on the fire. At 1:49 pm, almost a half hour after he learned that the Capitol was under attack, Trump tweeted a link to the video of his incendiary speech from the Ellipse. Ex. 4, J6 Findings #328; Ex. 64 at 41. And at 2:24 p.m., Trump poured more gasoline on the fire by targeting Vice President Pence:

> Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!

Ex. 4, J6 Findings #130; Ex. 64 at 42.

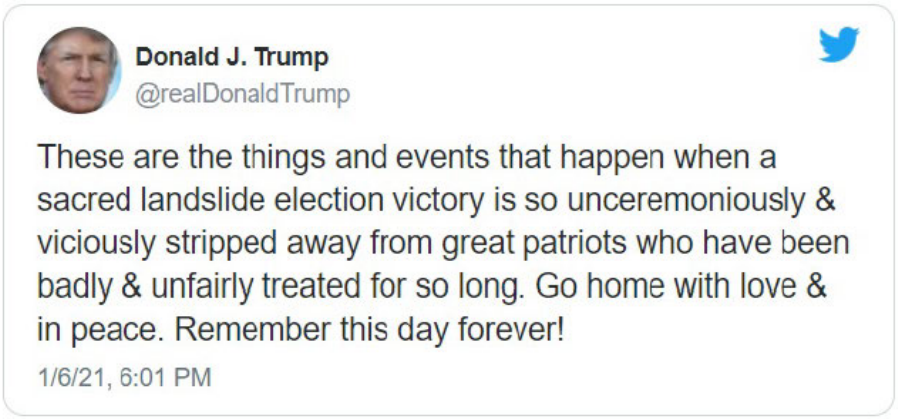
Of course, when he sent his 2:24 p.m. tweet, Trump knew that a violent attack was gaining steam and knew that his words would incite further violence. Ex. 4, J6 Findings #10, 19, 130, 150. In the minutes before 2:24 p.m., Fox News—which the President was watching in the Dining Room—showed that the Capitol was on lockdown, that Capitol police officers were injured, and that attackers had entered the building. *Id.* #321. Throughout the attack, Trump was being briefed in real time by White House Staff about the violence at the Capitol. *Id.* #327. The only possible purpose of such a targeted public message, while the Capitol was under siege, was to encourage the mob who was at that very moment breaching the Capitol in search of the Vice President.

Trump's tweet immediately inflamed the violence at the Capitol. *Id.* #56, 131, 142; Ex. 51, Simi Rep. ¶ 8.2g. A member of the mob read Trump's tweet aloud with a bullhorn, and the mob outside began to chant "bring out Pence" and "hang Mike Pence" around a scaffold and noose apparently erected in front of the Capitol for that very purpose. *Id.* #54; Ex. 18 at 5:00–5:35. Immediately after the tweet, "the crowds both inside and outside the Capitol building violently surged forward." Ex. 4, J6 Findings #56, 131; Ex. 18 at 5:36–7:45 (crowd violently surging in the

minutes just after Trump tweet). Trump intended this surge of violence following his tweet. When he was informed that the crowd was shouting violent threats toward Mike Pence, Trump responded by insisting that perhaps the Vice President "deserved" to be hung. Ex. 4, J6 Findings #132, 150; Ex. 23, Hutchinson Testimony at 21.

During the attack, Trump issued two tweets (at 2:38 p.m. and 3:13 p.m.) instructing the mob to "[s]tay peaceful" and "remain peaceful" toward law enforcement. Ex. 64 at 42–43. Both tweets falsely implied that the insurrection at the Capitol had been "peaceful," when in fact Trump knew of the ongoing violence at the Capitol. *See, e.g.*, Ex. 4, J6 Findings # 11, 20, 133–134. Neither tweet urged the mob to leave the Capitol or to stop targeting the Vice President or members of Congress, and Trump issued them reluctantly after repeated pressure by his confidants to make some kind of public statement. *Id.* #133–134. Trump's staff found these tweets insufficient, and there is no evidence they influenced the mob. *Id.*

As the January 6 Committee found, "[i]t was not until it was obvious that the riot would fail to stop the certification of the vote that the President finally relented and released a video statement made public at 4:17 p.m." *Id.* #331. By that time, it was clear that members of Congress and the Vice President had been brought to safety, and law enforcement had begun securing the interior of the building. *Id.* #386–395. But even that message supported the attackers, claiming the "landslide election" was "stolen" and telling the attackers "We love you. You're very special." Ex. 4, J6 Findings #319. Displaying his control over the mob, Trump's statement was relayed as an "order" among them, and they began to disperse. Ex. 51, Simi Rep. ¶¶ 8.2h-i. Once again, a few hours later, Trump tweeted his support for those who had ransacked the Capitol, saying:



Ex. 64 at 43; Ex. 4, J6 Findings #332. And even after the insurrection, Trump continued to publicly justify the actions of the attackers, suggesting that his false fraud allegations justified "termination of all rules, regulations, and articles, even those found in the Constitution." Ex. 65 (Dec. 3, 2022 truth social post). He has called the attackers "patriots" (even those convicted of seditious conspiracy and violence against police officers), and his calls for violence against his perceived enemies, including judges, still bring forth extremist volunteers. Ex. 51, Simi Rep. ¶ 8.2j.

* * * *

Trump's defense is that he did not act with "purpose or knowledge" to incite the insurrection—that he somehow did so accidentally. *See* Mot. at 16. But the evidence detailed above makes clear that Trump knew precisely what he was doing. Trump's "voluntary act[s] in furtherance of an insurrection against the Constitution of the United States," Ex. 53, Magliocca Rep. at 21, disqualified Trump from holding public office under Section Three of the Fourteenth Amendment.

D. Trump's Other Fourteenth Amendment Arguments Are Meritless

Trump disputes this Court's authority to adjudicate whether he is disqualified under Section 3 of the Fourteenth Amendment on various grounds. *See* Mot. at 19–24. None have merit. Because Trump merely previews points that he says, "will be discussed in more detail in Respondent's Motion to Dismiss based upon the federal issues," *id*. at 19, Petitioners respond in

kind and reserve additional arguments for later briefing.

i. States Have the Power to Exclude Constitutionally Ineligible Presidential Candidates from the Ballot

Trump claims that only Congress can enforce presidential qualifications and can do so only *after the general election*, when the Joint Session meets to count electoral votes on January 6th. Mot. at 20–21. Both the law and common sense refute that absurd result.

States have the power to exclude constitutionally ineligible presidential candidates from the ballot. As then-Judge Neil Gorsuch wrote for the Tenth Circuit, "a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (upholding exclusion of a naturalized citizen from the presidential primary ballot); *Hassan v. New Hampshire*, No. 11-cv-552, 2012 WL 405620 at *1, 4 (D.N.H. Feb. 8, 2012) (same); *Lindsay v. Bowen*, 750 F.3d 1061, 1063–65 (9th Cir. 2014) (upholding exclusion of a 27-year-old from the presidential primary ballot); *see also Elliott v. Cruz*, 137 A.3d 646 (Pa. Commw. Ct. 2016) (adjudicating the merits of challenge to presidential primary candidate Ted Cruz's constitutional eligibility), *aff'd*, 635 Pa. 212 (2016).

The state's "'interest in protecting the integrity … of their ballots and election processes'" forms the "very backbone of our constitutional scheme—the right of the people to cast a meaningful ballot." *Utah Republican Party v. Cox*, 892 F.3d 1066, 1084 (10th Cir. 2018) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)). And "this legitimate interest includes enforcing existing constitutional requirements to ensure that candidates meet the threshold requirements for office and will therefore not be subsequently disqualified, thereby causing the need for new elections." *Greene v. Raffensperger*, 599 F. Supp. 3d 1283, 1319 (N.D. Ga. 2022); *see also Louisiana ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 632 (1869) ("the State has obviously a great interest in" enforcing Section 3 "and a clear right to" do so).

Counsel for Trump embraced this view when he was Colorado's Secretary of State. In 2012, then-Secretary Gessler insisted that "any candidate who does not meet the minimum Constitutional requirements for the office of the Presidency *may not be placed on the ballot for that office*." Ex. 69, Answer ¶ 27, *Hassan v. Colorado,* No. 11-cv-3116, ECF No. 27 (D. Colo., filed Apr. 24, 2012) (emphasis added). His office further stated: "The Secretary of State is responsible for ensuring that only eligible candidates are placed on the ballot, and *must give effect to* … the qualifications for the office of President as outlined in the U.S. Constitution[.]" Ex. 70, Letter to Abdul K. Hassan (Aug. 12, 2011) (emphasis added).

Trump wrongly argues that his qualification for office under Section Three raises a nonjusticiable political question. "A controversy 'involves a political question ... where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012). Neither condition is met here. First, nothing in the Constitution suggests that any one branch of government has exclusive authority to determine a candidate's constitutional eligibility for the Presidency. *Elliott*, 137 A.3d at 650–51. And of course, "States have typically enjoyed broad powers to regulate *candidates*" for public office. *Cawthorn v. Amalfi*, 35 F.4th 245, 262 (4th Cir. 2022) (Wynn, J., concurring); *see also* U.S. CONST. art. II § 1 ("Each State shall appoint" presidential Electors "in such Manner as the Legislature thereof may direct"). Second, judicial precedent applying Section 3 of the Fourteenth Amendment confirms there are "judicially discoverable and manageable standards for resolving the issue." *Elliott*, 137 A.3d at 652; *see* Ex. 53, Magliocca Rep. at 17–18, 23–26 (citing cases construing the "oath," "insurrection" and "engagement" elements of Section 3).

The cases cited by Trump are readily distinguishable. *See* Mot. at 20. In those cases, plaintiffs brought *post-election* lawsuits challenging President Obama's constitutional eligibility,

with no discernible cause of action, to enjoin the Electoral College and Congress from formalizing the election results, *see Berg v. Obama*, 586 F.3d 234, 238 (3d Cir. 2009), or to undo the results post-inauguration, *see Grinols v. Electoral Coll.*, No. 12-cv-2997, 2013 WL 2294885, at *1 (E.D. Cal. May 23, 2013), *aff'd*, 622 F. App'x 624 (9th Cir. 2015); *Strunk v. N.Y. State Bd. of Elections*, 950 N.Y.S.2d 722 (Sup. Ct. 2012). Here, Petitioners bring a *pre-election* suit under a state law that explicitly authorizes ballot access challenges to presidential primary candidates.

Trump argues that allowing state election officials and courts to evaluate presidential candidate qualifications—as they routinely do—would create "chaos." Mot. at 21. But consider the calamitous prospects of Trump's position: Congress would be responsible for disqualifying an ineligible President-Elect during its January 6th Joint Session, *after millions of voters chose that candidate in the general election.* Common sense and the events of January 6, 2021, teach that this is a recipe for disaster. It would lead to precisely "the sort of electoral 'chaos' that the Supreme Court has repeatedly held States are constitutionally empowered to mitigate" by policing their ballots of unqualified candidates *before* any votes are cast. *Cawthorn*, 35 F.4th at 266 n.4 (Wynn, J., concurring) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). And, because a federal question is involved here, the U.S. Supreme Court will have the opportunity to weigh in to eliminate any conflicts between states.

ii. Section 3 of the Fourteenth Amendment Is Enforceable in State Courts through State Law, Without Any Federal Legislation

Trump's argument that "the Fourteenth Amendment … is not self-executing," Mot. at 21, is both irrelevant and wrong. It is irrelevant because Petitioners here do not seek to enforce Section 3 standing alone; they proceed under a cause of action created by Colorado law to enforce qualifications for office. And it is wrong because Section Three is self-executing.

Trump provides no argument for why Section Three cannot be "executed" by *state statutes* enforcing federal qualifications. State courts, of course, have an affirmative duty to adjudicate

constitutional questions where state law allows, even absent federal legislation. The Constitution's Supremacy Clause explicitly "'charges state courts with a coordinate responsibility to enforce [federal] law according to their regular modes of procedure' . . . unless Congress dictates otherwise." *Consumer Crusade, Inc. v. Affordable Health Care Sols., Inc.*, 121 P.3d 350, 353 (Colo. App. 2005) (quoting *Howlett v. Rose*, 496 U.S. 356, 367 (1990), and *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990)). "[T]he Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." *Howlett*, 496 U.S. at 367.

In keeping with these bedrock principles of federalism, state courts have historically enforced Section 3 pursuant to *state* statutes and procedural rules. *See, e.g.*, Ex. 54, *Griffin*, 2022 WL 4295619 (adjudicating Section 3 challenge under state quo warranto law); *Worthy*, 63 N.C. 199 (mandamus); *In re Tate*, 63 N.C. 308 (mandamus); *Sandlin*, 21 La. Ann. 631 (quo warranto); *see also* Ex. 53, Magliocca Rep. at 34–37. To defeat Petitioners' claims here, Trump must show not only that Section 3 is not "self-executing," but that state statutes implementing federal constitutional requirements like Section Three are somehow *unconstitutional*. Such a claim would be absurd, and nothing in the Constitution or the case law remotely supports it.

In any event, no statute is required to activate Section 3 of the Fourteenth Amendment, just as no statute is required to activate other sections of the Fourteenth Amendment or other constitutional qualifications for office. Section 3 is a command with independent legal force, dictating that "[n]o person *shall*" hold public office if the disqualifying conditions are met. U.S. CONST. amend. XIV § 3 (emphasis added). Its mandatory language mirrors other self-executing constitutional qualifications, *see, e.g.*, *id.* art. I, § 2, cl.2 ("No Person shall be a Representative who shall not…"); art. I, § 3, cl.3 ("No Person shall be a Senator who shall not…"); art. II, § 1, cl. 5 ("No Person … shall be eligible to the Office of President … who shall not…"); amend. XXII ("No person shall be elected to the office of the President more than twice…"); and other

provisions of the Fourteenth Amendment, *see, e.g.*, *id.* amend. XIV § 1 ("No State shall …").

Like these provisions, Section 3 "directly adopts a constitutional rule of disqualification from office" that requires no legislation to be effective. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024), at 18, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751. And the fact that Section 3 grants Congress authority to "remove" its disabilities by a two-thirds vote implies that the disability *already exists* because of Section Three with no legislation required for it to take effect. *Id.*

Contrary to Trump's argument that "the Fourteenth Amendment is not self-executing," Mot. at 21–22, the Supreme Court has expressly held that Section 1 of the Fourteenth Amendment *is* "self-executing," just like the "first eight Amendments to the Constitution." *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997). That is so even though Section 5 of the Fourteenth Amendment provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV § 5. While Section 5 grants Congress the "remedial power" to adopt legislation implementing each section of the Fourteenth Amendment, it does not *condition* the Amendment's operation on congressional action; rather, the "power to interpret the Constitution in a case or controversy remains in the Judiciary." *City of Boerne*, 521 U.S. at 524–29.[11] The Supreme Court's rationale applies equally to Section 3.

Trump's motion cites only a single, non-binding case that is both unpersuasive and inapplicable: *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869). *See* Mot. at 22. There, Chief Justice Salmon Chase, while sitting as a circuit judge in post-war Virginia, held that an Act of Congress

[11] The Thirteenth and Fifteenth Amendments are likewise self-executing, despite having similar provisions authorizing Congressional implementing legislation. *Civil Rights Cases*, 109 U.S. 3, 20 (1883); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009). And state courts routinely adjudicate other Fourteenth Amendment claims brought directly under the Constitution. *See, e.g.*, *Town of Dillon v. Yacht Club Condos. Home Owners Ass'n,* 2014 CO 37 (Due Process Clause claim); *San Isabel Elec. Ass'n v. Pub. Utils. Comm'n*, 2021 CO 31 (same).

was required to permit a federal court to grant habeas corpus relief to a defendant convicted in a trial presided over by a state judge presumably disqualified under Section 3. *In re Griffin*, 11 F. Cas. at 26. That case, however, arose from a unique historical context with no applicability to the modern day: in 1869, Virginia was an "unreconstructed" territory under federal military control, *id.* at 11, and it lacked any operative state law that could have enabled enforcement of Section 3. The case did not decide whether a functional state like Colorado could pass its own legislation providing procedures for enforcing constitutional qualifications like Section 3. Ex. 53, Magliocca Rep. at 35–37. And Chase reversed his position on Section 3 in the treason prosecution of Jefferson Davis, where he agreed (again as a circuit judge) with Davis that Section 3 "executes itself" and "needs no legislation on the part of congress to give it effect." *In re Davis*, 7. F. Cas. 63, 90, 102 (C.C.D. Va. 1871). Neither *Griffin* nor *Davis* are binding precedent, since Chase was merely "acting as a circuit judge," and Chase's "contradictory holdings, just a few years apart, draw both cases into question and make it hard to trust [his] interpretation." *Cawthorn*, 35 F.4th at 278 n.16 (Richardson, J., concurring in the judgment); *see also* Baude & Paulsen, *supra*, at 35–49 (explaining why the reasoning of *Griffin*'s case is atextual, ahistorical, and illogical).

iii. Section 3 Disqualification Does Not Require a Criminal Conviction for "Insurrection" or Any Other Offense

Citing no authority, Trump also asserts he cannot be disqualified under Section 3 because he has not been charged with or convicted of the separate crime of "rebellion or insurrection" under 18 U.S.C. § 2383 and was found "not guilty" in the second impeachment because the bipartisan majority of 57 senators finding Trump guilty of inciting insurrection fell short of the required 2/3 supermajority. Mot. at 23–24.

So what. Neither Section 3's text nor judicial precedent require a criminal indictment, conviction, or impeachment for "insurrection" or any other offense for a person to be adjudged

disqualified, as leading scholars have confirmed.[12] Rather, Section 3 sets a qualification for office that "operates independently of any … criminal proceedings and, indeed, also independently of impeachment proceedings and of congressional legislation." Luttig & Tribe, *supra*. None of the individuals disqualified under the Fourteenth Amendment since its ratification in 1868—not one—was charged under 18 U.S.C. § 2383 or its predecessor statutes. *See, e.g.*, Ex. 54, *Griffin*, 2022 WL 4295619, at *16; *Worthy*, 63 N.C. 199; *In re Tate*, 63 N.C. 308; *Sandlin*, 21 La. Ann. 631.

This makes sense because, despite some overlapping text, 18 U.S.C. § 2383 does not implement the Fourteenth Amendment and was not enacted under Section 5's enforcement authority. Indeed, the criminal statute was originally codified in *1862*, six years *before* the Fourteenth Amendment's ratification in 1868. *See* Second Confiscation Act, 12 Stat. 589 (July 17, 1862); Baude & Paulsen, *supra*, at 81–82 & n.288 ("[A] prosecution under Section 2383 of Title 18 is neither a prerequisite to nor preclusive of the self-executing application of Section Three…."). Not surprisingly, then, Section 3 and Section 2383 differ materially in text, scope, and function. For example, Section 3 only applies to individuals who commit insurrection against the Constitution after taking an oath, whereas Section 2383 applies to individuals who commit insurrection against the United States no matter if they have taken an oath.

Petitioners seek "not to inflict punishment or to impose penalties" on Trump, but only "to inquire legally into his right to hold … office." *Sandlin*, 21 La. Ann. at 632–33. The lack of criminal insurrection charges has no bearing on that constitutional inquiry.

[12] Baude & Paulsen, *supra*, at 68, 82 n.288; J. Michael Luttig & Laurence H. Tribe, *The Constitution Prohibits Trump From Ever Being President Again*, The Atlantic, Aug. 19, 2023, https://www.theatlantic.com/ideas/archive/2023/08/donald-trump-constitutionally-prohibited-presidency/675048; *accord Litigation of Criminal Prosecutions for Treason, Insurrection, and Seditious Conspiracy*, 179 Am. Jur. Trials 435 § 17 (2023).

III. Trump Has No First Amendment Right to Engage in Insurrection in Violation of the Fourteenth Amendment

The thrust of Trump's Anti-SLAPP motion is that even if Trump engaged in insurrection in violation of the Fourteenth Amendment, his "actions were all protected by the First Amendment." Mot. 6. The First Amendment does not, however, immunize Trump's efforts to violently subvert American democracy in violation of his Oath.

A. Trump's Conduct, as Well as Speech, Constitutionally Disqualifies Him from Future Office

Trump's motion incorrectly assumes that his disqualification is "premised on speech (or his refusal to speak)" alone. Mot. 6. But Trump's insurrectionary engagement extends to conduct, not just speech. For example, Trump failed to perform any act to protect the Capitol, contrary to his legal duties, for nearly three hours after he learned the Capitol was under attack, despite having the immense powers of the presidency at his disposal and despite repeated urging by his staff and others. *See supra* at 28–30; *see also Twitter, Inc. v. Taamneh*, 598 U.S. 471, 489 (2023) ("[I]naction can be culpable" when there is an "independent duty to act."). This violated, among other duties, Trump's constitutionally mandated oath to "preserve, protect and defend the Constitution." That invoking his powers to stop the insurrection would have required Trump to communicate commands does not convert his dereliction into protected speech: a command is "speech . . . brigaded with action" and is conduct for purposes of the First Amendment. *Thompson v. Trump*, 590 F. Supp. 3d 46, 116 (D.D.C. 2022) (*quoting Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring)); *see also Chaplinsky v. N.H.*, 315 U.S. 568, 574 (1942) ("verbal acts" do not receive constitutional protection).

B. The Constitution's Disqualification of Oath-Breaking Insurrectionists Is Not Unconstitutional

Trump's motion assumes that the First Amendment somehow takes precedence over Section 3 of the Fourteenth Amendment, but basic logic dictates it cannot. As a collection of First

Amendment scholars observed in the *Griffin* case, his argument is effectively that Section 3, "though a part of the Constitution, is itself unconstitutional in whole or in part" under the First Amendment—an argument that "has never succeeded in American courts and was specifically rejected by the Clause's drafters."[13] A statute may be unconstitutional, but "the Supreme Court has rejected all claims that a duly passed constitutional amendment can be unconstitutional." Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 Ark. L. Rev. 217, 244 (2016) (citing *Leser v. Garnett*, 258 U.S. 130, 136 (1922), which held that the Fifteenth and Nineteenth Amendments are both valid).

If there *were* somehow genuine tension between the two, the appropriate response would not be to assume the First Amendment displaces Section 3. Instead, the Court would "construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other." *Cohens v. State of Virginia*, 19 U.S. 264, 393 (1821). "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity." *Prout v. Starr*, 188 U.S. 537, 543 (1903).

Here, Section 3 is easily harmonized with the First Amendment. While Trump seeks to reduce the First Amendment to the test set out in *Brandenburg v. Ohio*, that case identifies just one of many categories of speech regulation that do not raise First Amendment concerns. *See, e.g., Cole v. Richardson*, 405 U.S. 676, 680 (1972) (constitutionally mandated oaths consistent with First Amendment, notwithstanding general prohibition on compelled speech); *United States v.*

[13] Br. of Amici Curiae Floyd Abrams, Erwin Chemerinsky, Martha Minow, Laurence H. Tribe, Maryam Ahranjani, Lynne Hinton, and National Counsel of Jewish Women in Supp. Of Pls.' Action for Quo Warranto Relief at 14, New Mexico ex rel. White v. Griffin, No. 101-cv-2022-00473 (N.M. Dist. Ct. Aug 1, 2022), https://www.justsecurity.org/wp-content/uploads/2023/05/griffin-scholar-brief-aug-1-2022.pdf ("First Amendment Amicus").

Hansen, 143 S. Ct. 1932, 1939 (2023) ("The First Amendment does not shield fraud" (citation omitted)); *Counterman v. Colorado*, 143 S. Ct. 2106, 2114 (2023) ("True threats," "defamation," and "obscenity," are all "historically unprotected categories of communications"); *United States v. Stevens*, 559 U.S. 460, 468 (2010) (exempting "speech integral to criminal conduct"); *Branti v. Finkel*, 445 U.S. 507, 518 (1980) (exempting speech that "interfere[s] with the discharge of [employee's] public duties"); *Cohen v. California*, 403 U.S. 15, 20 (1971) ("fighting words"). Section 3 fits neatly alongside existing categories of regulation that do not infringe First Amendment rights. *See* First Amendment Amicus at 13–14.

Section 3 is a narrowly-tailored, non-punitive measure that seeks to achieve the compelling governmental purpose of protecting the Constitution from insurrectionist office-holders. Section 3 is limited to those high-ranking government officials who previously "had taken an oath to support the Constitution and violated it." *Worthy v. Barrett*, 63 N.C. at 204. On this limited self-selected set of individuals, Section 3 imposes no penalty, but "merely change[s] the qualifications of office." Mark Graber, *Their Fourteenth Amendment and Ours*, Just Security (Feb.16, 2021), https://www.justsecurity.org/74739/their-fourteenthamendment-section-3-and-ours/ (discussing drafting history); Cong. Globe, 39th Cong., 1st Session, 2919 (1866) (Section 3 is "a precautionary, not a penal measure"). It also applies only in the extraordinarily rare case of an insurrection or rebellion against the U.S. Constitution. Ex. 53, Magliocca Rep. at 19–20.[14] Even then, one's

[14] Such a limit would distinguish most civil disturbances, even if they were wrongly assumed to otherwise meet the qualifications of an insurrection, as they are rarely directed at the operation of the Constitution itself. For example, "[c]ourts have . . . rejected January 6 insurrectionists' attempts to compare their conduct to that of Black Lives Matter protesters." Ex. 54, *Griffin*, 2022 WL 4295619, at *66; *United States v. Jackson*, No. 22-cr-00230-RC-1, ECF No. 40 at pp. 20-22 (D.D.C. Sept. 26, 2022) (rejecting comparison between January 6 and Black Lives Matters protests, stating: "One involved the attempt to delay or subvert the peaceful transfer of power. The other did not."); *see also* Br. of Amici Curiae NAACP New Mexico State Conference and NAACP Otero County Branch, *New Mexico ex. rel. White v. Griffin*, No. D-101-CV-2022-00473 (N.M. Dist. Ct. Aug. 23, 2022) (discussing courts' differentiation between January 6 to Black Lives

"disloyal sentiments, opinions, or sympathies would not disqualify." *Id.* at 22 (quoting 12 Op. Att'y Gen. 141, 164 (1867)). Rather, speech is disqualifying only if "the words voluntarily encouraged insurrection against the Constitution" *Id.* at 21. In this way, Section 3 leaves untouched the "mere abstract teaching … of the moral propriety or even moral necessity for a resort to force and violence" that the First Amendment protects. *Brandenburg v. Ohio*, 395 US. 444, 448 (1969). Finally, Section 3 provides its own safety valve: the removal of disqualification by a two-thirds vote in Congress. U.S. CONST. amend. XIV § 3. Section 3's scope is "so circumscribed that, between the end of Reconstruction and 202[3], the Clause was successfully invoked only [twice]," First Amendment Amicus at 15, with one case involving the January 6 insurrection, *see* Ex. 54, *Griffin.* Given its narrowly targeted scope and its non-punitive character, Section Three may (and must) be applied without any additional First Amendment overlay.

Moreover, even under usual First Amendment principles, the government "has broader discretion to restrict speech when it acts in its role as employer." *Garcetti v. Ceballos*, 547 U.S. 410, 417–18 (2006). Thus, if an employee's speech, even "private political beliefs," "interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." *Branti v. Finkel*, 445 U.S. 507, 517 (1980) (citation omitted); *see also, e.g., Houston Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1259–60 (2022) (noting that "elected bodies in this country have long exercised the power to censure their members" and surveying historical precedent). That is especially so where, as here, the country has gone through the painstaking process of amending the Constitution to bar from future office those who engage in insurrection, whether by statement or otherwise. As Senator John Henderson (MO) stated during the congressional debates over Section 3:

If [the people] had the power to originally declare [qualifications for the Presidency

Matter protests), https://www.justsecurity.org/wp-content/uploads/2023/05/griffin-naacp-new-mexico-state-conference-brief-aug-23-2022.pdf.

> and Congress set forth in the Constitution of 1787] … [h]ave not the people the right, by a constitutional amendment, to enact [Section 3]? … [T]his is an act fixing the qualifications for officers and not an act for the punishment of crime. … Office is the creature of Government. … The right is not absolute… The Government created it and the Government can take it away.

Cong. Globe, 39th Cong., 1st Sess. 3036 (June 8, 1866) (statement of Sen. Henderson). That is clearly correct. The people may add qualifications for public office through constitutional amendment without somehow running afoul of earlier constitutional provisions.

C. The First Amendment Does Not Immunize Trump's Insurrectionary Speech

Even if usual First Amendment principles somehow constrained application of Section 3, Trump's speech is unprotected. Trump declares that his statements cannot disqualify him unless they fall within a single category of unprotected speech subject to criminal penalties: the incitement to imminent violence. Mot. 7 (citing *Brandenburg*). Trump ignores other exceptions to the First Amendment that render his speech unprotected. In any event, Trump's speech meets the demands of *Brandenburg*, as one federal court has already recognized and as is only further confirmed by the evidence Petitioners submit today.

i. Trump's Speech was Integral to an Unlawful Act

An insurrection, by its nature, requires speech: it requires speech to organize the assembly, to give it common purpose, and to direct its force. Trump's statements provided those necessary elements: mobilizing and inspiring the mob, organizing their location and time, inciting them, and directing their attack to the Capitol and the Vice President. *See generally* Ex. 51, Simi Rep.; Ex. 31, Grisham Decl. ¶¶ 17–18. Trump's statements "encourage[d]" and "induce[d]" those who attacked the Capitol on January 6, and thus are unprotected.

Even where "the state may not criminalize the expression of views," it "may nonetheless outlaw encouragement, inducement, or conspiracy to take violent action." *United States v. Rahman*, 189 F.3d 88, 115 (2d Cir. 1999). To that end, the Supreme Court has expressly rejected

"the contention that conduct [that is] otherwise unlawful is always immune from state regulation [merely] because an integral part of that conduct is carried on by" means of speech. *Giboney v. Emp. Storage & Ice Co.*, 336 U.S. 490, 498 (1949). It is likewise not an "abridgement of speech" to penalize unlawful conduct that "was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Cox v. Louisiana*, 379 U.S. 559, 563 (1965). "Put another way, speech is not protected by the First Amendment when it is the very vehicle of the crime itself," *United States v. Rowlee*, 899 F.2d 1275, 1278 (2d Cir. 1990) (quotation omitted), or of civilly sanctionable conduct, *see Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2006). This is not to say that speech loses its protection "simply because the speech is illegal under the law that is being challenged." Eugene Volokh, *The Speech Integral to Criminal Conduct Exception*, 101 Cornell L. Rev. 981, 987 (2016). Rather, "[w]hen speech tends to cause, attempts to cause, or makes a threat to cause some illegal conduct … *other than the speech itself*," such as "murder, fights, restraint on trade, child sexual abuse, discriminatory refusal to hire, and the like," this "opens the door to possible restrictions on such speech." *Id.* at 986–87.

Many criminal offenses pass muster under the First Amendment despite being "characteristically committed through speech," *Rahman*, 189 F.3d at 117, including the use of "conspiratorial or exhortatory words" to facilitate "preparatory steps towards criminal action." *Id*. at 116. The law may reach such speech even if there is no incitement to imminent violence. *See United States v. Bell*, 414 F.3d 474, 482 n.8 (3d Cir. 2005) ("*Brandenburg* clearly does not apply to [otherwise] unprotected or unlawful speech or speech-acts (e.g., aiding and abetting, extortion, criminal solicitation, conspiracy, harassment, or fighting words)"); *see also Associated Press v. United States*, 326 U.S. 1, 7 (1945) (government need not meet "clear and present danger" test to charge conspiracy in violation of the Sherman Act). And it may touch speech even if uttered with less than "purpose or knowledge" that it would lead to unlawful consequences. *See Counterman*

v. Colorado, 143 S. Ct. 2106, 2111 (2023) ("a mental state of recklessness is sufficient" to render statements unprotected "true threats"); *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964) (speech may be deemed defamatory if it reflects "reckless disregard" for the truth).

As demonstrated thoroughly above, Trump's statements easily fall within the category of proscribed speech that encourages, induces, or furthers violent criminal action, and evidences his knowledge about the consequences of his efforts. *See supra* at 13–32. To say Trump's speech was integral to the insurrection that day is an understatement, but it is enough to place it outside the protections of the First Amendment.

ii. Trump Incited an Insurrection and Exacerbated It as It Was Ongoing

Turning finally to the *Brandenburg* test, it is satisfied here. Trump's speech was "directed to inciting or producing imminent lawless action and [was] likely to incite or produce such action. *Brandenburg*, 395 U.S. at 447.

The evidence makes clear—and certainly gives rise to a reasonable inference, which is all that is required at this stage—that Trump's speech was directed to, and was likely to, incite violence on January 6. *See supra* at 13–32. In the words of the January 6 Committee, "President Trump had 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.' They clearly got the message." Ex. 4, J6 Findings #313. Not only did Trump summon and incite the mob before the attack, but he continued to deliberately fan the flames by his words and deeds during the three-hour period of the attack. *See supra* at 13–32. He did all of this knowing that his supporters would understand his words as a call to violence based on a years-long "call-and-response" pattern of extremist supporters acting on his words. *See supra*

14–15, 27–28; Ex. 51, Simi Rep. ¶ 4.2, 4.3, 6.1c–j, 7.1a–h, 8.1a–n, 8.2a–c, 9.[15]

Trump's words at the Ellipse also were not remotely in the realm of "abstract advocacy." He gave his incendiary speech to a mob that he had assembled and angered with a weeks-long persistent drumbeat. *Supra* at 13–22. When he unleashed them on the Capitol building, he knew that many were armed and dangerous and even more were willing to engage in violence to take back their country. *Id.* at 23–24. Trump directed his words at "inciting or producing imminent lawless action[.]" *Brandenburg*, 395 U.S. at 447. And they had that predictable effect.

A federal district court has already held, even without the benefit of the factual record assembled here, that Trump's January 6 speech "plausibly [contains] words of incitement not protected by the First Amendment." *Thompson*, 590 F. Supp. 3d at 115. That is so even though the court believed "[t]he President's words on January 6th did not explicitly encourage the imminent use of violence or lawless action" because it concluded his words "implicitly encourage[d] violence or lawlessness." *Id.* at 115 (holding that words may incite if a "rational inference from the import of the language" is that they "intended to produce, or likely to produce, imminent disorder" (quoting *Hess v. State of Indiana*, 414 U.S. 105, 109 (1973))). "Federal appellate courts have understood the *Brandenburg* exception to reach implicit encouragement of violent acts." *Id*. (citing *Bible Believers v. Wayne County*. 805 F.3d 228, 246 (6th Cir. 2015) (*en banc*)).

The court correctly recognized that "[t]he 'import' of the President's words must be viewed within the broader context in which the Speech was made and against the Speech as a whole": his creation of "an air of distrust and anger among his supporters by creating a false narrative that the election was literally stolen," leading to "threats against state election officials" and "clash[es]

[15] This makes Trump unlike the speaker "wholly at the mercy of the varied understanding of his hearers and … whatever inference may be drawn as to his intent and meaning." *Thomas v. Collins*, 323 U.S. 516, 535 (1945). Trump ensured his call to "fight like hell" was *not* misunderstood to be "metaphorical, referring to a political 'fight,'" Mot. 13, at least by those ready to deploy force to keep him in power.

with police in Washington, D.C., following pro-Trump rallies" of which "[t]he President would have known," leading to the "reasonable ... infer[ence] that the President would have known his supporters viewed his invitation [to Washington, D.C.] as a call to action." *Id.* at 115–16 (relying on the Supreme Court's decision in *Hess*, which "signaled that there is no safe haven under *Brandenburg* for the strategic speaker who does not directly and unequivocally advocate for imminent violence or lawlessness, but does so through unmistakable suggestion and persuasion"). And despite the likelihood that "when the President stepped to podium on January 6th, . . . he would have known that some in the audience were prepared for violence" based on his certain knowledge of threats and plans for violence that his supporters shared in the days before, he "delivered a speech he understood would only aggravate an already volatile situation." *Id.* at 116. As the court summarized:

> President Trump's January 6 Rally Speech was akin to telling an excited mob that corn-dealers starve the poor in front of the corn-dealer's home. He invited his supporters to Washington, D.C., after telling them for months that corrupt and spineless politicians were to blame for stealing an election *from them*; retold that narrative when thousands of them assembled on the Ellipse; and directed them to march on the Capitol building—the metaphorical corn-dealer's house—where those very politicians were at work to certify an election that he had lost. The Speech plausibly was … a "positive instigation of a mischievous act."

Id. at 118.

Exactly so. Trump summoned an armed mob that he knew would read his words as a call to violent action, inflamed them through incendiary rhetoric, whipped up anger against Vice President Pence and members of Congress, and then directed the angry mob toward the Capitol building. Trump violated his oath and put at risk the very existence of our republic under the U. S. Constitution—including the First Amendment rights that Constitution protects.

Conclusion

For all of these reasons, the Court should deny the Anti-SLAPP motion because the claim against Trump is moot and he cannot raise Anti-SLAPP claims as an intervenor, because § 1-1-

113's "exclusive" procedures displace the Anti-SLAPP statute, and because this case falls within the public interest exception. This procedural ruling will avoid any improper attempts at an interlocutory appeal that could delay the evidentiary hearing. But should the Court feel the need to reach the merits, the Court should reject the motion because Petitioners have provided extensive evidence supporting their claim that Trump engaged in insurrection against the Constitution, that he is disqualified under Section Three, and that the First Amendment does not shield his incitement to violence against the U.S. Capitol.

Date: September 29, 2023 Respectfully submitted,

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Appendix 1: The Findings of the January 6 Committee Are Admissible

Following the January 6 insurrection, the House of Representatives organized the Select Committee to Investigate the January 6th Attack on the U.S. Capitol. Ex. 1, Heaphy Decl. ¶ 11. That Committee undertook a comprehensive investigative process over the course of roughly a year and a half. *Id.* ¶¶ 10–19. After its detailed investigation, the Committee released an 840-page report detailing its factual findings about the events leading up to the violence on January 6, the factors that incited the mob to attack the Capitol, how the insurrection unfolded and how it breached the Capitol's defenses, and what role Trump played in the insurrection. *See generally* Ex. 3, J6 Report.

All of the findings of the January 6 Report are highly probative of the issues here and admissible under the public records exception to the hearsay rule laid out in Colo. R. Evid. 803(8). To streamline the issues and to avoid any potential hearsay challenges to particular portions of the Report, however, Petitioners currently intend to offer as evidence only certain excerpts from the Report's factual findings, attached as Exhibit 4. *See* Ex. 1, Heaphy Decl. ¶ 20. Because these excerpts constitute "factual findings resulting from an investigation made pursuant to authority granted by law," and because Trump will be unable to rebut the presumptive admissibility of public investigative reports, the excerpts are admissible evidence. *Id.*; Colo. R. Evid. 803(8)(C).

I. The January 6 Report is Admissible under Rule 803(8)

Colorado Rule of Evidence 803(8)(C) provides a hearsay exception permitting the introduction of factual findings from government investigations:

> Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law.

This rule is "nearly identical" to the analogous federal rule, and thus federal cases "are instructive" in interpreting its scope. *Bernache v. Brown*, 2020 COA 106, ¶¶ 15–43, 471 P.3d 1234, 1239–43.

There can be no doubt that the January 6 Report is a report "of public offices or agencies"—namely, a Congressional Special Committee. Nor can there be any doubt that the Report contains "factual findings resulting from an investigation made pursuant to authority granted by law." House Resolution 503, enacted on June 30, 2021, established the January 6 Committee to "investigate and report on the facts, circumstances, and causes relating to the January 6, 2021, domestic terrorism attack upon the U.S. Capitol[.]" Ex. 1, Heaphy Decl. ¶ 11; Ex. 2, H. Res. 503. That is precisely the scope of the Committee's Final Report.

"An authorized report of a government agency is assumed to be trustworthy absent evidence to the contrary." *Gentile v. County of Suffolk*, 129 F.R.D. 435, 449 (E.D.N.Y.1990), *aff'd*, 926 F.2d 142, 155 (2d Cir.1991); *see also Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143 (2d Cir. 2000) (factual findings of government investigations are "presumptively admissible"). Thus, if Trump intends to oppose the admission of the excerpted portions of the January 6 Report, Trump must provide evidence showing that "circumstances indicate a lack of trustworthiness." Rule 803(8)(C). He will be unable to do so.

Based on the federal Advisory Committee notes, courts have identified "a nonexclusive list of four factors" bearing on trustworthiness: "(1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 168 (1988). Those factors warrant admissibility:

(1) *Timeliness*: The investigation was timely—it began just months after the attack on January 6 and the report issued less than two years after the events. Ex. 1, Heaphy Decl. ¶¶ 10–11.

(2) *Investigator's Skill*: Timothy J. Heaphy, the Chief Investigative Counsel for the J6 Committee, has a wealth of experience carrying on complex investigations. *See id*. ¶¶

1–9. Among other things, he served as the U.S. Attorney for the Western District of Virginia and was hired by the City of Charlottesville to investigate the violence that occurred at the August 2017 Unite the Right Rally in Charlottesville. *Id.* ¶¶ 7–8. He also has extensive experience with white collar investigations in private practice. *Id.* ¶¶ 1–9. He supervised a team of approximately 20 experienced investigators. *Id.* ¶ 14–15.

(3) *Hearings*: Extensive public hearings were held over ten days, in which the Committee presented testimony from 70 witnesses. *Id.* ¶ 17.

(4) *Potential Bias*: Any possible "bias" is minimal here. The Report came from a detailed, deliberative process. *Id*. ¶¶ 2, 12–19, 22. The Committee consisted of nine members of Congress, including two Republicans, who agreed unanimously to the findings contained in the Report. *Id.* ¶¶ 12, 22. The investigative staff included self-identified Republicans, and there was no political litmus test for hiring. *Id.* ¶¶ 14–15.

In addition to these factors, other information demonstrates the reliability of the Report's process. The Committee interviewed or deposed more than 1,000 witnesses, the overwhelming majority of whom were Republicans—and many of whom served in Trump's own administration. *Id.* ¶ 17; Ex. 3, J6 Report at 131–134. The investigative staff warned each witness of the criminal penalties that anyone who makes knowingly false statements to the Committee would face. Ex. 1, Heaphy Decl. ¶ 18. Depositions and hearing testimony were given under oath. *Id*. The Committee also collected enormous troves of material, including over one million documents and hundreds of hours of video evidence. *Id.* ¶ 17. To ensure a transparent process, the Committee posted the documents, recorded interviews, depositions, and exhibits that it relied upon on its official public website. *Id.* ¶ 19.

To the extent Trump attempts to prove that the January 6 Report is "untrustworthy," these facts refute any such inference. *See Barry v. Tr. of Int'l Ass'n Full Time Salaried Officers & Emps. of Outside Local Unions & Dist. Counsel's (Iron Workers) Pension Plan*, 467 F. Supp. 2d 91, 99 (D.D.C. 2006). In *Barry*, the federal district court in Washington, D.C., assessed whether a Senate report and a House report were trustworthy enough to warrant admission under the public records exception to the hearsay rule, ultimately holding that the Senate report was admissible and the House report was not. *Id.* Among the deciding factors was that the Senate investigatory

committee had access to large volumes of records and independently evaluated those records in crafting its final report, the investigation started soon after public disclosure of potential wrongdoing, Senators treated investigation as one of utmost importance and tailored their questions and their demeanor accordingly, and minority members did not dissent from the report's findings and conclusions. *Id*. at 100–101. By contrast, the House's report was not sufficiently trustworthy because the document was prepared with considerable haste, borrowed extensively from a report prepared by a private law firm, reached tentative legal conclusions without appreciable analysis, and minority party members were never asked or permitted to participate in preparing report. *Id*. at 101. The January 6 Report is far more like the Senate report in *Barry*, including a large investigatory record, somber process, and bipartisan involvement. Ex. 1, Heaphy Decl. ¶ 1–17; *see also McFarlane v. Ben-Menashe*, No. CIV. A. 93-1304(TAF), 1995 WL 129073, at *5 (D.D.C. Mar. 16, 1995), *opinion withdrawn in part on other grounds on reconsideration,* No. CIV. A. 93-1304(TAF), 1995 WL 799503 (D.D.C. June 13, 1995), *aff'd, 91* F.3d 1501 (D.C. Cir. 1996) (admitting Congressional task force report because, among other things, the Task Force was "staffed by ten attorneys and six professional investigators" who "interviewed or deposed more than 230 people" and "had direct access to voluminous documents and electronic surveillance").

II. The Findings Offered by Plaintiffs Do Not Have Multiple Hearsay Issues

The portions of the January 6 Report that Petitioners seek to admit are not otherwise objectionable on hearsay grounds. Most are pure factual "findings" of the committee that raise no hearsay issues. Some findings that Petitioners seek to admit quote statements from non-testifying declarants, but those statements are either not being offered for the truth of the matter asserted, or they fall within another hearsay exception.

State of Mind: Some findings include statements that show the state of mind of Trump's supporters, and the effect that his words had on them. *See, e.g.*, Ex. 4, J6 Findings #54. Other findings include statements that show what information was available in the public domain at the time that Trump likely would have been aware of, and therefore tend to show Trump's state of mind. *See e.g.*, *id.* #176. These findings are admissible because they are being introduced not for the truth of any matter asserted in them, but for the state of mind of either the declarant or the listener. *People v. Phillips*, 2012 COA 176, ¶ 107 ("Under CRE 801(c), if an out-of-court statement is offered solely to show its effect on the listener, it is not offered to prove the truth of the matter asserted and is not hearsay.").

Trump's Own Statements: Some of the findings quote Trump's own tweets, speeches, or other statements. *See, e.g.,* Ex. 4, J6 Findings #111, 254. These are admissions of a party opponent. Additionally, Petitioners do not rely on a single one of his statements for the truth of the matter asserted—indeed, they are cited either for their *untruth*, or because they are the verbal acts by which Trump induced his supporters to violence or by which he unlawfully pressured federal and state officials to fraudulently overturn the election. *See, e.g.*, Ex. 4, J6 Findings #75, 196.

Agent Admissions: Other findings include statements that constitute admissions of Trump's agents. *See, e.g.*, Ex. 4, J6 Findings #50. For example, Rudy Giuliani and John Eastman were Trump's lawyers and agents who advised him on his efforts to overturn the 2020 election; *see, e.g., Eastman v. Thompson*, 594 F.Supp.3d 1156, 1176 (C.D. Cal. 2022) (finding that "Eastman had an attorney client relationship with President Trump and his campaign"); Ex. 3, J6 Report at 132 (identifying Giuliani and Eastman as "attorney[s] for Donald Trump"). Findings that cite their contemporaneous statements within the scope of the agency relationship with Trump are admissible. *See* CRE 801(d)(2) (admission by party opponent is admissible if made "by the party's agent or servant concerning a matter within the scope of the agency or employment, made during

the existence of the relationship"). Similarly, statements by Pat Cipollone, who was White House Counsel at the time and advising Trump on the legality of plans to overturn the election, are also agent admissions. *See, e.g.*, Ex. 4, J6 Findings #229; Ex. 3, J6 Report at 131. But in any event, these are admissible for purposes other than the truth of the matter. Instead, they are offered to show Trump's state of mind. For instance, the fact that Trump's close confidants did not believe they had a factual or legal basis to overturn the election supports the inference that they would have informed Trump of the same.

Government Reports: Some of the findings quote from other government reports—for example, intelligence reports on potential threats in advance of January 6. *See, e.g.*, *id.* # 88, 103. Those are admissible under Rule 803(8)(A) as reports of public agencies setting forth "the activities of the office or the agency"—namely, their monitoring of intelligence threats. Moreover, these findings show what information would have been available to Trump regarding intelligence threats in the lead-up to January 6 and therefore bear on his state of mind.