STATE OF MICHIGAN
IN THE SUPREME COURT

ROBERT LaBRANT, ANDREW BRADWAY, NORAH MURPHY, and **WILLIAM NOWLING,**

Plaintiffs-Appellants,

Supreme Court No.
Court of Appeals No. 368628
Court of Claims No. 23-000137-MZ

v

JOCELYN BENSON, in her official capacity as Secretary of State,

Defendant-Appellee,

THIS APPEAL INVOLVES AN URGENT ELECTION MATTER RELATED TO THE FEBRUARY 27, 2024 PRESIDENTIAL PRIMARY

and

DONALD J. TRUMP,

Intervening Defendant-Appellee.
_____/

ROBERT DAVIS,

Plaintiff,

Court of Appeals No. 368615
Circuit Court No. 23-012484-AW

v

WAYNE COUNTY ELECTION COMMISSION,

Defendant,

and

DONALD J. TRUMP,

Intervening Defendant.
_____/

EMERGENCY APPLICATION FOR LEAVE TO APPEAL OF PLAINTIFFS-APPELLANTS LaBRANT ET AL.

APPENDIX

Table of Contents

STATE OF MICHIGAN

COURT OF CLAIMS

ROBERT LaBRANT, ANDREW BRADWAY, NORAH MURPHY and WILLIAM NOWLING,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State,

Defendant.
_____/

OPINION AND ORDER

Case No. 23-000137-MZ

Hon. James Robert Redford

OPINION AND ORDER DENYING PLAINTIFFS' REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF

In the instant case, 23-000137-MZ, plaintiffs come before the Court seeking declaratory and injunctive relief to:

1. Declare Donald J. Trump is disqualified from holding the office of President of the United States pursuant to Section 3 of the Fourteenth Amendment to the Constitution of the United States;

2. Permanently enjoin the Secretary of State from including Donald J. Trump on the ballot for the 2024 presidential primary election and;

3. Permanently enjoin the Secretary of State from including Donald J. Trump on the ballot for the November 5, 2024 general election as a candidate for the office of President of the United States.

For the reasons which will be set forth below the Court holds:

1. Michigan's Constitution of 1963, art 2, § 4 and MCL 168.614a and 168.615a prescribe the manner a person may have their name placed on the Michigan presidential primary ballot and in so doing direct the actions the Secretary of State shall take.

2. The Fourteenth Amendment arguments of plaintiffs present a political question that is nonjusticiable at the present time. [1]

The Court will therefore DENY plaintiffs' prayer for declaratory relief and for a permanent injunction as relates to the Michigan primary election ballot for 2024. [2]

I. STANDARD OF REVIEW

MCR 2.605, which affords the Court the power to enter a declaratory judgment, "incorporates the doctrines of standing, ripeness, and mootness." *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). MCL 2.605(A)(1) provides, "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." To obtain declaratory relief, a plaintiff must thus show that he is an interested party and allege a "case of actual controversy" within the jurisdiction of the court. "An actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters of Mich v Sec'y of State*, 506 Mich 561, 586; 957 NW2d 731 (2020). A court "is not precluded from reaching issues before actual injuries or losses have occurred," but there still must be "a present legal

[1] The Court thanks and acknowledges the parties', proposed intervenor's, and all amicus curiae filers' thoughtful and comprehensive submissions received by the Court.

[2] The Court notes there are three cases that seek relief related to the 2024 Michigan presidential primary election: *Davis v Benson et al.*, 23-000128-MB, *LaBrant et al. v Benson,* 23-000137-MZ, and *Trump v Benson*, 23-000151-MZ. Because the cases are not consolidated and to facilitate immediate and individual appellate review of each opinion and order if desired by a litigant, while the Court may discuss some aspects of other cases in each opinion and order, the Court will seek to set forth the entire basis of the Court's rulings in each individual opinion and order, recognizing that there will be some redundancy in the respective cases.

controversy, not one that is merely hypothetical or anticipated in the future." *Id.* The bar for standing is lowered in cases concerning election laws, but even in election cases, a party may not bring a declaratory-judgment action on the basis that they "*might* affect his or her interests in the future" or because "they only want instruction going forward." *Id.* at 587-588 (emphasis added). In addition, in determining whether a present controversy exists, "[a] claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all." *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273, 282; 761 NW2d 210 (2008). See also *Thomas v Union Carbide Agricultural Prod Co*, 473 US 568, 580-581; 105 S Ct 3325; 87 L Ed 2d 409 (1985).

II. HISTORICAL INFORMATION

A. BRIEF BACKGROUND OF THE UNITED STATES CONSTITUTION

On September 17, 1787, the Constitution of the United States was agreed upon in the Constitutional Convention and transmitted to Congress by George Washington, the President of the Constitutional Convention. See Myers, *History Of The Printed Archetype Of The Constitution Of The United States Of America,* 11 Green Bag 2d 217 (2008). The Constitution was thereafter transmitted to the several states for consideration on September 28, 1787. See *id.* Following ratification by the states, March 4, 1789, was selected as the date upon which the operation of the government under the Constitution would commence.

The Constitution has Seven Articles which generally address the following:

Article I	The Legislature
Article II	The Executive
Article III	The Judiciary
Article IV	The Relationships between the Federal Government & States, Creation of New States

Article V	The Amendment Process
Article VI	The Supremacy Clause and the Oath required of persons holding certain offices to support the Constitution
Article VII	The Ratification Process for the United States Constitution

On September 25, 1789, Congress transmitted twelve proposed Amendments to the Constitution to the states, ten of which were adopted and became the Bill of Rights, effective December 15, 1791. Since its adoption, in total, the Constitution has been amended 27 times. See US Const, Am I-XXVII. Of these amendments, the following specifically address the office of the President: the XII, XX, XXII, XXIII, and XXV. The XII, XIV and XXIII Amendments also, *inter alia*, address the office of presidential electors.

B. POST-BILL OF RIGHTS & PRE-CIVIL WAR AMENDMENTS

The Eleventh Amendment, ratified February 7, 1795, placed certain limits on the judicial power unrelated to the matter at bar. The Twelfth Amendment, ratified June 15, 1804, set forth the process by which electors would vote for President and Vice President.

C. CIVIL WAR

In November 1860, Abraham Lincoln was elected the Sixteenth President of the United States. Between December 20, 1860 and June 8, 1861, 11 states voted to secede from the United States.

On February 8, 1861, the Constitution for the Provisional Government of the Confederate States of America was adopted.[3] Jefferson Davis was selected to be Provisional President of the

[3] Yale Law School, Lillian Goldman Law Library, The Avalon Project https://avalon.law.yale.edu/19th_century/csa_csapro.asp, accessed November 13, 2023.

Confederate States of America on February 18, 1861.[4] On March 11, 1861, the Constitution of the Confederate States of America was adopted.[5]

On April 12, 1861, the federal enclave and military reservation at Fort Sumter, South Carolina was bombarded by cannon fire. On April 9, 1865, at Appomattox Court House, Virginia, the Army of Northern Virginia surrendered to the Union Army.

D. THE THIRTEENTH, FOURTEENTH & FIFTEENTH AMENDMENTS TO THE U.S. CONSTITUTION
THE CIVIL WAR AMENDMENTS

The Thirteenth Amendment, ratified December 6, 1865, abolished slavery. US Const, Am XIII.

The Fourteenth Amendment, ratified July 9, 1868, contains five sections including Section 3, the subject of this case, referred to as the Insurrection Clause. US Const, Am XIV.

The Fifteenth Amendment was ratified February 3, 1870, and prohibited states from denying the right to vote on the basis of race, color, or previous condition of servitude. US Const, Am XV.

III. ANALYSIS

A. PLAINTIFFS' ALLEGATIONS

Plaintiffs filed their complaint September 29, 2023. The complaint alleges actions and instances of inaction by Donald J. Trump, before, during, and after January 6, 2021, that plaintiffs

---

[4] https://www.britannica.com/biography/Jefferson-Davis, accessed November 10, 2023.

[5] Yale Law School, Lillian Goldman Law Library, The Avalon Project, https://avalon.law.yale.edu/19th_century/csa_csa.asp, accessed November 13, 2023.

allege make him ineligible to stand for election for the office of President of the United States, on the basis of Section 3 of the Fourteenth Amendment to the United States Constitution.

B. LEGAL ANALYSIS

1. MICHIGAN'S CONSTITUTION AND STATUTES PRESCRIBE ELIGIBILITY TO BE PLACED ON THE MICHIGAN PRESIDENTIAL PRIMARY BALLOT

The Court finds that the statutory steps currently involved in any candidate being placed on the Michigan presidential primary ballot demonstrate that plaintiffs cannot show that they are entitled to a declaratory judgment with respect to an individual who is running in the Michigan primary election for the office of President. This is because the 1963 Michigan Constitution grants the power to the Michigan Legislature to regulate elections under Const 1963, art 2, § 4(2) and because the Legislature has specifically delineated the process by which an individual is to be placed on a presidential primary ballot.

Const 1963, art 2, § 4(2) provides the Michigan Legislature the power to "enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." The Legislature in turn has prescribed the process and eligibility for a presidential candidate to be placed on the primary ballot in the mandatory requirements set out in MCL 168.614a and MCL 168.615a. MCL 168.614a(1) requires:

> Not later than 4 p.m. of the second Friday in November of the year before the presidential election, the secretary of state *shall* issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section [MCL 168.613a]. The secretary of state *shall* make the list issued under this subsection available to the

> public on an internet website maintained by the department of state. [Emphasis added.][6]

MCL 168.614a(2) provides for the state chairperson of each political party to then file a list of individuals whom they consider to be potential presidential candidates for that party and requires the Secretary to make that list available to the public. MCL 168.615a then requires the Secretary to place the candidates so identified on the presidential primary ballot unless a candidate withdraws. "Except as otherwise provided in this section, the secretary of state *shall* cause the name of a presidential candidate notified by the secretary of state under [MCL 168.614a] to be printed on the appropriate presidential primary ballot for that political party." MCL168.615a(1) (Emphasis added).

Under those requirements, while the Secretary is mandated to act, she retains discretion as to what media sources to consider when choosing which candidates to list on the notices she provides to the respective political parties under MCL 168.614a. However, the ultimate decision is made by the respective political party, with the consent of the listed candidates.[7] Given this comprehensive statutory scheme, there are substantial questions whether plaintiffs' complaint,

---

[6] The Court notes, at oral argument on November 9, 2023, in this case and Cases 23-000128-MB and 23-000151-MZ, the attorney for the Secretary of State indicated that, in accordance with the Michigan Court Rules regarding deadlines that fall upon a weekend or legal holiday, the issuance of the list of individuals described in MCL 168.614a(1) would be transmitted on Monday, November 13, 2023, instead of Friday, November 10, 2023, because November 10, 2023, was the state of Michigan holiday in observance of Veteran's Day.

[7] The Court notes that candidates seeking to be placed on the presidential primary ballot in Michigan, if not included in the process outlined above and as provided by MCL 168.614a, may seek ballot access through a nominating petition process set forth in MCL 168.15a(2).

taken in the light most favorable to plaintiffs, supports a conclusion that other qualifications to be placed on the presidential primary ballot may be imposed by the Court. [8]

The Court is further persuaded by the analysis of the Minnesota Supreme Court in its November 8, 2023 order in *Growe et al. v Simon*, ___ NW2d ___ (Minn, 2023). As in the instant case, petitioners in *Growe* asked the Court to determine that Donald Trump was disqualified from holding the office of President under Section 3, and requested that the Court direct the Minnesota Secretary of State to exclude him from Minnesota's March 5, 2024 primary ballot and from the 2024 general election ballot.

The Court first determined, as the Court does here, that any question concerning Donald Trump's placement on the general election ballot is not ripe, or "about to occur" as required for relief under Minn Stat 204B. Turning to the question of disqualification to be placed on the primary ballot, the Court discussed the steps involved in placing candidates on the presidential primary ballot. Similar to the steps in the instant case, Minnesota's procedure involves placement on the ballot after the Chair of the Republican Party of Minnesota provides his name to the Minnesota Secretary of State.

The Court determined that, although the Minnesota Secretary of State and administration officials "administer the mechanics of the election," primary elections are designed as an aid to the respective political parties in choosing their nominees at the national conventions:

> The Legislature enacted the presidential nomination primary process to allow major political parties to select delegates to the national conventions of those parties; at those conventions the selected delegates will cast votes along with delegates from all of the other

[8] Similarly, this is among the reasons that this Court will not order the Secretary to place former President Trump on the primary ballot. The relevant statutory provisions contain the only way set out by the Legislature for a candidate to be placed on the ballot.

> states and territories and choose a presidential candidate who will subsequently appear on general election ballots. See Minn. Stat. § 207A.11(d) (2022) (explaining that the presidential nomination primary "only applies to a major political party that selects delegates at the presidential nomination primary to send to a national convention"). This is "a process that allows political parties to obtain voter input in advance of a nomination decision made at a national convention." *De La Fuente v Simon*, 940 NW2d 477, 492 (Minn, 2020). Thus, although the Secretary of State and other election officials administer the mechanics of the election, this is an internal party election to serve internal party purposes, and winning the presidential nomination primary does not place the person on the general election ballot as a candidate for President of the United States. As we explained in *De La Fuente*, in upholding the constitutionality of this statutory scheme for the presidential nomination primary, "[t]he road for any candidate's access to the ballot for Minnesota's presidential nomination primary runs only through the participating political parties, who alone determine which candidates will be on the party's ballot." 940 N.W.2d at 494-95. And there is no state statute that prohibits a major political party from placing on the presidential nomination primary ballot, or sending delegates to the national convention supporting, a candidate who is ineligible to hold office. [*Growe*, slip op pp 2-3].

Similarly, in Michigan, the procedures outlined in MCL 168.614a and MCL 168.615a provide the specific and explicit mechanism by which the Secretary of State is to place candidates on the 2024 Michigan presidential primary ballot. They are designed to assist the parties in determining their respective presidential candidates, and the Legislature has not provided any prohibition as to who may be placed on such ballots, irrespective as to whether the individual may either serve as a general election candidate or ultimately serve as President if elected.

In addition, the sheer number of steps involved in any candidate becoming a political party's candidate for President, in addition to the requirement that the candidate wins the general election, show that declaratory relief is not proper, at least at this time.

The Michigan Republican Party must list Mr. Trump as a Republican primary candidate in Michigan. Should they do so, he would then have to win said primary, which may well be affected by outside events that have occurred by that time. If he wins the Michigan primary, he would still have to prevail in primary challenges in the other states and win the vote at the Republican National

Convention to become the national Republican candidate. This process, too, is subject to the influence of outside events. Even if he prevails at that stage, he must win the general election.

If he does so, and his right to be seated as President is challenged and he is found to be under the Section 3 disability, he could then petition Congress to have that disability removed. Congress, by Section 3 of the Fourteenth Amendment, may remove the disability with a two-thirds vote of both Houses. As discussed, "[a] claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all." *Citizens Protecting Michigan's Constitution*, 280 Mich App at 282. Whether former President Trump even becomes the President-elect is such a future event that plaintiffs cannot demonstrate that their request for a declaratory judgment is ripe at this time.

2. POLITICAL QUESTION

An additional reason the Court concludes that plaintiffs cannot receive the relief of preventing former President Trump from being placed on the primary ballot—should he satisfy Michigan's process of determining who should be listed as a candidate—is that a claim such as that raised by plaintiffs turns on a nonjusticiable political question.

Section 3 of the Fourteenth Amendment of the United States Constitution states:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 5 of the Fourteenth Amendment of the United States Constitution states:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

In determining whether to apply the political-question doctrine, the Supreme Court identified six factors relevant to the political-question doctrine in the 1962 case, *Baker v Carr*, 369 US 186; 82 S Ct 691; 7 L Ed 2d 663 (1962).

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. [*Id.* at 217.]

With respect to factor 1 concerning who has the responsibility of making a factual determination of whether a person can serve under Section 3, the well-thought-out analysis and conclusion in *Castro v New Hampshire Sec'y of State*, ____ F Supp 3d ___ (D NH, 2023) (Docket No. 23-CV-416-JL, issued October 27, 2023) is helpful. This was a similar case to the matter at bar in which the plaintiff sought an injunction barring the New Hampshire Secretary of State from placing former President Trump's name on the New Hampshire Republican primary ballot because of an alleged disqualification under Section 3.

After discussing whether the plaintiff had standing, and setting out the *Baker* factors, the *Castro* Court provided the following analysis:

> The defendants contend that Castro's claim triggers the first *Baker* formulation, and they cite a number of cases that support their position. Indeed, state and federal district courts have consistently found that the U.S. Constitution assigns to Congress and the electors, and not the courts, the role of determining if a presidential candidate or president is qualified and fit for office—at least in the first instance. Courts that have considered the issue have found this textual

assignment in varying combinations of the Twelfth Amendment and the Electoral Count Act, 3 U.S.C. § 15, which prescribe the process for transmitting, objecting to, and counting electoral votes; the Twentieth Amendment, which authorizes Congress to fashion a response if the president elect and vice president elect are unqualified; and the Twenty-Fifth amendment and Article I impeachment clauses, which involve Congress in the removal of an unfit president from office.

For example, in *Robinson v Bowen*, the plaintiff moved for a preliminary injunction removing Senator McCain from the 2008 California general election ballot on the ground that he was not a "natural-born citizen," as required under Article II of the U.S. Constitution. 567 F Supp 2d 1144, 1145 (ND Cal 2008). The *Robinson* Court denied the motion and dismissed the case upon finding, in part, that the plaintiff's challenge raised a nonjusticiable political question. The *Robinson* Court noted that the Twelfth Amendment and the Electoral Count Act provide that "Congress shall be in session on the appropriate day to count the electoral votes," and that Congress decides upon the outcome of any objections to the electoral votes. *Id.* at 1147. The *Robinson* Court reasoned that

> It is clear that mechanisms exist under the Twelfth Amendment and [the Electoral Count Act] for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify. Issues regarding qualifications for president are quintessentially suited to the foregoing process . . . . Therefore, this order holds that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance. Judicial review—if any—should occur only after the electoral and Congressional processes have run their course.

Id. (citing *Texas v United States*, 523 US 296, 300-02, 118 S Ct 1257, 140 L Ed 2d 406 (1998)).

Similarly, in *Grinols v Electoral Coll*, the plaintiffs moved for a temporary restraining order halting the re-election of then-President Obama on the ground that he was ineligible for office because he was not a natural-born citizen. 2013 WL 211135, at *1. The *Grinols* Court denied the motion largely because it found the plaintiffs' claim "legally untenable." *Id.* at *2. It reasoned, in part, that "numerous articles and amendments of the Constitution," including the Twelfth Amendment, Twentieth Amendment, Twenty-Fifth Amendment, and the Article I impeachment clauses, "make it clear that the Constitution assigns to Congress, and not the Courts, the responsibility of determining whether a person is qualified to serve as President. As such, the question presented by Plaintiffs in this case—whether President Obama may legitimately run for office and serve as President—is a political question that the Court may not answer." *Id.* at * 4.

Courts across the country have reached the same conclusion, based on similar reasoning. See, e.g., *Kerchner v Obama*, 669 F Supp 2d 477, 483 n 5 (D

NJ 2009) (referencing the Twelfth and Twentieth Amendments, as well as Congress's role in counting electoral votes, and concluding that "it appears that" the plaintiffs' constitutional claims premised on President Obama's purported ineligibility are "barred under the 'political question doctrine' as a question demonstrably committed to a coordinate political department"), aff'd 612 F3d 204 (3d Cir 2010); *Taitz v Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *16 (SD Miss Mar. 31, 2015) ("find[ing] no authority in the Constitution which would permit [the court] to determine that a sitting president is unqualified for office or a president-elect is unqualified to take office[,]" and concluding that "[t]hese prerogatives are firmly committed to the legislative branch of our government"); *Jordan v Secretary of State Sam Reed*, No. 12-2-01763-5, 2012 WL 4739216, at *1 (Wash Super Aug. 29, 2012) ("The primacy of congress to resolve issues of a candidate's qualifications to serve as president is established in the U.S. Constitution.").

Critically, Castro does not present case law that contradicts the authority discussed above—nor has the court found any.

* * *

In sum, the vast weight of authority has held that the Constitution commits to Congress and the electors the responsibility of determining matters of presidential candidates' qualifications. Castro provides no reason to deviate from this consistent authority. Thus, it appears to the court that Castro's claim—which challenges Trump's eligibility as a presidential candidate under Section 3 of the Fourteenth Amendment—raises a nonjusticiable political question. As such, even if Castro did have standing to assert his claim, the court would lack jurisdiction to hear it under the political question doctrine. [*Castro*, slip op pp 7-9 (footnotes omitted).]

The Court agrees with the above analysis. Additionally, the actions of those to whom Section 3's disqualification provision applied and Congress's post-civil war responses to the various problems with the way "disabilities" were initially removed support the conclusion that Congress is primarily responsible for taking actions to effectuate Section 3.

The Fourteenth Amendment was ratified July 9, 1868. After this, the 1872 General Amnesty Act and the Amnesty Act of 1898 were passed.

The 1872 General Amnesty Act provided:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein), That all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States. [17 Stat 142]

The 1872 law cleared over 150,000 former Confederate troops who had taken part in the American Civil War. See Heritage Library, <https://heritagelib.org/amnesty-act-of-1872#>, accessed November 10, 2023

Subsequently, Congress removed the Section 3 disability from those remaining individuals, enacting the Amnesty Act of 1898. This Act provides, "[t]hat the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed." Act of June 6, 1898, ch 389; 30 Stat 432.

That Congress could remove the Section 3 bar to serving, at least with respect to individuals barred at that time,[9] by enacting a law to "remove" the disability, en masse, even to those who could be said to be barred from service, but had not yet personally sought such relief, itself indicates that Congress not only had the power to remove the disability when asked by a specific candidate, but also possesses the broader "proactive" power to decide how to apply Section 3 in the first instance.

Arguments have been made that Congress's only role with respect to Section 3 is to remove a disability only after the judicial branch has determined that the individual cannot serve. For

[9] The Court notes that there is disagreement over whether the enactment of the Amnesty Act was also intended to apply prospectively to future individuals who would otherwise be barred from holding office under Section 3. However, the Court need not reach that issue at this time.

example, in *Anderson v Griswold*, Colorado Denver District Court, Docket No. 2023-CV-32577, issued October 25, 2023, slip op p 17, the Court stated that Congress "has disavowed any ability it once had to consider objections other than [those in 3 USC 15(d)(2)(B)(*ii*), when 1) "the electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors according to section 5(a)(1)", or 2) "where the vote of one or more electors has not been regularly given."] including any regarding the constitutional qualifications of the President-elect." However, Section 5 of the Fourteenth Amendment explicitly provides Congress with the "power to enforce, by appropriate legislation, the provisions of this article." The fact that Congress may have, at least for the moment, decided not to address this question prior to judicial intervention does not change the fact that they have the power to do so, and have certainly done so in the past.

With respect to the remaining factors set out in *Baker*, the Court notes that factors 2, 4, 5, and 6 apply to the instant case.

In Bradley and Posner, *The Real Political Question Doctrine*, Stanford Law Review, Vol. 75 (2023), the authors discuss how the "prudential" concerns in the *Baker* factors play into the use of the doctrine. Notably, two United States Supreme Court decisions after *Baker* support an analysis that some questions fall within the doctrine, at least in part, because of the related prudential concerns of causing "chaos", see *Nixon v United States*, 506 US 224, 236; 113 S Ct 732; 122 L Ed 2d 1 (1993), or because the courts would be pulled into recurring and highly partisan disputes, such as in the instant case, see *Rucho v Common Cause*, ___ US ___; 139 S Ct 2484, 2507; 204 L Ed 2d 931 (2019).

In *Nixon*, a case involving former United States District Judge Walter L. Nixon's impeachment trial before the Senate, the Court held that a challenge to the Senate's use of a

committee to receive evidence during an impeachment trial, similar to the way congressional committees investigated early Section 3 cases, raised a political question. The impeached judge in *Nixon* argued that the Senate's use of the committee was inconsistent with the Constitutional requirement that the Senate "try" impeachment cases. However, as discussed in *The Real Political Question Doctrine*, pp 1070-1072, the Court found that the first *Baker* factor applied even though the Constitution did not specify that the Senate had exclusive authority to decide the relevant trial procedures to be used for impeachments. *Nixon*, 506 US at 228-229. Its reason for doing so involved prudential concerns. In reaching its conclusion, the Court specifically tied the first and second factors together, and held "the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Id.* After its analysis of Article I, § 3, cl 6, the Court further held that the "chaos" involved in attempting to fashion relief supported the finding of a political question. In doing so, this case provides support for the premise that attempting to resolve the question of whether former President Trump appears on the Michigan primary ballot, or any other ballot, is nonjusticiable.

> In addition to the textual commitment argument, we are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability. See *Baker v Carr*, 369 US, at 210, 82 S Ct, at 706. We agree with the Court of Appeals that opening the door of judicial review to the procedures used by the Senate in trying impeachments would "expose the political life of the country to months, or perhaps years, of chaos." 290 US App DC, at 427, 938 F2d, at 246. This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated. Equally uncertain is the question of what relief a court may give other than simply setting aside the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to

> create an additional judgeship if the seat had been filled in the interim? [*Nixon*, 506 US at 236.]

See also *id.* at 253 (Souter, J., concurring in the judgment) (discussing that one significant consideration was "the potentiality of embarrassment from multifarious pronouncements by various departments on one question", and stating, "As the Court observes, judicial review of an impeachment trial would under the best of circumstances entail significant disruption of government." (citation omitted)).

In *Rucho*, Chief Justice Roberts wrote:

> Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." *Marbury v Madison*, 1 Cranch 137, 177, 2 L Ed. 60 (1803). Sometimes, however, "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth v Jubelirer*, 541 US 267, 277; 124 S Ct 1769; 158 L Ed 2d 546 (2004) (plurality opinion). In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction. *Baker v Carr*, 369 US 186, 217; 82 S Ct 691; 7 L Ed 2d 663 (1962). Among the political question cases the Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Id.* [*Rucho*, 139 S Ct at 2494.]

Rucho involved a request to intervene in light of a complaint alleging partisan gerrymandering by Republicans in North Carolina and Democrats in Maryland. The Supreme Court held that the challenges raised a political question. *Id.* at 2506-2507. The Court emphasized the difficulty that courts would have with resolving such claims using a "limited and precise rationale" that was also "clear, manageable, and politically neutral." *Id.* at 2498 (quotation marks and citation omitted). The Court found that intervention in "heated partisan issues" required such constraints, *id.*, because "[w]ith uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id.* (quotations and citations omitted). The Court also noted that

the circumstances were such that "the Constitution provides no basis whatever to guide the exercise of judicial discretion." *Id.* at 2506. With respect to the caution against becoming embroiled in recurring and highly partisan districting disputes, the Court further held:

> [I]ntervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role. [*Id.* at 2507.]

The instant case presents the potential for running afoul of these principles. In the companion case of 23-000128-MB, the Secretary has included in Exhibit 1, a list of active and recently dismissed state and federal cases, each involving former President Trump. There are 37 cases on the Secretary's list, and it does not include either of the companion cases currently before this Court. Should this trend continue, it is conceivable that there could be 50 state cases, and a number of concurrent federal ones, each with a judicial officer or officers who "even when proceeding with best intentions," have the potential to issue partial or even totally conflicting opinions on the basis of a significant number of potentially dispositive issues. Some of these cases, such as *Anderson*, are already proceeding to trial.[10] Prior to the United States Supreme Court's intervention, none of these opinions, or factual findings, are binding on any other court.

The questions involved are by their nature political. The number of cases presents the risk of completely opposite and potentially confusing opinions and outcomes, which will certainly "expose the political life of the country to months, or perhaps years, of chaos." Moreover, there

[10] The Court notes, *Anderson* and *Castro* discussed above reached opposite conclusions with respect to whether the question is justiciable. This Court agrees with the *Castro* Court that it is not.

is no "limited and precise rationale" to guide this Court and the others that is also "clear, manageable, and politically neutral." Because the cases involve the office of the President, such confusion and lack of finality will be more pronounced. *Nixon*, 506 US at 236.

In determining if a question is justiciable, it is worthwhile to consider what the judiciary is asked to determine. In this case, some questions while complex, are nonetheless straightforward and embrace traditional means of legal decision-making. Is a specific office sought covered? Has a person taken a previous oath that is applicable?

Others are far more nuanced and complex. This Court recognizes the judiciary does not avoid questions because they are nuanced, complex, or difficult; however, when applying the *Baker* principles and standards, it seems appropriate in this case to ask:

What is an insurrection or a rebellion? What is it to engage in it or to give aid and comfort to the enemies of the Constitution?

Does it require a war of 1,458 days with 620,000 killed and battles throughout the land? [11] Could it be based on actions of physical violence, lawlessness, destruction, interruption of legislative sessions all of which take place on a single day even if allegedly supported by and aided by speeches and comments and actions and inactions by an individual before, during, and after that day? Could it be a political speech that some may argue encourages or incites others to act in ways they believe results in moral culpability on the part of the speaker for physical violence?

[11] American Battlefield Trust https://www.battlefields.org/learn/articles/civil-war-casualties, accessed November 13, 2023.

The short answer is–there are as many answers and gradations of answers to each of these proffered examples as there are people called upon to decide them.

The inappropriateness of the judicial branch resolving these questions, tendered by Section 3 of the Fourteenth Amendment, includes that the judicial action of removing a candidate from the presidential ballot and prohibiting them from running essentially strips Congress of its ability to "by a vote of two-thirds of each House, remove such a disability." Also, it takes the decision of whether there was a rebellion or insurrection and whether or not someone participated in it from the Congress, a body made up of elected representatives of the people of every state in the nation, and gives it to but one single judicial officer, a person who no matter how well intentioned, evenhanded, fair and learned, cannot in any manner or form possibly embody the represented qualities of every citizen of the nation–as does the House of Representatives and the Senate. Nor is that judicial officer provided the "power to enforce, by appropriate legislation, the provisions of this article," Section 5. [12]

[12]Plaintiffs argue that the chaos created by permitting Mr. Trump to run, and become the President-elect, prior to having Congress adjudicate whether he is disqualified under Section 3, would be far worse than that which is presently occurring. Because the Constitution contains direction on what will occur should a President-elect fail to qualify for office (see US Const, Am XX, § 3) or is unable to discharge the duties of his office (see US Const, Am XXV, § 4), this Court respectfully disagrees. As unsettling as such a process could be, it is the process provided for in the Constitution and is preferable to potentially having 50 or more separate trials or evidentiary hearings, which will undoubtably rely on nonstandard definitions of "insurrection or rebellion" or what constitutes providing "aid and comfort" to an "enemy" of the United States, where the results could then be completely contradictory and which would then have to survive the various state appellate processes—all in the extremely short time before the various state primaries. Also, the Court respectfully finds plaintiffs' argument that the United States Supreme Court would then be able to manage subsequent appeals and ultimately determine these issues in time for the effective administration of various primary elections speculative.

IV. CONCLUSION

For each of the reasons discussed above, the Court DENIES declaratory relief to plaintiffs in 23-000137-MZ.

IT IS SO ORDERED.

This is a final order and closes this case.

Date: November 14, 2023

Hon. James Robert Redford
Judge, Court of Claims

STATE OF MICHIGAN

COURT OF APPEALS

ROBERT DAVIS,

Plaintiff-Appellant,

v

WAYNE COUNTY ELECTION COMMISSION,

Defendant-Appellee

and

DONALD J. TRUMP,

Intervening Defendant-Appellee.

FOR PUBLICATION
December 14, 2023
9:35 a.m.

No. 368615
Wayne Circuit Court
LC No. 23-012484-AW

ROBERT LABRANT, ANDREW BRADWAY, NORAH MURPHY, and WILLIAM NOWLING,

Plaintiffs-Appellants,

v

SECRETARY OF STATE,

Defendant-Appellee,

and

DONALD J. TRUMP,

Intervening Appellee.

No. 368628
Court of Claims
LC No. 23-000137-MZ

Before: LETICA, P.J., and RIORDAN and CAMERON, JJ.

PER CURIAM.

In Docket No. 368615, plaintiff Robert Davis ("Davis"), as a registered voter, filed suit in the circuit court, asserting his intent to vote in the Republican primary and challenged the qualifications of former President Donald J. Trump ("Trump") to be placed on the ballot by defendant, the Wayne County Election Commission ("Commission"), and the resulting improper dilution of votes to other qualified candidates if emergency declaratory relief was not granted. Davis claimed that the United States Constitution and state election laws prevented Trump from being included on upcoming election ballots. The circuit court, assumed without deciding that Davis had standing, then determined that summary disposition was proper under MCR 2.116(C)(8) in favor of the Commission because it was not authorized to investigate the qualifications of a presidential candidate. In Docket No. 368628, Robert LaBrant, Andrew Bradway, Norah Murphy, and William Nowling ("plaintiffs") alleged that they were registered voters intending to vote in the 2024 presidential elections. In the Court of Claims, these plaintiffs filed suit against defendant Jocelyn Benson, Michigan's Secretary of State, also challenging Trump's qualification to be placed on the Michigan ballot in light of the United States Constitution and state election law. The Court of Claims denied the request for declaratory relief, deciding that state law determined the placement on an election ballot and that plaintiffs presented a political question that was not justiciable at that time. The actions were consolidated to advance the efficient administration of justice.[1] We address various arguments concerning the placement of Trump as a candidate on ballots for the upcoming 2024 Presidential Primary Election. The two lower courts, the Wayne Circuit Court, and the Court of Claims, rejected Davis's and plaintiffs' challenges in the underlying cases. We affirm in both cases.

I. FACTS

The background of these appeals lies in the United States Constitution. Section 3 of the Fourteenth Amendment of the United States Constitution, commonly referred to as the Insurrection Clause, states:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

The crux of the cases before us involves Davis's and plaintiffs' claims that Trump engaged in insurrection and is thus subject to the disqualification under this section of the Fourteenth Amendment. The questions largely concern whether Trump may appear on the upcoming presidential primary ballot in Michigan. The underlying suits were brought by Davis and

[1] *Davis v Wayne Co Election Comm*, unpublished order of the Court of Appeals, entered November 22, 2023 (Docket Nos. 368615 and 368628).

plaintiffs, registered voters, challenging Trump's qualifications to be placed on the ballot against defendants, the Wayne County Election Commission (the Commission) and the Secretary of State.

A. MICHIGAN ELECTION LAW

To put the present matters in context, there are multiple statutes that direct actions by county election commissions and the Secretary of State. These statutes emanate from Const 1963, art 2, § 4(2), which provides the Michigan Legislature with the power to "enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." The Legislature has, in turn, enacted the Michigan Election Law, MCL 168.1 *et seq*. Relevant to this matter are several provisions concerning presidential primary elections, which are found in Chapter XXIV of the Michigan Election Law, MCL 168.531 *et seq*., and also MCL 168.689, a statute found in Chapter XXVIII of the Michigan Election Law, MCL 168.641 *et seq*., concerning the ballot preparation process by county election commissions.

MCL 168.614a explains the initial process for identifying candidates to be placed on presidential primary ballots:

> (1) Not later than 4 p.m. of the second Friday in November of the year before the presidential election, the secretary of state shall issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section 613a. The secretary of state shall make the list issued under this subsection available to the public on an internet website maintained by the department of state.
>
> (2) Not later than 4 p.m. of the Tuesday following the second Friday in November of the year before the presidential election, the state chairperson of each political party for which a presidential primary election will be held under section 613a shall file with the secretary of state a list of individuals whom they consider to be potential presidential candidates for that political party. The secretary of state shall make the lists received under this subsection available to the public on an internet website maintained by the department of state.
>
> (3) After the issuance of the list under subsection (1) and after receipt of names from the state chairperson of each political party under subsection (2), the secretary of state shall notify each potential presidential candidate on the lists of the provisions of this act relating to the presidential primary election.

MCL 168.615a(1) then explains the process for placing candidates on presidential primary ballots, a task given to the Secretary of State:

> Except as otherwise provided in this section, the secretary of state shall cause the name of a presidential candidate notified by the secretary of state under section 614a to be printed on the appropriate presidential primary ballot for that political party. A presidential candidate notified by the secretary of state under

> section 614a may file an affidavit with the secretary of state indicating his or her party preference if different than the party preference contained in the secretary of state notification and the secretary of state shall cause that presidential candidate's name to be printed on the appropriate presidential primary ballot for that political party. If the affidavit of a presidential candidate indicates that the candidate has no political party preference or indicates a political party preference for a political party other than a political party for which a presidential primary election will be held under section 613a, the secretary of state shall not cause that presidential candidate's name to be printed on a ballot for the presidential primary election. A presidential candidate notified by the secretary of state under section 614a may file an affidavit with the secretary of state specifically stating that "(candidate's name) is not a presidential candidate", and the secretary of state shall not have that presidential candidate's name printed on a presidential primary ballot. A presidential candidate shall file an affidavit described in this subsection with the secretary of state no later than 4 p.m. on the second Friday in December of the year before the presidential election year or the affidavit is considered void.[2]

The task of preparing and printing ballots for any state, district, or county election falls on county election commissions pursuant to MCL 168.689:

> The board of election commissioners of each county shall prepare the official ballots for use at any state, district or county election held therein, and shall have printed a sufficient number of ballots containing the names of all candidates properly certified to said board of election commissioners, and ballots for all proposed constitutional amendments or other questions to be submitted at such election to supply each election precinct in such county with a sufficient number for such precinct, and not less than 25% more than the total number of votes cast therein at the corresponding election held 4 years previous for the office which received the greatest number of votes.

B. THE LOWER COURT CASES

As noted, two underlying cases are now before us. Again, Docket No. 368615 arises out of a complaint filed by plaintiff, Robert Davis, in Wayne Circuit Court. This complaint, which named only the Commission as a defendant,[3] explained that Davis had requested that the Secretary of State issue a declaratory ruling deciding whether Trump was disqualified from appearing on the presidential primary ballot because he was allegedly disqualified under the Insurrection Clause. The complaint alleges that the Secretary of State had refused the request because the Secretary of State did not believe she had authority to make such a determination. Davis's complaint generally sought a declaration that, in the event the Secretary of State did certify Trump as a candidate for

---

[2] While not relevant to these appeals, MCL 168.615a(2) also provides a process for those not included as potential candidates under MCL 168.614a to appear on the presidential primary ballot via nominating petitions.

[3] The circuit court allowed Trump to intervene as a defendant in the matter.

the upcoming primary election, the Commission had a statutory duty under MCL 168.689 to "determine and declare" whether presidential candidates, including Trump, are disqualified from running for or holding office under the Insurrection Clause. Davis asked that the circuit court further enjoin the Commission from "printing any ballots for the 2024 Presidential Primary Election containing the name of any presidential candidate" whom it found disqualified under the Insurrection Clause. In other words, in the event the Secretary of State continued to refuse to determine whether Trump was disqualified under the Insurrection Clause, Davis asked that the Commission make that determination itself, and requested an order compelling the Commission to do so.[4] The Wayne Circuit Court granted summary disposition and denied the requested declaratory relief, concluding that the Commission had no such authority.

In the Court of Claims, plaintiffs Robert LaBrant, Andrew Bradway, Norah Murphy, and William Nowling filed suit seeking declaratory and injunctive relief against the Secretary of State. The complaint filed in that court contains voluminous allegations concerning Trump's actions before the 2020 Presidential Election, during the time between that election and January 6, 2021, and on January 6, 2021 itself. The complaint alleges that as a result of his actions, Trump "engaged in insurrection," and that as he had previously sworn an oath to support the Constitution of the United States on January 20, 2017, the date he was sworn in as the 45th President of the United States, and that Trump was "disqualified from holding 'any office, civil or military, under the United States.' " The complaint further alleges that Congress had not removed this disability, and that the office of President of the United States was an "office" contemplated by the Insurrection Clause. "Consequently, Donald J. Trump is disqualified from, and ineligible to hold, the office of President of the United States."

The complaint then addresses the Secretary of State's alleged errors. Plaintiffs explained that they, too, had requested the Secretary of State to exclude Trump from both the primary and general election ballots for the reasons explained. But the Secretary of State declined, taking the position that it was not the role of the Secretary of State to make such a determination. The complaint alleges that, contrary to the Secretary of State's position, the Secretary of State had "both the authority and responsibility to determine whether" Trump was eligible to appear on the primary and general election ballots pursuant to MCL 168.614a(1).

Count I of the complaint seeks relief in the form of a declaration that "Trump is disqualified by section 3 of the Fourteenth Amendment, is ineligible to appear on the presidential primary or general election ballot, and has no legal right to appear on that ballot. Plaintiffs are entitled to declaratory judgment to preserve their right to have only eligible presidential candidates on the ballot." Count II of the complaint seeks a permanent injunction against the Secretary of State, enjoining her from placing Trump on either the primary or general election ballots. In their request for relief, plaintiffs sought the following: (1) a declaration "that Donald J. Trump is disqualified from holding the office of President of the United States pursuant to Section 3 of the Fourteenth Amendment to the Constitution of the United States;" (2) a permanent injunction "enjoining the

[4] The complaint does not request that the circuit court itself make any determination regarding whether Trump was disqualified under the Insurrection Clause, a point Davis makes clear on appeal.

Secretary of State from including Donald J. Trump on the ballot for the 2024 presidential primary election;" and (3) a permanent injunction "enjoining the Secretary of State from including Donald J. Trump on the ballot for the November 5, 2024, general election as a candidate for the office of President of the United States[.]"

The Court of Claims denied the requested relief without reaching the question whether Trump was disqualified by the Insurrection Clause. Rather, the Court of Claims held that Const 1963, art 2, § 4, MCL 168.614a, and MCL 168.615a direct the actions of the Secretary of State relevant to this matter. Relying on a decision of the Minnesota Supreme Court, which considered a similar challenge in that state, the Court of Claims explained that the presidential primary election is administered by the Secretary of State pursuant to MCL 168.614a and MCL 168.615a, but that the overall function of the primary election was to assist the political parties "in determining their respective presidential candidates . . . ." The Legislature had not crafted any specific prohibitions regarding whom could be placed on primary ballots, "irrespective as to whether the individual may either serve as a general election candidate or ultimately serve as President if elected." Further, the number of steps involved in becoming a party's candidate for President, along with the fact that any such candidate would also have to win the general election, showed that "declaratory relief is not proper, at least at this time." And, the Court of Claims explained, even if Trump were to win the general election, Congress could remove any disability that might be created by the Insurrection Clause. The Court of Claims concluded: "Whether former President Trump even becomes the President-elect is such a future event that plaintiffs cannot demonstrate that their request for a declaratory judgment is ripe at this time."

As a separate, additional reason for concluding that "plaintiffs cannot receive the relief of preventing former President Trump from being placed on the primary ballot,"[5] the Court of Claims held that the case presented a nonjusticiable political question. The Court applied the six factors from *Baker v Carr*, 369 US 186; 82 S Ct 691; 7 L Ed 663 (1962), and concluded that it would be inappropriate for a judicial officer to determine whether Trump was disqualified from holding office under the Insurrection Clause. The Court of Claims held that, given the nature and number of questions that would need to be answered in order to determine whether Trump was disqualified, coupled with the fact that Congress could remove any such disability, it would be inappropriate for a single judicial officer to decide whether Trump was disqualified from holding office under the Insurrection Clause.

Davis filed his claim of appeal from the Wayne Circuit Court's decision on November 14, 2023, and the following day, the plaintiffs filed their claim of appeal from the Court of Claims decision.[6] This Court expedited both appeals and consolidated them on motion, and further

[5] While the Court of Claims specifically referenced the presidential primary ballot, we perceive no reason why the Court of Claims' decision would not apply equally to plaintiffs' claims concerning the general election ballot or beyond.

[6] The plaintiffs to the Court of Claims matter also filed a bypass application in the Supreme Court, requesting that the Supreme Court review the matter before a decision by this Court pursuant to MCR 7.305(C)(1). On December 6, 2023, the Supreme Court denied the bypass application

directed that the appeals be submitted on December 8, 2023, to this panel, without oral arguments. *Davis v Wayne Co Election Comm*, unpublished order of the Court of Appeals, entered November 22, 2023 (Docket Nos. 368615 and 368628). This Court has also permitted the filing of several amicus briefs.[7]

With this background in mind, we address the matters currently before this Court.

II. DOCKET NO. 368615 (WAYNE CIRCUIT COURT)

In Docket No. 368615, Davis appeals as of right a November 13, 2023 opinion and order which concludes that the Commission does not possess authority under the relevant statutes to investigate Trump's potential disqualification under Section 3 of the Fourteenth Amendment. Finding no error warranting reversal, we affirm.

A. STANDARD OF REVIEW

The circuit court decided the matter on summary disposition, granting summary disposition pursuant to MCR 2.116(C)(8). We review de novo a trial court's ruling on summary disposition. *Bailey v Antrim Co*, 341 Mich App 411, 421; 990 NW2d 372 (2022). As explained in *Bailey*:

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the factual allegations in the complaint. When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. [*Id*. (quotation and italics omitted).]

As the matter ultimately concerns a request for certain declaratory rulings, we note that questions of law relevant to a request for a declaratory judgment are reviewed de novo, while the decision whether to grant declaratory relief is reviewed for an abuse of discretion. *Reed-Pratt v Detroit City Clerk*, 339 Mich App 510, 516; 984 NW2d 794 (2021).[8] Questions of statutory interpretation

---

"because the Court [was] not persuaded that the questions presented should be reviewed by th[e] Court before consideration by the Court of Appeals." *LaBrant v Secretary of State*, ___ Mich ___ (2023) (Docket No. 166373).

[7] *Davis v Wayne Co Election Comm*, unpublished order of the Court of Appeals, entered December 4, 2023 (Docket Nos. 368615; 368628); *Davis v Wayne Co Election Comm*, unpublished orders of the Court of Appeals, entered December 8, 2023 (Docket Nos. 368615; 368628); *Davis v Wayne Co Election Comm*, unpublished orders of the Court of Appeals, entered December 12, 2023 (Docket Nos. 368615; 368628).

[8] Any factual findings underlying a decision whether to grant declaratory relief are reviewed for clear error on appeal. *Reed-Pratt*, 339 Mich App at 516. However, in this case, the questions are purely legal questions of statutory interpretation, and the motion was decided pursuant to MCR 2.116(C)(8), where all factual allegations stated in the complaint are accepted as true. There are thus no relevant factual determinations by the circuit court for this Court to review.

are questions of law that we review de novo on appeal. *Moore v Genesee Co*, 337 Mich App 723, 727; 976 NW2d 921 (2021).

B. ANALYSIS

1. DUTY TO AUTHORIZE THE PRINTING OF BALLOTS

Davis first argues that the trial court erred to the extent that it has held that the Commission does not have the right to authorize the printing of ballots for the presidential primary election. This argument arises from the following statements, contained in the final page of the circuit court's opinion, addressing one of Davis's requests for a declaration:

> [Davis] asks the Court to "[e]nter a declaratory judgment declaring that pursuant to MCL 168.689, Defendant Wayne County Election Commission has a statutory duty to authorize the printing of the official ballots for the 2024 Presidential Primary Election." Notably, MCL 168.689 does not specifically address the preparation and printing of primary election ballots, which are addressed in Michigan Election Law Chapter XXIV. Regardless, to the extent [Davis] seeks a declaratory judgment imposing legal duties on the Election Commission under MCL 168.689 beyond the scope of the plain language of that statute, he has failed to state a claim for which relief may be granted.

Davis takes issue with the second sentence of this passage. He contends it means that the Commission does not, in fact, have the duty to authorize the printing of ballots for the upcoming presidential primary election.

As a general premise, it is true that MCL 168.689 authorizes, indeed requires, the Commission to do what the statute states: "prepare the official ballots for use" in Wayne County, and to "have printed a sufficient number of ballots containing the names of all candidates properly certified to said board of election commissioners," for "use at any state, district or county election held therein . . . ." There is no doubt that the upcoming presidential primary elections will be a state election. See MCL 168.2(g) (defining "election" as "an election or primary election at which the electors of this state or of a subdivision of this state choose or nominate by ballot an individual for public office . . ."); MCL 168.7 (defining the terms "primary" or "primary election" as "a primary election held for the purpose of deciding by ballot who shall be the nominee for the offices named in this act, or for the election by ballot of delegates to political conventions"). See also *Barrow v Detroit Election Comm*, 305 Mich App 649, 671; 854 NW2d 489 (2014) ("It is well established that it is the province of the election commission, not the city clerk, to approve and furnish the ballots to be used in an election").

However, we differ from Davis on the meaning of the circuit court's decision. The circuit court quotes verbatim from Davis's complaint on one form of the relief he seeks: a "declaratory judgment declaring that pursuant to MCL 168.689, Defendant Wayne County Election Commission has a statutory duty to authorize the printing of the official ballots for the 2024 Presidential Primary Election." The circuit court notes, correctly, that MCL 168.689 does not *itself* specifically reference primary election ballots. Rather, it is a general statute that, by its terms, applies to "any state, district or county election held therein . . . ." MCL 168.689. And, as the

circuit court correctly explains, Chapter XXIV of the Michigan Election Law governs the processes for primary elections. The circuit court's analysis is accurate. It is not reasonable to read the circuit court's opinion as a holding that the Commission does not have a duty to print the presidential primary ballots for Wayne County.

But the court correctly notes that MCL 168.689 does not *itself* specifically discuss the preparation or printing of ballots for the presidential primary election. In other words, MCL 168.689 does not impose any duties concerning presidential primary elections that are different than the duties that are generally imposed for *all* elections contemplated by MCL 168.689. Beyond that, the court simply explains the obvious: that to the extent Davis sought a declaration that would impose duties that cannot be found in the plain language of MCL 168.689, he was not entitled to any such declaration. We fully agree with this assessment. "This Court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Barrow*, 305 Mich App at 663 (quotation marks and citation omitted). And, there is no indication that the Commission has any intent to refuse to prepare or have printed a sufficient number of ballots for the election, as is required by MCL 168.689. We find no error warranting reversal stemming from this portion of the circuit court's decision.

2. WHETHER THE COMPLAINT ALLEGES A CLAIM FOR DECLARATORY RELIEF

Davis's second argument is that his complaint states a cognizable claim for declaratory relief, and thus, it was error for the circuit court to grant summary disposition under MCR 2.116(C)(8). Generally, Davis argues that he has standing to bring such a claim because, the Wayne County Election Commission has a duty to independently determine whether presidential candidates are "properly" certified by the Secretary of State under MCL 168.689. He argues that his complaint adequately pleads the existence of an actual controversy sufficient to support a request for declaratory relief. Again, Davis misunderstands the circuit court's decision.

On this point, the circuit court's decision provided:

> In sum, under the plain language of MCL 168.689 and MCL 168.567, the Election Commission does not have the authority to investigate a presidential candidate's possible disqualification under Section 3 of the Fourteenth Amendment, or remove the name of a presidential candidate certified by the Secretary of State unless otherwise ordered by a court. Accordingly, Plaintiff's complaint for a declaratory judgment that the Election Commission has a statutory legal duty to undertake the aforementioned actions fails to state a claim for which relief may be granted, and he has failed to establish that he is entitled to an injunction that prevents the Election Commission from printing any ballots for the 2024 presidential primary election containing the name of anyone deemed disqualified under Section 3 of the Fourteenth Amendment.

The circuit court did not hold that Davis lacked standing to seek a declaration. See *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010) ("[W]henever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment"). Nor did the circuit court, as Davis seems to suggest, hold that the

controversy was not sufficiently ripe for Davis to seek a declaration. See *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 294; 732 NW2d 160 (2006) ("The purpose of a declaratory judgment is to enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law or a breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants"). In fact, the circuit court specifically expressed that it did have jurisdiction over the complaint because the case was brought against local officials, seeking a declaratory judgment, which the court had the power to render under MCR 2.605.

The question decided below was whether Davis is entitled to the relief he seeks. The circuit court ultimately held that the Commission lacks authority to independently decide whether Trump or any other candidate is disqualified from the office of President of the United States under the Insurrection Clause, and that as such, Davis is not entitled to the relief sought in the complaint. For reasons discussed in the next section, we find no error in the circuit court's resolution of that question.[9]

3. THE ELECTION COMMISSION'S PURPORTED DUTY TO DETERMINE WHETHER TRUMP IS DISQUALIFIED UNDER THE INSURRECTION CLAUSE

The primary focus of Davis's circuit court action, and of his appeal, is whether the Commission has a duty, imposed by MCL 168.689, to determine whether Trump is disqualified from holding the office of President of the United States by Section 3 of the Fourteenth Amendment, and on that basis, then refuse to place his name on the primary ballot. Davis also suggests that MCL 168.567 could be a source from which to derive such authority.[10] Again finding no errors warranting relief, we affirm the circuit court's decision in this regard.

Davis's complaint argues that if the Secretary of State does place Trump on the ballot for the upcoming presidential primary election, the Commission must nonetheless independently determine whether Trump is disqualified under the Insurrection Clause and then refuse to authorize the printing of ballots including his name as a candidate if it determines that Trump is disqualified. Davis primarily relies on MCL 168.689, and in particular, the phrase "properly certified" in the statute:

> The board of election commissioners of each county shall prepare the official ballots for use at any state, district or county election held therein, and shall have

[9] In his brief on appeal, Davis seems to argue that he is entitled to a declaration that the Commission has a duty to prepare and print the ballots—i.e., the question addressed in part II(B)(2) of this opinion. That basic duty was never in dispute, however. Thus, on this particular issue, there is no actual controversy, and thus, no ability to grant declaratory relief. MCR 2.605(A)(1).

[10] In the circuit court, Davis suggested that another source of authority to undertake such an investigation could be derived from 1963 Const, art 11, § 1, which requires the taking of an oath to support the Constitution of the United States. The circuit court rejected this challenge, and Davis has not raised the issue on appeal. It has thus been abandoned. *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008).

> printed a sufficient number of ballots containing the names of all candidates *properly certified* to said board of election commissioners, and ballots for all proposed constitutional amendments or other questions to be submitted at such election to supply each election precinct in such county with a sufficient number for such precinct, and not less than 25% more than the total number of votes cast therein at the corresponding election held 4 years previous for the office which received the greatest number of votes. [MCL 168.689 (emphasis added).]

We have previously addressed the meaning of the phrase, "properly certified," and whether it permits a county election commission to make an independent determination regarding whether a ballot question or candidate was "properly" certified. In *Southeastern Mich Fair Budget Coalition v Killeen*, 153 Mich App 370; 395 NW2d 325 (1986), the question was whether resolutions adopted by the Detroit City Council and certified for inclusion on an upcoming election ballot by the city clerk would appear on the ballot. The questions certified by the city clerk were advisory questions (i.e., questions asking the voters for advice about how the City Council should proceed in certain matters). *Id*. at 375-376. On the advice of counsel, the Board of Commissioners refused to place those questions on the ballot, believing that there was "no constitutional or statutory authority for placing the resolutions on the state general election ballot." *Id*. at 376.

The first question this Court answered was whether the Board of Commissioners had authority to refuse to place on the ballot an item that had been certified by the official authorized to make that certification. This Court examined MCL 168.689, and in particular, the phrase, "properly certified," to conclude that the Board of Commissioners had the authority to determine not only whether a candidate, constitutional amendment, or ballot question had been certified, but also whether any of those had been *properly* certified. *Id*. at 377-378. "Accordingly, where it is apparent to the board of county election commissioners that the question is not entitled to placement on the ballot, it may refuse to place it thereon and leave the certifying body to its legal recourse. We interpret 'properly' in this context to mean that the election commissioners are required to determine that, on its face, the question is entitled to placement on the ballot." *Id*. at 378.

The second question addressed by this Court was whether the advisory questions were, in fact, entitled to placement on the ballot. This Court first held that the questions posed were clearly advisory. *Id*. at 378. And, "they are advisory questions in the areas of federal military intervention in Central America and federal military spending, with respect to which the city council has no power to act officially." *Id*. at 378-379. This Court explained that, while no constitutional or statutory authority explicitly prohibited advisory questions, nothing in the relevant statutes represented the Legislature's authorization "to spend public funds in a straw vote in an area entirely outside the powers of the city council . . . ." *Id*. at 382. While an advisory question concerning an area in which the city council had authority to act might be proper, advisory questions concerning topics that clearly fell outside the scope of the city council's powers were not. *Id*. at 382-384. Thus, while advisory questions might be properly placed on the ballot as a general matter, the particular questions at issue could not be placed on the ballot. *Id*. at 384.

Davis argues that the trial court was compelled to follow *Southeastern Mich Fair Budget Coalition*, and particularly, its interpretation of the phrase "properly certified" in MCL 168.689. But there is no indication that the circuit court failed to do so. Indeed, the circuit court's decision

cites and discusses the case, treating it as binding authority. And, the circuit court's ultimate holding is that the questions involved in the present matter do not involve the type of "facial" review contemplated by *Southeastern Mich Fair Budget Coalition*.[11]

There is no support for Davis's contention that the Wayne County Election Commission is authorized to independently determine whether Trump is disqualified under the Insurrection Clause and then refuse to authorize ballots including him as a candidate on that basis. Pursuant to *Southeastern Mich Fair Budget Coalition*, the duty at issue here is to "determine that, on its face, the [candidate] is entitled to placement on the ballot." *Southeastern Mich Fair Budget Coalition*, 153 Mich App at 378. This Court has implied that a "facial" review amounts to a ministerial review. See *Berry v Garrett*, 316 Mich App 37, 45; 890 NW2d 882 (2016) ("Rather, by doing nothing more than the ministerial task of completing a facial review of the affidavits [of identity], defendants would undertake to perform their clear legal duty under § 558(4) to 'not certify to the board of election commissioners the name of a candidate who [had] fail[ed] to comply' with § 558(2)"). And in *Southeastern Mich Fair Budget Coalition*, the review at issue was a purely legal matter, concerning the scope of the City Council's authority. *Southeastern Mich Fair Budget Coalition*, 153 Mich App at 382-384. The review in that case required no fact-finding and no investigation; it simply amounted to reviewing the proposed ballot questions and determining whether those questions were of a sort that were eligible to be placed on the ballot.

Here, in contrast to that case, Davis would have the Commission determine whether Trump is disqualified by the United States Constitution from holding the office of President of the United States, based on evidence that Davis states he plans to submit to the Commission, but which he has not clearly identified or made part of the record, that he believes proves that Trump engaged in acts of insurrection. Presumably, were this to take place, the Commission would act as both a fact-finder, tasked with reviewing whatever evidence Davis presents, requiring a factual determination regarding what that evidence shows,[12] while acting as constitutional law scholars, tasked with interpreting and applying a provision of the Fourteenth Amendment to the United

[11] This Court is not bound to follow *Southeastern Mich Fair Budget Coalition*, given that it was decided before November 1, 1990. MCR 7.215(J)(1). But, we have held that, while this Court is not strictly obligated to follow "uncontradicted opinions from this Court decided before November 1, 1990," such decisions are "nevertheless considered to be precedent and entitled to significantly greater deference than are unpublished cases." *Woodring v Phoenix Ins Co*, 325 Mich App 108, 114-115; 923 NW2d 607 (2018). In this matter, we decline to expressly endorse the meaning ascribed to MCL 168.689 stated in *Southeastern Mich Fair Budget Coalition*. We need not decide whether that interpretation was correct because, for reasons to be explained, applying that interpretation of the statute ends with the conclusion that the Commission does not have a duty to investigate or determine whether Trump is disqualified from holding office under the Insurrection Clause.

[12] Whether Davis envisions any other party being able to submit evidence before the Commission is unclear. That, of course, could raise questions regarding the due process rights of those affected by any decision.

States Constitution, the meaning of which is subject to significant debate. As the circuit court explained, the type of review Davis envisions would go far beyond the "face" of the matter.[13]

Davis also suggests that the authority to conduct such a review could be derived from MCL 168.567. This statute states: "The boards of election commissioners shall correct such errors as may be found in said ballots, and a copy of such corrected ballots shall be sent to the secretary of state by the county clerk." Davis cites *Berry* as support. That case, however, shows that the function of MCL 168.567 is not to authorize the type of investigation into the qualifications of a presidential candidate by a county election commission that Davis seeks. In *Berry*, this Court addressed a challenge to affidavits of identity filed by candidates for township trustee and township supervisor. *Berry*, 316 Mich App at 40. Both failed to state in their affidavits of identity their precinct number, a requirement stated in MCL 168.558(2). *Berry*, 316 Mich App at 40. This Court explained that under MCL 168.558(4), the defendants had a clear legal duty " 'not to certify to the board of election commissioners the name of a candidate who [had] fail[ed] to comply' with the requirement, under § 558(2), of duly including the precinct number where the candidate was registered to vote." *Berry*, 316 Mich App at 44, quoting MCL 168.558(4). This Court explained that because the defendants had failed to comply with their clear legal duty under MCL 168.558(4), they then had a clear legal duty to correct "such errors as may be found in the resulting, improper ballots" under MCL 168.567. *Berry*, 316 Mich App at 44.

In other words, MCL 168.567 is a mechanism by which boards of election commissioners must correct errors in ballots that are later found. Nothing in the plain language of the statute suggests or implies that it creates a duty to investigate a highly fact-intensive matter of constitutional law such as is presented by the instant case. Neither does MCL 168.689. And, as will be explained next in further detail in the following sections of this opinion, by placing Trump on the presidential primary ballot, the Secretary of State would be following her statutory mandates. Thus, there is no potential error to be corrected under MCL 168.567.

---

[13] We note that in a suit filed in the state of Colorado, a trial court, after a five-day trial, concluded that Trump did engage in acts of insurrection. *Anderson v Griswold*, Colorado Denver District Court, Docket No. 2023-CV-32577, issued November 17, 2023. Even so, that court declined to hold that Trump was disqualified from holding the office of President of the United States, concluding that the Insurrection Clause did not apply to the office of President of the United States. *Id*. The court's 102-page decision is currently on appeal to the Colorado Supreme Court.

We discuss this decision not because it binds this Court in any fashion, nor do we seek to express any opinion regarding whether the Colorado trial court's factual or legal conclusions were correct. Rather, we note this decision because it provides some context for the degree of review and types of determinations that would seem necessary before one could even begin to answer the question that Davis wishes to have the Commission answer in a purported "facial" review under MCL 168.689. And, one Justice of the Michigan Supreme Court has also indicated that, in order to resolve the issue, a substantial evidentiary hearing would be required. *LaBrant v Secretary of State*, ___ Mich ___ (2023) (Docket No. 166373) (WELCH, J., dissenting).

Finding no errors in the decision of the Wayne Circuit Court, in Docket No. 368615, we affirm.

III. DOCKET NO. 368628 (COURT OF CLAIMS)

In Docket No. 368628, plaintiffs LaBrant, Bradway, Murphy, and Nowling appeal the Court of Claims order which denied these plaintiffs' request for declaratory and injunctive relief. We affirm.[14]

A. WHETHER TRUMP IS DISQUALIFIED UNDER THE INSURRECTION CLAUSE

First, plaintiffs assert that Trump is, in fact, disqualified from holding the office of President of the United States pursuant to the Insurrection Clause. Generally, they argue that the clause applies to the office of President of the United States, and that under the definition of "insurrection" plaintiffs would apply, Trump engaged in insurrection. They further argue that Trump's words and actions are not protected by the First Amendment. Plaintiffs add that the Insurrection Clause is self-executing and may be enforced by the judiciary. Multiple amici curiae briefs concerning these topics have also been filed.

The Court of Claims declined to reach any of these questions, instead deciding the matter on other grounds. We too decline to reach these issues because, given our analysis in the next section of this opinion, it is unnecessary to make any determinations regarding whether Trump engaged in insurrection or is actually disqualified from holding the office of President of the United States by the Fourteenth Amendment, at least at this time. See *Pythagorean, Inc v Grand Rapids Twp*, 253 Mich App 525, 527; 656 NW2d 212 (2002)("We will not reach constitutional issues if cases may be resolved on other grounds.").

B. RIPENESS AND RELATED ISSUES

Second, plaintiffs contend that the Court of Claims incorrectly held that the Secretary of State and political parties alone determine which individuals appear on the presidential primary ballot. Plaintiffs assert that voters in Michigan have a right to have only eligible candidates appear on ballots, and to raise eligibility challenges in the courts. They also argue that the matter is ripe, contrary to the Court of Claims' decision, because plaintiffs challenge Trump's placement on the ballot for the presidential primary election, an election that is only months away.

As this Court explained in *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 545-546; 904 NW2d 192 (2017):

> MCR 2.605 governs a trial court's power to enter a declaratory judgment. The court rule provides, in pertinent part, that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other

[14] The standards of review applicable to this appeal are largely those identified in Section II(A) of this opinion. Other standards of review applicable to the Court of Claims' matter will be noted as relevant.

> legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1). The language in this rule is permissive, and the decision whether to grant declaratory relief is within the trial court's sound discretion. *PT Today, Inc v Comm'r of Office Fin & Ins Servs*, 270 Mich App 110, 126; 715 NW2d 398 (2006).
>
> When there is no actual controversy, the court lacks jurisdiction to issue a declaratory judgment. *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546 (2000). Thus, "the existence of an 'actual controversy' is a condition precedent to the invocation of declaratory relief." *PT Today, Inc*, 270 Mich App at 127. An actual controversy exists when a declaratory judgment is necessary to guide the plaintiff's future conduct in order to preserve the plaintiff's legal rights. *Shavers v Attorney General*, 402 Mich 554, 588–589; 267 NW2d 72 (1978). "It is not necessary that 'actual injuries or losses have occurred'; rather than 'plaintiffs plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised.' " *Kircher v City of Ypsilanti*, 269 Mich App 224, 227; 712 NW2d 738 (2005), quoting *Shavers*, 402 Mich at 589.

"MCR 2.605 does not limit or expand the subject-matter jurisdiction of the courts, but incorporates the doctrines of standing, ripeness, and mootness." *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). The "actual controversy" requirement "prevents a court from deciding hypothetical issues." *Id*. And that is the core concern addressed by the ripeness doctrine. "The doctrine of ripeness is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained. *A claim that rests on contingent future events is not ripe*." *King v Mich State Police Dep't*, 303 Mich App 162, 188; 841 NW2d 914 (2013) (quotation marks and citations omitted; emphasis added). "Hence, when considering the issue of ripeness, the timing of the action is the primary focus of concern." *Id*. (quotation marks and citation omitted). Questions concerning ripeness are reviewed de novo on appeal. *Id*.

We begin by analyzing Michigan's statutory framework as it pertains to presidential primary elections. First, and as the Court of Claims explained, Michigan's statutory scheme makes clear that the Secretary of State's role in the context of presidential primary elections is limited. Only one portion of MCL 168.614a gives the Secretary of State a role in making any decisions at all. This statute begins by directing the Secretary of State to publish a list of individuals generally advocated by the national news media as potential presidential candidates. MCL 168.614a(1). Which sources to review (i.e., exactly what sources represent the "national news media") is not defined, and thus, it appears that the Secretary of State has some discretion to decide from which sources this list should be drawn.

But after that, the Secretary of State's actions are purely administrative. The chairperson of each political party ultimately identifies which candidates are to be placed on the primary ballot, and does so by filing a list of such candidates with the Secretary of State. MCL 168.614a(2). The Secretary of State then publishes that list on the internet. MCL 168.614a(2). The statute gives the Secretary of State no discretion or authority to alter that list, either by adding or removing candidates. Rather, the Secretary of State "*shall* make lists received under this subsection available

to the public on an internet website maintained by the department of state." MCL 168.614a(2) (emphasis added). As is widely understood, the term "shall" represents a mandatory, and not discretionary, directive. See, e.g., *Lakeshore Group v Dep't of Environmental Quality*, 507 Mich 52, 64; 968 NW2d 251 (2021) ("The term 'shall' indicates that conduct is mandatory").

The Secretary of State's next task is that she "shall notify each potential presidential candidate on the lists of the provisions of this act relating to the presidential primary election." MCL 168.614a(3). Again, there is no discretion, and no decisions to be made. Given the use of the word "shall," if an individual is included on a list of potential candidates filed by a party chairperson, the Secretary of State must provide this notification.

MCL 168.615a then explains the process for placing candidates on the presidential primary ballots. This statute, which is quoted in full at the outset of this opinion, begins with the sentence: "Except as otherwise provided in this section, the secretary of state *shall* cause the name of a presidential candidate notified by the secretary of state under section 614a to be printed on the appropriate presidential primary ballot for that political party." MCL 168.615a(1) (emphasis added). Again, there is no discretion or indication of any decision-making authority. The statute goes on to explain that a notified presidential candidate may file an affidavit stating a different party affiliation, and directs that the Secretary of State "shall" then print that candidate's name on the appropriate primary ballot for that political party. MCL 168.615a(1). Or, if the presidential candidate files an affidavit that states they have no party affiliation, or that their party affiliation is with a party for which a primary will not be held, then the Secretary of State "shall not cause that presidential candidate's name to be printed on a ballot for the presidential primary election." MCL 168.615a(1). And, if the presidential candidate files an affidavit with the Secretary of State stating that they are not a presidential candidate, the Secretary of State "shall not have that presidential candidate's name printed on a presidential primary ballot." MCL 168.615a(1).

As is clear from the above, the Secretary of State's role in presidential primary elections is chiefly that of an administrator. In particular, when it comes to who is or is not placed on the primary ballot, the statutory scheme leaves nothing to the Secretary of State's discretion. As the Court of Claims explained, who to place on the primary ballot is determined by the political parties and the individual candidates.[15]

The Court of Claims relied on the Minnesota Supreme Court's resolution of a similar case in *Growe v Simon*, 997 NW2d 81 (Minn, 2023). There, the court determined that any claim regarding Trump's placement on the general election ballot was not ripe. But the court held that the petitioners' claim *was* ripe to the extent it asked the court to hold that Trump could not appear on the primary election ballot. *Id*. at 82. The court then explained that, with respect to this one ripe question, there was no potential error to correct:

> With respect to the only ripe issue before us at this time, we conclude that under section 204B.44, there is no "error" to correct here as to the presidential

[15] The only exception of sorts is that individuals who are not placed on the ballot as part of this process may, by a nominating petition process, gain access to the primary ballot. MCL 168.615a(2). But that process is not implicated here.

> primary election if former President Trump's name is included on the presidential primary ballot after the Chair of the Republican Party of Minnesota provides his name to the Secretary of State, notwithstanding petitioners' claim that former President Trump is disqualified from holding office under Section 3 of the Fourteenth Amendment. The Legislature enacted the presidential nomination primary process to allow major political parties to select delegates to the national conventions of those parties; at those conventions the selected delegates will cast votes along with delegates from all of the other states and territories and choose a presidential candidate who will subsequently appear on general election ballots. See Minn Stat § 207A.11(d) (2022) (explaining that the presidential nomination primary "only applies to a major political party that selects delegates at the presidential nomination primary to send to a national convention"). This is "a process that allows political parties to obtain voter input in advance of a nomination decision made at a national convention." *De La Fuente v Simon*, 940 NW2d 477, 492 (Minn, 2020). Thus, although the Secretary of State and other election officials administer the mechanics of the election, this is an internal party election to serve internal party purposes, and winning the presidential nomination primary does not place the person on the general election ballot as a candidate for President of the United States. As we explained in *De La Fuente*, in upholding the constitutionality of this statutory scheme for the presidential nomination primary, "[t]he road for any candidate's access to the ballot for Minnesota's presidential nomination primary runs only through the participating political parties, who alone determine which candidates will be on the party's ballot." 940 NW2d at 494-95. And there is no state statute that prohibits a major political party from placing on the presidential nomination primary ballot, or sending delegates to the national convention supporting, a candidate who is ineligible to hold office. [*Growe*, 997 NW2d at 82-83.]

The *Growe* court's final paragraph explains:

> Because there is no error to correct here as to the presidential nomination primary, and petitioners' other claims regarding the general election are not ripe, the petition must be dismissed, but without prejudice as to petitioners bringing a petition raising their claims as to the general election. [*Growe*, 997 NW2d at 83.]

In this case, the Court of Claims held that as to the general election, the issue is not ripe, and we agree. Before Trump becomes a candidate in the general election, he would first have to prevail in the nationwide primary process, and then be nominated as the Republican Party's candidate for that office at the Republican National Convention. Given the very nature of those processes, the outcome at either of those steps is unknown at this time. To the extent plaintiffs seek an injunction prohibiting the Secretary of State from placing Trump on the general election ballot, the claim is not ripe for adjudication. *King*, 303 Mich App at 188.

Plaintiffs argue that their request for declaratory relief is ripe, and that the Court of Claims' ripeness analysis is flawed, because it mischaracterizes the complaint. According to plaintiffs, "they challenge Trump's eligibility to appear on the *primary election* ballot, now less than three months away . . . ." Thus, plaintiffs contend that the Court of Claims' speculation regarding

whether Trump would win the primary election, become the Republican Party nominee, or win the general election is irrelevant. We disagree that the analysis as to the general election was irrelevant. Rather, the complaint specifically asks for an injunction prohibiting Trump from appearing on the general election ballot. As such, the Court of Claims did not mischaracterize the complaint or err by addressing that request.

We do agree with plaintiffs to the extent that they argue that their request for an injunction prohibiting the Secretary of State from placing Trump's name on the presidential primary ballot is ripe. While circumstances were different when this matter was filed, and when it was decided in the Court of Claims, at this point, absent judicial intervention of some sort, the Secretary of State will cause Trump's name to be placed on the presidential primary ballot, and that election will be held in the next few months.[16] This claim does not rest on contingencies or uncertainties; at this point in time, it rests on decided facts and the operation of certain statutes. But, like the Minnesota Supreme Court, we conclude that there is no error to be corrected concerning the presidential primary ballots because the Secretary of State must place Trump on this ballot, regardless of whether he would be disqualified from holding office by the Insurrection Clause.

As discussed previously, when it comes to Michigan's presidential primary, applicable statutes limit the Secretary of State's role to that of an administrator of what are internal party elections. There is virtually no discretion left to the Secretary of State in this process. The Secretary of State, rather, follows the directions of the political parties and the candidates themselves. The Secretary of State is *obligated* to place on the presidential ballot those individuals identified by the political parties, unless a candidate files an affidavit saying otherwise. MCL 168.615a(1). Nothing in this framework exhibits any decision-making to be had, at least by the Secretary of State. Michigan's statutes also contain no provisions that prohibit a candidate who is, or may be, disqualified from holding the office of President of the United States from appearing on the presidential primary ballot. In other words, nothing in the statutory framework prevents a political party from placing an individual on the presidential primary ballot who would be disqualified from holding the office, and nothing requires, or even implies, that the Secretary of State can refuse to place an individual on the presidential primary ballot for such reasons.

Contrast that with other areas in which the Legislature *has* incorporated eligibility requirements into Michigan law. See, e.g., MCL 168.51 (qualifications for the offices of Governor and Lieutenant Governor); MCL 168.71 (qualifications for the offices of Secretary of State and

[16] The case was filed in late September 2023, before the Secretary of State published a list of individuals generally advocated in the national media as potential presidential candidates. But at this point, the Secretary of State has published that list, as well as the list of candidates identified by the political parties as candidates for President, which includes Trump. See <https://mielections.us/election/candlist/2024PPR_CANDLIST.html> (accessed December 14, 2023). The deadline for Trump to file an affidavit withdrawing his candidacy was Friday, December 8, 2023, at 4:00 p.m. See MCL 168.615a(1) (the date to file an affidavit to withdraw one's candidacy is by 4:00 p.m. on the second Friday in December—December 8, 2023, in this election cycle). Trump has not done so.

Attorney General); MCL 168.91 (qualifications for the office of United States Senator); MCL 168.131 (qualifications to "be a Representative in Congress"); MCL 168.161 (qualifications for the offices of State Senator and Representative); and MCL 168.281 (qualifications for membership to the State Board of Education, Board of Regents of the University of Michigan, Board of Trustees of Michigan State University, and Board of Governors of Wayne State University). With each, there exists a mechanism for enforcement of these requirements before an election. Candidates for all of these offices, and many others, must file an affidavit of identity which includes a statement that the candidate "meets the constitutional and statutory qualifications for the office sought." MCL 168.558(1) and (2). And, pursuant to MCL 168.558(4), "An officer shall not certify to the board of election commissioners the name of a candidate who fails to comply with this section, or the name of a candidate who executes an affidavit of identity that contains a false statement with regard to any information or statement required under this section." Thus, candidates who file affidavits of identity containing false information are prohibited from appearing on the ballot. See *Reed-Pratt*, 339 Mich App at 517 (quotation marks and citation omitted) ("The failure to supply a facially proper affidavit of identity (AOI), i.e., an affidavit that conforms to the requirements of the Election Law, is a ground to disqualify a candidate from inclusion on the ballot"). This illustrates that when the Legislature wishes to require that election officers refuse to place ineligible candidates on the ballot, it has.

Yet, the Legislature has made plain that those seeking to run for the office of President of the United States are not required to file an affidavit of identity. MCL 168.558(1) ("The affidavit of identity filing requirement does not apply to a candidate nominated for the office of President of the United States or Vice President of the United States"). The process for identifying presidential primary candidates stated in MCL 168.614a and MCL 168.615a likewise says nothing of a presidential primary candidate filing an affidavit of identity. As such, the enforcement mechanism of MCL 168.558(4) has no application. Rather, when it comes to the presidential primary election, the statutory framework is different. As explained, nothing in the statutory framework that controls the process for presidential primary elections confers any authority on the Secretary of State to make eligibility determinations or to refuse to place a candidate on that particular ballot based on an eligibility determination.

Plaintiffs argue that Michigan recognizes a "well-established right" held by the voters to have only eligible candidates appear on primary and general election ballots. Plaintiffs rely on *Barrow*, 301 Mich App at 404, and a number of other election cases that followed *Barrow*, as standing for this right.

We disagree. *Barrow* was a mandamus matter in which one candidate for mayor argued that another candidate for mayor was ineligible to appear on an August 2013 primary ballot. The eligibility challenge was based on residency requirements stated in the Detroit City Charter, and ultimately was controlled by the fact that the challenged candidate filed his nominating petitions ten days before the one-year anniversary of his registration as a voter in the City of Detroit. *Id.* at 407-409. In upholding the trial court's decision, this Court explained that it was "undisputed that defendants have the statutory duty to submit the names of the eligible candidates for the primary election, see MCL 168.323 and MCL 168.719." *Barrow*, 301 Mich App at 412. Thus, "[t]he inclusion or exclusion of a name on a ballot" was, in that case, "ministerial in nature," making mandamus a potentially appropriate remedy. *Id.* This Court reviewed the facts and the charter provisions at issue, and concluded that the candidate was ineligible to be placed on the

ballot, as he was not a registered voter in the City of Detroit for a full year before filing to run for mayor. *Id*. at 417. This Court also addressed constitutional challenges made by the candidate, found those unavailing, and concluded that the candidate could not be placed on the ballot. *Id*. at 417-426.

Plaintiffs argue that *Barrow*, 301 Mich App at 412, stands for the proposition that voters have a "clear legal right . . . to have only eligible candidates on a primary election ballot." But *Barrow* does not stand for such a broad proposition. Rather, *Barrow* stands for the proposition that the defendant in that case, the Detroit Election Commission, had a clear legal duty, pursuant to statutes that do not control the outcome in this case, to place on the ballot only those candidates who were eligible to run in the mayoral primary race. For reasons explained previously, the statutes concerning the presidential primary contain no such right.

Plaintiffs cite other cases that have the same fault: *Berdy v Buffa*, 504 Mich 876 (2019) (concluding that some candidates were ineligible to run for city council under the local city charter, and thus, the city elections commission "had a clear legal duty to perform the ministerial act of removing the names of the challenged contestants from the ballots"); *Sheffield v Detroit City Clerk*, 337 Mich App 492; 976 NW2d 95 (2021), rev'd 508 Mich 851 (2021) (concerning whether the Detroit City Clerk was required to remove a proposal from an upcoming primary election on grounds that the proposed revised charter had not been approved by the Governor as required by MCL 117.22); *Burton-Harris v Wayne Co Clerk*, 337 Mich App 215; 976 NW2d 30 (2021), vacated in part, lv den in part 508 Mich 985 (2021) (concerning whether a candidate for county prosecutor made a false statement in an affidavit of identity and was thus precluded from appearing on the ballot pursuant to MCL 168.558(4)).[17] None of these cases involve the presidential primary or the statutes controlling that process, and they do not control the outcome in this matter.

Thus, we agree that plaintiffs' claims are not ripe to the extent they concern Trump's placement on the general election ballot, given all that must take place before that might occur. To the extent the claims concern the primary election ballot, while the claims may be ripe, there is no potential error. Even if Trump were disqualified from holding the office of President of the United States by the Insurrection Clause, nothing prevents the Michigan Republican Party from

[17] We note that the Supreme Court's order in *Burton-Harris* vacated this Court's entire analysis except that portion considering whether the trial court had abused its discretion by denying a motion to intervene. *Burton-Harris v Wayne Co Clerk*, 508 Mich 985 (2021). Thus, any substantive statement potentially relevant to this matter that might be derived from this Court's decision in *Burton-Harris* was vacated. Indeed, the pages of this Court's decision cited by plaintiffs are found in Section IV of the opinion, a section that was specifically vacated by the Supreme Court. *Burton-Harris*, 508 Mich at 985. Similarly, where this Court's decision in *Sheffield* was reversed, albeit on the basis that MCL 117.22 did not grant the Governor "an unfettered veto in the charter revision process," *Sheffield v Detroit City Clerk*, 508 Mich 851; 962 NW2d 157, 159 (2021), this Court's statements in the majority opinion are perhaps of limited consequence. But even ignoring all that, the point is the same: these cases do not concern the presidential primary or the statutes controlling the administration of that election by the Secretary of State.

identifying him as a candidate in the upcoming primary election. And, where the relevant statutes require the Secretary of State to place any candidate so identified on the presidential primary ballot, and confers no discretion to the Secretary of State to do otherwise, there is no error to correct.

Plaintiffs' complaint also requests a declaration that Trump is "disqualified from holding the office of President of the United States pursuant to Section 3 of the Fourteenth Amendment to the Constitution of the United States[.]" But a condition precedent to obtaining declaratory relief is the existence of an actual controversy, and where there is no actual controversy, there is no jurisdiction to grant declaratory relief. MCR 2.605(A); *Citizens for Common Sense in Gov't*, 243 Mich App at 55. An actual controversy exists where a declaratory judgment is needed to guide plaintiffs' future conduct, and requires plaintiffs to plead facts indicating an adverse interest necessitating the sharpening of the issues raised. *Van Buren Charter Twp*, 319 Mich App at 545.

As the Court of Claims recognized, it would be improper to decide whether to grant a declaration that Trump is disqualified from holding the office of President of the United States at this time. At the moment, the only event about to occur is the presidential primary election. But as explained, whether Trump is disqualified is irrelevant to his placement on that particular ballot. Thus, with respect to the presidential primary election, there is no actual controversy, as the only purported basis for removing Trump from the presidential primary ballot would not be a sufficient basis for removal of Trump's name from that ballot. Beyond that point in time, the request for a declaration that Trump is disqualified is not ripe. As explained, before Trump's potential disqualification from holding the office of President could become a relevant concern, he would minimally need to prevail in the primary process. That process has yet to begin, and whether Trump prevails in the primary process or becomes the Republican nominee for President are purely hypothetical questions at present. "[W]here the injury sought to be prevented is merely hypothetical, a case of actual controversy does not exist." *Citizens for Common Sense in Gov't*, 243 Mich App at 55. With no actual controversy, the Court of Claims was without jurisdiction to issue a declaratory judgment.[18]

IV. CONCLUSION

In Docket No. 368615, we affirm the decision of the Wayne Circuit Court.

In Docket No. 368628, we affirm the decision of the Court of Claims.

A public question being involved, no costs may be taxed under MCR 7.219.

/s/ Anica Letica
/s/ Michael J. Riordan
/s/ Thomas C. Cameron

[18] We need not, and do not, decide today at what point in the process such a claim would become ripe. It is enough to conclude that, given the current state of affairs, the request for declaratory relief stated in the complaint is not ripe. Similarly, we do not address the Court of Claims' conclusion that the question of whether Trump is disqualified by the Insurrection Clause is a nonjusticiable political question.

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ROBERT LaBRANT, ANDREW BRADWAY, NORAH MURPHY, and **WILLIAM NOWLING,**

Plaintiffs,

Case No.

v.

JOCELYN BENSON, in her official capacity as Secretary of State,

URGENT ELECTION MATTER

Defendant.
_____/

GOODMAN ACKER, P.C.
MARK BREWER (P35661)
ROWAN CONYBEARE (P86571)
Attorneys for Plaintiffs
17000 W. Ten Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com

FREE SPEECH FOR PEOPLE
Ronald Fein (*pro hac vice* forthcoming)
Amira Mattar (*pro hac vice* forthcoming)
Courtney Hostetler (*pro hac vice* forthcoming)
John Bonifaz (*pro hac vice* forthcoming)
Ben Clements (*pro hac vice* forthcoming)
1320 Centre St. #405
Newton, MA 02459
(617) 244-0234
_____/

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

A civil action between other parties includes factual allegations that overlap with those alleged in the complaint has been previously filed in this Court where it was given case number 23-000128-MB and assigned to Judge Redford. The action remains pending.

/s/ Mark Brewer
MARK BREWER (P35661)

TABLE OF CONTENTS

Plaintiffs for their Verified Complaint for Declaratory Judgment and Permanent Injunction against Secretary of State Jocelyn Benson ("Benson") state as follows:

INTRODUCTION

> "No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."
>
> -U.S. Const., amend. XIV, § 3

1. This is an action to prevent Donald J. Trump ("Trump") from appearing on the 2024 presidential primary or general election ballots because, having sworn an oath to support the Constitution of the United States, he has "engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof" and is therefore disqualified from public office under section 3 of the Fourteenth Amendment.

2. On November 15, 2022, Donald Trump filed paperwork with the Federal Election Commission as a candidate for president of the United States. That same day, he publicly announced his candidacy in a speech at his Mar-a-Lago property in Florida.

3. As set forth below, Donald Trump is constitutionally ineligible for the office of President of the United States, or for any other public office.

4. Under Section 3 of the Fourteenth Amendment to the U.S. Constitution, known as the Insurrectionist Disqualification Clause, "No person shall . . . hold any office, civil or military, under the United States, . . . who, having previously taken an oath, . . . as an officer of the United States, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."

5. Persons who trigger this provision are disqualified from public office. "The oath to support the Constitution is the test. The idea being that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress." *Worthy v. Barrett*, 63 N.C. 199, 204 (1869). Persons who are disqualified by this provision are thus ineligible to hold the presidency, just like those who fail to meet the age, residency, or natural-born citizenship requirements of Article II, section 1 of the Constitution, or those who have already served two terms, as provided by the Twentieth Amendment.

6. The events of January 6, 2021 amounted to an insurrection or a rebellion under Section 3: a violent, coordinated effort to storm the Capitol to obstruct and prevent the Vice President of the United States and the United States Congress from fulfilling their constitutional roles by certifying President Biden's victory, and to illegally extend then-President Trump's tenure in office.

7. The effort to overthrow the results of the 2020 election by unlawful means, from on or about November 3, 2020 through at least January 6, 2021, constituted a rebellion under Section 3: an attempt to overturn or displace lawful government authority by unlawful means.

8. By overwhelming majorities, both chambers of Congress declared those who attacked the Capitol on January 6, 2021 "insurrectionists." Pub. L. 117-32 (Aug. 5, 2021). Just days afterward, the U.S. Department of Justice under the Trump administration labeled it an "insurrection" in federal court. So have at least sixteen federal judges, and Trump's own defense lawyer in his impeachment proceeding.

9. Under Section 3, to "engage" means "a voluntary effort to assist the Insurrection . . . and to bring it to a successful [from insurrectionists' perspective] termination." *United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D.N.C. 1871); *Worthy*, 63 N.C. at 203 (defining "engage"

under Section 3 to mean "[v]oluntarily aiding the rebellion, by personal service, or by contributions, other than charitable, of any thing that was useful or necessary").

10. An individual need not personally commit an act of violence to have "engaged" in insurrection. *Powell*, 27 F. Cas. at 607 (defendant paid to avoid serving in Confederate Army); *Worthy*, 63 N.C. at 203 (defendant simply served as county sheriff). Indeed, Jefferson Davis—the president of the Confederacy—never fired a shot.

11. Both modern judicial decisions to construe "engage" under Section 3 have adopted the *Worthy-Powell* standard. *See State ex rel. White v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, *19 (N.M. 1st Jud. Dist., Sept. 6, 2022), appeal dismissed, No. S-1-SC-39571 (N.M. Nov. 15, 2022), cert. filed May 18, 2023; *Rowan v. Greene*, Case No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Ga. Off. of State Admin. Hg's, May 6, 2022), slip op. at 13-14.

12. "Engagement" does not require previous conviction, or even charging, of any criminal offense. *See, e.g.*, *Powell*, 27 F. Cas. at 607 (defendant not charged with any prior crime); *Worthy*, 63 N.C. at 203 (defendant not charged with any crime); *In re Tate*, 63 N.C. 308 (1869) (defendant not charged with any crime); *see also* Gerard N. Magliocca, *Amnesty and Section 3 of the Fourteenth Amendment*, 36 Const. Comment. 87, 98-99 (2021) (describing special congressional action in 1868 to enforce Section 3 and remove Georgia legislators, none of whom had been charged criminally); William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. __ (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751, at 16-22.

13. Most of the House and Senate candidates-elect that Congress excluded from their seats during Reconstruction for engagement in insurrection had never been charged or convicted of any crimes.

14. Indeed, the vast majority of disqualified ex-Confederates were never charged with any crimes.

15. Modern authority agrees that no evidence or authority suggests that a prior criminal conviction—whether under 18 U.S.C. § 2383 (insurrection) or any other statute—was ever considered necessary to trigger Section 3. *White*, 2022 WL 4295619, at *16, *24; *Greene*, *supra* ¶ 10, slip op., at 13.

16. As set forth in detail below and in the reports of publicly available investigations, in the months leading up to January 6, 2021, then-President Donald Trump plotted to overturn the 2020 presidential election outcome.

17. First, he disseminated false allegations of fraud and challenged election results through litigation.

18. When his election lawsuits failed, he attempted unlawful schemes, including pressuring then-Vice President Mike Pence to discard electoral votes from states that had voted for President-elect Biden.

19. To pressure Pence, Trump summoned tens of thousands of supporters to Washington for what he called a "wild" protest on January 6, 2021, the day that Congress would count and certify the electoral votes.

20. Although Trump knew that these supporters were angry and that many were armed, Trump incited them to a violent insurrection and instructed them to march to the Capitol to "take back" their country.

21. What followed was a searing image of violence Americans will always remember: violent insurrectionists flooding the Capitol, beating law enforcement, breaking into the chambers, and threatening to kill Vice President Pence, Speaker of the House Nancy Pelosi, and other leaders.

22. Even as insurrectionists demanded Pence's murder, Trump goaded them further. Knowing that his supporters' violent attack on the Capitol was underway and knowing that his words would aid and encourage the insurrectionists and induce further violence, at 2:24 PM Trump sent a widely-read social media message publicly condemning Pence.

23. Despite knowing that violence was ongoing at the Capitol and that his violent supporters would heed a call from him to withdraw, for 187 minutes, Trump refused repeated requests that he instruct his violent supporters to disperse and leave the Capitol. Instead, he reveled in the violent attack as it unfolded on television.

24. The insurrection defeated the forces of civilian law enforcement; forced the United States Congress to go into recess; stopped the essential constitutional process of certifying electoral votes; forced the Vice President, Senators, Representatives, and staffers into hiding; occupied the United States Capitol, a feat never achieved by the Confederate rebellion; held the Capitol for hours until reinforcements could arrive; and blocked the peaceful transition of power in the United States of America, another feat never achieved by the Confederate rebellion.

25. Donald J. Trump, through his words and actions, after swearing an oath as an officer of the United States to support the Constitution, engaged in insurrection or rebellion, or gave aid and comfort to its enemies, as defined by Section 3 of the Fourteenth Amendment. He is disqualified from holding the presidency or any other office under the United States unless and until Congress provides him relief.

JURISDICTION

26. This Court has jurisdiction over Plaintiffs' claims in this action for declaratory and permanent injunctive relief under MCL 600.6419 and MCR 2.605.

27. As set forth in more detail below, on July 12, 2023, counsel for Plaintiffs, Free Speech For People, wrote to the Secretary of State requesting that she determine that Donald J.

Trump is disqualified from holding the office of President, and decline to place his name on the presidential primary and general election ballots. On September 13, 2023, Secretary Benson published an op-ed in the Washington Post, claiming that the Secretary does not have authority to investigate a presidential candidate's ineligibility under section 3 of the Fourteenth Amendment. She has declared that she will place Trump's name on the Michigan 2024 presidential primary ballot unless a court order prevents her from doing so.

28. This action is necessary to prevent Donald J. Trump, who is disqualified from holding the office of President pursuant to Section 3 of the Fourteenth Amendment to the United States Constitution, from appearing on the ballot for either the 2024 presidential primary or the November 5, 2024 general election for the office of President of the United States.

PARTIES

29. Plaintiff Robert LaBrant is a resident and registered voter in Michigan who intends to vote in the 2024 presidential primary and general elections.

30. Plaintiff Andrew Bradway is a resident and registered voter in Michigan who intends to vote in the 2024 presidential primary and general elections.

31. Plaintiff Norah Murphy is a resident and registered voter in Michigan who intends to vote in the 2024 presidential primary and general elections.

32. Plaintiff William Nowling is a resident and registered voter in Michigan who intends to vote in the 2024 presidential primary and general election.

33. Defendant Jocelyn Benson is the duly elected Secretary of State. The Secretary of State is responsible for the administration of elections in the State of Michigan, including the 2024 presidential primary election and November 5, 2024 general election. Specifically, the Secretary of State is charged with "issu[ing] a list of the individuals generally advocated by the national

news media to be potential presidential candidates for each party's nomination," MCL § 168.614a(1), and with "caus[ing] the name of a presidential candidate notified by the secretary of state under section 614a to be printed on the appropriate presidential primary ballot for that political party," MCL § 168.615a(1). Secretary Benson is named as a defendant in her official capacity.

GENERAL ALLEGATIONS

I. TRUMP TOOK AN OATH TO UPHOLD THE U.S. CONSTITUTION.

34. On January 20, 2017, Donald Trump was sworn in as forty-fifth president of the United States.

35. On that day, Trump swore the presidential oath of office required by Article II, section 1, of the Constitution: "I, Donald John Trump, do solemnly swear that I will faithfully execute the office of President of the United States, and will to the best of my Ability preserve, protect, and defend the Constitution of the United States."[1]

36. After taking the oath, Trump gave an inaugural speech, in which he stated, "Every four years, we gather on these steps to carry out the orderly and peaceful transfer of power."[2]

II. TRUMP'S SCHEME TO OVERTURN THE GOVERNMENT.

A. Trump Sought Re-Election but Prepared to Retain Power Even if He Lost.

37. On January 19, 2019, at a rally in Florida, Trump officially launched his campaign for a second term as President.[3]

---

[1] Trump White House Archived, *The Inauguration of the 45th President of the United States*, YOUTUBE (Jan. 20, 2017), https://www.youtube.com/watch?v=4GNWldTc8VU; *see also* U.S. Const. art. I, § 2, cl. 8.

[2] Trump White House Archived, *The Inauguration of the 45th President of the United States*, YOUTUBE (Jan. 20, 2017), https://www.youtube.com/watch?v=4GNWldTc8VU.

[3] *Donald Trump formally launches 2020 re-election bid*, BBC (June 19, 2019), https://www.bbc.com/news/world-us-canada-48681573.

38. During his campaign, Trump stated that fraudulent voting activity would be the only possible reason for electoral defeat (rather than not receiving enough votes). For example:

a. On August 17, 2020, Trump spoke to a crowd in Oshkosh, Wisconsin and stated: "The only way we're going to lose this election is if the election is rigged."[4]

b. On August 24, 2020, during his Republican National Convention acceptance speech, Trump stated: "The only way they can take this election away from us is if this is a rigged election."[5]

c. On September 24, 2020, Trump stated: "We want to make sure the election is honest, and I am not sure that it can be. I don't know that it can be with this whole situation of unsolicited ballots."[6]

39. In particular, Trump claimed that this "fraud" occurred or would occur in cities and states with majority or substantial Black populations.

40. In parallel, Trump aligned himself with violent extremist and white supremacist organizations and suggested they should be prepared to act on his behalf.

41. For example, on September 29, 2020, Trump was asked if he would disavow the Proud Boys. Instead, he stated: "Proud Boys, stand back and *stand by*," later adding "somebody's got to do something about Antifa and the left."[7]

---

[4] Kevin Liptack, *Trump warns of 'rigged election' as he uses conspiracy and fear to counter Biden's convention week*, CNN (Aug. 18, 2020), https://www.cnn.com/2020/08/17/politics/donald-trump-campaign-swing/index.html.

[5] *RNC 2020: Trump warns Republican convention of 'rigged election'*, BBC (Aug. 25, 2020), https://www.bbc.com/news/election-us-2020-53898142.

[6] *President Trump Departs White House*, C-SPAN (Sept. 24, 2020), https://www.c-span.org/video/?476212-1/president-trump-departs-white-house#.

[7] YOUTUBE (Sep. 29, 2020), https://www.youtube.com/watch?v=qIHhB1ZMV_o.

42. The Proud Boys celebrated this as a call to "stand by."

a. On the social media site Parler, Proud Boys leader Henry "Enrique" Tarrio responded, "Standing by sir."[8] (Tarrio was convicted of seditious conspiracy on May 4, 2023 and sentenced to 22 years in prison for his role on January 6.[9])

b. Another Proud Boys leader, Joseph Biggs, posted, "President Trump told the proud boys to stand by because someone needs to deal with ANTIFA...well sir! we're ready!!" and "Trump basically said to go fuck them up! this makes me so happy."[10] (Biggs was convicted of seditious conspiracy and sentenced to 17 years in prison for his role on January 6.[11])

c. That same night, the Proud Boys began making and selling merchandise with the slogan "Stand Back and Stand By."

43. Meanwhile, before November 3, 2020 ("Election Day"), Trump was advised by his campaign manager William Stepien not to prematurely declare victory while lawful votes, including mail-in and absentee ballots, were still being counted.[12]

---

[8] H.R. Rep. No. 117-663 (Dec. 22, 2022), at 507-08; https://twitter.com/ByMikeBaker/status/1311130735584051201/photo/1 (screenshot).

[9] *Proud Boys Leader Sentenced to 22 Years in Prison on Seditious Conspiracy and Other Charges Related to U.S. Capitol Breach*, U.S. DEPT. OF JUSTICE (Sept. 5, 2023), https://www.justice.gov/usao-dc/pr/proud-boys-leader-sentenced-22-years-prison-seditious-conspiracy-and-other-charges.

[10] H.R. Rep. No. 117-663 (Dec. 22, 2022), at 507-08; https://twitter.com/ByMikeBaker/status/1311130735584051201/photo/1 (screenshot).

[11] *Two Leaders of the Proud Boys Sentenced to Prison on Seditious Conspiracy and Other Charges Related to U.S. Capitol Breach*, U.S. DEPT. OF JUSTICE (Aug. 31, 2023), https://www.justice.gov/usao-dc/pr/two-leaders-proud-boys-sentenced-prison-seditious-conspiracy-and-other-charges-related-us.

[12] Hearing Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol, No. 117-3 (June 13, 2022), https://www.govinfo.gov/content/pkg/CHRG-117hhrg48999/pdf/CHRG-117hhrg48999.pdf ("Second Jan. 6 Hearing Transcript").

44. Notwithstanding Stepien's advice, Trump and his associates planned to declare victory before all ballots were counted. For instance:

a. On November 1, 2020, Trump told close associates that he would declare victory on election night if it looked as if he was "ahead."[13]

b. Around the same time, Steve Bannon, former White House strategist and advisor to Trump told a group of associates: "And what Trump's going to do is just declare victory, right? He's gonna declare victory, but that doesn't mean he's the winner, he's just gonna say he's a winner."[14]

45. On November 3, 2020, the United States held its presidential election.

46. That evening, media outlets projected Biden was in the lead.[15]

47. Trump falsely alleged that widespread voter fraud had compromised the validity of such results. For example:

a. On November 4, 2020, he tweeted: "We are up BIG, but they are trying to STEAL the Election. We will never let them do it. Votes cannot be cast after the Polls are closed!"[16]

b. On November 5, 2020, he tweeted: "STOP THE FRAUD!" and, "STOP

[13] Jonathan Swan, *Scoop: Trump's plan to declare premature victory*, AXIOS (Nov. 1, 2020), https://www.axios.com/2020/11/01/trump-claim-election-victory-ballots.

[14] Hearing Before the Select Comm. To Investigate the January 6th Attack on the United States Capitol, No. 117-9, at 38 (July 21, 2022), https://www.govinfo.gov/content/pkg/CHRG-117hhrg49356/pdf/CHRG-117hhrg49356.pdf.

[15] Meg Wagner, Melissa Mahtani, et al., *Election 2020 presidential results*, CNN (Nov. 5, 2020), https://www.cnn.com/politics/live-news/election-results-and-news-11-04-20/index.html.

[16] Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 3, 2020), https://twitter.com/realDonaldTrump/status/1323864823680126977.

THE COUNT!"[17]

48. On November 7, 2020, news organizations across the country declared that Joseph Biden won the 2020 presidential election.[18]

49. That same day, Trump tweeted: "I WON THIS ELECTION, BY A LOT!"[19]

B. Trump Attempted to Enlist Government Officials to Illegally Overturn the Election.

50. After Election Day, several aides and advisors close to Trump investigated his election fraud claims and informed Trump that such allegations were unfounded. For example:

a. Days after the election, lead data expert Matt Oczkowski informed Trump that he would lose because not enough votes were in his favor.[20]

b. At approximately the same time, former Attorney General William Barr told Trump he did not agree with the idea of saying the election was stolen.[21]

c. On November 23, 2020, Barr again informed Trump that his claims of fraud were not meritorious.[22]

---

[17] Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 5, 2020), https://twitter.com/realDonaldTrump/status/1324401527663058944?lang=en, and https://twitter.com/realDonaldTrump/status/1324353932022480896?.

[18] *See, e.g.*, Bo Erickson, *Joe Biden projected to win presidency in deeply divided nation*, CBS NEWS (Nov. 7, 2020), https://www.cbsnews.com/news/joe-biden-wins-2020-election-46th-president-united-states/; Asma Khalid and Scott Detrow, *Biden Wins Presidency, According to AP, Edging Trump in Turbulent Race*, NPR (Nov. 7, 2020), https://www.npr.org/2020/11/07/928803493/biden-wins-presidency-according-to-ap-edging-trump-in-turbulent-race.

[19] Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 7, 2020), https://twitter.com/realDonaldTrump/status/1325099845045071873.

[20] Hearing Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol, No. 117-2 (June 9, 2022), https://www.govinfo.gov/content/pkg/CHRG-117hhrg48998/pdf/CHRG-117hhrg48998.pdf ("First Jan. 6 Hearing Transcript").

[21] Second Jan. 6 Hearing Transcript, *supra* n.12.

[22] Select Comm. to Investigate the Jan. 6 Attack on the United States Capitol, Transcribed Interview of William Barr, at 18 (June 2, 2022), *available at* https://www.govinfo.gov/app/details/GPO-J6-TRANSCRIPT-CTRL0000083860.

d. In mid to late November, campaign lawyer Alex Cannon told Trump's Chief of Staff Mark Meadows that he had not found evidence of voter fraud sufficient to change the results in any of the key states.[23]

51. On December 1, 2020, Attorney General William Barr publicly declared that the U.S. Justice Department found no evidence of voter fraud that would warrant a change of the election result.[24]

52. Sometime between the election and December 14, 2020, Trump asked Barr to instruct the Department of Justice to seize voting machines.[25]

53. Barr refused, citing a lack of legal authority.[26]

54. On December 6, 2020, Trump called the Chairwoman of the Republican National Committee Ronna Romney McDaniel to enlist the Committee's support in gathering a slate of electors for Trump in states where President-elect Biden had won the election but legal challenges to the election results were underway.[27]

55. On December 8, 2020, a senior campaign advisor to Trump wrote in an internal campaign email: "When our research and campaign legal team can't back up any of the claims made by our Elite Strike Force Legal Team, you can see why we're 0-32 on our cases. I'll

---

[23] First Jan. 6 Hearing Transcript, *supra* n.20.

[24] *Disputing Trump, Barr says no widespread election fraud*, ASSOCIATED PRESS (Dec. 1, 2020), https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d.

[25] Hearing Before the Select Comm. To Investigate the January 6th Attack on the United States Capitol, No. 117-6 (June 23, 2022), https://www.govinfo.gov/content/pkg/CHRG-117hhrg49353/pdf/CHRG-117hhrg49353.pdf ("Fifth Jan. 6 Hearing Transcript").

[26] *Id.*

[27] Select Committee to Investigate the January 6th Attack on the United States Capitol, Transcribed Interview of Ronna Romney McDaniel, at 9-13 (June 1, 2022), *available at* https://www.documentcloud.org/documents/23559939-transcript-of-ronna-mcdaniels-interview-with-house-january-6-committee.

obviously hustle to help on all fronts, but it's tough to own any of this when it's all just conspiracy shit beamed down from the mothership."[28]

56. On December 14, 2020, presidential electors convened in all 50 states and D.C. to cast their official electoral votes. They voted 306-232 against Trump.[29]

57. On December 14, 2020, at Trump's direction, fraudulent electors convened sham proceedings in seven targeted states where President-elect Biden had won a majority of the votes (Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin) and cast fraudulent electoral ballots in favor of Trump.

58. Also on December 14, 2020, Attorney General Barr resigned as head of the Department of Justice ("DOJ") and Trump appointed Jeffrey Rosen as acting attorney general and Richard Donoghue as acting deputy attorney general.[30]

59. During Rosen's term, Trump requested that the DOJ file a lawsuit challenging the election before the U.S. Supreme Court as an exercise of its original jurisdiction.[31]

60. The DOJ declined because it did not have legal authority to challenge state electoral procedures.[32]

61. On December 18, 2020, at a meeting in the Oval Office which included Trump, Sidney Powell, Mike Flynn, Patrick Byrne, Rudy Giuliani, Mark Meadows, and other Trump advisors, Powell, Flynn and Byrne attempted to persuade Trump to issue an executive order that

---

[28] Indictment at 13-14, *U.S. v. Trump*, Case No. 1:23-cr-00257-TSC, ECF No. 1 (D.D.C., Aug. 1, 2023), *available at* https://www.justice.gov/storage/US_v_Trump_23_cr_257.pdf ("August 1, 2023 Indictment").

[29] *See* National Archives, *2020 Electoral College Results*, https://www.archives.gov/electoral-college/2020.

[30] Fifth Jan. 6 Hearing Transcript, *supra* n.25.

[31] *Id.*

[32] *Id.*

would, among other things, direct the seizure of voting machines by either the Department of Homeland Security or the Department of Defense.

62. White House Counsel Pat Cipollone, Eric Herschmann (a lawyer in the White House Counsel's office and senior advisor to Trump), and Giuliani dissuaded Trump from ordering the seizure of voting machines using his official authority.

63. However, as the meeting continued, Giuliani and others stated in Trump's presence that they could instead obtain access to voting machines through "voluntary" means.[33]

64. On December 31, 2020, Trump asked Rosen and Donoghue to direct the Department of Justice to seize voting machines.[34]

65. Rosen and Donoghue rejected Trump's request, again for lack of authority.[35]

66. Meanwhile, just as Giuliani and others had told Trump, teams coordinated by Powell, Giuliani, and other Trump advisors illegally accessed or attempted to illegally access voting machines in multiple battleground states. These included:

a. Fulton County, Pennsylvania (successfully breached Dec. 31, 2020)

b. Coffee County, Georgia (successfully breached Jan. 7, 2021)

c. Cross County, Michigan (attempted breach Jan. 14, 2021)

67. A purpose of these illegal breaches or attempted breaches was to support Trump's efforts to overturn the 2020 election by generating supposed "proof" of "fraud," even (in the

[33] Interview of Derek Lyons by the Select Committee to Investigate the January 6th Attack on the US Capitol, U.S. House of Representatives, pp. 113-116, *available at* https://www.govinfo.gov/content/pkg/GPO-J6-TRANSCRIPT-CTRL0000055541/pdf/GPO-J6-TRANSCRIPT-CTRL0000055541.pdf; Deposition of Rudolph Giuliani by the Select Committee to Investigate the January 6th Attack on the US Capitol, U.S. House of Representatives, pp. 179-181, *available at* https://www.govinfo.gov/content/pkg/GPO-J6-TRANSCRIPT-CTRL0000083774/pdf/GPO-J6-TRANSCRIPT-CTRL0000083774.pdf.

[34] *Id.*

[35] *Id.*

Coffee County, Georgia and Cross County, Michigan instances) after the violent January 6, 2021 attack.[36]

68. Between December 23, 2020, and early January 2021, Trump attempted to speak with Rosen on the matter of election fraud nearly every day.[37]

69. According to Rosen, "the president's entreaties became more urgent" and Trump "became more adamant that we weren't doing our job."[38]

70. On December 25, 2020, Trump called Pence to wish him a Merry Christmas and to request that Pence reject the electoral votes on January 6, 2021.[39]

71. Pence responded, "You know I don't think I have the authority to change the outcome."

72. On December 27, 2020, Rosen told Trump "that the DOJ can't and won't snap its fingers and change the outcome of the election. It doesn't work that way."[40]

73. Trump responded to Rosen along the lines of, "just say the election was corrupt and leave the rest to me [Trump] and the Republican congressmen."[41]

74. On January 2, 2021, Jeffrey Clark, the acting head of the Civil Division and head of the Environmental and Natural Resources Division at the DOJ, and who had met with Trump

---

[36] See, e.g., Interview of Christina Bobb by the Select Committee to Investigate the January 6th Attack on the US Capitol, U.S. House of Representatives, pp. 96-97, *available at* https://www.govinfo.gov/content/pkg/GPO-J6-TRANSCRIPT-CTRL0000071088/pdf/GPO-J6-TRANSCRIPT-CTRL0000071088.pdf.

[37] Fifth Jan. 6 Hearing Transcript, *supra* n.25.

[38] *Id.*; *see also* Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General,* N.Y. TIMES (Jan. 22, 2021), https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justicedepartment-election.html.

[39] August 1, 2023 Indictment at 33, *supra* n.28.

[40] Fifth Jan. 6 Hearing Transcript, *supra* n.25.

[41] *Id.*

without prior authorization from the DOJ, told Rosen and Donoghue that Trump was prepared to fire them and to appoint Clark as the acting attorney general.[42]

75. Clark asked Rosen and Donoghue if they would sign a draft letter to state officials recommending that the officials send an alternate slate of electors to Congress, and if they did so, then Clark would turn down Trump's offer and Rosen would remain in his position.[43]

76. Rosen refused.[44]

77. On January 3, 2021, Clark—again without authorization— met with Trump and accepted Trump's offer to become Acting Attorney General in light of Rosen and Donoghue's refusal to sign the draft letter.[45]

78. That afternoon, Clark attempted to fire Rosen, but Rosen would not accept being fired by a subordinate.[46]

79. That evening, when told that Rosen's departure would result in mass resignations at the DOJ and his own White House Counsel, Trump relented on his plan to replace Rosen with Clark.[47]

80. Trump's efforts to coerce public officials to assist in his scheme to unlawfully overturn the election were not limited to federal officials. Following his election loss, Trump

[42] H.R. Rep. No. 117-663, ch. 4 at 397 (Dec. 22, 2022).

[43] Fifth Jan. 6 Hearing Transcript, *supra* n.25.

[44] *Id.*

[45] H.R. Rep. No. 117-663, ch 4 at 398 (Dec. 22, 2022).

[46] Select Committee to Investigate the January 6th Attack on the United States Capitol, *Hearing on the January 6th Investigation*, 117th Cong., 2d sess. (June 23, 2022), *available at* https://www.govinfo.gov/committee/house-january6th.

[47] Select Committee to Investigate the January 6th Attack on the United States Capitol, Transcribed Interview of Richard Peter Donoghue, at 125 (Oct. 1, 2021), *available at* https://www.govinfo.gov/app/details/GPO-J6-TRANSCRIPT-CTRL0000034600 .

publicly and privately pressured state officials in various states around the country to unlawfully overturn the election results. For example, on January 2, 2021, in a recorded telephone conversation, Trump pressured Georgia Secretary of State Brad Raffensperger to "find 11,780 votes" for him, and thereby fraudulently and unlawfully turn his electoral loss in Georgia to an electoral victory.

81. Trump's relentless false claims about election fraud and his public pressure and condemnation of election officials resulted in threats of violence against election officials around the country.

82. Trump knew about the threats of violence that he was provoking and, in the face of pleas from public officials to denounce the violence, instead further encouraged it with inflammatory tweets.

83. During the weeks leading up to January 6, 2021, Trump oversaw, directed, and encouraged a "fake elector" scheme under which seven states that Trump lost would submit an "alternate" slate of electors as a pretext for Vice President Pence to decline to certify the actual electoral vote on January 6.

84. Trump's efforts to unlawfully overturn the results of the 2020 presidential election are the subjects of criminal indictments pending against him in United States District Court for the District of Columbia and in the State of Georgia.

85. On January 3, 2021, Trump again told Pence that Pence had the right to reject the electoral vote on January 6.[48]

86. Pence rejected Trump's request.[49]

---

[48] August 1, 2023 Indictment at 33, *supra* n.28.

[49] *Id.*

87. On January 4, 2021, Trump and his then-attorney John Eastman met with then-Vice President Mike Pence and his attorney Greg Jacob to discuss Eastman's legal theory that Pence might either reject votes on January 6 during the certification process, or suspend the proceedings so that states could reexamine the results.[50]

88. Later, Trump admitted that the decision to continue seeking to overturn the election after the failure of legal challenges was his alone. On a September 17, 2023 broadcast of NBC's "Meet the Press," moderator Kristen Welker asked Trump: "The most senior lawyers in your own administration and on your campaign told you that after you lost more than 60 legal challenges that it was over. Why did you ignore them and decide to listen to a new outside group of attorneys?" Trump responded, "I didn't respect them as lawyers. . . . You know who I listen to? Myself." [51] When Welker asked, "Were you calling the shots, though, Mr. President, ultimately?", Trump replied, "As to whether or not I believed it was rigged? Oh, sure. It was my decision."[52]

89. On January 5, 2021, Eastman met privately with Jacob.[53]

90. Eastman expressly requested that Pence reject the certification of election results.[54]

91. During that meeting, Eastman acknowledged that vice presidents both before and after Pence would not have the legal authority to do so under the Electoral Count Act. He also

[50] Hearing Before the Select Comm. To Investigate the January 6th Attack on the United States Capitol, No. 117-4 (June 16, 2022), https://www.govinfo.gov/content/pkg/CHRG-117hhrg49351/pdf/CHRG-117hhrg49351.pdf ("Third Jan. 6 Hearing Transcript"); *see also* Order Re Privilege of Documents, *Eastman v. Thompson*, No. 8:22-cv-00099, ECF No. 260 at 7 (C.D. Cal. March 28, 2022).

[51] NBC News, *Full transcript: Read Kristen Welker's interview with Trump*, Sept. 17, 2023, https://www.nbcnews.com/meet-the-press/transcripts/full-transcript-read-meet-the-press-kristen-welker-interview-trump-rcna104778.

[52] *Id.*

[53] Third Jan. 6 Hearing Transcript, *supra* n.50.

[54] *Id.*

stated that this theory would lose in the Supreme Court without a single justice in agreement.[55]

92. All the while, Trump publicly and falsely maintained that the 2020 presidential election results were illegitimate due to fraud, and set the expectation that Pence had the authority to overturn the election. For example:

a. On December 4, 2020, Trump tweeted: "RIGGED ELECTION!"[56]

b. On December 10, 2020, Trump tweeted: "How can you give an election to someone who lost the election by hundreds of thousands of legal votes in each of the swing states. How can a country be run by an illegitimate president?"[57]

c. On December 15, 2020, Trump tweeted: "Tremendous evidence pouring in on voter fraud. There has never been anything like this in our Country!"[58]

d. On December 23, 2020, Trump retweeted a memo titled "Operation 'PENCE' CARD," which falsely asserted that the Vice President could disqualify legitimate electors.[59]

e. On January 5, 2021, Trump tweeted: "The Vice President has the power to

[55] *Id.*

[56] Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 4, 2020), https://twitter.com/realDonaldTrump/status/1334858852337070083.

[57] Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 10, 2020), https://twitter.com/realDonaldTrump/status/1337040883988959232.

[58] Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 15, 2020), https://twitter.com/realDonaldTrump/status/1338718623156674 56.

[59] Mike Pence, *Mike Pence: My Last Days With Donald Trump*, WALL STREET JOURNAL (Nov. 9, 2022) https://www.wsj.com/articles/donald-trump-mike-pence-jan-6-president-rally-capitol-riot-protest-vote-count-so-help-me-god-stolen-election-11668018494?st=rna6xw1pmjmaoss.

reject fraudulently chosen electors."[60]

C. Trump Urged his Supporters to Amass at the Capitol.

93. On December 11, 2020, the Supreme Court rejected a lawsuit brought by the State of Texas alleging that election procedures in four states had resulted in illegitimate votes.[61]

94. The next morning, on December 12, 2020, Trump tweeted that the Supreme Court order was "a great and disgraceful miscarriage of justice," and "WE HAVE JUST BEGUN TO FIGHT!!!"[62]

95. That same day, Ali Alexander of Stop the Steal, and Alex Jones and Owen Shroyer of Infowars led a march on the Supreme Court.[63]

96. The crowd at the march chanted slogans such as "Stop the Steal!" "1776!" "Our revolution!" and Trump's earlier tweet, "The fight has just begun!" [64]

97. On that day, Trump tweeted: "Wow! Thousands of people forming in Washington (D.C.) for Stop the Steal. Didn't know about this, but I'll be seeing them! #MAGA." [65]

98. Later that day, Trump flew over the crowd in Marine One.[66]

99. On December 18, 2020, Trump tweeted: ".@senatemajldr and Republican Senators have to get tougher, or you won't have a Republican Party anymore. We won the Presidential

---

[60] The American Presidency Project, Donald Trump Tweets of January 5, 2021 (archived), https://www.presidency.ucsb.edu/documents/tweets-january-5-2021.

[61] *Texas v. Pennsylvania, et al.*, No. 22-155, Order (U.S. Sup. Ct., Dec. 11, 2020).

[62] Donald J. Trump (@realDonaldTrump), TWITTER (Dec.12, 2020), https://twitter.com/realDonaldTrump/status/1337743516294934529, and https://twitter.com/realDonaldTrump/status/1337755964339081216.

[63] H.R. Rep. No. 117-663, ch. 6 at 505 (Dec. 22, 2022).

[64] *Id.*

[65] Donald J. Trump (@realDonaldTrump), TWITTER (Dec.12, 2020), https://twitter.com/realDonaldTrump/status/1337774011376340992.

[66] H.R. Rep. No. 117-663, ch. 6 at 506 (Dec. 22, 2022).

Election, by a lot. FIGHT FOR IT. Don't let them take it away!"[67]

100. On December 19, 2020, Trump tweeted "Big protest in D.C. on January 6th! Be there, will be wild!"[68]

D. <u>In Response to Trump's Call for a "Wild" Protest, Trump's Supporters Planned Violence.</u>

101. In response to Trump's "wild" tweet, Twitter's Trust and Safety Policy team recorded a "fire hose of calls to overthrow the U.S. government."[69]

102. Other militarized extremist groups began organizing for January 6 after Trump's "will be wild" tweet. These include the Oath Keepers, the Proud Boys, the Three Percenter militias, and others.

103. An analyst at the National Capital Region Threat Intelligence Consortium observed that Trump's tweet led to "a tenfold uptick in violent online rhetoric targeting Congress and law enforcement" and noticed "violent right-wing groups that had not previously been aligned had begun coordinating their efforts."[70]

104. For example:

a. Kelly Meggs of the Oath Keepers Florida Chapter read Trump's tweet and commented in a Facebook post: "Trump said It's gonna be wild!!!!!!! It's gonna be wild!!!!!!! He wants us to make it WILD that's what he's saying. He called us all to the Capitol and wants us to make it wild!!! Sir Yes Sir!!!

[67] Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 18, 2020), http://www.twitter.com/realDonaldTrump/status/1339937091707351046.

[68] Donald J. Trump (@realDonaldTrump), TWITTER (Dec.18, 2020), https://twitter.com/realDonaldTrump/status/1340185773220515840.

[69] H.R. Rep. No. 117-663, ch. 6 at 449 (Dec. 22, 2022).

[70] H.R. Rep. No. 117-663, at 694 (Dec. 22, 2022).

Gentlemen we are heading to DC pack your shit!!"[71]

b. Meggs was later convicted by a federal jury for seditious conspiracy under 18 U.S.C. § 2384 after the January 6 attack, and sentenced to 12 years in prison.[72]

c. Oath Keepers from various states had established a "Quick Reaction Force" plan where they cached weapons for January 6, 2021 at hotels in Ballston and Vienna in Virginia.[73]

d. Henry "Enrique" Tarrio, a leader of the Proud Boys, sent encrypted messages to others that they should "storm the Capitol."[74]

e. The Proud Boys received and had been in possession of a document titled "1776 Returns" where the initial authors divided their plan to overtake federal government buildings into five parts: "Infiltrate, Execution, Distract, Occupy and Sit-In."[75]

f. Members of the Proud Boys were also convicted of seditious conspiracy

[71] Third Superseding Indictment at ¶ 37, *United States v. Crowl et al.*, No. 1:21-cr-28, ECF No. 127 (D.D.C., Mar. 31, 2021); *see also* H.R. Rep. No. 117-663, at 515 (Dec. 22, 2022).

[72] *United States v. Rhodes, III et al.*, No. 1:22-cr-00015 (D.D.C. Nov. 29, 2022).

[73] Superseding Indictment at ¶ 45, *United States v. Rhodes, III et al.*, No. 1:22-cr-15, ECF No. 167 (D.D.C. June 22, 2022); Select Committee to Investigate the January 6th Attack on the United States Capitol, Transcribed Interview of Frank Marchisella, at 34 (Apr. 29, 2022), *available at* https://www.govinfo.gov/content/pkg/GPO-J6-TRANSCRIPT-CTRL0000071096/pdf/GPO-J6-TRANSCRIPT-CTRL0000071096.pdf.

[74] Second Superseding Indictment at ¶ 50, *United States v. Nordean, et al.*, No. 1:21-cr-00175, ECF No. 305 (D.D.C. Mar. 7, 2022).

[75] Zachary Rehl's Motion to Reopen Detention Hearing and Request for a Hearing, Exhibit 1: "1776 Returns," *United States v. Nordean, et al.*, No. 1:21-cr-00175, ECF No. 401-1 (D.D.C. June 15, 2022), *available at* https://s3.documentcloud.org/documents/22060615/1776-returns.pdf.

after the January 6 attack.[76]

g. Matt Bracken, a host for Infowars, a website specializing in disinformation and false election fraud theories, told viewers that it may be necessary to storm the Capitol, and that "we're only going to be saved by millions of Americans. . . occupying the entire area, if—if necessary storming right into the Capitol. . . we know the rules of engagement. If you have enough people, you can push down any kind of fence or a wall."[77]

h. QAnon, an online false theory group, shared online a digital banner of "Operation Occupy the Capitol," which depicted the U.S. Capitol being torn in two.[78]

i. The Three Percenter militias, a far-right, anti-government movement, tried to share online "#OccupyCongress" memes with text that say, "If they Won't Hear Us" and "They Will Fear Us."[79]

105. On January 1, 2021, a supporter tweeted to Trump that "The calvary [sic] is coming, Mr. President!"[80]

---

[76] *Jury Convicts Four Leaders of the Proud Boys of Seditious Conspiracy Related to U.S. Capitol Breach*, U.S. DEPT. OF JUSTICE (May 4, 2023), https://www.justice.gov/opa/pr/jury-convicts-four-leaders-proud-boys-seditious-conspiracy-related-us-capitol-breach.

[77] The Alex Jones Show, "January 6th Will Be a Turning Point in American History," BANNED.VIDEO, at 16:29 (Dec. 31, 2020), *available at* https://www.bitchute.com/video/XBllZYTRfaIB/; *see also* H.R. Rep. No. 117-663, at 507 (Dec. 22, 2022).

[78] Ben Collins and Brandy Zadrozny, *"Extremists Made Little Secret of Ambitions to 'Occupy' Capitol in Weeks Before Attack,"* NBC (Jan. 8, 2021), *available at* https://www.nbcnews.com/tech/internet/extremists-made-little-secret-ambitions-occupy-capitalweeks-attack-n1253499.

[79] Criminal Complaint at 10-11, *United States v. Hazard*, No. 1:21-mj-00686, ECF No. 1 (D.D.C. Dec. 7, 2021).

[80] Donald J. Trump (@realDonaldTrump), TWITTER (Jan.1, 2021), https://twitter.com/realDonaldTrump/status/1345106078141394944.

106. Trump quoted that tweet and wrote back, "A great honor!"[81]

107. Organizers planned two separate demonstrations for January 6, 2021.

a. Kylie and Amy Kremer, a mother-daughter pair involved with Women for America First, planned a demonstration on the Ellipse ("Ellipse Demonstration"), a park south of the White House fence and north of Constitution Avenue and the National Mall in Washington, D.C.[82]

b. Ali Alexander, an extremist associated with the Stop the Steal, planned an assemblage immediately outside the Capitol, on the court side and the steps of the building.[83]

108. On December 29, 2020, Alexander tweeted, "Coalition of us working on 25 new charter buses to bring people FOR FREE to #JAN6 #STOPTHESTEAL for President Trump. If you have money for more buses or have a company, let me know. We will list our buses sometime in the next 72 hours. STAND BACK & STAND BY!"[84]

109. Meanwhile, by late December, Trump, his White House, and his campaign became directly involved in planning the Ellipse Demonstration. Trump personally helped select the speaker lineup, and his campaign and joint fundraising committees made direct payments of $3.5

[81] Donald J. Trump (@realDonaldTrump), TWITTER (Jan.1, 2021), https://twitter.com/realDonaldTrump/status/1345106078141394944.

[82] Women For America First Ellipse Public Gathering Permit, NTL. PARK SERV. (Jan. 5, 2021), *available at* https://www.nps.gov/aboutus/foia/upload/21-0278-Women-for-America-First-Ellispse-permit_REDACTED.pdf .

[83] *President Trump Wants You in DC January 6*, WILDPROTEST.COM (Dec 19.2020), *available at* https://web.archive.org/web/20201223062953/http://wildprotest.com/ (archived).

[84] H.R. Rep. No. 117-663, at 532 (Dec. 22, 2022).

million to rally organizers.[85]

110. By December 29, 2020, Trump had formed and conveyed to allies a plan to order his supporters to march to the Capitol at the end of his speech.[86] His goal was to force Congress to stop the certification of electoral votes.[87]

111. Between January 2 and 4, 2021, Kremer and other organizers of the Ellipse Demonstration became aware that Trump intended to "order [the crowd] to the Capitol at the end of his speech." These organizers messaged each other that "POTUS is going to have us march there [the Supreme Court]/the Capitol," and that the President was going to "call on everyone to march to the [C]apitol."[88]

112. These organizers received this information from White House Chief of Staff Mark Meadows.[89]

113. In early January 2021, Trump and extremists began publicly referring to January 6 using increasingly apocalyptic terminology. Some referred to a "1776" plan or option for January 6, drawing a thinly veiled analogy between the American Revolution (which forcefully revolted against an oppressive government) and these extremists' plans surrounding the upcoming January 6 congressional certification of electoral votes.

114. On January 4, 2021, at a rally in Dalton, Georgia, Trump stated: "If you don't fight

[85] H.R. Rep. No. 117-663, at 533-36 (Dec. 22, 2022); Anna Massoglia, *Trump's political operation paid more than $3.5 million to Jan. 6 organizers*, Open Secrets (Feb. 10, 2021), https://www.opensecrets.org/news/2021/02/jan-6-protests-trump-operation-paid-3p5mil/ .

[86] H.R. Rep. No. 117-663, ch. 6 at 533 (Dec. 22, 2022).

[87] *Id.*

[88] *Id.*

[89] *Id.*

to save your country with everything you have, you're not going to have a country left."[90]

115. During the rally, Trump asserted that the transfer of power set for January 6, 2021 would not take place and insinuated that powerful events would later occur.[91] For example, he stated:

a. "If the liberal Democrats take the Senate and White House. . . And they're not taking this White House. We're going to fight like hell, I'll tell you right now."

b. "We're going to take it back."

c. "There's no way we lost Georgia. There's no way. That was a rigged election, but we're still fighting it and you'll see what's going to happen."

d. "We can't let that happen. The damage they do will be permanent and will be irreversible. Can't let it happen."

e. "We will never give in. We will never give up. We will never back down. We will never, ever surrender."

f. "We have to go all the way and that's what's happening. You watch what happens over the next couple of weeks. You watch what's going to come out. Watch what's going to be revealed. You watch."

116. At the rally, the crowd chanted "Fight for Trump! Fight for Trump!" several times.[92]

---

[90] Bloomberg Quicktake, *LIVE: Trump Stumps for Georgia Republicans David Perdue, Kelly Loeffler Ahead of Senate Runoff,* YOUTUBE (Jan. 4, 2021), https://www.youtube.com/watch?v=9HisWmJJ3oE.

[91] Bloomberg Quicktake, *LIVE: Trump Stumps for Georgia Republicans David Perdue, Kelly Loeffler Ahead of Senate Runoff,* YOUTUBE (Jan. 4, 2021), https://www.youtube.com/watch?v=9HisWmJJ3oE.

[92] Bloomberg Quicktake, *LIVE: Trump Stumps for Georgia Republicans David Perdue, Kelly Loeffler Ahead of Senate Runoff,* YOUTUBE (Jan. 4, 2021), https://www.youtube.com/watch?v=9HisWmJJ3oE.

117. By early January 2021, Trump anticipated that the crowd that was preparing to amass on January 6 at his behest would be large and violent.[93]

118. On January 5, 2021, several events were held across D.C. on behalf of Stop the Steal, an entity formed in early November 2020 to mobilize around Trump's claim that the election had been rigged.[94] Speakers during these events made remarks about the event to be held at the Capitol the next day. For example:

a. Ali Alexander from Stop the Steal said: "We must rebel. . . we might make this Fort Trump. . . we're going to keep fighting for you Mr. Trump."[95]

b. Alex Jones from Infowars stated: "This is a fight for the future of western civilization as we know it. . . we dare not fail," and "1776 is always an option. . . these degenerates in the deep state are going to give us what we want, or we are going to shut this country down."[96]

c. Several members of the Phoenix Project, a Three-Percenter-linked group, told the January 5 crowd, "We are at war," promising to "fight" and "bleed," and that they will "not return to our peaceful way of life until this election is made right."[97]

119. On January 5, in response to the noise from these extremist demonstrations, Trump

[93] Letter from Donald J. Trump to Select Committee to Investigate the January 6th Attack on the U.S. Capitol (Oct. 13, 2022), https://s3.documentcloud.org/documents/23132276/830-am-final-january-6th-committee-letter14446.pdf.

[94] On information and belief, this "Stop the Steal" entity is distinct from an identically named organization founded in 2016 by Roger Stone.

[95] H.R. Rep. No. 117-663, ch. 6 at 537 (Dec. 22, 2022).

[96] *Id.*

[97] *Id.*

tweeted: "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!"[98]

120. That same evening, President Trump told White House staff that his supporters would be "fired up" and "angry" the next day.[99]

121. Also on January 5, 2021, Trump met alone with Pence and again asked him to obstruct the certification.[100]

122. Pence informed Trump that he did not have the authority to unilaterally reject electoral votes and consequently would not do so.[101]

123. Trump informed Pence that if he did not reject the votes, then Trump would publicly criticize Pence for it.[102]

124. Later that night, Trump authorized his campaign to issue a false public statement that: "The Vice President and I are in total agreement that the Vice President has the power to act."[103]

E. Trump and his Administration Knew of Supporters' Plans to Use Violence and/or to Forcefully Prevent Congress from Certifying the Election Results.

125. Trump, his closest aides, the Secret Service, and the Federal Bureau of Investigations were all aware that Trump supporters—whom Trump had aroused with claims of election fraud and veiled calls for violence—intended to commit violence at the Capitol on January

---

[98] Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 5, 2021), http://www.twitter.com/realDonaldTrump/status/1346578706437963777.

[99] H.R. Rep. No. 117-663, at 539 (Dec. 22, 2022).

[100] August 1, 2023 Indictment at 36, *supra* n.28.

[101] Kaitlan Collins & Jim Acosta, *Pence informed Trump that he can't block Biden's win*, CNN (Jan. 5, 2021), *available at* https://cnn.it/3FH4gx9.

[102] August 1, 2023 Indictment at 36, *supra* n.28.

[103] *Id.*

6 if the vote was certified.

126. On December 24, 2020, the Secret Service received from a private intelligence group a list of responses to Trump's December 19 "will be wild" tweet.[104] Those responses included:

a. "I read [the President's tweet] as armed."[105]

b. "There is not enough cops in DC to stop what is coming."

c. "Make sure they know who to fear," and "Waiting for Trump to say the word."

127. On December 26, 2020, the Secret Service received a tip that the Proud Boys had plans to enter Washington, D.C. armed. The Secret Service forwarded this tip to the Capitol Police.[106]

128. On December 28, 2020, the Secret Service again forwarded warnings that pro-Trump demonstrators were being urged to occupy the federal building.[107]

129. On December 30, 2020, the Secret Service held a briefing that highlighted how the President's December 19 "will be wild!" tweet was found alongside hashtags such as #OccupyCapitols and #WeAreTheStorm.[108]

130. Also on December 30, 2020, Jason Miller—a senior advisor to Trump—texted White House Chief of Staff Mark Meadows a link to thedonald.win website and stated, "I got the base FIRED UP." The link was to a page with comments like "Gallows don't require electricity"

[104] H.R. Rep. No. 117-663, Executive Summary at 62 (Dec. 22, 2022).

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

and "if the filthy commie maggots try to push their fraud through, there will be hell to pay."[109]

131. On January 5, 2021, an FBI office in Norfolk, Virginia issued an alert to law enforcement agencies titled, "Potential for Violence in Washington, D.C., Area in Connection with Planned 'StopTheSteal' Protest on 6 January 2021."[110]

132. Trump was personally informed of at least some of these plans for violent action.

133. Trump proceeded with his plans for January 6, 2021.

III. THE JANUARY 6, 2021 INSURRECTION.

A. The Two Demonstrations.

134. On the morning of January 6, 2021, before the joint session of Congress began to count the votes and certify the results, thousands of people began gathering around Washington, D.C. Many of these people headed to the Ellipse, near the White House, where then-President Trump and others were scheduled to speak. Others headed directly to the Capitol building.

135. By 11:00 AM (Eastern time), the United States Capitol Police ("USCP") reported "large crowds around the Capitol building," including approximately 200 members of the Proud Boys.[111] Some of the people gathering in Washington were "equipped with communication devices and donning reinforced vests, helmets, and goggles."[112]

---

[109] *Id.* at 63.

[110] H.R. Rep. No. 117-663, Executive Summary at 62 (Dec. 22, 2022).

[111] U.S. Senate Comm. On Homeland Security & Gov't Affairs, *Examining The U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on January 6 (Staff Report)*, at 22 (June 8, 2021), https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/HSGAC&RulesFullReport_ExaminingU.S.CapitolAttack.pdf.

[112] *United States v. Caldwell*, 581 F. Supp. 3d 1, 8 (D.D.C. 2021).

B. Trump's Preparations as the Demonstrations Began.

136. On January 6, at 1:00 AM, Trump tweeted: "If Vice President @Mike_Pence comes through for us, we will win the Presidency. . . Mike can send it back!"[113]

137. On January 6, at approximately 10:00 AM, White House Deputy Chief of Staff Tony Ornato briefed Chief of Staff Mark Meadows over concerns that members of the crowd were armed with weapons, such as knives and guns. Ornato confirmed with Meadows that he had spoken with Trump about this.[114]

138. At approximately 10:30 AM, Trump edited a draft of his speech for that afternoon's Ellipse Demonstration (also known as the Save America Rally).

139. Trump personally added the text, "[W]e will see whether Mike Pence enters history as a truly great and courageous leader. All he has to do is refer the illegally-submitted electoral votes back to the states that were given false and fraudulent information where they want to recertify."[115]

140. Before Trump edited the draft, it did not contain any mention of Pence.

141. Eric Herschmann, a lawyer in the White House Counsel's office and senior advisor to Trump, had tried to remove the lines and advised against advancing Eastman's legal theory that Pence should reject electoral votes because, he stated, he "didn't concur with the legal analysis."[116]

---

[113] Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 6, 2021), https://twitter.com/realDonaldTrump/status/1346698217304584192 .

[114] H.R. Rep. No. 117-663, ch. 7 at 585 (Dec. 22, 2022).

[115] *Id.* at 582.

[116] H.R. Rep. No. 117-663, ch. 7 at 582 (Dec. 22, 2022).

C. The Increasingly Apocalyptic Demonstration at the Ellipse.

142. At the Ellipse Demonstration, speakers preceding Trump exhorted the crowd to take forceful action to ensure that Congress and/or Pence rejected electoral votes for Biden. For example:

a. Representative Mo Brooks of Alabama urged the crowd to "start taking down names and kicking ass" and be prepared to sacrifice their "blood" and "lives" and "do what it takes to fight for America" by "carry[ing] the message to Capitol Hill," since 'the fight begins today."[117]

b. Trump's lawyer Rudy Giuliani called for "trial by combat."[118]

c. Trump's lawyer John Eastman perpetuated claims of voter fraud and said: "all that we are demanding of Pence is this afternoon at 1 o'clock he let the legislators of the states look into this so we get to the bottom of it."[119]

143. Trump and Meadows were aware of the line-up of speakers at the Ellipse Demonstration.[120]

144. Trump and Meadows were warned by aides against including known incendiary speakers, like Giuliani and Eastman, who would falsely emphasize claims of election fraud.

---

[117] The Hill, *Mo Brooks gives FIERY speech against anti-Trump Republicans, socialists*, YOUTUBE (Jan. 6, 2021), https://youtu.be/ZKHwV6sdrMk.

[118] Wash. Post, *Trump, Republicans incite crowd before mob storms Capitol*, YOUTUBE (Jan. 6, 2021), https://youtu.be/mh3cbd7niTQ.

[119] *Rally on Electoral College Vote Certification,* C-SPAN at 2:26:00 (Jan. 6, 2021), https://www.c-span.org/video/?507744-1/rally-electoral-college-vote-certification.

[120] Select Committee to Investigate the January 6th Attack on the United States Capitol, Deposition of Max Miller, at 81-83, 129-30 (Jan. 20, 2022), *available at* https://www.govinfo.gov/app/details/GPO-J6-TRANSCRIPT-CTRL0000038857; *see also* Select Committee to Investigate the January 6th Attack on the United States Capitol, Transcribed Interview of Katrina Pierson (Mar. 25, 2022), *available at* https://www.govinfo.gov/app/details/GPO-J6-TRANSCRIPT-CTRL0000060756 .

145. Trump and Meadows refused to remove Giuliani and Eastman.

146. Meadows himself explicitly directed that Giuliani and Eastman speak at the Demonstration before Trump.

147. Around 10:57 AM, the organizers of the demonstration played a two-minute pro-Trump video.[121] The video reflected flashing images of Joseph Biden and Nancy Pelosi while Trump voiced over, "For too long, a small group in our nation's capital has reaped the rewards of government, while the people have borne the cost." The video emphasized that the government had been compromised by sinister powers.

148. Around 11:39 AM, Trump left the White House by motorcade and drove to the Ellipse.[122]

149. At the Ellipse, an estimated 25,000 people refused to walk through the magnetometers at the entrance.[123]

150. White House Deputy Chief of Staff Tony Ornato informed Trump that these people were unwilling to pass through the monitors because they had weapons that they did not want confiscated by the Secret Service.[124]

151. Trump became upset that his people were not being allowed to carry their weapons through the entrance.

152. Trump ordered his team to remove the magnetometers.

153. He shouted at his advance team words to the effect of, "I don't [fucking] care that

[121] Ryan Goodman, Trump Film Ellipse Jan. 6, 2021, VIMEO (Feb. 3, 2021), https://vimeo.com/508134765.

[122] *What Happened on Jan. 6*, WASH. POST (Oct. 31, 2021), https://wapo.st/3eSdf2y.

[123] H.R. Rep. No. 117-663, ch. 7 at 585 (Dec. 22, 2020).

[124] *Id.*

they have weapons. They're not here to hurt *me*. Take the [fucking] mags away. Let my people in. They can march to the Capitol from here. Take the [fucking] mags away."[125]

154. Around 11:57 AM, Trump took the stage at the Ellipse to give his speech.

D. Insurrectionists Prepared For Battle at the Capitol.

155. Even before Trump gave his speech at the Ellipse Demonstration, crowds had already begun swarming near the Capitol.

156. Around 11:30 AM, a large group of Proud Boys arrived at the Capitol, moving in loosely organized columns of five across. The crowd made way for them.[126]

157. At the same time, Washington, D.C. police had to leave Capitol grounds to respond to reports of violence throughout the city, including a man with a rifle, and a vehicle loaded with weaponry.[127] For example:

a. Around 12:33 PM, police detained another individual with a rifle near the World War II Memorial, which was close to where Trump was speaking.

b. Around 12:45 PM, various security agencies such as the Capitol Police and FBI responded to reports of a pipe bomb outside the Republican National Committee headquarters and suspicious packages found in or around other buildings near the Capitol, such as the Supreme Court and the Democratic National Committee headquarters.

158. On information and belief, Trump was personally informed about the escalating security situation at the Capitol before he began his speech.

---

[125] *Id.*

[126] *What Happened on Jan. 6*, *supra* n.122.

[127] *Id.*

E. Trump Directed Supporters to March on the Capitol and Intimidate Pence and Congress.

159. Around 11:57 AM, Trump began his speech at the Ellipse.[128]

160. For the first 15 minutes of his speech, he falsely repeated that he had been defrauded of the presidency, which he had won "by a landslide," and that "we will never give up, we will never concede. It doesn't happen. You don't concede when there's theft involved."[129]

161. Throughout his speech, Trump repeatedly called out Vice President Pence by name, urging Pence to reject electoral votes from states Trump had lost.

162. As his speech continued, the mob became audibly and increasingly angry at Pence and Congress. During Trump's speech, demonstrators shouted "storm the Capitol!", "invade the Capitol building!", and "take the Capitol!".[130]

163. Around 12:16 PM, Trump made his first call on demonstrators to head towards the Capitol: "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 any one 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. 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."

164. Immediately after this remark, approximately 10,000-15,000 demonstrators began the roughly 30-minute march to the Capitol just as Trump had directed, where they joined a crowd

---

[128] *Id.*

[129] *Donald Trump Speech "Save America" Rally Transcript January 6*, REV (Jan. 6, 2021), https://bit.ly/3GheZid; Brian Naylor, Read Trump's Jan. 6 Speech, *A Key Part Of Impeachment Trial*, NPR (Feb. 10, 2021), https://n.pr/3G1K2ON.

[130] Dylan Stableford, *New video shows Trump rally crowd cheering call to 'storm the Capitol'*, YAHOO NEWS (Jan. 25, 2021), https://www.yahoo.com/video/trump-jan-6-rally-crowd-storm-thecapitol-video-184828622.html .

of 300 members of the violent extremist group, the Proud Boys.[131]

165. Nearly halfway through the speech, Trump again called on Pence to reject the certification, stating: "I hope you're [Mike Pence] 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."

166. During Trump's speech, the audience chanted "Storm the Capitol," "Invade the Capitol Building," "Take the Capitol Right Now," "Fight Like Hell," and "Fight For Trump."[132]

167. For the remainder of his speech, Trump asserted that Biden's victory was illegitimate and that the process of transferring power to Biden could not take place. For example:

a. "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."

b. "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."

c. "And we're going to have to fight much harder."

d. "And you know what? If they do the wrong thing, we should never, ever forget that they did. Never forget. We should never ever forget."

e. "You will have an illegitimate president. That's what you'll have. And we can't let that happen."

[131] Martha Mendoza & Juliet Linderman, *Officers maced, trampled: Docs expose depth of Jan. 6 chaos*, ASSOCIATED PRESS (Mar. 10, 2021), https://bit.ly/3F2Hi26.

[132] *Thompson v. Trump*, 590 F. Supp. 3d 46, 100 (D.D.C. 2022).

f. "And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore."

g. "When you catch somebody in a fraud, you're allowed to go by very different rules."

168. Around 1:00 PM, towards the end of his speech, Trump again directed the crowd to the Capitol: "After this, we're going to walk down, and I'll be there with you," and "I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard."

169. Knowing that many in the crowd were armed, Trump gave a final plea and urged that the crowd assemble near the Capitol:

a. "So we're going to, we're going to walk down Pennsylvania Avenue. . . And we're going to the Capitol, and we're going to try and give."

b. "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. So let's walk down Pennsylvania Avenue."

170. At approximately 1:10 PM, Trump ended his remarks.

F. <u>Trump Intended to March on the Capitol and Capitalize on the Unfolding Chaos.</u>

171. On January 6, at approximately 1:17 PM, Trump was seated within his motorcade and asked to be transported to the Capitol.[133]

[133] H.R. Rep. No. 117-663, ch. 7 at 587 (Dec. 22, 2022); NBC News, *Full transcript: Read Kristen Welker's interview with Trump*, Sept. 17, 2023, https://www.nbcnews.com/meet-the-press/transcripts/full-transcript-read-meet-the-press-kristen-welker-interview-trump-rcna104778 (Trump stating, "I wanted to go down peacefully and patriotically to the Capitol.").

172. When it was clear that Trump could not be taken to the Capitol for security reasons, Trump became irate with those who prevented him from going to the Capitol.[134]

173. On the drive to the White House, Trump attempted to seize control of the steering wheel of the presidential limousine in hopes of driving to the Capitol.[135]

174. Around approximately 1:19 PM, Trump arrived at the White House and sat in the private dining room to watch the news coverage unfold.[136]

175. At around 1:25 PM, the Secret Service communicated internally that "The President is planning on holding at the white house for the next approximate two hours, then moving to the Capitol."[137]

176. Around 1:55 PM, the motorcade finally disbanded on orders from the Secret Service that Trump's plan to go to the Capitol had been nixed.[138]

G. <u>Pro-Trump Insurrectionists Violently Attacked the Capitol.</u>

177. Before Trump ended his speech at the Ellipse, attackers had already begun swarming the Capitol building.

178. The attackers, following directions from Trump and his allies, shared the common purpose of preventing Congress from certifying the electoral vote. Many of them also expressed a desire to assassinate Vice President Pence, the Speaker of the House, and other Members of Congress.

179. By 12:53 PM, attackers had breached the outer security perimeter that the Capitol

---

[134] *Id.*

[135] Sixth Jan. 6 Committee Hearing.

[136] *What Happened on Jan. 6*, *supra* n.122.

[137] H.R. Rep. No. 117-663, ch. 7 at 592 (Dec. 22, 2022).

[138] H.R. Rep. No. 117-663, ch. 7 at 592 (Dec. 22, 2022).

Police (USCP) had established around the Capitol. Many were armed with weapons, pepper spray, and tasers. Some wore full body armor; others carried homemade shields. Many used flagpoles, signposts, or other weapons to attack police officers defending the Capitol.[139] Some moved through the crowd and entered the Capitol in a "stacked" formation, a single file configuration often used by special forces or infantry units during urban combat or close-quarters operations.

180. Following the initial breach, the crowd flooded into the Capitol West Front grounds. Attackers began climbing and scaling the Capitol building.

181. Around 12:55 PM, Capitol Police called on all available units to the Capitol to assist with the breach. Attackers clashed violently with police officers on the scene.[140]

182. Around 1:03 PM, Capitol Police found an unoccupied vehicle containing weapons, ammunition, and components to make Molotov cocktails.[141]

183. Inside the Capitol, Congress was in session to certify electoral votes in accordance with the Electoral Count Act and the Twelfth Amendment to the U.S. Constitution. At about 1:15 PM, the House and the Senate separated to debate objections to the certification of Arizona's Electoral College votes.

184. Around 1:30 PM, law enforcement retreated as attackers scaled the walls of the Capitol.

185. Around 1:50 PM, the on-site D.C. Metropolitan Police Department incident commander officially declared a riot at the Capitol.[142]

---

[139] *What Happened on Jan. 6*, *supra* n.122.

[140] *Id.*

[141] *What Happened on Jan. 6*, *supra* n.122.

[142] *What Happened on Jan. 6*, *supra* n.122.

186. At that point, law enforcement still held the building, and Congress was still able to function. But that soon changed.

187. By 2:06 PM, attackers reached the Rotunda steps.

188. By 2:08 PM, attackers reached the House Plaza.

189. By 2:10 PM, the West Front and northwest side of the Capitol had been breached through the barricades. Attackers smashed the first floor windows, which were big enough to climb through. Two individuals kicked open a nearby door to let others into the Capitol.

190. Many attackers demanded the arrest or murder of various other elected officials who refused to participate in their attempted coup.[143]

a. Some chanted "hang Mike Pence" and threatened to kill Speaker Pelosi.[144]

b. Some taunted a Black police officer with racial slurs for pointing out that overturning the election would deprive him of his vote.[145]

c. Confederate flags and symbols of white supremacist movements were widespread.[146]

191. Throughout the roughly 187 minutes of the attack, police defending the Capitol were viciously attacked. For example:

a. One police officer was crushed against a door, screaming in agony as the

[143] *Id.*

[144] H.R. Rep. No. 117-2, at 16, 12-13 (Jan. 12, 2021), https://www.govinfo.gov/app/details/CRPT-117hrpt2/CRPT-117hrpt2

[145] *What Happened on Jan. 6*, *supra* n.122.

[146] *Id.*; Staff of S. Comm. on Rules & Admin., 117th Cong., A Review of the Security, Planning, and Response Failures on January 6, at 28 (June 1, 2021), https://www.rules.senate.gov/download/hsgac-rules-jan-6-report.

crowd chanted "Heave, ho!"[147]

b. An attacker ripped off the officer's gas mask, beat his head against the door, took his baton, and hit his head with it.[148]

c. Another officer was pulled into a crowd, beaten and repeatedly tased by attackers.[149]

192. While not all who stormed the Capitol personally used violence against law enforcement, the combined mass overwhelmed the police and prevented the execution of lawful authority.

H. <u>The Fall of the United States Capitol.</u>

193. Around 2:13 PM, Vice President Pence was removed from the Capitol by Secret Service, along with his family.

194. Because of this, the Senate was forced to go into recess.

195. Senate staffers took the electoral college certificates with them when they were evacuated, ensuring they did not fall into the hands of the attackers.[150]

196. Around 2:25 PM, attackers who had breached the east side of the Capitol entered the Rotunda.

197. At 2:29 PM, the House was forced to go into recess.

198. Thus, by approximately 2:29 PM, the attack stopped the legal process for counting

---

[147] Kelsie Smith & Travis Caldwell, *Disturbing video shows officer crushed against door by mob storming the Capitol*, CNN (Jan. 9, 2021), https://cnn.it/3eAmdSc.

[148] Clare Hymes & Cassidy McDonald, *Capitol riot suspect accused of assaulting cop and burying officer's badge in his backyard*, CBS (Mar. 13, 2021), https://cbsn.ws/3eFAaxS.

[149] Michael Kaplan & Cassidy McDonald, *At least 17 police officers remain out of work with injuries from the Capitol attack*, CBS NEWS (June 4, 2021), https://cbsn.ws/3eyXZr8.

[150] *Id*.

and certifying electoral votes.[151]

199. Around 2:43 PM, attackers broke the glass of a door to the Speaker's lobby, which would give them direct access to the House chamber. There, officers barricaded themselves with furniture and weapons to prevent the attackers' entry.

200. Around ten minutes later, attackers successfully breached the Senate chamber.

201. By this point, both the House Chamber and Senate Chamber were under the control of the attackers.

202. Due to the ongoing assault, Congress was unable to function or exercise its constitutional obligations. The attack successfully obstructed Congress from certifying the votes, temporarily blocking the peaceful transition of power from one presidential administration to the next.

203. Throughout the attack, Senators, Representatives, and staffers were forced to flee the House chamber and seclude themselves as attackers rampaged through the building.

204. Even at the height of the Civil War, the Confederate Army never succeeded in taking control of the U.S. Capitol or any other portion of Washington, D.C., nor in preventing Congress from meeting to exercise its constitutional obligations.

I. Trump Reveled in, and Deliberately Refused to Stop, the Insurrection.

205. Early during the attack, by approximately 1:21 PM, Trump was informed by staffers in the White House that television broadcasts of his speech had been cut to instead show the violence at the Capitol.[152]

206. After this, Trump immediately began watching the Capitol attack unfold on live

[151] *What Happened on Jan. 6*, *supra* n.122.

[152] H.R. Rep. No. 117-663, ch. 7 at 592 (Dec. 22, 2022).

news in the private dining room of the White House.[153]

207. Shortly after, White House Acting Director of Communications Ben Williamson sent a text to Chief of Staff Mark Meadows recommending that Trump tweet about respecting Capitol Police.[154]

208. At 2:24 PM, at the height of violence, Trump made his first public statement during the attack. Against the advisors' recommendation above, he tweeted: "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!"[155]

209. Trump knew, consciously disregarded the risk, or specifically intended that this tweet would exacerbate the violence at the Capitol.

210. Trump's 2:24 PM tweet "immediately precipitated further violence at the Capitol." Immediately after it, "the crowds both inside and outside of the Capitol building violently surged forward."[156]

211. Thirty seconds after the tweet, attackers who were already inside the Capitol opened the East Rotunda door. And thirty seconds after that, attackers breached the crypt one floor below Vice President Pence.[157]

212. At 2:25 PM, the Secret Service determined it needed to evacuate the Vice President

---

[153] *Id.* at 593.

[154] *Id.* at 595.

[155] This tweet appears to have been removed. It is archived on the American Oversight website. *2:24 PM-2:24 PM*, AMERICAN OVERSIGHT (Jan 6, 2021), https://www.americanoversight.org/timeline/224-p-m (archived).

[156] H.R. Rep. No. 117-663, at 86 (Dec. 22, 2022).

[157] *Id.* at 466.

to a more secure location. At one point during this process, attackers were within forty feet of him.[158]

213. Shortly after Trump's tweet, Cassidy Hutchinson (assistant to White House Chief of Staff Mark Meadows) and Pat Cipollone (White House Counsel) expressed to Meadows their concern that the attack was getting out of hand and that Trump must act to stop it.

214. Meadows responded, "You heard him, Pat. . . he thinks Mike deserves it. He doesn't think they're doing anything wrong."[159]

215. Around 2:26 PM, Trump made a call to Republican leaders trapped within the Capitol. He did not ask about their safety or the escalating situation but instead asked whether any objections had been cast against the electoral count.[160]

216. Around the same time, Trump called House Leader Kevin McCarthy regarding any such objections. McCarthy urged Trump on the phone to make a statement and to instruct the attackers to cease and withdraw.

217. Trump declined to make a statement directing the attackers to withdraw.

218. Instead, Trump responded with words to the effect of, "Well, Kevin, I guess they're just more upset about the election theft than you are."[161]

219. Within ten minutes after Trump's tweet, thousands of attackers "overran the line on the west side of the Capitol that was being held by the Metropolitan Police Force's Civil Disturbance Unit, the first time in history of the DC Metro Police that such a security line had ever

[158] *Id.*

[159] *Id.* at 596.

[160] H.R. Rep. No. 117-663, ch. 7 at 597 (Dec. 22, 2022).

[161] *Id.*

been broken."[162]

220. Throughout the time Trump sat watching the attack unfold, multiple relatives, staffers, and officials tried to convince Trump to make a direct statement that the attackers must leave the Capitol. For example:

a. House Minority Leader Kevin McCarthy on the phone told Trump he must make a public statement to end the attack.

b. Ivanka Trump and Eric Herschmann entered the room where Trump sat watching the attack on television. They suggested he make a public statement about being peaceful.

221. At 2:38 PM, Trump tweeted: "Please support our Capitol Police and Law Enforcement. They are truly on the side of our Country. Stay peaceful!"[163]

222. Many attackers saw this tweet but understood it *not* to be an instruction to withdraw from the Capitol.

223. The attack raged on.

224. Around 3:05 PM, Trump was informed that a Capitol Police officer fatally shot one Ashli Babbitt. Babbitt had been attempting to forcibly enter the Speaker's Lobby adjacent to the House chamber.[164]

225. Around this time, Pence, Speaker Pelosi, and Senate leaders directly contacted senior law enforcement leaders and arranged for reinforcements.

---

[162] *Id.* at 86.

[163] Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 6, 2021), https://twitter.com/realDonaldTrump/status/1346904110969315332?lang=en.

[164] H.R. Rep. No. 117-663, Executive Summary, at 91 (Dec. 22, 2022); *What Happened on Jan. 6*, *supra* n.122.

226. Although the force and ferocity of the assault overwhelmed the U.S. Capitol Police, Trump did not himself order any additional federal military or law enforcement personnel to help retake the Capitol.[165]

227. After 3:00 PM, the Department of Homeland Security, the Bureau of Alcohol, Tobacco, Firearms, and Explosives and FBI agents, and police from Virginia and Maryland, joined Capitol Police to help regain control of the Capitol.[166]

228. Shortly after 4:00 PM, President-elect Biden addressed the nation and said, "I call on President Trump to go on national television now, to fulfill his oath and defend the Constitution and demand an end to this siege. This is not a protest—it is an insurrection."[167]

229. Throughout this period, Trump knew that if he issued a public statement directing the attackers to disperse, many or most would have heeded his instruction.

230. In fact, when he finally *did* issue such a statement, it had precisely that effect.

231. At 4:17 PM, nearly 187 minutes after attackers first broke into the Capitol, Trump released a video on Twitter directed to those currently at the Capitol. In this video, he stated: "I know your pain. I know your hurt. . . We love you. You're very special, you've seen what happens. You've seen the way others are treated. . . I know how you feel, but go home, and go home in peace."

232. Erich Herschmann offered a correction to the video and suggested that Trump make

---

[165] H.R. Rep. No. 117-663, ch. 7 at 595 (Dec. 22, 2022); The Daily Diary of President Donald J. Trump, January 6, 2021, https://www.washingtonpost.com/wp-stat/graphics/politics/jan-6-call-logs-white-house/daily-diary-of-president-donald-trump.pdf (demonstrating what calls Trump made or did not make on that day); *READ: Transcript of CNN's town hall with former President Donald Trump*, CNN (May 11, 2023), https://www.cnn.com/2023/05/11/politics/transcript-cnn-town-hall-trump/index.html.

[166] *What Happened on Jan. 6*, *supra* n.122.

[167] *Biden condemns chaos at the capitol: 'It's not protest, it's insurrection'*, NBC NEWS (Jan. 6, 2021), https://www.nbcnews.com/video/biden-condemns-chaos-at-the-capitol-as-insurrection-98957381507.

a more direct statement that attackers leave the Capitol.[168]

233. Trump refused.[169]

234. Immediately after Trump uploaded the video to Twitter, the attackers began to disperse from the Capitol and cease the attack.[170]

235. Attackers were streaming the video. One attacker, Jacob Chansley, announced into a bullhorn, "I'm here delivering the president's message: Donald Trump has asked everybody to go home." Other attackers acknowledged, "That's our order" or "He says go home. He says go home."[171]

236. Group leaders from the Proud Boys texted each other saying, "Gentlemen our commander in chief has just ordered us to go home."[172]

237. Around 5:20 PM, the D.C. National Guard began arriving.[173]

238. This was not because Trump ordered the National Guard to the scene; he never did. Rather, Vice President Pence—who was not actually in the chain of command—ordered the

---

[168] Select Committee to Investigate the January 6th Attack on the United States Capitol, Deposition of Nicholas Luna, at 181 (Mar. 21, 2022), *available at* https://www.govinfo.gov/app/details/GPO-J6-TRANSCRIPT-CTRL0000060749 .

[169] *Id*.

[170] Select Committee to Investigate the January 6th Attack on the United States Capitol, Hearing on the January 6th Investigation, 117th Cong., 2d sess. (July 21, 2022), *available at* https://www.youtube.com/watch?v=pbRVqWbHGuo (1:58:30) (testimony of Stephen Ayres) ("[A]s soon as that come [*sic*] out, everybody started talking about it and that's—it seemed like it started to disperse.").

[171] Select Committee to Investigate the January 6th Attack on the United States Capitol, Hearing on the January 6th Investigation, 117th Cong., 2d sess. (July 21, 2022), at 1:58:30, *available at* https://www.youtube.com/watch?v=pbRVqWbHGuo.

[172] H.R. Rep. No. 117-663, ch. 7 at 579 (Dec. 22, 2022).

[173] Staff of S. Comm. on Rules & Admin., 117th Cong., *A Review of the Security, Planning, and Response Failures on January 6*, at 26 (June 1, 2021), https://www.rules.senate.gov/download/hsgac-rules-jan-6-report.

National Guard to assist the beleaguered police and rescue those trapped at the Capitol.[174]

239. By 6:00 PM, the attackers had been removed from the Capitol, though some committed sporadic acts of violence through the night.[175]

240. At 6:01 PM, Trump issued the final tweet of the day in which he stated that: "These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!"

241. Vice President Pence was not able to reconvene Congress until 8:06 PM, nearly six hours after the process had been obstructed.[176]

242. Around 9:00 PM, Trump's counsel John Eastman again argued to Pence's counsel via email that Pence should refuse to certify Biden's victory by not counting certain states.[177]

243. Pence's counsel ignored it.[178]

244. Congress was required under the Electoral Count Act to debate the objections filed by Senators and Members of Congress to electoral results from Arizona and Pennsylvania. Despite six Senators and 121 Representatives voting to reject Arizona's electoral results,[179] and seven Senators and 138 Representatives voting to reject Pennsylvania's results,[180] Biden's victory was

[174] H.R. Rep. No. 117-663, at 578, 724 (Dec. 22, 2022).

[175] *What Happened on Jan. 6*, *supra* n.122.

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] 167 Cong. Rec. H77 (daily ed. Jan. 6, 2021), http://bit.ly/Jan6CongRec.

[180] *Id*. at H98.

ultimately certified at 3:14 AM, January 7, 2021.[181]

245. In total, five people died,[182] and over 150 police officers suffered injuries, including broken bones, lacerations, and chemical burns.[183] Four Capitol Police officers on-duty during January 6 have since died by suicide.[184]

IV. MULTIPLE JUDGES AND GOVERNMENT OFFICIALS HAVE DETERMINED THAT JANUARY 6 WAS AN INSURRECTION AND THAT TRUMP WAS RESPONSIBLE.

246. Since the mob overtook the Capitol on January 6, 2021, government officials, judges, and other authorities have repeatedly characterized the event as an insurrection.

247. For example, just days after the attack, the U.S. Department of Justice characterized the events of January 6 as "a violent insurrection that attempted to overthrow the United States Government" in *United States v. Chansley*.[185]

248. A federal magistrate judge in Phoenix, Arizona agreed and ordered Chansley (also known as "QAnon Shaman") to be detained pending trial for being "an active participant in a violent insurrection that attempted to overthrow the United States government," and who thus

---

[181] *What Happened on Jan. 6*, *supra* n.122; 167 Cong. Rec. H114–15 (daily ed. Jan. 6, 2021), http://bit.ly/Jan6CongRec.

[182] Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (Jan. 11, 2021), https://nyti.ms/3pTyN5q.

[183] Michael Kaplan & Cassidy McDonald, *At least 17 police officers remain out of work with injuries from the Capitol attack*, CBS (June 4, 2021), https://cbsn.ws/3eyXZr8; Michael S. Schmidt & Luke Broadwater, *Officers' Injuries, Including Concussions, Show Scope of Violence at Capitol Riot*, N.Y. TIMES (Feb. 11, 2021), https://nyti.ms/3eN31k2.

[184] Luke Broadwater & Shaila Dewan, *Congress Honors Officers Who Responded to Jan. 6 Riot*, N.Y. TIMES (Aug. 3, 2021), https://nyti.ms/3EURwlp.

[185] Government's Br. in Supp. of Detention at 1, *United States v. Chansley*, No. 2:21-MJ-05000-DMF, ECF No. 5 (D. Ariz. Jan. 14, 2021).

posed a danger to the community and flight risk.[186]

249. On January 13, 2021, bipartisan majorities of the House and Senate voted for articles of impeachment against Trump describing the attack as an "insurrection."[187]

250. On February 13, 2021, during Trump's impeachment trial, Senate Majority Leader Mitch McConnell stated on the floor of the Senate that the people who entered the Capitol on January 6 had "attacked their own government." He further stated that the attackers "used terrorism to try to stop a specific piece of domestic business they did not like. . . fellow Americans beat and bloodied our own police. They stormed the Senate floor. They tried to hunt down the Speaker of the House. They built gallows and chanted about murdering the Vice President."

251. During the trial, Trump's defense lawyer stated that "the question before us is not whether there was a violent insurrection of [*sic*] the Capitol. *On that point, everyone agrees.*"[188]

252. On August 5, 2021, Congress passed Public Law 117-32, which granted four congressional gold medals to Capitol Police officers who defended the Capitol on that day. The law declared that "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."[189]

253. On September 6, 2022, Judge Francis J. Matthew of New Mexico's First District permanently enjoined Otero County Commissioner and "Cowboys for Trump" founder Couy

---

[186] Brad Health, Sarah N. Lynch, et al., *Judge Calls Siege 'Violent Insurrection,' Orders Man Who Wore Horns Held*, REUTERS (Jan. 14, 2021), https://www.reuters.com/article/us-usa-trump-capitol-arrests/judge-calls-capitol-siege-violent-insurrection-orders-man-who-wore-horns-held-idUSKBN29K0K7.

[187] 167 Cong. Rec. H191 (daily ed. Jan. 13, 2021); 167 Cong. Rec. S733 (daily ed. Feb. 13, 2021).

[188] 167 Cong. Rec. S729 (daily ed. Feb. 13, 2021) (emphasis added).

[189] 31 U.S.C. Chapter 51.

Griffin from holding office under Section 3 of the Fourteenth Amendment.[190] The court held that the January 6 attack constituted an "insurrection" under section 3 of the Fourteenth Amendment.[191]

254. Since the January 6, 2021 attack on the Capitol, various judges have issued opinions describing it an "insurrection." For example:

a. In *United States v. Little*, the judge held in a sentencing memorandum that "contrary to [defendant's] Facebook post and the statements he made to the FBI, the riot was not 'patriotic' or a legitimate 'protest,' . . . it was an insurrection aimed at halting the functioning of our government."[192]

b. In *United States v. Munchel*, the judge granted an application for access to exhibits and wrote, "defendants face criminal charges for participating in the unsuccessful insurrection at the Capitol on January 6, 2021."[193]

c. In *United States v. Bingert*, the judge denied a motion to dismiss indictment and again called it an "unsuccessful insurrection."[194]

d. In *United States v. Brockhoff,* the judge issued an order denying a motion for pretrial release, stating that "[t]his criminal case is one of several hundred arising from the insurrection at the United Sates Capitol on January 6, 2021."[195]

---

[190] *New Mexico v. Griffin*, No. D-101-CV-202200473, 2022 WL 4295619 (N.M. 1st Jud. Dist., Sept. 6, 2022), *available at* https://bit.ly/GriffinNM, appeal dismissed, No. S-1-SC-39571 (N.M. Nov. 15, 2022).

[191] *Id.*

[192] No. 1:21-cr-00315, 2022 WL 768685, *2 (D.D.C. Mar. 14, 2022).

[193] 567 F. Supp. 3d 9, 13 (D.D.C. 2021).

[194] No. 1:21-cr-0091, 2022 WL 1659163, *1 (D.D.C. May 25, 2022).

[195] 590 F. Supp. 3d 295 (D.D.C. 2022)

e. In *United States v. Grider*, the judge denied a motion to dismiss indictment, stating that "[t]his criminal case is one of several hundred arising from the insurrection at the United States Capitol on January 6, 2021."[196]

f. In *United States v. Puma*, the judge characterized the January 6, 2021 attack as an "insurrection" *passim* in an order denying a motion to dismiss the indictment.[197]

g. In *United States v. Rivera*, the judge characterized the January 6, 2021 attack as an "insurrection" *passim* in an opinion after bench trial.[198]

h. In *United States v. DeGrave*, the judge characterized the January 6, 2021 attack as an "insurrection" *passim* in an order on pretrial detention.[199]

i. In *United States v. Randolph*, the judge characterized the January 6, 2021 attack as an "insurrection" *passim* in an order on pretrial detention.[200]

j. In the *Matter of Giuliani*, a state appellate court referred to "violence, insurrection and death on January 6, 2021 at the U.S. Capitol" in an order suspending Trump's lawyer from the practice of law. [201]

255. Multiple leaders and members of the extremist groups that played key roles in the insurrection have also been convicted of seditious conspiracy under 18 U.S.C. § 2384, which requires the government to prove that two or more persons "conspire to overthrow, put down, or

[196] No. 1:21-cr-00022, 2022 WL 17829149 (D.D.C. Dec. 21, 2022).

[197] 596 F. Supp. 3d 90 (E.D. Ky. Mar. 19, 2022).

[198] No. 1:21-cr-00060, 2022 WL 2187851 (D.D.C. June 17, 2022).

[199] 539 F. Supp. 3d 184, 203 (D.D.C. 2021).

[200] 536 F. Supp. 3d 128, 132 (E.D. Ky. 2021).

[201] 197 A.D.3d 1, 25, 146 N.Y.S.3d 266 (N.Y. App. Div. 2021).

to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof."

256. The Department of Justice maintains a growing list of defendants charged in federal court in Washington, D.C. who took direction from Trump on January 6, 2021 and breached the U.S. Capitol.[202]

257. For example:

a. In April 2022, an Oath Keepers member named Brian Ulrich pleaded guilty to seditious conspiracy.[203]

b. In May of 2022, Oath Keepers member William Todd Wilson pleaded guilty to seditious conspiracy.[204]

c. In October 2022, former leader of the Proud Boys Jeremy Bertino pleaded guilty to seditious conspiracy.[205]

d. On January 23, 2023, four Oath Keepers were found guilty of seditious

---

[202] *Capitol Breach Cases*, DEPT OF JUSTICE, https://www.justice.gov/usao-dc/capitol-breach-cases.

[203] Ryan Lucas, *A second Oath Keeper pleaded guilty to seditious conspiracy in the Jan. 6 riot*, NPR (Apr. 29, 2022), https://www.npr.org/2022/04/29/1095538077/a-second-oath-keeper-pleaded-guilty-to-seditious-conspiracy-in-the-jan-6-riot.

[204] Michael Kunzelman, *Oath Keeper from North Carolina pleads guilty to seditious conspiracy during Jan. 6 insurrection*, PBS (May 4, 2022), https://www.pbs.org/newshour/politics/oath-keeper-from-north-carolina-pleads-guilty-to-seditious-conspiracy-during-jan-6-insurrection.

[205] *Former Leader of the Proud Boys Pleads Guilty to Seditious Conspiracy for Efforts to Stop Transfer of Power Following 2020 Presidential Election*, DEPARTMENT OF JUSTICE (Oct. 6, 2022), https://www.justice.gov/opa/pr/former-leader-proud-boys-pleads-guilty-seditious-conspiracy-efforts-stop-transfer-power.

conspiracy.[206]

e. Around May 4, 2023, four members of the Proud Boys, including their former leader Enrique Tarrio, were convicted of seditious conspiracy.[207]

f. Both the Oath Keepers and the Proud Boys were instrumental in mobilizing in response to Trump's December 19 "will be wild!" tweet. Both acted as vanguards in the attack. And both withdrew after Trump belatedly ordered them to do so.

258. In a published opinion, one federal judge in the District of Columbia stated:

> For months, the President led his supporters to believe the election was stolen. When some of his supporters threatened state election officials, he refused to condemn them. Rallies in Washington, D.C., in November and December 2020 had turned violent, yet he invited his supporters to Washington, D.C., on the day of the Certification. They came by the thousands. And, following a 75-minute speech in which he blamed corrupt and weak politicians for the election loss, he called on them to march on the very place where Certification was taking place.
> * * *
> 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, as [John Stuart]

[206] Kyle Cheney, *4 more Oath Keepers found guilty of seditious conspiracy tied to Jan. 6 attack*, POLITICO (Jan. 23, 2023), https://www.politico.com/news/2023/01/23/oath-keepers-guilty-seditious-conspiracy-jan-6-00079083.

[207] Alan Feuer, Zach Montague, *Four Proud Boys Convicted of Sedition in Key Jan 6. Case*, N.Y. TIMES (May 4, 2023), https://www.nytimes.com/2023/05/04/us/politics/jan-6-proud-boys-sedition.html.

Mill put it, a "positive instigation of a mischievous act."[208]

259. At least eight other federal judges—in published opinions and in sentencing decisions—have explicitly assigned responsibility for the January 6 insurrection to Trump.

260. For example:

a. "Based on the evidence, the Court finds it more likely than not that President Trump corruptly attempted to obstruct the Joint Session of Congress on January 6, 2021."[209]

b. "The fact remains that [the defendant] and others were called to Washington, D.C. by an elected official; he was prompted to walk to the Capitol by an elected official. . . [the defendant was] told lies, fed falsehoods, and told that our election was stolen when it clearly was not."[210]

c. "The steady drumbeat that inspired defendant to take up arms has not faded away. . . not to mention, the near-daily fulminations of the former President."[211]

d. "Defendant's promise to take action in the future cannot be dismissed as an unlikely occurrence given that his singular source of information, . . . ("Trump's the only big shot I trust right now"), continues to propagate the lie that inspired the attack on a near daily basis."[212]

---

[208] *Thompson*, 590 F. Supp. 3d at 104, 118.

[209] *Eastman v. Thompson*, 594 F. Supp. 3d 1156, 1193 (C.D. Cal. 2022).

[210] Tr. of Sentencing at 55, *United States v. Lolos*, No. 1:21-cr-00243 (D.D.C. Nov. 19, 2021).

[211] Mem. Op. at 24, *United States v. Meredith, Jr.*, No. 1:21-cr-00159, ECF No. 41 (D.D.C. May 26, 2021).

[212] *United States v. Dresch*, No. 1:21-cr-00071, 2021 WL 2453166, *8 (D.D.C. May 27, 2021).

e. "At the end of the day the fact is that the defendant came to the Capitol because he placed his trust in someone [Donald Trump] who repaid that trust by lying to him."[213]

f. "And as for the incendiary statements at the rally detailed in the sentencing memo, which absolutely, quite clearly and deliberately, stoked the flames of fear and discontent and explicitly encouraged those at the rally to go to the Capitol and fight for one reason and one reason only, to make sure the certification did not happen, those may be a reason for what happened, they may have inspired what happened, but they are not an excuse or justification."[214]

g. "[B]ut we know, looking at it now, that they were supporting the president who would not accept that he was defeated in an election."[215]

h. "And you say that you headed to the Capitol Building not with any intent to obstruct and impede congressional proceedings; but because the then-President, Trump, told protesters at the "stop the steal" rally -- and I quote: After this, we're going to walk down; and I will be there with you. We're going to walk down. We're going to walk down. I know that everyone here will soon be marching over to the Capitol Building to peacefully and patriotically make your voices heard. And you say that you wanted to show your support for and join then-President Trump as he said he would be

[213] Tr. of Plea and Sentence at 30, *United States v. Dresch*, No. 1:21-cr-00071 (D.D.C. Aug. 4, 2021).

[214] Tr. of Sentencing at 22, *United States v. Peterson*, No. 1:21-cr-00309, ECF No. 32 (D.D.C Dec. 1, 2021).

[215] *United States v. Tanios*, No. 1:21-mj-00027, ECF No. 30 at 107 (N.D.W. Va. Mar. 22, 2021).

marching to the Capitol; but, of course, didn't."[216]

i. "[A]t the "Stop the Steal" rally, then-President Trump eponymously exhorted his supporters to, in fact, stop the steal by marching to the Capitol. . . [h]aving followed then-President Trump's instructions, which were in line with [the defendant's] stated desires, the Court therefore finds that Defendant intended her presence to be disruptive to Congressional business."[217]

j. Moreover, four sentencing cases of January 6 defendants included statements by a judge that, "The events of January 6th involved the rather unprecedented confluence of events spurred by then President Trump. . ."[218]

V. TRUMP ACKNOWLEDGES THAT HE WAS IN COMMAND OF INSURRECTIONISTS AND CALLS THEM PATRIOTS.

261. On May 10, 2023, during a CNN town hall, Trump maintained his position that the 2020 presidential election was a "rigged election."

262. When CNN moderator Kaitlin Collins asserted that it was not a stolen election and offered Trump "a chance to acknowledge the results," Trump responded "If you look at what happened in Pennsylvania, Philadelphia, if you look at what happened in Detroit, Michigan. . . all

[216] Tr. of Sentencing at 36, *United States v. Gruppo*, No. 1:21-cr-00391 (D.D.C. Oct. 29, 2021).

[217] Findings of Fact and Conclusions of Law at 15, *United States v. MacAndrew*, No. 1:21-cr-00730, ECF No. 59 (D.D.C. Jan. 17, 2023). https://storage.courtlistener.com/recap/gov.uscourts.dcd.238421/gov.uscourts.dcd.238421.59.0_2.pdf .

[218] Tr. of Sentencing at 38, *United States v. Prado*, No. 1:21-cr-00403 (D.D.C. Feb. 7, 2022); Tr. of Sentencing at 28, *United States v. Barnard, et al.*, No. 1:21-cr-00235 (D.D.C. Feb 4, 2022); Tr. of Sentencing at 68, *United States v. Stepakoff*, No. 1:21-cr-00096 (D.D.C. Jan. 20, 2022); Tr. of Sentencing at 28, *United States v. Williams*, No. 1:21-cr-00388 (D.D.C. Feb. 7, 2022).

you have to do is take a look at government cameras. You will see them, people going to 28 different voting booths to vote, to put in seven ballots apiece."[219]

263. Collins asked Trump "Will you pardon the January 6th rioters who were convicted of federal offenses?". Trump responded, "I am inclined to pardon many of them. I can't say for every single one because a couple of them, probably, they got out of control."[220]

264. Collins asked Trump, "When it was clear [attackers] weren't being peaceful, why did you wait three hours to tell them to leave the Capitol? They listen to you like no one else." Trump responded, "They do. I agree with that."[221]

265. Trump then asserted he thought it was "Nancy Pelosi's and the mayor's job" to do so. He also stated that the video he posted 187 minutes after the initial break in "was a beautiful video."[222]

266. When Collins mentioned Ashli Babbitt, who was shot by police while attempting to break into the Capitol, Trump praised her and responded, "That thug [the police officer] killed her, there was no reason to shoot her at blank range. . . And she was a good person. She was a patriot."

267. When Collins told Trump that Mike Pence "says that you endangered his life on that day," Trump responded, "I don't think he was in any danger."

268. Trump said this notwithstanding violent chants among the crowd to "Hang Mike Pence!" and active tweets by Trump during the attack that Pence lacked courage to unlawfully

---

[219] *READ: Transcript of CNN's town hall with former President Donald Trump*, CNN (May 11, 2023), https://www.cnn.com/2023/05/11/politics/transcript-cnn-town-hall-trump/index.html.

[220] *Id*.

[221] *READ: Transcript of CNN's town hall with former President Donald Trump*, CNN (May 11, 2023), https://www.cnn.com/2023/05/11/politics/transcript-cnn-town-hall-trump/index.html.

[222] *Id*.

reject certification of the election.

269. Collins then asked Trump if he feels that he owes Pence an apology. Trump replied, "No, because he did something wrong. He should have put the votes back to the state legislatures and I think we would have had a different outcome."

VI. TRUMP REMAINS UNREPENTANT AND WOULD DO IT AGAIN.

270. To this day, Trump has never expressed regret that his supporters violently attacked the U.S. Capitol, threatened to assassinate the Vice President and other key leaders, and obstructed congressional certification of the electoral votes. Nor has he condemned any of them for these actions.

271. Trump has never expressed regret for any aspect whatsoever of his own conduct in the days leading up to January 6, 2021 or on January 6 itself.

272. Trump has not offered personal condolences to any of the law enforcement personnel or their families who were injured or died as a result of the January 6 attack.

273. Trump has not apologized to anyone, either on his own behalf or on behalf of his supporters, for the January 6 attack.

274. To the contrary, Trump has continued to defend and praise the attackers.

275. Around December 20, 2022, after the bi-partisan House committee voted to recommend that the Justice Department bring criminal charges against Trump, Trump posted on his website Truth Social: "these folks don't get it that when they come after me, the people who love freedom rally around me."[223]

276. Trump has endorsed and appeared at multiple fundraisers for the "Patriot Freedom

[223] Steve Peoples, *Republicans' usual embrace of Trump muted following criminal referral*, PBS (Dec. 20, 2022), https://www.pbs.org/newshour/politics/republicans-usual-embrace-of-trump-muted-following-criminal-referral.

Project," an organization that provides support for January 6 attackers.

277. Trump has not petitioned Congress for amnesty under Section 3 of the Fourteenth Amendment, nor has Congress granted it.

278. In fact, Trump has demonstrated that the purpose of Section 3 of the Fourteenth Amendment—to prevent insurrectionists from holding power *because of the danger they pose to the Republic*—applies with undiminished vigor.

279. For example, on December 3, 2022, Trump called for "termination of all rules, regulations, and articles, even those found in the Constitution."[224]

280. And on September 22, 2023, Trump stated that General Mark Milley, Chairman of the Joint Chiefs of Staff, had committed "an act so egregious that, in times gone by, the punishment would have been DEATH."[225]

VII. THE CONSTITUTION DISQUALIFIES INSURRECTIONISTS FROM OFFICE.

281. Under Section 3 of the Fourteenth Amendment to the U.S. Constitution, known as the Disqualification Clause, "No Person shall . . . hold any office, civil or military, under the United States . . . who, having previously taken an oath . . . as an officer of the United States . . . or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same."

282. Persons who trigger this provision are disqualified from public office, just as those who fail to meet the age or citizenship requirements of Article I, section 2 of the Constitution are disqualified from the presidency. "The oath to support the Constitution is the test. The idea being

[224] Donald J. Trump (@realDonaldTrump) Truth Social, Dec. 3, 2022, 7:44 AM, https://truthsocial.com/@realDonaldTrump/posts/109449803240069864.

[225] Donald J. Trump (@realDonaldTrump) Truth Social, Sept. 22, 2023, 7:59 PM, https://truthsocial.com/@realDonaldTrump/posts/111111513207332826.

that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress." *Worthy*, 63 N.C. at 204.

283. Under Section 3, to "engage" merely requires "a voluntary effort to assist the Insurrection . . . and to bring it to a successful [from insurrectionists' perspective] termination"). *Powell*, 65 N.C. 709 (C.C.D.N.C. 1871); *Worthy*, 63 N.C. at 203 (in leading national precedent, defining "engage" under Section 3 to mean "[v]oluntarily aiding the rebellion, by personal service, or by contributions, other than charitable, of any thing that was useful or necessary").

284. Planning or helping plan an insurrection or rebellion satisfies the definition of "insurrection" under Section 3 of the Fourteenth Amendment. So does planning a demonstration or march upon a government building that the planner knows is substantially likely to (and does) result in insurrection or rebellion, as it constitutes taking voluntary steps to contribute, "by personal service," a "thing that was useful or necessary" to the insurrection or rebellion. And knowing that insurrection or rebellion was likely makes that aid voluntary.

VIII. TRUMP ENGAGED IN INSURRECTION OR REBELLION AND IS THUS DISQUALIFIED FROM PUBLIC OFFICE.

285. The allegations of all previous paragraphs are incorporated by reference.

286. On January 20, 2017, Trump took an oath to support the U.S. Constitution.

287. Trump took that oath as an "officer of the United States" within the meaning of Section 3 of the Fourteenth Amendment.

288. During his 2020 re-election campaign, and after the results made clear that he had lost the election, Trump inflamed his supporters with claims that the 2020 presidential election had been rigged.

289. Over the course of November and December 2020, and continuing into January 2021, Trump attempted a series of unlawful schemes to overturn the election. These schemes

included pressuring state legislators to appoint pro-Trump electors in states he had lost; the submission of fake electoral certificates by pro-Trump electors in states he had lost; pressuring Pence to discard electoral votes from states he had lost; and seizing voting machines as a pretext for other unlawful means to retain power.

290. Trump's lawyers and aids and Vice President Pence himself had repeatedly advised Trump that Pence had no lawful authority to reject electoral votes.

291. After various other schemes to overturn the 2020 election failed, Trump summoned his supporters to Washington, D.C., on January 6, 2021, telling them that it would be "wild."

292. Trump knew that some of his supporters on January 6, 2021 were armed and had plans to commit violence on that day.

293. Still, Trump egged supporters on and insisted they must "fight" and reclaim the presidency from supposed theft.

294. After enraging his supporters further, telling them to "fight like hell" and that "you're allowed to go by very different rules," Trump sent them to the Capitol.

295. Trump's supporters defeated civilian law enforcement, captured the United States Capitol, and prevented Congress from certifying the 2020 presidential election, just as Trump had desired.

296. Although they did not succeed, many of the attackers threatened to assassinate Vice President Pence, Speaker Pelosi, and other leaders whom Trump had urged them to target.

297. During the hours-long attack, and despite pleas from family and aides, Trump did not call off the attack. Nor did he use his presidential authority to order reinforcements for the beleaguered police. Instead, he goaded the attackers on.

298. As a result, the certification of the 2020 presidential election could not take place

until the next day.

299. The events of January 6, 2021, constituted an insurrection or a rebellion under Section 3: a violent, coordinated effort to storm the Capitol to obstruct and prevent the Vice President of the United States and the United States Congress from fulfilling their constitutional roles by certifying President Biden's victory, and to illegally extend then-President Trump's tenure in office.

300. The effort to overthrow the results of the 2020 election by unlawful means, from on or about November 3, 2020 through at least January 6, 2021, constituted a rebellion under Section 3: an attempt to overturn or displace lawful government authority by unlawful means.

301. Trump knew of, consciously disregarded the risk of, or specifically intended the attackers' unlawful actions described in the preceding allegations.

302. Trump knew of, consciously disregarded the risk of, or specifically intended each of the following:

a. Angry and armed supporters would amass in Washington, D.C., on January 6, 2021.

b. These supporters would, at his command, march on the U.S. Capitol.

c. These supporters would disrupt, delay, or obstruct Congress from certifying the electoral votes.

d. His 2:24 PM tweet would goad and encourage his supporters to continue their attack.

e. His refusal to issue a public statement directing the attackers to disperse would encourage the attackers to continue.

f. His refusal to order federal law enforcement to the scene would enable the

attackers to continue.

303. Trump summoned the attackers to Washington, D.C. to "be wild" on January 6; ensured that his armed and angry supporters were able to bring their weapons; incited them against Vice President Pence, Congress, the certification of electoral votes, and the peaceful transfer of power; instructed them to march on the Capitol for the purpose of preventing, obstructing, disrupting, or delaying the electoral vote count and peaceful transfer of power; encouraged them during their attack; used the attack as an opportunity to further pressure and intimidate the Vice President and Members of Congress; provided material support to the insurrection by refraining from mobilizing federal law enforcement or National Guard assistance; and otherwise fomented, facilitated, encouraged, and aided the insurrection.

304. None of this conduct was undertaken in performance of Trump's official duties, in his official capacity, or under color of his office. Under Article II of the Constitution, the Twelfth Amendment, and statutes in effect then or now, the President is not involved in counting or certifying votes. Rather, Trump engaged in insurrection solely in his personal or campaign capacity. In fact, when he did contemplate the unlawful use of executive power to further his unlawful schemes (such as seizing voting machines), government aides and lawyers advised him that it would be illegal and/or refused his orders.

305. Despite having sworn an oath to support the Constitution of the United States, Trump "engaged in insurrection or rebellion against the same, or [gave] aid or comfort to the enemies thereof" within the meaning of section 3 of the Fourteenth Amendment.

306. Trump is disqualified from holding "any office, civil or military, under the United States."

307. Congress has not removed this disability from Trump.

308. The presidency of the United States is an "office . . . under the United States" within the meaning of Section 3 of the Fourteenth Amendment.

309. Consequently, Donald J. Trump is disqualified from, and ineligible to hold, the office of President of the United States.

DEFENDANT'S ERRORS

310. On July 12, 2023, Free Speech For People sent a letter to Secretary of State Benson requesting that she exclude Donald J. Trump from the ballots for the presidential nomination primary and the general election for the office of President of the United States. The letter described Trump's disqualification from holding the office of President, the self-executing nature of Section 3 of the Fourteenth Amendment, and Secretary Benson's authority to exclude Trump from the ballot. The letter encouraged Secretary Benson to act promptly because time is of the essence to resolve any litigation resulting from the announcement of her intent to exclude Trump from the ballot prior to the preparation of the ballots for the presidential nomination primary.

311. On September 13, 2023, Secretary Benson published an op-ed in the Washington Post, claiming that the Secretary does not have authority to investigate a candidate's ineligibility. The Secretary stated that "[t]he appropriate forum for deciding whether a candidate qualifies to serve in office under the Constitution is the courts." She further acknowledged, "it's possible state courts would be the final arbiters regarding candidate eligibility, and election officers like me would be charged with carrying out our state courts' rulings. That's why in Michigan, unless a court rules otherwise, Donald Trump will be on the ballot for our Republican presidential primary on Feb. 27, 2024."[226]

[226] Jocelyn Benson, *It's not up to secretaries of state like me to keep Trump off the ballot*, Wash. Post, Sept. 13, 2023, https://wapo.st/45SxGFw.

312. As of the filing of this Petition, Secretary Benson has not taken any action to exclude Trump from the ballot for the presidential primary or the general election for the office of President of the United States nor has she expressed an intention to do so; to the contrary, she has expressly *disclaimed* any intention to do so.

313. Contrary to the Secretary's assertions, the Secretary of State has both the authority and responsibility to determine whether a candidate for office is ineligible to appear on the ballot for the presidential nomination primary or the general election. MCL § 614a(1). This authority and responsibility applies regardless of whether the ineligibility results from the purported candidate's failure to meet the eligibility requirements of the Presidential Eligibility Clause of Article II, section 1 of the Constitution; the fact that the purported candidate has previously served two terms in the office of President of the United States; or the fact that the purported candidate, "having previously taken an oath . . . to support the Constitution of the United States," proceeded to "engage[] in insurrection or rebellion against the same" in contravention of Section 3 of the Fourteenth Amendment.

314. As the exclusive official in Michigan responsible for placing the names of the candidates on the ballots for the presidential primary and the general election for the office of President of the United States, the Secretary of State holds the inherent power to exclude ineligible candidates from the ballot.

315. Without a judicial determination to the contrary, the Secretary will list Trump's name on the presidential primary and general election ballots.

COUNT I – DECLARATORY JUDGMENT: TRUMP IS DISQUALIFIED FROM OFFICE UNDER SECTION 3 OF THE FOURTEENTH AMENDMENT

316. Plaintiffs incorporate the prior paragraphs as if set forth word for word.

317. MCR 2.605(A)(1) states: "In a case of actual controversy within its jurisdiction, a

Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." The Michigan Supreme Court has held that "[a]n actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters of Mich v Sec'y of State*, 506 Mich. 561, 586; 957 N.W.2d 731 (2020).

318. There is an actual controversy because Plaintiffs have a legal right to have only eligible candidates on the ballot. *See Barrow v City of Detroit Election Comm'n*, 301 Mich. App. 404, 412; 836 NW2d 498 (2013), *lv den*, 494 Mich. 866; 831 N.W.2d 461 (2013).

319. Trump is disqualified by section 3 of the Fourteenth Amendment, is ineligible to appear on the presidential primary or general election ballot, and has no legal right to appear on that ballot. Plaintiffs are entitled to declaratory judgment to preserve their right to have only eligible presidential candidates on the ballot.

COUNT II – PERMANENT INJUNCTION: THE SECRETARY SHOULD BE ENJOINED FROM PLACING TRUMP ON THE 2024 PRESIDENTIAL PRIMARY OR GENERAL ELECTION BALLOTS

320. Plaintiffs incorporate the prior paragraphs as if set forth word for word.

321. Trump is disqualified by section 3 of the Fourteenth Amendment, is ineligible to appear on the presidential primary or general election ballot, and has no legal right to appear on that ballot. Plaintiffs are entitled to declaratory judgment to preserve their right to have only eligible candidates on the ballots. Based upon that declaratory judgment Plaintiffs are entitled to relief by way of a permanent injunction under MCR 2.605(F).

322. Plaintiffs are entitled to permanent injunctive relief preventing the Secretary from placing Trump on the 2024 presidential primary or general election ballots.

THIS IS AN URGENT ELECTION MATTER REQUIRING IMMEDIATE ACTION

323. Declaratory judgment actions may be expedited, MCR 2.605(D), and election matters should be expedited, *see, e.g.,* MCR 7.213(C)(4); *Scott v. Mich. Dir. of Elections*, 490 Mich 888; 804 NW2d 119 (2011); *Ferency v. Secretary of State*, 409 Mich 569, 599; 297 NW2d 544 (1980).

324. In light of the urgency of this matter, if Trump chooses to file an action seeking relief opposite to that of Petitioners (i.e., seeking declaratory or injunctive relief compelling the Secretary to list his name on ballots), Petitioners do not object to such action being consolidated with this one.

PRAYER FOR RELIEF SOUGHT

For the reasons stated Plaintiffs respectfully pray for an Order of the Court as follows:

1. Declaring that Donald J. Trump is disqualified from holding the office of President of the United States pursuant to Section 3 of the Fourteenth Amendment to the Constitution of the United States;

2. Permanently enjoining the Secretary of State from including Donald J. Trump on the ballot for the 2024 presidential primary election;

3. Permanently enjoining the Secretary of State from including Donald J. Trump on the ballot for the November 5, 2024, general election as a candidate for the office of President of the United States;

4. Expediting the hearing and disposition of this matter; and

5. Granting Plaintiffs' such other relief as the Court deems just and appropriate.

/s/ Mark Brewer
MARK BREWER (P35661)
ROWAN CONYBEARE (P86571)
GOODMAN ACKER, P.C.

17000 W. Ten Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com

FREE SPEECH FOR PEOPLE
Ronald Fein (*pro hac vice* forthcoming)
Amira Mattar (*pro hac vice* forthcoming)
Courtney Hostetler (*pro hac vice* forthcoming)
John Bonifaz (*pro hac vice* forthcoming)
Ben Clements (*pro hac vice* forthcoming)
1320 Centre St. #405
Newton, MA 02459
(617) 244-0234
rfein@freespeechforpeople.org
amattar@freespeechforpeople.org
chostetler@freespeechforpeople.org
jbonifaz@freespeechforpeople.org
bclements@freespeechforpeople.org

COUNSEL FOR PLAINTIFFS

Date: September 29, 2023

VERIFICATION

STATE OF MICHIGAN)
)ss
COUNTY OF INGHAM)

I declare under the penalties of perjury that this Complaint has been examined by me and that its contents are true to the best of my knowledge, information, and belief.

Robert J. LaBrant

Subscribed and sworn to before me
this 28th day of September, 2023
Elizabeth M. Rhodes
Elizabeth M. Rhodes, Notary Public
Macomb County, State of Michigan
My Commission Expires: 11/9/2028
Acting in the County of Oakland

STATE OF MINNESOTA

IN SUPREME COURT

A23-1354

Joan Growe, et al.,

Petitioners,

vs.

Steve Simon, Minnesota Secretary of State,

Respondent.

O R D E R

On September 12, 2023, petitioners filed a petition pursuant to Minnesota Statutes section 204B.44 (2022) asking, in part, for an order declaring that Donald J. Trump, who served as President of the United States and has filed federal paperwork as a candidate for President in the 2024 election, is disqualified from holding the office of President of the United States pursuant to Section 3 of the Fourteenth Amendment to the United States Constitution; and directing the Secretary of State to exclude Donald J. Trump from the ballot for the March 5, 2024, presidential nomination primary and from the ballot for the November 5, 2024, general election as a candidate for the office of President of the United States. Absentee voting for the presidential nomination primary will begin January 19, 2024. *See* Minn. Stat. § 204B.35, subd. 4 (2022); *see also* Minn. Stat. § 204B.45, subd. 2 (2022).

Before considering petitioners' request to pursue discovery and hold an evidentiary hearing, we determined first to address threshold and potentially dispositive legal issues of justiciability and the legal construction of Section 3 of the Fourteenth Amendment to the United States Constitution. We directed petitioners, the Secretary of State, the Republican Party of Minnesota, and former President Trump to file briefs addressing these issues and held a hearing on November 2, 2023.

We conclude that petitioners have standing and that their claims are ripe as to the issue of whether former President Trump should be excluded from the 2024 Republican presidential nomination primary. We reach a different conclusion regarding petitioners' claim that it would be error for the Secretary of State to place former President Trump's name on the ballot for the 2024 general election ballot. That claim is neither ripe, nor is it "about to occur" as section 204B.44(a) requires.

With respect to the only ripe issue before us at this time, we conclude that under section 204B.44, there is no "error" to correct here as to the presidential primary election if former President Trump's name is included on the presidential primary ballot after the Chair of the Republican Party of Minnesota provides his name to the Secretary of State, notwithstanding petitioners' claim that former President Trump is disqualified from holding office under Section 3 of the Fourteenth Amendment. The Legislature enacted the presidential nomination primary process to allow major political parties to select delegates to the national conventions of those parties; at those conventions the selected delegates will cast votes along with delegates from all of the other states and territories and choose a presidential candidate who will subsequently appear on general election ballots. *See* Minn.

Stat. § 207A.11(d) (2022) (explaining that the presidential nomination primary "only applies to a major political party that selects delegates at the presidential nomination primary to send to a national convention"). This is "a process that allows political parties to obtain voter input in advance of a nomination decision made at a national convention." *De La Fuente v. Simon*, 940 N.W.2d 477, 492 (Minn. 2020). Thus, although the Secretary of State and other election officials administer the mechanics of the election, this is an internal party election to serve internal party purposes, and winning the presidential nomination primary does not place the person on the general election ballot as a candidate for President of the United States. As we explained in *De La Fuente*, in upholding the constitutionality of this statutory scheme for the presidential nomination primary, "[t]he road for any candidate's access to the ballot for Minnesota's presidential nomination primary runs only through the participating political parties, who alone determine which candidates will be on the party's ballot." 940 N.W.2d at 494–95. And there is no state statute that prohibits a major political party from placing on the presidential nomination primary ballot, or sending delegates to the national convention supporting, a candidate who is ineligible to hold office.

Because there is no error to correct here as to the presidential nomination primary, and petitioners' other claims regarding the general election are not ripe, the petition must be dismissed, but without prejudice as to petitioners bringing a petition raising their claims as to the general election.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. The petition is dismissed, but without prejudice as to the general election.

2. So as not to impair the orderly election process, this order is issued with an opinion to follow.

Dated: November 8, 2023

BY THE COURT:

Natalie E. Hudson
Chief Justice

CHUTICH, PROCACCINI, JJ., took no part in the consideration or decision of this case.

DATE FILED: November 17, 2023 4:50 PM

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, CO 80202	
Petitioners: NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN **v.** **Respondent:** JENA GRISWOLD, in her official capacity as Colorado Secretary of State **and** **Intervenors:** COLORADO REPUBLICAN STATE CENTRAL COMMITTEE and DONALD J. TRUMP	**Δ COURT USE ONLY Δ** Case No.: 2023CV32577 Division: 209
FINAL ORDER	

This matter came before the Court from October 30, 2023 to November 3, 2023 pursuant to a C.R.S. § 1-1-113 proceeding. Petitioners Norma Anderson, Michelle Priola, Claudine Cmarada, Krista Kafer, Kathi Wright, and Christopher Castilian ("Petitioners") were represented by Eric Olson, Sean Grimsley, Jason Murray, Martha Tierney, Mario Nicolais, and Nikhel Sus. Respondent Jena Griswold, in her official capacity as Colorado Secretary of State ("Secretary"), was represented by Jennifer Sullivan, Grant Sullivan, and Michael Kotlarczyk. Intervenor Donald J. Trump was represented by Scott Gessler, Geoffrey Blue, Justin North, Johnathan Shaw, Christpher Halbohn, Mark

Meuser, and Jacob Roth. The Colorado Republican State Central Committee ("CRSCC") was represented by Jane Raskin, Michael Melito, Robert Kitsmiller, Nathan Moelker, and Benjamin Sisney. The Court, having considered the evidence, the extensive briefing, the proposed findings of fact and conclusions of law, and applicable legal authority, makes the following findings of fact and conclusions of law and issues the following order:

I. PROCEDURAL BACKGROUND[1]

1. On September 6, 2023, Petitioners filed their Verified Petition under C.R.S. §§ 1-4-1204, 1-1-113, 13-51-105 and C.R.C.P. 57(a). Petitioners alleged two claims for relief. First, they asserted a claim against the Secretary pursuant to C.R.S. § 1-4-1204 and § 1-1-113. Second, they requested declaratory relief against both the Secretary and Trump. The declaratory relief requested included a declaration that Trump was not constitutionally eligible for the office of the presidency.

2. On September 7, 2023, Trump filed a notice of removal to the United States District Court for the District of Colorado. On September 12, 2023, the United States District Court for the District of Colorado remanded the case, finding that the Secretary was not a nominal party whose consent to remove was permissive.

3. CRSCC filed a motion to intervene on September 14, 2023. This Court granted that motion on September 18, 2023.

4. On September 22, 2023, Trump filed a Special Motion to Dismiss Pursuant to C.R.S. § 13-20-1101(3)(a) ("Trump Anti-SLAPP Motion"). In that motion,

[1] The Court adopts and incorporates all its prior rulings in this Order.

Trump argued that this case is subject to Colorado's anti-SLAPP statute because Petitioners' claims all stem from protected speech or the refusal to speak and because the speech concerned election fraud and a hard-fought election, they are the epitome of public issues. Trump further argued Petitioners were unable to establish a reasonable likelihood of success on their claims. As a result, Trump argued, the Court must dismiss the claims.

5. Also on September 22, 2023, Trump separately moved to dismiss Petitioners' claims ("Trump Procedural Motion to Dismiss"). Specifically, Trump argued: (1) Petitioners may not litigate constitutional claims in a C.R.S. § 1-1-113 proceeding; (2) the C.R.S. § 1-4-1204 claim was not ripe; (3) C.R.S. § 1-4-1204 does not provide grounds to use the Fourteenth Amendment to bar candidates; and (4) there is no standing on the declaratory judgment claim because there is no particularized or concrete injury. On September 29, 2023, the Petitioners responded to the Trump Procedural Motion to Dismiss. In that Response, the Petitioners agreed to dismiss their declaratory judgment claim. This Court has since dismissed Petitioners' claim for declaratory judgment.

6. Also, on September 22, 2023, CRSCC filed a Motion to Dismiss Pursuant to Colorado Rule of Civil Procedure 12(b)(5) ("CRSCC Motion to Dismiss"). In that motion, CRSCC argued: (1) the Petition infringes on CRSCC's first amendment rights; (2) the Secretary's role in enforcing C.R.S. § 1-4-1204 is ministerial; and (3) the C.R.S. § 1-4-1204 claim is not ripe. The motion also previewed additional arguments that Trump

made in a subsequent motion to dismiss on whether the Fourteenth Amendment can be used to keep Trump off the ballot.

7. Finally, also on September 22, 2023, Petitioners moved to dismiss CRSCC's First Claim for Relief ("Petitioners' Motion to Dismiss"). The Petitioners argued that the CRSCC's First Claim for Relief was inappropriate in a C.R.S. § 1-1-113 proceeding because it is a constitutional challenge to the election code.

8. On September 29, 2023, Trump filed an additional motion to dismiss. This motion to dismiss addressed various constitutional arguments regarding why the Petitioners' Fourteenth Amendment arguments fail ("Fourteenth Amendment Motion to Dismiss"). In that motion, Trump argues: (1) this case presents a nonjusticiable political question; (2) Section Three of the Fourteenth Amendment is not self-executing; (3) Congress has preempted states from judging presidential qualifications; (4) Section Three does not apply to Trump; (5) Petitioners fail to allege that Trump "engaged" in an "insurrection;" and (6) this is an inconvenient forum under C.R.S. § 13-20-1004.

9. Finally, on September 29, 2023, CRSCC filed a Motion for Judgment on the Pleadings under Rule 12/Judgment as a Matter of Law Under Rule 56 ("CRSCC Motion for Judgment"). This motion essentially argued that this Court should grant all the relief CRSCC requested in its Petition based on the Petition alone. This included its requests that this Court declare: (1) the relief Petitioners request is a violation of their First Amendment rights; (2) the Secretary does not have authority to preclude the placement of Trump on Colorado's ballot pursuant to the Fourteenth Amendment; and

(3) only the CRSCC has the authority to determine who is qualified to be on Colorado's ballot as a Republican candidate.

10. On October 5, 2023, the Court granted Donald J. Trump's motion to intervene.

11. On October 11, 2023, the Court denied the Trump Anti-SLAPP Motion on the basis that the anti-SLAPP statute did not apply to this case.

12. On October 20, 2023, the Court issued its Omnibus Ruling on the Pending Dispositive Motions. The Court denied the Trump Procedural Motion to Dismiss, finding Petitioners' claim procedurally proper under C.R.S. § 1-1-113 and ripe for decision under C.R.S. § 1-4-1204. The Court further found that the issue of whether an elector can make a Fourteenth Amendment challenge under C.R.S. § 1-4-1204 was an issue to be preserved for trial. The Court denied the CRSCC Motion to Dismiss, finding that if a political party puts forth a constitutionally ineligible candidate, and if the Secretary of State has the legal authority to vet candidate fitness, the First Amendment is not violated if the State disqualifies that candidate on the grounds of his ineligibility. The Court denied the CRSCC Motion for Judgment, finding it premature. Finally, the Court granted Petitioners' Motion to Dismiss, finding the only relief the Court can afford in a C.R.S. § 1-1-113 proceeding is an order to comply with the Election Code and that the CRSCC's request for declaratory judgment was improper.

13. On October 25, 2023, by separate order, this Court denied Trump's Fourteenth Amendment Motion to Dismiss. First, the Court declined to dismiss the case under the political question doctrine, reserving the issue of whether presidential

eligibility has been delegated to the United States Congress for its final ruling following the presentation of evidence and argument at trial.[2] Next, the Court held that to the extent the Court holds that C.R.S. § 1-4-1204 allows the Court to order the Secretary to exclude a candidate under the Fourteenth Amendment, states can, and have, applied Section Three pursuant to state statutes without federal enforcement legislation. As to Trump's argument that Congress has preempted states from judging presidential qualifications, the Court further declined to dismiss the action based on field preemption. Finally, the Court found Trump had failed to establish dismissal based on *forum non conveniens*. The Court reserved the issues of whether Section Three of the Fourteenth Amendment applies to Trump and whether Trump engaged in an insurrection for its ruling following trial.

14. Trump filed a Motion to Realign the Secretary as a Petitioner, arguing that the Secretary was acting as a Petitioner and should be realigned so that Trump could appeal her decisions, ensure a proper order of proof, and, if necessary, cross-examine the Secretary's witnesses. On October 23, 2023, this Court held that the Secretary, in the context of this litigation, is not antagonistic such that a realignment was

[2] The Court held it would revisit this ruling to the extent that there was any evidence or argument at trial that provided the Court with additional guidance on whether the issue of presidential eligibility has been delegated to the United States Congress. The Court holds that no evidence or arguments made since its initial ruling on this issue has changed its analysis. Specifically, the Court has reviewed the Honorable Judge Redford's rulings in *LaBrant v. Benson*, Case No. 23-137-MZ (Mich. Ct. Cl. November 14, 2023) and *Castro v. New Hampshire Sec'y of State*, No. 23-CV-416-JL, 2023 WL 7110390 (D.N.H. Oct. 27, 2023) and notes that they rely heavily on certain constitutional provisions and 3 U.S.C. § 15 as providing a textual commitment to a coordinate political branch. This Court has already undertaken that analysis and disagrees. If Intervenors could point to a *clear* textual commitment to Congress, this Court would readily hold that the questions this case presents have been delegated in the Constitution to Congress.

appropriate. The Court further noted it had previously held the Secretary's time would be counted against Petitioners, that Trump was permitted to put on a case, and that all Parties would further be allowed to cross-examine all other Parties' witnesses, except for Intervenors cross-examining each other's witnesses.

15. On October 25, 2023, Trump filed a brief regarding the standard of proof for trial. Petitioners filed a response brief on October 27, 2023. This Court addressed those briefs in its October 28, 2023 Order, holding that pursuant to *Santosky v. Kramer*, 455 U.S. 745, 754 (1982), while Intervenor Trump has a clear interest in being on Colorado's ballot, that interest does not rise to the level of a fundamental liberty interest. The Court thus determined to apply the burden of proof prescribed in C.R.S. § 1-4- 1204(4) at trial.

16. In its Order re: Donald J. Trump's Motion *in limine* to Exclude Petitioners' Anticipated Exhibits issued October 27, 2023 ("Exhibits MIL Order"), this Court held that the Final Report, Select Committee to Investigate the January 6th Attack on the United States Capitol, HR 117-663, 117th Cong., 2d Sess. (Dec. 22, 2022) ("January 6th Report") was conditionally admissible in this matter subject to the information elicited from the cross-examination of Timothy Heaphy and the testimony of Congressman Troy Nehls.[3]

17. The Court issued its Order Re: Intervenor Trump's Objections to Specific Findings Contained in January 6th Report on October 29, 2023. In that Order, the Court made specific and conditional determinations as to which findings were excluded

[3] Intervenors ultimately did not call Congressman Nehls, but the Court did consider his previously submitted declaration.

pursuant to the Colorado Rules of Evidence, further stating that "[t]o the extent the parties believe the Court has egregiously or inadvertently erred in its ruling here, they can still argue for admissibility or inadmissibility in their proposed findings of fact, conclusions of law."

18. The matter proceeded to a five-day trial beginning on October 30, 2023 and concluding on November 3, 2023 (the "Hearing"). On November 15, 2023, the parties presented their closing arguments.

19. Petitioners, the Secretary, and the Intervenors provided this Court with proposed findings of fact and conclusions of law. The Court has incorporated some of the Parties' proposed findings of fact and conclusions of law, in whole or in part, but only after careful consideration and adoption.

II. JANUARY 6TH REPORT

20. At the Hearing and in their proposed findings of fact and conclusions of law, Intervenors renewed their objections to the admission of the January 6th Report into evidence. The Court hereby makes its final decision regarding the admissibility of the January 6th Report.

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

22. Citing to *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988) and the Federal Advisory Committee Notes to C.R.E. 803(8)'s federal analogue, the Court in *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, 96 (D.D.C. 2006) noted that the Rule assumes admissibility in the first instance. "Hence, the party challenging the admissibility of a public or agency report. . . bears the burden of demonstrating that the report is not trustworthy." *Barry*, 467 F.Supp.2d at 96. The Court then examined four factors first articulated in *Beech Aircraft Corp.*, 488 U.S. at 167, n. 11 which are meant to assist courts in assessing a report's trustworthiness: "(1) the timeliness of the investigation; (2) the special skill or expertise of the investigating official; (3) whether a hearing was held and the level at which it was conducted; and (4) possible motivation problems." *Barry*, 467 F.Supp.2d at 97. The Court in *Barry* further instructed that when examining the factors, a court must focus on whether the report was prepared in a reliable manner instead of whether the Court agrees with the conclusions. 467 F.Supp.2d at 97 (ci*ting Moss v. Ole S. Real Estate, Inc.*, 933 F.2d 1300, 1306-07 (5th Cir. 1991)).

23. In addition to the four factors, *Barry* instructs that "Congressional reports are not entitled to an additional presumption of trustworthiness or reliability–beyond the one already established in the Advisory Committee Notes—simply by virtue of having been produced by Congress." *Id.* at 98. Further, courts should look to whether members of both parties joined in the report. *Id.*

24. The question before this Court is whether Intervenors have overcome the presumptive admissibility of the January 6th Report. The Court holds that the first three *Barry* factors weigh strongly in favor of reliability. The investigation started approximately six months after the events of January 6, 2021 and ended less than two years after the events took place. As a result, "the passage of time in no way detracts from the report's reliability." *Id.* at 100. The investigation was conducted by a well-staffed, highly skilled group of lawyers (including a Republican U.S. Attorney) and led by a former U.S. Attorney. There was a hearing conducted over ten days and 70 witnesses testified—all of whom testified under oath. The Select Committee had large volumes of records that it independently evaluated when crafting its final report. None of these findings were contradicted by evidence presented at the Hearing.

25. Much of the evidence and argument presented at the Hearing centered around the fourth *Barry* factor: possible motivation problems. Intervenors' arguments against the admissibility of the January 6th Report are that: (1) all nine members of the committee were biased against Trump and held a "deep personal animus" towards him; and (2) there was a lack of involvement by the minority party (the Republican Party in this instance) and therefore a lack of opportunity for effective dissent.

26. Through his cross-examination of Mr. Heaphy, Trump presented evidence that prior to the formation of the January 6th Committee numerous members of the January 6th Committee had expressed disdain for Trump and indicated that they believed that he was responsible for the events of January 6, 2021. Mr. Heaphy confirmed that the January 6th Committee members made these statements but

testified that these statements merely indicated that the committee members had formed a hypothesis as to what had led to the events of January 6, 2021. 11/03/2023 Tr. 186:2-7. Mr. Heaphy further testified that although the committee members had developed this hypothesis, they remained open to whatever conclusions were supported by the evidence uncovered in the investigation. 11/03/2023 Tr. 210:11-19. The Court finds Mr. Heaphy's testimony on this subject to be credible and holds that any perceived animus of the committee members towards Trump did not taint the conclusions of the January 6th Report in such a way that would render them unreliable.[4]

27. Furthermore, the idea that any amount of political bias would render the January 6th Report untrustworthy for the purposes of C.R.E. 803(8) is incompatible with the case law surrounding the admissibility of Congressional reports.

28. As Congressman Ken Buck testified, all (or at least nearly all) Congressional investigations have some measure of political bias or motivation underlying them. 11/02/2023 Tr. 229:4-10. However, courts have admitted Congressional reports subject to their reliability for decades. *See Barry*, 467 F.Supp.2d at 101 (admitting report from a Senate investigation); *Mariani v. United States*, 80 F.Supp.2d 352, 361 (M.D. Pa. 1999) (admitting minority report from a Congressional investigation); *Hobson v. Wilson*, 556 F. Supp. 1157, 1183 (D.D.C. 1982), *aff'd in part, rev'd in part*, 737 F.2d 1 (D.C. Cir. 1984) (admitting Congressional Committee report);

[4] The Court further notes that nearly all Congressional investigations are initiated because there is something to investigate, *i.e.*, Congress does not investigate events where it does not think something wrong occurred. In this way, Congressional investigations operate somewhat like a police investigation. The fact that the Committee members thought that Trump had instigated the attacks does not necessarily translate to the Committee not turning over every stone and thoroughly investigating the events before reaching its ultimate conclusions.

McFarlane v. Ben-Menashe, No. 93-1304(TAF), 1995 WL 129073, at *5 (D.D.C. Mar. 16, 1995), *withdrawn in part on reconsideration*, No. 93-1304(TAF), 1995 WL 799503 (D.D.C. June 13, 1995), *aff'd sub nom. McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501 (D.C. Cir. 1996) (admitting Congressional Task Force report). Based on the foregoing case law, it would be inappropriate to exclude the January 6th Report simply because it was in part politically motivated. The relevant inquiry is instead whether the report is reliable and trustworthy based upon the factors articulated in *Barry*.

29. Intervenors argue that the composition of the January 6th Committee demonstrates underlying motivation problems. Specifically, Intervenors argue that because the January 6th Committee was made up of 7 Democrats and only 2 Republicans (who, as previously discussed, Trump argues were biased against him), there was no meaningful input from the minority party in the investigation. Petitioners respond that the composition of the January 6th Committee was the result of two events: (1) Senate Republicans' refusal to vote for an independent and bipartisan commission; and (2) Republicans' decision to boycott the January 6th Committee altogether when then-Speaker of the House Nancy Pelosi refused to seat two of the five choices Republicans put forth to sit on the January 6th Committee.

30. While the Court agrees with Intervenors that the January 6th Report would have further reliability had there been greater Republican participation, the events pointed to by Petitioners demonstrate that the Republicans had a meaningful opportunity to participate but simply chose not to do so. While the Court is cognizant that then-Speaker Pelosi rejected two of the five recommended Republicans for the

Committee that the Minority Leader put forth and that she admitted this decision was "unprecedented," the fact that the congressional Republicans chose not to seat the three Republican members that Speaker Pelosi was agreeable to seating or to nominate a new slate of potential members and instead chose to boycott the Committee is not a valid reason to reject the January 6th Report in total. This is especially true where Congressman Buck testified that he had asked to be placed on the January 6th Committee after then-Speaker Pelosi rejected two of the five Republican nominees, but his request was turned down by Republican Party leadership. 11/02/2023 Tr. 213:3-14.

31. Furthermore, the two Republicans who did sit on the January 6th Committee – Former Reps. Elizabeth Cheney and Adam Kinzinger – were both duly elected Republicans; Congressman Kinzinger was elected six times and Congresswoman Cheney was elected three times. Prior to January 6, 2021, Congresswoman Cheney also served as the chair of the House Republican Conference which is the third highest position in House Republican Leadership.

32. The investigative counsel for the January 6th Committee was also highly qualified. Mr. Heaphy was the chief investigative counsel for the Select Committee. Mr. Heaphy is a former U.S. Attorney with significant experience. The investigative staff included 20 lawyers which Mr. Heaphy noted included many Republicans. Importantly, the staffing decisions did not include any inquiry into political affiliation. 11/03/2023 Tr. 153:24-154:9.

33. The Committee and its investigative staff interviewed or deposed more than 1,000 witnesses, collected, and reviewed over 1 million documents, reviewed

hundreds of hours of video footage, and reviewed 60 federal and state court rulings related to the 2020 election. Trump was subpoenaed, and he refused to comply with the subpoena. The overwhelming majority of witnesses who the January 6th Committee interviewed or deposed were Trump administration officials and Republicans. These witnesses included many of the witnesses that testified at the Hearing.

34. The findings of the January 6th Committee were unanimous, which is why there was not a minority report. This includes the two Republicans who sat on the Committee. These facts all cut against Intervenors' argument that lack of participation of the minority party resulted in the January 6th Report reaching unreliable conclusions.

35. As to Intervenors' arguments that the January 6th Committee's disregard of certain evidence indicates that the investigators were prejudiced against him, the Court finds such arguments unavailing. No evidence was presented at the Hearing that the January 6th Committee or its staff coerced witness testimony, refused to hear testimony they did not want to hear, or disregarded credible exculpatory evidence. Instead, the evidence presented at the Hearing demonstrated that the January 6th Committee heard and reviewed all evidence put before it. The only evidence presented at the Hearing that could arguably show a disregard of certain evidence by the Committee is the fact that the Committee simply chose not to credit certain testimony as credible.[5]

[5] The only potential evidence presented at the Hearing of the Committee disregarding testimony is Mr. Patel's testimony concerning the authorization of 10,000-20,000 National Guardsmen (which the Court has found incredible for reasons detailed below) and Congressman Buck's testimony that apparently Congressman Jim Jordan told Congressman Buck, when courting his

36. However, as is the case in judicial proceedings and administrative law, such a determination is the purpose of a factfinder. *See, e.g.*, *People ex rel. S.G.*, 91 P.3d 443, 452 (Colo. App. 2004) ("The fact finder is entitled to reject part of a witness's testimony that it finds to be untruthful and still accept other parts that it finds to be credible."); *People v. Liggett*, 114 P.3d 85, 90 (Colo. App. 2005) ("A fact finder may believe all, some, or none of a witness's testimony.").

37. Furthermore, while Trump spent much time contesting potential biases of the Committee members and their staff, he spent almost no time attacking the credibility of the Committee's findings themselves. The Hearing provided Trump with an opportunity to subject these findings to the adversarial process, and he chose not to do so, despite frequent complaints that the Committee investigation was not subject to such a process.[6] Because Trump was unable to provide the Court with any credible evidence which would discredit the factual findings of the January 6th Report, the Court has difficulty understanding the argument that it should not consider its findings which are admissible under C.R.E. 803(8).

---

vote for Speaker of the House, that he did not refuse to sit for an interview with the January 6th Select Committee. The Court did not consider this testimony because it is hearsay and the Court cannot think of any possible exception to the hearsay rule that would allow its consideration.

[6] The Court notes that while Trump has repeatedly suggested he was not afforded due process, at no point did he ask the Court for any relief on this basis that the Court denied and in fact only used approximately twelve hours and fifteen minutes of the eighteen hours provided to him at the Hearing (or, approximately two-thirds of the allotted time). Further, the Court offered to hear additional witness testimony outside the 5-day hearing if there were any witnesses who were not able to testify between October 30, 2023 and November 3, 2023.

38. Considering the foregoing, the Court holds that the January 6th Report is reliable and trustworthy and thereby admissible pursuant to C.R.E. 803(8). Despite this ruling, the Court wishes to emphasize that it has only considered those portions of the January 6th Report which are referenced in this Order and has considered no other portions in reaching its decision.[7]

III. HEARING TESTIMONY

39. Officer Daniel Hodges testified on behalf of the Petitioners. Daniel Hodges is an officer with the Metropolitan Police Department of Washington, D.C. Daniel Hodges was on duty on January 6, 2021 and testified to his experiences on January 6, 2021 where he was initially monitoring the Stop the Steal Rally at the Ellipse. He ultimately was deployed to the Capitol to reinforce the defenses there—to prevent people from gaining entry to the Capitol. Officer Hodges testified in detail regarding being attacked with a variety of weapons including flagpoles, stolen riot batons, police shields, bike rack barriers, pepper spray, and chemical irritants. Officer Hodges walked the Court through a variety of videos from the body camera he wore that day. The Court found Officer Hodges's testimony to be credible. The Court gave weight to Officer Hodges's testimony in finding that there was an insurrection and that the mob was there on Trump's behalf.

[7] The Court notes that the Petitioners originally submitted 411 findings from the January 6th Report. The Court previously held that 143 of those findings were inadmissible. In their proposed findings of fact and conclusions of law, Petitioners submitted 98 findings. The Court has considered and cited 31 of those findings in this Order.

40. Congressman Eric Swalwell testified on behalf of the Petitioners. Congressman Swalwell testified regarding his experience with two prior electoral college certifications as well as the 2020 electoral college certification. He also recounted his experience on the house floor during the attack on the Capitol on January 6, 2021 which took place during the electoral college certification. He recounted his role in the impeachment of Trump for the events of January 6, 2021. The Court holds that Congressman Swalwell's testimony regarding his experience during the attack on the Capitol was credible. The Court gave weight to Congressman Swalwell's testimony in finding that there was an insurrection.

41. Officer Winston Pingeon testified on behalf of the Petitioners. Officer Pingeon was a police officer for the United States Capitol Police on January 6, 2021. That day, he was assigned to the Civil Disturbance Unit with a group of about 25 officers. He was originally staged in what he described as the truck tunnel, but the group was told to put on their riot gear because the outer perimeter lines of the Capitol had been breached. When they arrived, members of the mob assaulted, pushed, and pepper sprayed him and his fellow officers. Officer Pingeon described engaging in hand-to-hand combat for up to three hours while he and the other officers tried to fend off the attackers. The Court holds that Officer Pingeon's testimony was credible. The Court gave weight to Officer Pingeon's testimony in finding that there was an insurrection and that the mob was there on Trump's behalf.

42. Professor Peter Simi testified on behalf of the Petitioners. Professor Simi is a professor of sociology at Chapman University. The Court qualified Professor Simi as

an expert in political extremism, including how extremists communicate, and how the events leading up to and including the January 6, 2021 attack relate to longstanding patterns of behavior and communication by political extremists. Professor Simi has been studying political extremism, political violence, and the communication styles of far-right political extremists for twenty-seven years. He has conducted these studies in three ways: (1) fieldwork (which is spending time embedded with extremists in their natural environments); (2) formal interviews; and (3) archival (collecting information). He testified that he has spent thousands of hours doing fieldwork including with the three primary perpetrators of the January 6, 2021 attack: Oath Keepers, Proud Boys, and Three Percenters. He further testified that he has interviewed 217 right wing extremists and that fourteen of those interviews were with Oath Keepers, Proud Boys, and Three Percenters. Finally, he testified he's spent thousands of hours doing archival research and that research included all three groups. The Court finds that Professor Simi's testimony was credible and helped the Court understand that while Trump's words both before and after January 6, 2021 might seem innocuous to the average listener, they would be interpreted differently by political extremists. The Court gave weight to Professor Simi's testimony in finding that Trump intended and incited the violence on January 6, 2021.

43. Professor William Banks testified on behalf of the Petitioners. Professor Banks is a law professor at Syracuse University teaching classes in constitutional law, national security law, counterterrorism law, and the domestic role of the military. In 2003, he founded the Institute for National Security and Counterterrorism. He has also

advised the Department of Defense and civilian agencies providing for emergency preparedness and response exercises to better prepare for crisis situations. He has written between thirty and forty books and articles on the President's authority to respond to domestic security threats. The Court qualified Professor Banks as an expert on the President's powers to stop domestic attacks on the government and the authorities that then-President Trump had to call on to stop the attack on January 6, 2021. The Court finds that Professor Banks's testimony was credible and helpful to understand the authority then-President Trump had over the D.C. National Guard as well as any authority he had over the National Guard in the adjoining states. The Court gave weight to Professor Banks's testimony in finding that Trump had the authority to call in reinforcements on January 6, 2021, and chose not to exercise it, thereby recklessly endangering the lives of law enforcement, Congress, and the attackers on January 6, 2021.

44. Professor Gerard Magliocca testified on behalf of the Petitioners. Professor Magliocca is a law professor at the Indiana University, Robert H. McKinney School of Law with a focus on constitutional history. Professor Magliocca has been studying the history of the Fourteenth Amendment for several years and in 2020 wrote a paper on Section Three of the Fourteenth Amendment. The Court qualified Professor Magliocca as an expert in the history of Section Three of the Fourteenth Amendment. The Court finds that Professor Magliocca's testimony clarified the history of Section Three of the Fourteenth Amendment. The Court gave weight to Professor Magliocca's testimony in finding that Trump engaged in insurrection. The Court gave weight to

Professor Magliocca's testimony, but ultimately rejected it, regarding whether Section Three of the Fourteenth Amendment applies to former President Trump.

45. Hilary Rudy testified on behalf of the Petitioners. Ms. Rudy is Colorado's Deputy Elections Director. She has held that position since 2013 and has worked full time for the Secretary of State since 2006. The Court finds that Ms. Rudy was knowledgeable about how the Secretary of State's office has traditionally handled qualification issues. Her demeanor was very matter of fact, and it was clear that her goals were apolitical.[8] She was extremely credible. The Court gave weight to Ms. Rudy's testimony regarding the historical practices of the Secretary of State's office including when it would traditionally prevent ballot access and when it would not.

46. Timothy Heaphy testified on behalf of the Petitioners. Mr. Heaphy was the former chief investigative counsel for the January 6th Select Committee. Mr. Heaphy was an assistant U.S. Attorney from 1991-2006, moved to private practice where he did white-collar defense until President Obama appointed him as U.S. Attorney for the Western District of Virginia–a position he held from 2009-2015. In 2017, the City of Charlottesville hired him to investigate the deadly Unite the Right rally. He worked for the January 6th Select Committee from June 2021 through December 2022. The Court found Mr. Heaphy to be a qualified and seasoned investigator. The Court found his testimony regarding the inner workings of the Select Committee to be credible. The Court gave weight to Mr. Heaphy's testimony in deciding to admit specific findings in the January 6th Report.

[8] The Court notes that Ms. Rudy was not made available to the Petitioners prior to the hearing. She prepared for her testimony with the Deputy Secretary of State.

47. Kash Patel testified on behalf of Intervenor Trump. Mr. Patel was the former Chief of Staff to the acting Secretary of Defense on January 6, 2021. Mr. Patel testified that on January 3, 2021, then-President Trump authorized 10,000-20,000 National Guard forces. He also testified about his experiences with the January 6th Select Committee including that he gave a deposition to the Committee. The Court finds that Mr. Patel was not a credible witness. His testimony regarding Trump authorizing 10,000-20,000 National Guardsmen is not only illogical (because Trump only had authority over about 2,000 National Guardsmen) but completely devoid of any evidence in the record.[9] Further, his testimony regarding the January 6th Committee refusing to release his deposition and refusing his request to speak at a public hearing was refuted by Mr. Heaphy who was a far more credible witness. The Court did not give any weight to Mr. Patel's testimony other than as evidence that the January 6th Select Committee interviewed many of Trump's supporters as part of its extensive investigation.

48. Katrina Pierson testified on behalf of Intervenor Trump. Katrina Pierson was a senior advisor to both of Trump's presidential campaigns. Ms. Pierson tried to intervene regarding internal disputes that had arisen regarding the January 6, 2021 rally. According to Ms. Pierson's testimony, at a January 5, 2021 meeting at the White House, Trump agreed with her position that the speakers at the January 6, 2021 rally should not include inflammatory speakers such as Alex Jones and Ali Alexander. She

[9] Trump, as commander of the D.C. National Guard, only had direct authority over around 2,000 Guardsmen. To mobilize 10,000-20,000 Guardsmen, he would have had to contact the Governors of other States and they would have had to then give orders, or he would have had to federalize the Guardsmen from those States. In either case, there would have been significant official action taken. No record of such action was produced at the Hearing.

also testified that Trump told someone in the room at the same meeting that he wanted "10,000 National Guards." The Court has no reason to disbelieve this testimony but mentioning 10,000 National Guardsmen is not the same as authorizing them. Finally, she testified that she spoke with the January 6, 2021 committee for nineteen or twenty hours. The Court finds that Ms. Pierson was credible, and the Court believes her testimony that in a meeting on January 5, 2021, Trump chose the speakers for the January 6, 2021 rally. The Court gave weight to Ms. Pierson's testimony in finding that Trump chose the speakers on January 6, 2021, that he knew radical political extremists were going to be in Washington, D.C. on January 6, 2021 and likely attending his speech, and that the January 6th Committee extensively interviewed witnesses who were Trump supporters.

49. Amy Kremer testified on behalf of Intervenor Trump. Ms. Kremer is the founder of Women for America First. Her group hosted the January 6, 2021 rally at the Ellipse. Ms. Kremer's testimony was like Ms. Pierson's in that she worked with Ms. Pierson to keep the people she described as "whackos" from speaking at the Ellipse. The reason she did not want "whackos" to speak at the Ellipse is because she was worried they might incite violence. She testified that from where she stood on the stage of the Ellipse, she did not witness any violence. Ms. Kremer acknowledged that she remained by the event stage throughout the rally, did not interact with anyone outside the security perimeter at the rally, and was unaware that in response to Trump's speech, some people in the crowd yelled "storm the Capitol," "take the Capitol," and "take the Capitol right now." She personally did not walk with the crowd to the Capitol and did not go to

the Capitol but instead returned to her hotel immediately after Trump's speech. Ms. Kremer also testified before the January 6th Committee. The Court found Ms. Kremer to be credible but found her testimony to be largely irrelevant other than that she was concerned about speeches at the Ellipse inciting violence and that the January 6th Select Committee interviewed many Trump supporters.

50. Tom Van Flein testified on behalf of Intervenor Trump. He is the chief of staff for Congressman Paul Gosar. He testified that he and the Congressman and his wife attended the January 6, 2021 rally at the Ellipse from about 8:30 a.m. to 10:30 a.m. (more than 2 full hours before Trump spoke) and did not see any violence. The Court found his testimony to be credible but largely irrelevant.

51. Tom Bjorklund testified on behalf of Intervenor Trump. He is the Colorado Republican Party Treasurer. Mr. Bjorklund attended the January 6, 2021 rally at the Ellipse. Mr. Bjorklund showed the Court several pictures and videos he took on that day. Mr. Bjorklund testified that he was not close to the stage at the Ellipse during the rally. He then marched to the Capitol and claimed he did not see any violence despite acknowledging he saw people smashing the windows of the Capitol to gain access. The Court found Mr. Bjorklund's testimony that he did not see any violence to be not credible given he saw people breaching the Capitol through windows they'd smashed. Further, Mr. Bjorklund's testimony that Antifa was involved in the attack lacked credibility and was evidence of his inability to discern conspiracy theory from reality. The Court only gave weight to Mr. Bjorklund's testimony that not all the

protestors were violent and that he understood Trump to be directing the crowd to the Capitol and that he followed that direction.[10]

52. Congressman Ken Buck testified on behalf of Intervenor Trump. Congressman Buck testified about his experience on January 6, 2021, when the Capitol was attacked as well as his views regarding the reliability of the January 6th Report. Congressman Buck also testified that he was not particularly scared during the attack on the Capitol but admitted that was because he did not have a cell phone and did not realize the extent of the attack. The Court found Congressman Buck to be a credible witness. The Court gave weight to Congressman Buck's testimony that Congressional reports are inherently political, and that Minority Leader Kevin McCarthy actively prevented the January 6th Committee from being bipartisan including when he rejected Congressman Buck's request to be on the Committee.

53. Professor Robert Delahunty testified on behalf of Intervenor Trump. Professor Delahunty is a constitutional law professor. The Court qualified Professor Delahunty as an expert in constitutional law and the application of historical documents to 19th-century statutes and constitutional provisions. Professor Delahunty was offered to rebut the opinions of Professor Magliocca, and while he had nowhere near the expertise of Professor Magliocca, he offered opinions that were helpful to the Court in

[10] The Court notes that it is uncontested that not all attendees of Trump's January 6, 2021 speech heard it as a call to violence. That is consistent with Professor Simi's testimony that the language of political extremists is coded so that there is plausible deniability.

assessing the historical context in which Section Three of the Fourteenth Amendment was ratified.[11]

IV. FINDINGS OF FACT[12]

A. THE PARTIES

54. Petitioners Norma Anderson, Michelle Priola, Claudine Cmarada, and Krista Kafer are each registered voters affiliated with the Republican Party who reside in Colorado. Joint Stipulated Facts ("Stipulation") ¶¶ 1–4. Petitioners Kathi Wright and Christopher Castilian are each registered voters unaffiliated with any political party who reside in Colorado. *Id.* ¶¶ 5–6. Each are eligible electors as defined in C.R.S. § 1-1-104(16).

55. Respondent Jena Griswold is the Secretary of State of Colorado and is sued solely in her official capacity. *Id.* ¶ 7.

56. Intervenor Donald J. Trump served as 45th President of the United States from January 20, 2017, to January 20, 2021. *Id.* ¶ 8. On January 20, 2017, Trump took the Presidential Oath of Office, swearing to "faithfully execute the Office of President of

[11] The Intervenors seem to have largely abandoned Professor Delahunty's testimony and cite it only once in their 177 pages of proposed findings of fact and conclusions of law. The citation is for the proposition that the omission of the word "incite" from Section Three means that incitement was not meant to be a form of engagement.

[12] The Court is denying Petitioners the relief they request on legal grounds. Because of the Parties' extraordinary efforts in this matter, the Court makes findings of facts and conclusions of law on all remaining issues before it. The Court does so because it is cognizant that to the extent the Colorado Supreme Court decides to review this matter, it may disagree with any number of the legal conclusions contained in this Order and the Orders that precede it. The Court has endeavored to give the Colorado Supreme Court all the information it needs to resolve this matter fully and finally without the delay of returning it to this Court.

the United States," and "to the best of [his] Ability, preserve, protect and defend the Constitution of the United States." U.S. CONST. art. II, § 1, cl. 8; Stipulation ¶ 9.

57. Trump was a candidate for re-election in 2020. Stipulation ¶ 10.

58. On November 15, 2022, Trump publicly announced his 2024 presidential campaign. *Id.* ¶ 16.

59. On October 11, 2023, the Secretary received a notarized statement of intent from Trump to appear on the presidential primary ballot, along with the required filing fee and the Colorado Republican Party's approval of his candidacy as required under C.R.S. § 1-4-1204(1). *Id.* ¶ 17.

60. Intervenor CRSCC is an unincorporated nonprofit association and political party committee in the state of Colorado, operating under Colorado law. State Party's Verified Petition in Intervention ¶ 5.

B. TRUMP'S HISTORY WITH POLITICAL EXTREMISTS

61. As noted above, Petitioners called an expert in political extremism, Professor Peter Simi. Professor Simi has a Ph.D. in Sociology, teaches at Chapman University, and has spent his 27-year career focused on political violence and extremism. 10/31/23 Tr. 11:15–12:12. He has written two books on political violence and extremism—*American Swastika* and *Out of Hiding*—and published over sixty peer-reviewed articles or book chapters on different facets of political violence and extremism. 10/31/23 Tr. 21:15–23:2. He has provided training on political extremism and violence to the Federal Bureau of Investigation, Department of Homeland Security,

the Federal Bureau of Prisons, the Department of Justice, and several state and local law enforcement agencies across the country. 10/31/23 Tr. 23:20–24:6.

62. Professor Simi reviewed Trump's relationship with his supporters over the years, identified a pattern of calls for violence that his supporters responded to, and explained how that long experience allowed Trump to know how his supporters responded to his calls for violence using a shared language that allowed him to maintain plausible deniability with the wider public. 10/31/23 Tr. 56:23–59:17, 200:22–203:12.

63. Trump himself agrees that his supporters "listen to [him] like no one else." Ex. 134. Amy Kremer also testified that Trump's supporters are "very reactive" to his words. 11/02/2023 Tr. 49:4–6.

64. Professor Simi testified about the following examples of patterns of call-and-response that Trump developed and used to incite violence by his supporters.

65. At an October 23, 2015 rally, Trump said to his supporters in response to protestors disrupting the rally, "See, the first group, I was nice . . . The second group, I was pretty nice. The third group, I'll be a little more violent. And the fourth group I'll say, 'Get the hell outta here!'" Ex. 127.

66. The next month, Trump used this very language, telling his supporters to "get [a protester] the hell out of here" and the protester was then assaulted. When asked about the attack the next day, Trump said "maybe [the protester] should have been roughed up." Ex. 50; 10/31/2023 Tr. 70:1–4, 71:13-72:1, 235:3–10.

67. At a February 2016 rally, Trump told his supporters to "knock the crap out of" any protesters who threw tomatoes and promised to pay the legal fees of anyone carrying out the assault. Ex. 51; 10/31/2023 Tr. 213:14–25.

68. At another February 2016 rally, Trump told his supporters that, in the "old days" a protester would be "carried out on a stretcher," and that he would like to "punch him in the face." Ex. 52; 10/31/2023 Tr. 214:6–25.

69. When asked about his supporters' violent acts in March 2016, Trump said the violence was "very, very appropriate" and that "we need a little bit more of" it. Ex. 53; 10/31/2023 Tr. 67:6–25.

70. At an August 2016 rally, Trump noted "Second Amendment people" might be able to prevent Hillary Clinton (if elected President) and judges appointed by her from interpreting the Constitution in unfavorable ways. Ex. 159.

71. In August 2017, when asked about the white supremacist Unite the Right rally in Charlottesville, Virginia, where a counter-protester was murdered, Trump stated there "was blame on both sides . . . some very fine people on both sides." Ex. 56; 10/31/2023 Tr. 68:12–20.

72. Far-right extremists, including David Duke, Richard Spencer, and Andrew Anglin, thanked Trump for his comments and took them as an endorsement, notwithstanding Trump's condemnation of neo-Nazis and white supremacists in the same speech. Professor Simi testified that the latter statement would be understood as plausible deniability. 10/31/2023 Tr. 68:21–69:16, 74:18–75:9, 166:9–20, 226:11–227:7.

73. At an October 2018 rally, Trump referred to a candidate who body slammed a reporter as "my kind of guy." Ex. 57; 10/31/2023 Tr. 215:22–216:5.

74. At a May 2019 rally, when one of his supporters suggested shooting migrants, Trump stated: "That's only in the panhandle you can get away with that statement." The crowd cheered. Ex. 58.

75. In a May 2020 tweet referring to an armed occupation of the Michigan State Capitol by anti-government extremists, Trump tweeted that the attackers were "very good people," and that the Michigan Governor should respond by appeasing them. Ex. 148, p. 3.

76. On May 29, 2020, President Trump threatened to deploy "the Military" to Minneapolis to shoot "looters" amid protests over the police killing of George Floyd, tweeting "when the looting starts, the shooting starts." Ex. 148, p. 5.

77. During a presidential debate on September 29, 2020, Trump refused to denounce white supremacists and violent extremists and instead told the Proud Boys to "stand back and stand by," later adding that "somebody's got to do something about Antifa and the left." Ex. 1064. [13]

78. Trump's words "stand back and stand by" were well received and considered an endorsement. In fact, the Proud Boys turned the phrase into a mantra

[13] The Court acknowledges that the statement occurred during a debate, when the moderator had asked Trump to ask white nationalists and militias to "stand down," and further that President Biden called on Trump to disavow the Proud Boys, specifically. Nevertheless, Trump's conduct is consistent with the pattern identified by Professor Simi in that an apparent disavowal (though the Court notes that "stand back and stand by" does not carry the same meaning as "stand down") was immediately qualified by an apparent endorsement (*i.e.* that somebody has "got to do something.").

and put it on merchandise. 10/31/2023 Tr. 77:13–21. The Proud Boys and other extremists understood this as a directive to be prepared for future violence. 10/31/2023 Tr. 78:21–23.

79. Trump also regularly endorsed and cultivated relationships with incendiary figures connected with far-right extremists, including Alex Jones, Steve Bannon, and Roger Stone. 10/31/2023 Tr. 57:8-10, 199:23-200:4, 222:21-225:2. Katrina Pierson, a senior advisor to the Trump campaign who helped to organize the Ellipse rally, testified that Trump "likes the crazies" (referring to individuals like Alexander and Jones, whose speeches are often "incendiary" and "inflammatory") "who viciously defend him in public." 11/01/23 Tr. 287:2–12, 299:4–16; *see also* 11/02/23 Tr. 57:15–58:3 (Amy Kremer calling Jones and Alexander "flamethrowers" and "agitators" who "want to get everybody riled up").

80. Trump retained Bannon and Stone as advisers, two individuals with very close relationships with far-right extremists. 10/31/2023 Tr. 199:23–200:8, 222:21–23, 224:2–13. Though Trump did fire Bannon, he would eventually issue a presidential pardon to him. 10/31/2023 Tr. 223:1–3. Regardless, the Court finds that Trump had courted these fringe figures for many years through activities such as endorsing far-right conspiracy theories like birtherism. 10/31/2023 Tr. 56:23–57:15.

81. On October 30, 2020, a convoy of Trump supporters driving dozens of trucks (calling themselves a "Trump Train") surrounded a Biden-Harris campaign bus on a Texas highway. On October 31st, Trump tweeted a stylized video of the Trump Train confrontation and stated, "I LOVE TEXAS!" Exs. 71; 148, p. 8.

82. On November 1, 2020, in response to news that the FBI was investigating the incident, Trump tweeted, "In my opinion, these patriots did nothing wrong" and indicated they should not be investigated. Ex. 148, p. 9. Later that day at a rally in Michigan, Trump again celebrated the incident boasting "they had hundreds of cars, Trump, Trump. Trump and the American flag." Ex. 67.

83. At no point did Trump ever credibly condemn violence by his supporters but rather confirmed his supporters' violent interpretations of his directives. Professor Simi testified that through these repeated interactions, Trump developed and employed a coded language based in doublespeak that was understood between himself and far-right extremists, while maintaining a claim to ambiguity among a wider audience. 10/31/2023 Tr. 53:2–54:12, 65:20–66:20, 76:9–23, 211:13–218:24.

84. For example, violent far-right extremists understood that Trump's calls to "fight," which most politicians would mean only symbolically, were, when spoken by Trump, literal calls to violence by these groups, while Trump's statements negating that sentiment were insincere and existed to obfuscate and create plausible deniability. 10/31/2023 Tr. 49:14–21, 59:7–17, 101:20–102:6.

85. The Court finds that Trump knew his violent supporters understood his statements this way, and Trump knew he could influence his supporters to act violently on his behalf. 10/31/2023 Tr. 126:11–19, 221:10–21.

86. The Court notes that Trump did not put forth any credible evidence or expert testimony to rebut Professor Simi's conclusions or to rebut the argument that Trump intended to incite violence.

C. TRUMP'S FALSE ALLEGATIONS OF A STOLEN ELECTION

87. Trump planted the seed well before the 2020 election that any loss would be fraudulent. 10/31/2023 Tr. 61:15–62:1, 63:3–11. He portrayed the election as being "stolen" in a way that "resonate[d]" with far-right extremists and aligned with their "perspective that . . . there's this corrupt system that's preventing them from electing somebody that they support, that the system is rigged." 10/31/2023 Tr. 64:6–16, 168:20–169:6.

88. At an August 17, 2020 campaign rally in Wisconsin, Trump stated, "the only way we're going to lose this election is if the election is rigged. Remember that. It's the only way we're going to lose this election . . . The only way they're going to win is that way. And we can't let that happen." Ex. 61.

89. On August 24, 2020, at the Republican National Convention, Trump called mail-in voting "the greatest scam in the history of politics," accused Democrats of "stealing millions of votes" and argued that "the only way they can take this election away from us is if this is a rigged election." Ex. 62.

90. On September 23, 2020, when asked at a White House press briefing whether he would commit to a peaceful transfer of power after the election, President Trump refused. Ex. 64.

91. On November 2, 2020, the day before Election Day, Trump criticized the U.S. Supreme Court for allowing Pennsylvania to extend the time for receiving mail-in ballots, tweeting that the Court's decision was "VERY dangerous," "will allow rampant and unchecked cheating and will undermine our entire systems of laws," and "will also

induce violence in the streets," imploring that "[s]omething must be done!" Ex. 148, p. 10.

92. On election night, Trump claimed victory, asserting from the White House: "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. 47.

93. On November 4, 2020, President Trump tweeted: "We are up BIG, but they are trying to STEAL the Election. We will never let them do it." Ex. 148, p. 10.

94. On November 5, 2020, Trump tweeted "STOP THE COUNT!". Ex. 148, p. 12.

95. On November 7, 2020, the election was called for Joe Biden Ex. 78, p. 51 (Finding # 162).

96. On November 8, 2020 Trump tweeted, "We believe these people are thieves. The big city machines are corrupt. This was a stolen election. Best pollster in Britain wrote this morning that this clearly was a stolen election" Ex. 148, p. 12.

97. Trump's advisors (within his administration, his campaign, and his legal team) repeatedly told him he had virtually no chance of victory, and that there was no evidence of widespread election fraud sufficient to change the election results. Ex. 78, pp. 8, 9, 22 (Finding ## 30, 36, 77).

98. Despite his advisors telling him there was no evidence of election fraud, Trump continued to maintain the election was stolen. *See, e.g.*, Exs. 99; 100; 148, pp. 13-15, 18, 20, 24, 30, 38, 47.

99. Trump filed 62 lawsuits—61 were rejected outright.

100. Trump put forth no evidence at the Hearing that he believed his claims of voter fraud despite the overwhelming evidence there was none. The Court finds that Trump knew his claims of voter fraud were false.

101. On December 13, 2020, Trump tweeted "Swing States that have found massive VOTER FRAUD, which is all of them, CANNOT LEGALLY CERTIFY these votes as complete & correct without committing a severely punishable crime." Ex. 148, p. 38.

102. On December 14, 2020, the Electoral College met and cast their votes in the 2020 election. Stipulation ¶ 12. The certified electors voted as follows: 306 for Joe Biden and 232 for Donald Trump. *Id.* The certified Electoral College votes were then submitted to Congress. *Id.* ¶ 13.

103. Trump further sought to corruptly overturn the election results through direct pressure on Republican officeholders in various states both before and after the Electoral College met and voted in their respective states. Ex. 78, pp. 2, 59. (Finding ## 5, 185).

104. Many of the state officials targeted by Trump's campaign of intimidation were subject to a barrage of harassment and violent threats by Trump's supporters—prompting Georgia election official Gabriel Sterling to issue a public warning to Trump to "stop inspiring people to commit potential acts of violence" or "[s]omeone's going to get killed." Ex. 126.

105. Trump saw and retweeted a video of that press conference with a message repeating the very rhetoric Sterling warned would cause violence. Exs. 126; 148, p. 27.

Far-right extremists understood Trump's refusal to condemn the violence cited in the video and his doubling down on the motivation for that violence as an endorsement of the use of violence to prevent the transfer of presidential power. 10/31/2023 Tr. 92:8–94:6.

106. Trump propelled the "Stop the Steal" movement and cross-country rallies in the lead-up to January 6, 2021 with continued false assertions of election fraud. Ex. 78, p. 82 (Finding # 263).

107. Between Election Day 2020 and January 6, 2021, Stop the Steal organizers held dozens of rallies around the country, inflaming Trump supporters with election disinformation and recruiting them to travel to Washington, D.C. on January 6, 2021. The rallies brought together many groups, including violent extremists such as the Proud Boys, Oath Keepers, and Three Percenters; QAnon conspiracy theorists; and white nationalists. *Id.*; 10/31/2023 Tr. 61:4–14.

108. These same Stop the Steal leaders joined two "Million MAGA Marches" in Washington, D.C. on November 14, 2020, and December 12, 2020. Tens of thousands of Trump supporters attended the events, with protests focused on the Supreme Court building. 11/02/23 Tr. 20:20–22:17, 37:22–38:21.

109. After the November rally turned violent, Trump acknowledged his supporters' violence, but justified it as self-defense against "ANTIFA SCUM." Ex. 148, p. 17. Far-right extremists understood Trump's statement as another endorsement of the use of violence against his political opponents. 10/31/2023 Tr. 91:10–23.

110. As the crowds gathered in Washington, D.C. on December 12, 2020 Trump publicly assailed the Supreme Court for refusing to hear his fictitious claims of election fraud. Ex. 78, p. 83 (Finding # 267); 148, pp. 32-36. Stop the Steal organizers Alex Jones, Owen Shroyer, and Ali Alexander understood his communications as a call to action and thereafter led a march on the Supreme Court, where the crowd chanted slogans such as "Stop the Steal!"; "1776!"; "Our revolution!"; and "The fight has just begun!" Ex. 78, p. 83 (Finding # 268).

111. During the November rally, Trump passed through the crowd in his presidential motorcade. 11/01/23 Tr. 306:8–14. Then, on the morning of December 12, 2020, Trump tweeted: "Wow! Thousands of people forming in Washington (D.C.) for Stop the Steal. Didn't know about this, but I'll be seeing them! #MAGA." Ex. 148, p. 36. Later that day, Trump flew over the protestors in Marine One. Ex. 148, p. 37; 11/01/23 Tr. 306:8–24.

112. Trump sent a tweet at 1:42 a.m. on December 19, 2020, urging his supporters to travel to Washington, D.C. on January 6, 2021: "Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6. Be there, will be wild!" Ex. 148, p. 41.

113. Trump's "plan" was that when Congress met to certify the election results, Vice President Pence could reject the true electors that voted for Biden and certify Trump's fake slate of electors or return the slates to the States for further proceedings. Exs. 78, p. 13 (Finding #50); 148, pp. 75, 80.

114. Under the Twelfth Amendment and the Electoral Count Act, 3 U.S.C. § 15 (2018), electoral votes are sent to Congress for a joint session on January 6 where Congress counts the votes from the states. If a Representative objects to the counting of electoral votes from a state, they need a Senator to join in the objection. If that happens, the joint session recesses and goes back to each chamber. The Vice President has no role in the objections other than presiding over the proceedings. 10/30/2023 Tr. 131:17-133:25; 11/02/23 Tr. 187:3–188:15.

115. The Court finds that on December 19, 2020, when Trump tweeted "Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6. Be there, will be wild!" he knew he had lost the election, and he knew there was no basis for Vice President Pence to reject the States' lawfully certified electors.

116. The Court also finds that Trump's December 19, 2020 tweet focused the anger he had been sowing about the election being stolen on the January 6, 2021, joint session. The message he sent was that to save democracy, his supporters needed to stop the January 6, 2021 joint session.

117. Trump's December 19, 2020 tweet had an immediate effect on far-right extremists and militias such as the Proud Boys, the Oath Keepers, and the Three Percenters, who viewed the tweet as a "call to arms" and began to plot activities to disrupt the January 6, 2021 joint session. Ex. 78, pp. 79, 85, 86, 88 (Finding ## 254, 275, 276, 280, 289); 10/31/2023 Tr. 104:18–105:4; 11/03/23 Tr. 200:3–21.

118. Trump repeated his invitation to come to Washington, D.C. on January 6, 2021 at least a dozen times. Ex. 148, pp. 55, 60, 62, 63, 72, 75, 76, 78.

119. On January 1, 2021, Trump retweeted a post from Kylie Jane Kremer, an organizer of March for Trump on January 6, saying "The calvary is coming, Mr. President! JANUARY 6th | Washington, DC."[14] Trump added, "A great honor!" Ex. 148, p. 64.

120. At the same time, Trump continued to make false statements regarding voter fraud, fueling the fire of his supporters' belief that the election was somehow stolen. Ex. 148, pp. 47, 48, 50, 61, 69, 73, 75.

121. On December 26, 2023, he tweeted: "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!" Ex. 148, p. 49.

122. With this message he justified "an act of war" by claiming that is what the Democrats would do but asserted the Republicans were too weak.

123. Federal agencies that Trump oversaw as the Chief Executive Officer of the Executive Branch—including the Secret Service—identified significant threats of violence ahead of January 6, 2021, including threats to storm the U.S. Capitol and kill elected officials. Such threats were made openly online and widely reported in the press. *See* Ex. 32, pp. 18–26, 102–105. Agency threat assessments stated domestic violent

[14] A calvary is "an open-air representation of the crucifixion of Jesus." https://www.merriam-webster.com/dictionary/calvary. The Court presumes that Ms. Kremer (and Trump when he retweeted the text) were referring to cavalry or "an army component . . . assigned to combat missions that require great mobility." https://www.merriam-webster.com/dictionary/cavalry.

extremists or militia groups planned for violence on January 6, 2021, with weapons including firearms, and enough ammunition to "win a small war." *See id.* at 103.

124. The FBI received many tips regarding the potential for violence on January 6, 2021 following Trump's "will be wild" tweet. One such tip said, "They think they will have a large enough group to march into DC armed and will outnumber the police so they can't be stopped . . . They believe that since the election was 'stolen' it's their constitutional right to overtake the government and during this coup no U.S. laws apply. Their plan is to literally kill. Please, please take this tip seriously and investigate further." 11/03/2023 Tr. 218:7–16.

125. Nonetheless, Trump did not advise federal law enforcement agencies that in his speech on January 6, 2021, he was going to instruct the crowd to march to the Capitol. As a result, law enforcement was not prepared for the attendees at the rally to descend on the Capitol.

126. Trump knew that Ali Alexander and Alex Jones wanted to speak at the rally. Katrina Pierson and Amy Kremer described those two as "flamethrowers" and "agitators" who "want to get everyone riled up." Pierson called them "crazies" and Kremer called them "whackos." While Trump agreed they should not speak at the rally, there is no evidence Trump discouraged their attendance at the rally or their presence at the Capitol.

127. In the early morning of January 6, 2021 Trump tweeted, "If Vice President @Mike_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!" Ex. 148, p. 80. At 8:17 a.m., Trump tweeted, "All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!" *Id.*

128. The Court finds that prior to the January 6, 2021 rally, Trump knew that his supporters were angry and prepared to use violence to "stop the steal" including physically preventing Vice President Pence from certifying the election. In fact, Trump did everything in his power to fuel that anger with claims he knew were false about having won the election and with claims he knew were false that Vice President Pence could hand him the election.

D. THE SPEECH AT THE ELLIPSE

129. In the early morning of January 6, 2021, tens of thousands of Trump supporters began gathering around the Ellipse for Trump's speech and "wild" protest he had promoted. Ex. 133, pp. 1–7; 11/02/23 Tr. 56:22–57:10.

130. To enter the Ellipse itself, attendees were required by the Secret Service to pass through magnetometers and to be checked for weapons. 11/02/23 Tr. 44:2–45:18, 57:5–14. Around 28,000 rally attendees passed through the security checkpoints to enter the Ellipse. Ex. 78, pp. 31-32, 102 (Finding ##107, 338).

131. From only the attendees who went through security checkpoints at the Ellipse, the Secret Service confiscated hundreds of weapons and prohibited items, including 269 knives or blades, 242 canisters of pepper spray, 18 brass knuckles, 18

tasers, 6 pieces of body armor, 3 gas masks, 30 batons or blunt instruments, and 17 miscellaneous items like scissors, needles, or screwdrivers. *Id.*

132. About 25,000 additional attendees purposely remained outside the Secret Service perimeter at the Ellipse and avoided the magnetometers. Ex. 78, pp. 31-32 (Finding # 107); 11/02/23 Tr. 57:5–14. They formed into a large crowd that extended to the National Mall and Washington Monument. Ex. 1003; 11/02/2023 Tr. 151:18–152:2. Those attendees were not subject to any security screening. Ex. 78, p. 98 (Finding # 323); 11/02/23 Tr. 44:19–24, 57:5–13.

133. Some members of the crowd wore tactical gear, including ballistic helmets like those worn by riot police, goggles, gas masks, armored gloves, tactical boots, earpieces for radios, and military-grade backpacks with additional gear unknown to police. 10/30/2023 Tr. 70:6–11; 11/02/2023 Tr. 328:19–329:1.

134. Some attendees of the January 6 Ellipse event were armed. Ex. 78, p. 32 (Finding # 108).

135. Despite knowing of the risk of violence and knowing that crowd members were angry and armed, Trump still attended the rally and directed the crowd to march to the Capitol. The following are excerpts from his speech:

> "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.***"
>
> "***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."

"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."

"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.***"

"We're gathered together in the heart of our nation's capital for one very, very basic reason: ***to save our democracy.***"

"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.***"

"***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."

"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.***"

"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.***"

"***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."

"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."

"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."

"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.***"

"***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."

"***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.***"

"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.***"

"And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore."

Exs. 22, pp. B1-B23 (emphasis added); 49.

136. Much of Trump's speech was not in Trump's prepared remarks. For instance, Trump's speech called out Vice President Pence by name eleven times. Exs. 22, pp. B1-B23; 49. The teleprompter draft of the speech released by the National Archives contained only one reference to Vice President Pence. Ex. 157, p. 34.

137. Trump used the word "fight" or variations of it 20 times during his Ellipse speech. Exs. 22, pp. B1-B23; 49. The teleprompter draft contained only one mention of the word fight. Ex. 157, p. 29.

138. Trump also repeatedly insisted that the crowd cannot let the certification happen:

> "You will have an illegitimate president. . . . ***we can't let that happen"***
>
> "We can't let this stuff happen. We won't have a country if it happens"
> "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***"
>
> "They want to come in again and rip off our country. ***Can't let it happen***"
>
> "We will never give up, we will never concede. ***It doesn't happen***. You don't concede when there's theft involved."

Exs. 22, pp. B1-B23 (emphasis added); 49. The teleprompter draft contained no mention of the crowd needing to prevent something from happening. *See* Ex. 157.

139. The statement that the alleged voter fraud "allowed" his supporters "to go by very different rules," was not in the prepared speech. Exs. 22, p. B20; 49; 157.

140. Knowing many in the crowd were angry and armed, Trump called on them to march to the Capitol and vowed to join them. Rally attendees took Trump at his word and thought he would join them at the Capitol. 11/02/2023 Tr. 166:21–24.

141. The crowd at the Ellipse reacted to Trump's words with calls for violence. After Trump instructed his supporters to march to the Capitol, members of the crowd responded with shouts of "storm the Capitol!" "invade the Capitol Building!" and repeated chants of "take the Capitol!" Ex. 166.

142. As Professor Simi testified, Trump's speech took place in the context of a pattern of Trump's knowing "encouragement and promotion of violence" to develop and deploy a shared coded language with his violent supporters. 10/31/2023 Tr. 221:10–21. An understanding had developed between Trump and some of his most extreme supporters that his encouragement, for example, to "fight" was not metaphorical, referring to a political "fight," but rather as a literal "call to violence" against those working to ensure the transfer of Presidential power. 10/31/2023 Tr. 66:7–20, 101:8–102:6. While Trump's Ellipse speech did mention "peaceful" conduct in his command to march to the Capitol, the overall tenor was that to save the democracy and the country the attendees needed to fight. 10/31/2023 Tr. 101:8–102:21.

143. Trump understood the power that he had over his supporters. Amy Kremer testified that "when [Trump] does these speeches, he plays off the crowd. And they're very reactive." 11/02/2023 Tr. 49:4–6. She also acknowledged that the rally attendees were there because they believed the lie that the election was stolen. 11/02/2023 Tr. 47:23–48:2. Trump admitted his power over his supporters recently. Ex. 134.

144. The Court finds that Trump's Ellipse speech incited imminent lawless violence. Trump did so explicitly by telling the crowd repeatedly to "fight" and to "fight

like hell," to "walk down to the Capitol," and that they needed to "take back our country" through "strength." He did so implicitly by encouraging the crowd that they could play by "very different rules" because of the supposed fraudulent election.

145. In the context of the speech as a whole, as well as the broader context of Trump's efforts to inflame his supporters through outright lies of voter fraud in the weeks leading up to January 6, 2021 and his long-standing pattern of encouraging political violence among his supporters, the Court finds that the call to "fight" and "fight like hell" was intended as, and was understood by a portion of the crowd as, a call to arms. The Court further finds, based on the testimony and documentary evidence presented, that Trump's conduct and words were the factual cause of, and a substantial contributing factor to, the January 6, 2021 attack on the United States Capitol. *See also* 11/03/2023 Tr. 203:20–22; 11/02/2023 278:2–12.

E. THE ATTACK ON THE CAPITOL

146. While Trump was speaking, large portions of the crowd began moving with purpose from the Ellipse rally toward the Capitol building. Exs. 22, p. 22; 1007; 10/30/2023 Tr. 71:9–21; 11/02/2023 Tr. 331:22–332:15.

147. Around 12:53 p.m., the mob overran United States Capitol Police officers at a police barricade near the Peace Circle, breaching the Capitol's security perimeter. Ex. 133, p. 9; 10/30/2023 Tr. 194:16–195:7. The Proud Boys, who in the moments before led the mob in chants of "1776," led this initial breach. Ex. 78, pp. 25-26, 104-105; 10/31/2023 Tr. 54:24–55:3.

148. Shortly before 1:00 p.m., Vice President Pence released a letter asserting that his "role as presiding officer is largely ceremonial" and dismissed the arguments that he could take unilateral action to overturn the election or return the Electoral College votes to the States as contrary to his oath to the Constitution. Ex. 78, p. 78 (Finding # 247); 10/30/2023 Tr. 161:5–162:15.

149. By about 1:00 p.m., the mob had advanced to the Capitol steps and began attacking Capitol police officers there. 10/30/2023 Tr. 201:22–202:5. At 1:00 p.m., the joint session of Congress convened to count the electoral votes. Stipulation ¶ 14. After Congressman Gosar and Senator Cruz objected to the certification of Arizona's electoral votes, the House and Senate split into their respective chambers to debate them. 10/30/2023 Tr. 139:21–140:6; 11/02/23 Tr. 190:24–192:9.

150. Trump's speech ended around 1:10 p.m. Ex. 22, p. 24. Thousands more marched toward the Capitol down Pennsylvania Avenue as Trump had instructed. Exs. 22, pp. B1-B23; 49; 10/30/2023 Tr. 199:8–200:8. The size of the mob grew by the minute. 10/30/2023 Tr. 197:8–13. The mob occupied the entire West Plaza by 1:14 p.m. Ex. 133, pp. 11, 12.

151. At 2:13 p.m., the Capitol was breached for the first time when the Proud Boys smashed a window in the Senate wing and the mob began entering the building. Ex. 78, p. 109 (Finding # 361).

152. The Senate recessed at 2:13 p.m., and the House suspended debate on the objections to certification at 2:18 p.m., halting the process of the electoral certification. Stipulation ¶ 14; Ex. 78, p. 113 (Finding # 374).

153. The mob moved immediately toward its target–the certification of the election–and reached the House and Senate chambers within minutes. Ex. 78, p. 113 (Finding # 374); 10/30/2023 Tr. 142:9–143:2, 144:11–23, 146:16–18; 11/02/2023 Tr. 192:10–195:24.

154. Some Members of Congress removed their Congressional pins so they would not be identified by the encroaching mob, others prepared to fight off the mob. 10/30/2023 Tr. 144:11–23.

155. The mob was armed with a variety of weapons including guns, knives, tasers, sharpened flag poles, scissors, hockey sticks, pitchforks, bear spray, pepper spray, and other chemical irritants. Exs. 16; 78, pp. 103, 104, 115-116 (Finding ## 342, 346, 382); 133; 1018; 10/30/2023 Tr. 74:4–10; 75:15–76:4, 105:25–106:24, 201:22–202:5, 220:23–221:2, 224:25–225:2; 11/02/2023 Tr. 334:17–23.

156. The mob also stole objects at the Capitol to use as weapons, including metal bars from police barricades, pieces of scaffolding, trash cans, and batons and riot shields stolen from law enforcement. Ex. 16; 10/30/2023 Tr. 74:4–10, 75:15–76:4, 201:22–202:5.

157. The mob assaulted police officers defending the Capitol to force its way into the building. Throughout the day, police officers were tased, crushed in metal door frames, punched, kicked, tackled, shoved, sprayed with chemical irritants, struck with objects thrown by the crowd, dragged, hit with objects thrown by the crowd, gouged in the eye, attacked with sharpened flag poles, and beaten with weapons and objects that the mob brought to the Capitol or stole on site. Ex. 78, pp. 115-116 (Finding # 382);

10/30/2023 Tr. 73:19–74:10, 87:18–88:6; 103:14–104:10, 201:22–202:5, 208:8–15, 212:14–17, 220:23–221:2, 224:25–225:2. Police deployed tear gas, pepper spray, flash bangs, and a loudspeaker with a pre-recorded message instructing the mob to disperse, but the mob defied those orders and remained at the Capitol. 10/30/2023 Tr. 94:20–97:2; 11/02/2023 Tr. 176:16–177:4, 336:10–337:5.

158. Members of law enforcement feared for their lives as well as the lives of their fellow officers, the Vice President, and the Members and staff inside the Capitol. 10/30/2023 Tr. 74:22–75:4, 210:25–211:2, 222:14–19. The attacks were deadly, resulting in the death of Capitol Police Officer Brian Sicknick. 10/30/2023 Tr. 224:23–225:2. Many other law enforcement officers were injured, some requiring hospitalization for their injuries. 10/30/2023 Tr. 230:11–14.

159. Even though not everyone in the mob was violent, officers were unable to escape or get reinforcements. 10/30/2023 Tr. 79:9–20. Law enforcement could not differentiate between which members of the mob were violent and which were not. *Id.*

160. The mob's size prevented the police from carrying out arrests for fear of the safety of officers and the detainees. 10/30/2023 Tr. 81:9–22. The mob's size prevented law enforcement from using firearms or employing lethal force. 10/30/2023 Tr. 80:20–81:6. The chaos created by the mob made it futile for police to call for help when they were individually under attack. 10/30/2023 Tr. 209:11–20. The mob's size made it impossible for first responders to reach those in medical distress, and when first responders attempted to provide such aid, they were harassed by the mob and assaulted. 10/30/2023 Tr. 198:20–199:7. The presence of nonviolent members of the mob, who

refused demands to leave, contributed to these problems. Ex. 11; 10/30/2023 Tr. 82:9–11; 90:2–93:13.

161. The Court finds that by sending otherwise non-violent protestors to the Capitol thereby increasing the mob's numbers through his actions and words, Trump materially aided the attack on the Capitol.

162. Members of the mob told officers, "Trump sent us," "we don't want to hurt you, but we will; we're getting into that building," "you look scared and you might need your baton," and "take off your badges, take off your helmets, and show solidarity with we the people or we're going to run over you. . . . Do you think your little pea shooter guns are going to stop this crowd," and "it's going to turn bad man; we have to get you out of here. The others are coming up from the back." Exs. 11; 14; 10/30/2023 Tr. 200:25–201:11, 202:24–203:5. The mob chanted "fight for Trump" and members yelled into bullhorns "this is not a peaceful protest!" Ex. 21. These types of statements were repeated at multiple locations around the Capitol during the attack where the mob faced resistance from law enforcement. Exs. 11; 14; 10/30/2023 Tr. 200:25–201:11, 212:3–13.

163. The mob referenced war, revolution, Donald Trump, and stopping the election certification. Members of the mob carried flags from the Revolutionary War and the Confederate Battle Flag. Exs. 13; 133; 10/30/2023 Tr. 99:13–100:1. Their flags and signs said, among other things, "Liberty or Death," "Certify Honesty Not Fraud," and "Over Turn Biden Win," "Pence has the power," "Mike Pence is a bitch," and "Lynch the Rhinos [sic]," evoking Trump's references to "RINOs" (Republicans in Name Only) at the Ellipse speech. Ex. 133. They chanted "fight for Trump," "Stop the Steal," and "1776."

Ex. 78, pp. 104-105 (Finding # 347); 10/30/2023 Tr. 77:25–78:11. The crowd displayed a makeshift gallows. 10/31/2023 Tr. 120:19–121:18.

164. The mob taunted law enforcement calling them "traitors" and suggesting that law enforcement was the problem. They yelled "you swore an oath," "oath breakers," "you're on the wrong team," "you're not wanted here," "what about your oath," and "you're going against our country." Ex. 10; 10/30/2023 Tr. 73:14–18, 86:5–10, 200:25–201:11; 212:3–13.

165. Professor Simi testified that the repeated references to 1776, "revolution," and the Confederate flag, are consistent with far-right extremists' use of the terms as literal calls for violent revolution. 10/31/2023 Tr. 94:21–95:7, 107:24–108:8, 109:3–8, 120:25–121:18. The presence of weaponry and defensive gear among a significant portion of the crowd confirmed this purpose. 10/31/2023 Tr. 109:16–21. The mob at times worked together. Exs. 20; 21; 10/31/2023 Tr. 115:20–116:3.

166. The January 6th Senate Report that Trump's counsel described as "the staff report from the Senate that was a bipartisan report" described January 6, 2021 as a "violent and unprecedented attack on the U.S. Capitol, the Vice President, Members of Congress and the democratic process" and that the attackers were "intent on disrupting the Joint Session, during which Members of Congress were scheduled to perform their constitutional obligation to count the electoral votes." Ex. 22, p. 1; 10/31/2023 Tr. 276:21–25.

167. Amy Kremer described the event as a "horrifying" event and "an awful, awful attack on the seat of our democracy." 11/02/23 Tr. 65:14–20, 69:3–7.

168. The Court agrees with Congressman Buck and concludes that the attack was "meant to disturb" Congress's "electoral vote count." 11/02/2023 Tr. 230:3–7, 341:24–342:8.

F. TRUMP'S REACTION TO THE ATTACK

169. By 1:21 p.m., Trump was informed the Capitol was under attack. Ex. 78, p. 96 (Finding # 316).

170. At 2:24 p.m., an hour after Trump had been informed the Capitol was under attack, Trump tweeted: "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. 148, p. 83.

171. That tweet was read over a bullhorn to the crowd at the Capitol. Ex. 94.

172. The Court holds that Trump's 2:24 p.m. tweet further encouraged imminent lawless violence by singling out Vice President Pence and suggesting that the attacking mob was "demand[ing] the truth." Congressman Swalwell interpreted President Trump's 2:24 p.m. tweet as painting a "target" on the Capitol and threatening the Vice President and their "personal safety and the proceedings" to certify the election. 10/30/2023 Tr. 149:2–11.

173. The Court further holds that Trump's 2:24 p.m. tweet caused further violence at the Capitol. Exs. 6; 15; 78, pp. 16-17 (Finding # 56); 10/30/2023 Tr. 103:14–104:5.

174. At 2:25 p.m., the mob breached the Capitol's East Rotunda doors. Ex. 78, pp. 46-47 (Finding # 150).

175. At 2:25 p.m., the Secret Service evacuated Vice President Pence from his Senate office to a more secure location. Ex. 78, pp. 16-17 (Finding # 56).

176. Around 2:30 p.m., Officer Pingeon was attacked by the mob in the Northwest Courtyard where he was forced to the ground and had his baton stolen. 10/30/2023 Tr. 208:8–210:8.

177. Around the same time, the Senate Chamber and House floor were evacuated. Ex. 78, pp. 35-36 (Finding # 119); 10/30/2023 Tr. 152:19–153:7.

178. At 2:38 p.m. and 3:13 p.m. Trump sent two tweets both encouraging the mob to "remain peaceful" and "[s]tay peaceful" and asking the mob to not hurt law enforcement. Ex. 148, pp. 83, 84. Neither of the tweets condemned the ongoing violence or told the mob to retreat.

179. The mob's conduct after it breached the Capitol confirmed that its common purpose was to prevent the constitutional transfer of power by targeting Vice President Pence and House Speaker Nancy Pelosi. Immediately after the first breach of the Capitol at 2:13 p.m., the mob moved to the Senate and House chambers where the certification was being debated and Pence and Pelosi were expected to preside. The mob breached the Senate gallery and the mob made a concerted and violent effort to break into the House chamber. Ex. 78, pp. 35-36 (Finding # 119); 10/30/2023 Tr. 155:14–21.

180. Other than sending the two tweets at 2:38 p.m. and 3:15 p.m. which did not call off the attack, Trump did nothing between being informed of the attack at 1:21

p.m. and 4:17 p.m. Instead, Trump ignored pleas to intervene and instead called Senators urging them to help delay the electoral count. When told that the mob was chanting "Hang Mike Pence," Trump responded that perhaps the Vice President deserved to be hanged. Ex. 78, pp. 46-47 (Finding # 150). Trump also rebuffed pleas from Leader McCarthy to ask that his supporters leave the Capitol stating, "Well, Kevin, I guess these people are more upset about the election than you are." *Id.*

181. The Court finds that Trump, as the Commander of the D.C. National Guard, had law enforcement entities at this disposal to help stop the attack without any further approval. 10/31/2023 Tr. 246:24-247:7, 249:6-9.

182. Trump could have redeployed the 340 National Guard troops already activated in Washington, D.C. to assist with traffic and other duties on January 6, 2021. This group could have rapidly responded because riot gear was already stored at convenient locations near their places of deployment throughout the city. Exs. 1027; 1031, p. 37; 10/31/2023 Tr. 259:25-260:8. There is no evidence that Trump made any effort on January 6 to redeploy these troops to the Capitol once he knew the attack was underway. 10/31/23 Tr. 259:25–260:11.

183. In addition to the 340 National Guard troops that had already been activated for traffic control duty or as a quick reaction force, Trump could have ordered deployment of additional D.C. National Guard troops once he knew about the attack on the Capitol. Ex. 1027; 10/31/2023 Tr. 252:4–10. He could have asked the Governors of Maryland and Virginia to authorize their state National Guards to help. 10/31/2023 Tr. 260:12–20. He could have ordered the Department of Justice rapid response teams to

the Capitol. 10/31/2023 Tr. 262:11–16. He could have authorized the Department of Homeland Security's rapid response team which could have deployed "in a matter of minutes from headquarters to the Capitol." 10/31/2023 Tr. 262:17–21.

184. Trump provided no evidence that he took any action to deploy any of these authorities after learning of the attack on the Capitol. 10/31/2023 Tr. 264:5–8.[15]

185. The Court finds Trump had the authority to call in reinforcements on January 6, 2021, and chose not to exercise it thereby recklessly endangering the lives of law enforcement, Congress, and the attackers on January 6, 2021.

186. Finally, at 4:17 p.m. Trump called off the attack. He released a video in which he said:

> I know your pain. I know you're hurt. We had an election that was stolen from us. It was a landslide election, and everyone knows it, especially the other side. ***But you have to go home now***. We have to have peace. We have to have law and order. We have to respect our great people in law and order. We don't want anybody hurt. It's a very tough period of time. There's never been a time like this where such a thing happened, where they could take it away from all of us, from me, from you, from our country. This was a fraudulent election. But we can't play into the hands of these people. We have to have peace. ***So go home.*** We love you. You're very special. You've seen what happens. You see the way others are treated that are so bad and so evil. I know how you feel but ***go home and go home in peace.***

Ex. 68 (emphasis added).

187. The Court holds that Trump's 4:17 p.m. video endorsed the actions of the mob in trying to stop the peaceful transfer of power. It did not condemn the mob but instead sympathized with them and praised them. It did, however, instruct the mob to

[15] The Court considers Trump's inaction solely for the purpose of inferring that he intended for the crowd to engage in violence when he sent them to the Capitol "to fight like hell." It does not consider his inaction as independent conduct constituting engagement in an insurrection.

go home on three occasions, emphasizing to the mob that this was an order to be followed.

188. The mob obeyed Trump's order. Ex. 78, p. 36 (Finding # 120); 10/31/2023 Tr. 121:19-21. The statement was understood as a clear directive to cease the attack. 10/31/2023 Tr. 122:9–23, 220:21–221:4.

189. At 6:01 p.m. Trump tweeted again: "These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!" Ex. 148, p. 84.

190. The Court holds that even after the attack, Trump's tweet justified violence by calling the attackers "patriots," and continued to perpetuate the falsehood that justified the attack in the first place, his alleged "sacred landslide election victory." Ex. 148, p. 84.

191. As Professor Simi testified, this after the fact tweet was consistent with Trump's pattern of communication related to political violence which always ended with Trump praising the violence. 10/31/2023 Tr. 123:12–15.

192. The Court finds that the 6:01 p.m. tweet is further proof of Trump's intent to disrupt the election certification on January 6, 2021.

193. The Court heard no evidence that Trump did not support the mob's common purpose of disrupting the constitutional transfer of power. To the contrary, both his 4:17 p.m. video and 6:01 p.m. tweet support the opposite conclusion—that Trump endorsed and intended the actions of the mob on January 6, 2021.

G. SECRETARY OF STATE PRACTICES

194. The Secretary of State is responsible for "certify[ing] the content for state and federal offices to the ballot." 11/01/2023 Tr. 91:4-5. The Secretary of State's office "is the filing office for state and federal offices for individuals seeking . . . to run for office in Colorado." 11/01/2023 Tr. 96:10-12. When the Secretary of State receives a candidate's paperwork, the office "verif[ies] the information on the application as required under state law, and then ultimately there is a deadline by which [the] office must certify all [contents] to the ballot," including candidates. 11/01/2023 Tr. 96:13-17.

195. "The Secretary of State is responsible for ensuring that only eligible candidates are placed on the ballot." Ex. 107. In determining whether a candidate is eligible, the Secretary "must give effect to applicable federal and state law unless a court has held such law to be invalid." *Id.*; *see also* 11/01/2023 Tr. 107:24-108:3. If the Secretary of State's office has "affirmative knowledge that a candidate is ineligible for office, then [it] will not certify them to the ballot." 11/01/2023 Tr. 99:14-16.

196. The office has also kept ineligible presidential candidates off the ballot. 11/01/2023 Tr. 104:24-105:4. One candidate, Abdul Hassan, informed the Secretary of State's office that he did not meet the constitutional requirements for the presidency because he was not a natural-born United States citizen. 11/01/2023 Tr. 106:7-107:1. The Secretary of State's office informed Mr. Hassan that he was ineligible, and a court affirmed that determination. 11/01/2023 Tr. 106:17-107:1, 108:11-17; *see also Hassan v. Colorado*, 495 F.App'x 947 (10th Cir. 2012).

197. Other presidential candidates were excluded from the ballot in 2012, 2016, and 2023 (for the 2024 ballot) because they failed to certify their compliance with mandatory federal constitutional requirements for the presidency by completing the required paperwork that would otherwise attest to their qualifications. 11/01/2023 Tr. 151:24-153:12.

198. Candidates, or other electors, who disagree with the Secretary of State's decision regarding whether to certify a candidate to the ballot can challenge the Secretary's decision in court. 11/01/2023 Tr. 91:18-92:2, 102:25-103:3. The office expects such challenges in every election cycle. 11/01/2023 Tr. 101:20-102:3. Accordingly, "[t]he Secretary's Office is never the final arbiter of eligibility because the Secretary's decision to either certify a candidate or not can be challenged in court." 11/01/2023 Tr. 108:7-10.

199. The Secretary of State's office creates the forms used by candidates to access the ballot, including the presidential primary forms. *See* 11/01/2023 Tr. 111:17-22; *see also* Ex. 158.

200. The Major Party Candidate Statement of Intent for the Presidential Primary includes, among other things, checkboxes that require the candidate to certify: "Age of 35 Years;" "Resident of the United States for at least 14 years;" and "Natural-born U.S. Citizen." Ex. 158; 11/01/2023 Tr. 113:1-5. But those qualifications are not the only qualifications for president. 11/01/2023 Tr. 113:9-12. Candidates submitting this form must also sign and notarize the following statement: "I intend to run for the office

stated above and solemnly affirm that I meet ***all*** qualifications for the office prescribed by law." Ex. 158 (emphasis added).

201. For instance, the Secretary of State would not put a presidential candidate on the ballot who had already served two terms because that would be in violation of the Twenty-Second Amendment. That is true despite there not being a box to check for the Twenty-Second Amendment.

202. When questioned by the Court, Ms. Rudy testified that should the Secretary of State desire to do so, it could revise the Statement of Intent Form to add a box confirming that the candidate had not served two terms as President. She further testified, that should President Obama seek to be on the presidential primary ballot, that given it was "an objective, knowable fact" that he was not qualified, "it is unlikely we would certify that candidate's name to the ballot." 11/01/2023 Tr. 157:15-158:24.

203. On October 11, 2023, the Secretary of State's office received (1) a Major Party Candidate Statement of Intent for Presidential Primary, signed by Donald J. Trump; (2) a State Party Presidential Primary Approval, signed by Dave Williams, the chair of the Colorado Republican Party, stating that the "Colorado Republican Party has determined [Donald J. Trump] is bona fide and affiliated with the party;" and (3) a $500 filing fee from Donald J. Trump for President 2024, Inc. Ex. 158.

204. The Major Party Candidate Statement of Intent for Presidential Primary contains the following affirmation: "I intend to run for the office stated above and solemnly affirm that I meet all qualifications for the office prescribed by law." *Id.* Donald J. Trump signed the affirmation. *Id.*

205. The documents contained in Exhibit 158 are facially complete. No additional paperwork is required for Trump to be certified to the 2024 presidential primary ballot. 11/01/2023 Tr. 123:8-12.

206. The Secretary is holding Trump's application "pending further direction from the Court." *See* Notice (Oct. 11, 2023).

207. The Secretary of State is required to certify the candidates who will be listed on the 2024 presidential primary ballot on January 5, 2024. C.R.S. § 1-4-1204(1).

208. The Secretary does not certify candidates individually; rather, she certifies the entire contents of the ballot at once. 11/01/23 Tr. 145:7-16. The Secretary intends to certify the entire 2024 presidential primary ballot on January 5, 2024. See 11/01/2023 Tr. 145:7-16.

V. CONCLUSIONS OF LAW

209. The Court previously held that pursuant C.R.S. § 1-4-1204(4) the burden of proof in this matter is preponderance of the evidence. That is the burden the Court has applied. However, the Court holds that the Petitioners have met the higher standard of clear and convincing evidence.

A. CAN THE SECRETARY OF STATE EXCLUDE TRUMP FROM THE BALLOT?

210. The Colorado Secretary of State is charged with the duty to "supervise the conduct of primary, general, congressional vacancy, and statewide ballot issue elections" and to "enforce the provisions of [the election] code." C.R.S. § 1-1-107(1). When a

dispute regarding the application and enforcement of the Election Code arises, C.R.S. § 1-1-113 is implicated. This statute provides in part:

> When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction ***alleging that 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***, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, ***the district court shall issue an order requiring substantial compliance with the provisions of this code***. The order shall require the person charged to forthwith perform the duty or to desist from the wrongful act or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.

C.R.S. § 1-1-113(1) (emphasis added).

211. After the filing of a "verified petition" by a registered elector and "notice to the official which includes an opportunity to be heard," if a court finds good cause to believe that the election official "has committed or is about to commit a breach or neglect of duty or other wrongful act," it "shall issue an order requiring substantial compliance with the provisions of [the Election Code]." C.R.S. § 1-1-113(1).

212. C.R.S. § 1-4-1204(1) provides that "[n]ot later than sixty days before the presidential primary election, the secretary of state shall certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots." Each candidate must be:

> seeking the nomination for president of a political party as a bona fide candidate for president of the United States pursuant to political party rules and [must be] affiliated with a major political

> party that received at least twenty percent of the votes cast by eligible electors in Colorado at the last presidential election.

C.R.S. § 1-4-1204(1)(b). C.R.S. § 1-4-1204(4) expressly incorporates section 1-1-113 for "[a]ny challenge to the listing of any candidate on the presidential primary election ballot." Such challenges "must be . . . filed with the district court in accordance with section 1-1-113(1)." C.R.S. § 1-4-1204(4). "Any such challenge must provide notice in a summary manner of an alleged impropriety that gives rise to the complaint." C.R.S. § 1-4-1204(4).

213. In the Court's Omnibus Ruling on Pending Dispositive Motions, the Court left for trial the issue of whether the General Assembly has charged the Secretary of State with the authority to investigate or enforce Section Three of the Fourteenth Amendment.

214. Intervenors argue that the Secretary's role is simply ministerial. They argue "her responsibility is to either confirm that a candidate is affiliated with a party that is a 'major political party' according to statute and is a bona fide candidate, pursuant to that party's rules, or to confirm that the candidate submitted a proper notarized candidate's statement of intent."

215. The Court will not revisit its decision from the Omnibus Ruling on Pending Dispositive Motions rejecting CRSCC's argument that it has an unfettered right to put constitutionally unqualified candidates on the primary ballot. The Court has read the opinion in *Growe v. Simon*, No. A23-1354, 2023 WL 7392541 (Minn. November 8, 2023). C.R.S. § 1-4-1203(2)(a) provides that political parties may participate in a presidential primary only if the party has a "qualified candidate." C.R.S. § 1-4-1203(3)

provides the Secretary has "the same powers and shall perform the same duties for presidential primary elections as they provide by law for other primary elections and general elections." In Colorado, the Secretary of State has, at least in some instances, kept constitutionally unqualified candidates off the ballot. *See Hassan*, 495 F.App'x at 948 (holding that Secretary Gessler was correct in excluding a constitutionally ineligible candidate and that "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.").

216. However, in the Court's view there is a difference between the Secretary having the authority to prohibit a candidate from being put on the ballot based on what Ms. Rudy described as "an objective, knowable fact" and prohibiting a candidate from being put on the ballot due to potential constitutional infirmity that has yet to be determined by either a Court or Congress. The Court holds that the Secretary cannot, on her own accord, keep a candidate from appearing on the ballot based on a constitutional infirmity unless that constitutional infirmity is "an objective, knowable fact." Here, whether Trump is disqualified under Section Three of the Fourteenth Amendment is not "an objective, knowable fact."

217. The question then becomes whether Petitioners can file a C.R.S. § 1-1-113 action based on the Secretary's impending failure to keep Trump off the ballot where the Court does not believe the Secretary, on her own accord, has the power to keep him off the ballot.

218. Petitioners argue that, regardless of whether the Secretary has the power to investigate candidate qualifications, C.R.S. §§ 1-4-1204(4) and 1-1-113 authorize eligible electors to seek a Court order barring the Secretary from placing on the ballot a candidate who is constitutionally ineligible to assume the office they are seeking and that, in such a proceeding, the Court evaluates the candidate's qualifications *de novo*.

219. The Petitioners argue that in *Hanlen v. Gessler*, 333 P.3d 41, 50 (Colo. 2014), the Colorado Supreme Court made clear that "the election code requires a court, not an election official, to determine the issue of eligibility" of a candidate. Two years later, the Colorado Supreme Court reaffirmed that holding and again declared, "when read as a whole, the statutory scheme evidences an intent that challenges to the qualifications of a candidate be resolved only by the courts." *Carson v. Reiner*, 370 P.3d 1137, 1139 (Colo. 2016). Two years after that, the Colorado Supreme Court noted that even where the paper record submitted to an election official appears sufficient on its face, courts retain the power to review extrinsic evidence in eligibility challenges. *Kuhn v. Williams*, 418 P.3d 478, 485-87 (Colo. 2018). The Court held that "judicial review" under C.R.S. § 1-1-113 is "*de novo*" and "includes the taking of evidence" and that the challengers there could "present evidence demonstrating that a petition actually fails to comply with the Election Code, even if it 'appear[ed] to be sufficient' in a paper review." *Id*. at 485-86 (quoting C.R.S. § 1-4-909(1)).

220. *Kuhn* is particularly instructive in this regard. There, the Court held that the Secretary properly relied on the information before him when certifying the Lamborn Campaign's petition to appear on the ballot. *Id*. at 485. The Court held,

however, that "the question becomes whether the Secretary has another relevant duty he might be 'about to' breach or neglect, or some other relevant wrongful act in which he might be 'about to' engage." *Id.* (quoting C.R.S. § 1-1-113(1)).

221. The Court held that "[s]hould the court determine that the petition is not in compliance with the Election Code, the election official should certainly 'commit a breach or neglect of duty or other wrongful act'" and that it was proper for the district court to review evidence that was not available to the election official. *Id.* (quoting C.R.S. § 1-1-113(1)).

222. The question before the Court then is does the Election Code incorporate Section Three of the Fourteenth Amendment? The Election Code states that the presidential primary process is intended to "conform to the requirements of federal law," which includes the U.S. Constitution. C.R.S. § 1-4-1201. Further, C.R.S. § 1-4-1203(2)(a) provides that political parties may participate in a presidential primary only if the party has a "qualified candidate."

223. Ms. Rudy testified that the Secretary has previously kept candidates off the ballot who do not meet the requirements of Article II, Section 1, Clause 5 of the U.S. Constitution. She further testified that the Secretary would likely enforce the Twenty-Second Amendment should Barack Obama or George W. Bush attempt to be put on the primary ballot.

224. While the Court agrees with Intervenors that the Secretary cannot investigate and adjudicate Trump's eligibility under Section Three of the Fourteenth Amendment, the Election Code gives this Court that authority. C.R.S. § 1-4-1204(4)

("[T]he district court shall hear the challenge and assess the validity of all alleged improprieties" and "issue findings of fact and conclusions of law."); *see also Hassan*, 495 F.App'x at 948 ("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"); *Munro v. Socialist Workers Party*, 479 U.S. 189, 193-95 (1986) (affirming exclusion of candidate from ballot under state law based on compelling state interest in protecting integrity and stability of political process); *Bullock v. Carter*, 405 U.S. 134, 145 (1972) ("Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies").

B. DID PRESIDENT TRUMP ENGAGE IN AN INSURRECTION?

1. Definition of Insurrection

225. Section Three of the Fourteenth Amendment, passed in 1866 and ratified by the states in 1868, provides that:

> No Person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. CONST. amend. XIV, § 3.

226. Section Three of the Fourteenth Amendment was primarily written to prevent officials who left to join the Confederacy from returning to office. When many former confederates sought to be seated as if nothing happened, Republicans in Congress found it necessary to act and exclude them from positions of authority unless they demonstrated repentance or deserved forgiveness. 11/1/23 Tr. 21:11–23. Congressional debates surrounding Section Three make clear that it was intended not as a punishment for crime, but to add an additional qualification for public office. 11/01/23 Tr. 22:2–6.

227. The oath is central to Section Three. 11/01/23 Tr. 22:9–25. It served a limiting function, because Section Three only applies to those who had betrayed a previously sworn oath to the Constitution–which included those most responsible for the Civil War. 11/01/23 Tr. 22:9–25. Supporters of Section Three believed that such oathbreakers could not again take office and swear the oath without committing "moral perjury." 11/01/23 Tr. 22:9–25.

228. The history of Section Three and its passage indicate that the provision is not limited to the events of the Civil War. The language of Section Three refers generally to insurrection or rebellion, and senators in the debate made clear their intent for it to apply to future insurrections. 11/01/23 Tr. 23:4–10; 11/03/23 Tr. 42:4–43:4.

229. In the years following ratification of the Fourteenth Amendment, Section Three was enforced by various entities. These enforcements came before the enactment of federal implementing legislation in 1870. 11/01/23 Tr. 23:14–24:21.

230. Congress has the power to remove the disability by a two-thirds vote, and Congress passed a series of measures that would give amnesty to people by name, then afterwards a general amnesty to all the people then covered by Section Three. 11/01/23 Tr. 25:4–19.

231. Section Three qualifies "insurrection" by the phrase "against the same," referring to the Constitution of the United States to which the oath was sworn. U.S. CONST. amend. XIV, § 3. That limits the scope of the provision by excluding insurrections against state or local law, and including only insurrections against the Constitution, which officials have sworn an oath to support and have now broken. 11/01/23 Tr. 36:10–37:15.

232. As the Supreme Court declared during the Civil War, "[i]nsurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government." *The Amy Warwick*, 67 U.S. 635, 666 (1862).

233. The Court finds that an "insurrection" at the time of ratification of the Fourteenth Amendment was understood to refer to any public use of force or threat of force by a group of people to hinder or prevent the execution of law.

234. This understanding of "insurrection" comports with the historical examples of insurrection before the Civil War, with dictionary definitions from before the Civil War, with judicial opinions during the same time, and with other authoritative legal sources. *See e.g.*, *Case of Fries*, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800) ("any insurrection or rising of any body of people, within the United States, to attain or effect,

by force or violence any object of a great public nature, or of public and general (or national) concern, is a levying war against the United States"); *United States v. Hanway*, 26 F. Cas. 105, 127–28 (C.C.E.D. Pa. 1851); *Chancely v. Bailey*, 37 Ga. 532, 548–49 (1868) ("If the late war had been marked merely by the armed resistance of some of the citizens of the State to its laws, or to the laws of the Federal Government, as in the cases in Massachusetts in 1789, and in Pennsylvania in 1793, it would very properly have been called an insurrection") (emphasis original).

235. "When interpreting the text of a constitutional provision or statute, [courts] often resort to contemporaneous dictionaries or other sources of context to ensure that we are understanding the word in the way its drafters intended." *Bevis v. City of Naperville, Illinois*, No. 23-1353, 2023 WL 7273709 at *11 (7th Cir. Nov. 3, 2023).

236. Noah Webster's, An American Dictionary of the English Language in 1828 defined insurrection as:

> a rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state. It is the equivalent to *sedition*, except that *sedition* expresses a less extensive rising of citizens. It differs from *rebellion*, for the latter expresses a revolt, or an attempt to overthrow the government, to establish a different one or to place the country under another jurisdiction.

NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). Another contemporary dictionary from 1848, John Boag's *A Popular and Complete English Dictionary*, had an identical definition. JOHN BOAG, A POPULAR AND COMPLETE ENGLISH DICTIONARY 727 (John Boag ed., 1848); 11/01/2023 Tr. 31:16-32:2.

237. Trump's expert witness, Robert Delahunty, offered an opinion that the meaning of "insurrection" at the time was less clear. 11/03/23 Tr. 43:15–51:7. However, Professor Delahunty did not identify any historical sources that appeared to adopt a materially different view. In fact, Professor Delahunty acknowledges that "insurrection need not rise to the level of a rebellion" or to "the level of a civil war," which supports Magliocca's definition of "insurrection." 11/03/23 Tr. 133:8–23.[16] Importantly, Delahunty did not offer an alternate definition of insurrection.

238. Intervenors have offered an alternate definition of insurrection as "the taking up of arms and preparing to wage war upon the United States."

239. However, in the context of Section Three, and in accordance with the historical understanding, the Court finds that such insurrection must be "against" the "Constitution of the United States" and not against "the United States" as the Intervenors would suggest.

240. Considering the above, and the arguments made at the Hearing and in the Parties' proposed findings of fact and conclusions of law, the Court holds that an insurrection as used in Section Three of the Fourteenth Amendment is (1) a public use of

[16] The Court also considered Professor Delahunty's opinion that this definition is over inclusive and would potentially include the use of force to prevent the delivery of the U.S. Mail. Article I, Section 8, Clause 7 gives Congress the authority to designate mail routes and construct or designate post offices, and presumably the authority to carry, deliver, and regulate the mail of the United States as a whole. *See* U.S. CONST. art. I, § 8, cl. 7. Professor Delahunty argued that the definition of insurrection put forth by the Petitioners would include someone preventing the mail man from delivering mail. Even if the Court interprets delivering mail as "execution of the Constitution," preventing delivery would only be an insurrection if it was accomplished by a coordinated group of people preventing the delivery of mail and that group was preventing the delivery of mail by force.

force or threat of force (2) by a group of people (3) to hinder or prevent execution of the Constitution of the United States.

241. The Court further concludes that the events on and around January 6, 2021, easily satisfy this definition of "insurrection."

242. Thousands of individuals descended on the United States Capitol. Many of them were armed with weapons or had prepared for violence in other ways such as bringing gas masks, body armor, tactical vests, and pepper spray. The attackers assaulted law enforcement officers, engaging them in hours of hand-to-hand combat and using weapons such as tasers, batons, riot shields, flagpoles, poles broken apart from metal barricades, and knives against them.

243. The mob was coordinated and demonstrated a unity of purpose. The mob overran police lines outside the Capitol, broke into the Capitol through multiple entrances, and searched out members of Congress and the Vice President who were still inside the Capitol building. They marched through the building chanting in a manner that made clear they were seeking to inflict violence against members of Congress and Vice President Pence.

244. The mob's purpose was to prevent execution of the Constitution so that Trump remained the President. Specifically, the mob sought to obstruct the counting of the electoral votes as set out in the Twelfth Amendment and thereby prevent the peaceful transfer of power.

2. Definition of Engage

245. Section Three of the Fourteenth Amendment provides that no person shall hold certain offices who, "having previously taken an oath . . . shall have engaged in insurrection or rebellion . . . or given aid or comfort to the enemies thereof." Petitioners argue that Trump "engaged" in insurrection in two primary ways: (1) through incitement, and (2) through his conduct, by organizing and inspiring the mob and by his inaction during the January 6, 2021 attack on the Capitol.

246. Trump argues that "engage," as used in Section Three of the Fourteenth Amendment demands a significant level of activity beyond mere words or inaction, as alleged. The Court therefore must resolve the meaning of "engage" as used in Section Three of the Fourteenth Amendment. The Court first considers whether incitement qualifies as "engagement."

247. Trump's primary argument that incitement fails to meet the constitutional standard of "engagement" stems from the Second Confiscation Act, passed in 1862. The Second Confiscation Act, among other things, made it a crime for any person to "incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give aid or comfort thereto, or shall engage in, or give aid and comfort to, any such existing rebellion or insurrection." 12 Stat. 589, 590.

248. The argument, generally, is that the Second Confiscation Act distinguished between "incitement" and "engagement" by virtue of listing them separately, thereby suggesting that they were understood to be separate activities. Further, he argues, as

Section Three of the Fourteenth Amendment was patterned, in part, on the Second Confiscation Act, and based disqualification on "engagement," and not "incitement" or "setting on foot," Congress did not intend to disqualify those who merely incited insurrection or rebellion. Lastly, Trump argues that certain cases in Congress in 1870 suggest that the Congressional understanding of Section Three did not include incitement as engagement.

249. Petitioners' argument on this subject is essentially that constitutional amendments generally are less granular than criminal statutes, and so it is not surprising (or determinative) that Section Three provided only for "engagement" and did not specify incitement; further, evidence of the application, interpretation, and enforcement of the term "engage" as used exists and suggests a broader definition that encompasses incitement. Of principal import to Petitioners' argument are the opinions of Attorney General Henry Stanbery, which, generally, described "engagement" as a voluntary, direct, overt act done with the intent to further the goals of the Confederacy, and distinguished acts of charity, compulsory acts, and the mere harboring of disloyal sentiments uncoupled from activity. Further, Petitioners also point to Congressional actions, concerning members precluded from taking their seats due to conduct which Petitioners argue illustrates the Congressional understanding of Section Three.

250. Having considered the arguments, the Court concludes that engagement under Section Three of the Fourteenth Amendment includes incitement to insurrection. The Court has reviewed The Congressional Globe and Hinds' Precedents regarding the cases of Representatives Rice and McKenzie, cited by Trump, and finds that they offer

little to no guidance on the question before the Court. Both cases concerned fact questions as to whether the Representatives provided "aid or comfort" to the enemies of the United States, and not whether they had "engaged" in insurrection or rebellion. Though the Court acknowledges the adjacency of the issues, the cases remain unpersuasive as they dealt with a discrete issue in highly distinguishable circumstances from the present case.

251. Similarly, the Court has reviewed the Congressional cases the Petitioners cite and finds that they, too, are inapposite and, therefore, unhelpful. The cases of Philip Thomas and John Young Brown likewise considered whether aid and comfort had been given to the enemies of the United States, and both were assessed pursuant to the standard supplied by a congressional oath which required would-be congressmen to swear that they had not "voluntarily given aid, countenance, counsel, and encouragement to persons engaged in armed hostility to the United States." Again, the issues presented by these cases go beyond the question before this Court and consequently provide little utility.

252. Further, the Court is not convinced that the Second Confiscation Act compels the conclusion that Congress deliberately omitted other distinct unlawful acts such as incitement by requiring only that a person shall not have engaged in insurrection or rebellion. Section Three of the Fourteenth Amendment is not a mere revision, recodification, or consolidation of the Second Confiscation Act, and so the Court finds that it has limited utility in interpretating Section Three.

253. Further, this Court is mindful that Section Three is a constitutional provision, and as such, its provisions "naturally…must receive a broad and liberal construction." *See Protestants & Other Ams. United for Separation of Church & State v. O'Brien*, 272 F.Supp. 712, 718 (D.D.C. 1967) (citing *M'Culloch v. Maryland*, 17 U.S. 316, 407 (1819) (nature of constitution necessarily requires "that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves."); *see also U.S. v. Classic*, 313 U.S. 299, 316 (1941) (when interpreting constitution "we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.").

254. The Court finds more persuasive the opinions of Attorney General Stanbery, which adopted an unequivocally broad interpretation of "engagement" in insurrection. Attorney General Stanbery, on the subject, opined that "an act to fix upon a person the offence of engaging in rebellion under this law, must be an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose." The Reconstruction Acts, 12 Op. Att'y Gen. 182, 204 (1867). Specifically, as it relates to incitement, he opined "disloyal sentiments, opinions, or sympathies would not disqualify, but where a person has by speech or by writing, incited others to engage in rebellion, he must come under the disqualification." *Id.* at 205; *see also United States v. Powell*, 65 N.C. 709 (C.C.D.N.C. 1871) (the Court, instructing jury, that "the word

'engage' implies, and was intended to imply, a voluntary effort to assist the Insurrection or Rebellion, and to bring it to a successful termination."). Stanbery further rejected the notion that a person need levy war or take up arms to have "engaged" in insurrection or rebellion. The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141, 161-62 ("...it does not follow that other classes than those who actually levied war and voluntarily joined the ranks of the rebels are to be excluded, taking it to be clear, that in the sense of this law persons may have engaged in rebellion without having actually levied war or taken arms...persons who, in their individual capacity, have done any overt act for the purpose of promoting the rebellion, may well be said, in the meaning of this law, to have engaged in rebellion."). The Court agrees that "engage" was not intended to be limited to the actual physical, prosecution of combat, or likewise import a necessity that an individual take up arms.

255. Lastly, it would be anomalous to exclude those insurrectionists or rebels who, having taken an oath, participated in the insurrection or rebellion through instigation or incitement. Instigation and incitement are typically actions taken by those in leadership roles, and not, for example, by those on the front lines, with weapon in hand. To exclude from disqualification such people would seem to defeat the purpose of disqualification, at least as it relates to potential leaders of insurrection. Intervenors' position that "engage" requires more than incitement, therefore, undermines a significant purpose of the disqualification, and as such the Court cannot favor this interpretation. *Jarrolt v. Moberly*, 103 U.S. 580, 586 (1880) ("A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to

give it effective operation and suppress the mischief at which it was aimed."); *Classic*, 313 U.S. at 316 (when interpreting constitution "we cannot rightly prefer, of the possible meaning of its words, that which will defeat rather than effectuate the Constitutional purpose.").

256. The Court does not endeavor to fully define the extent to which certain conduct might qualify as "engagement" under Section Three of the Fourteenth Amendment; it is sufficient, for the Court's purposes, to find that "engagement" includes "incitement."[17] The Court agrees with Intervenors that engagement "connotes active, affirmative involvement." The definition of incitement meets this connotation. "Incitement," as the Court has found, requires a voluntary, intentional act in furtherance of an unlawful objective; such an act is an active, affirmative one.

257. As discussed below, the reason incitement falls outside of First Amendment protections is because of its quality of speech as action. Consequently, the Court sees nothing inconsistent between a requirement that a person be affirmatively, actively involved in insurrection to qualify as having engaged therein and a finding that incitement qualifies as engagement.

3. Does Engage Include Inaction?

258. Intervenors argue this Court should not consider Trump's failure to act on January 6, 2021 as evidence that he engaged in an insurrection.

[17] The Court does note that at no point in this proceeding has Trump (or any other party) argued that some type of appropriate criminal conviction is a necessary precondition to disqualification under Section Three. There is nothing in the text of Section Three suggesting that such is required, and the Court has found no case law or historical source suggesting that a conviction is a required element of disqualification.

259. Petitioners argue that Trump's intentional dereliction of duty was undertaken with the purpose of helping the mob achieve their goal of obstructing the Electoral College certification and it is therefore an independent basis for finding that Trump engaged in insurrection.

260. The Court holds that it need not look further than the words of Section Three to conclude that a failure to act does not constitute engagement under Section Three.

261. Section Three provides two disqualifying offenses: (1) engaging in insurrection or rebellion; or (2) giving aid or comfort to enemies of the United States. U.S. CONST. amend. XIV, §3. Under a plain reading of the text, "engag[ing]" is distinct from" giv[ing] aid or comfort to." *Id.* In the Court's view engaging in an insurrection requires action whereas giving aid and comfort could include taking no action.

262. Because the Petitioners do not argue that Trump gave aid or comfort to an enemy of the United States, the Court holds that Trump's inaction as it relates to his failure to send in law enforcement reinforcements it is not an independent basis for finding he engaged in insurrection.

263. That does not mean that Trump's failure to condemn the January 6, 2021 attackers (at any point during the attack), his failure to tell the mob to go home (for three hours), or his failure to send reinforcements to support law enforcement has no relevance. To the contrary, the Court holds that all three of these failures are directly relevant to the question of whether the Petitioners have proven the specific intent required under Section Three.

4. The First Amendment's Application

264. Trump has advanced the argument that the conduct at the core of this case is pure speech, and as such, is afforded robust protections under the First Amendment. Trump raised this issue in his Special Motion to Dismiss Pursuant to C.R.S. § 13-20-1101(3)(a), in his subsequent motion to dismiss, and again during his motion for a directed verdict at trial. The argument relies heavily on *Brandenburg v. Ohio*, 395 U.S. 444 (1969) and its progeny, and (broadly speaking) contends that Trump's purported involvement in the January 6, 2021 attack amounts to nothing more than pure speech which, under the *Brandenburg* test, is only sanctionable as incitement if such speech satisfies the requirements of imminence, intention, and tendency to produce violence. In his motion for a directed verdict, Trump argued that *Brandenburg* requires an objective analysis of the speaker's words when considering the test, citing the relatively recent Sixth Circuit decision *Nwanguma v. Trump*, 903 F.3d 604 (6th Cir. 2018).

265. Petitioners generally respond that they seek disqualification under Section Three of the Fourteenth Amendment not just for speech, but for conduct, as well, and as such, the First Amendment provides no protection. They further argue that, even if the First Amendment would normally operate to shield Trump's conduct from sanction, it has no application here where the sanction sought is itself required by the Constitution. Lastly, they argue that, even if *Brandenburg* applies to the proceeding, Trump's conduct satisfies the test and, consequently, his speech is appropriately subject to sanction as falling outside of the First Amendment protections.

266. Before resolving the arguments of the Parties, the Court explores the lay of the land when it comes to First Amendment jurisprudence on the question of inflammatory political speech.

a. Legal Backdrop

267. The Court starts with *Brandenburg*, it being the central case at issue and providing the namesake for the test the Court is to consider employing. The appellant in *Brandenburg* was the leader of a local Ku Klux Klan chapter, convicted under the Ohio Criminal Syndicalism statute for "advocating the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl(ing) with any society, group, or assemblage or persons formed to teach or advocate the doctrines of criminal syndicalism." 395 U.S. at 444-45 (quoting Ohio Rev. Code Ann. § 2923.13, *repealed by* 1972 H 511). The Supreme Court of the United States held that the Ohio Criminal Syndicalism statute was unconstitutional on its face. *Id*. at 448-49. The *Brandenburg* Court held that developments in First Amendment jurisprudence favored "the principle that the constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id*. at 447. The *Brandenburg* Court cited *Noto v. United States*, 367 U.S. 290, 297-98 (1961) for the proposition that "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the

same as preparing a group for violent action and steeling it to such action." 395 U.S. at 448.

268. Almost a decade later, the Supreme Court considered the intersection of concerted political action and violence in *Nat'l Ass'n for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). The case considered the boycott of white merchants in Claiborne County, Mississippi, which began in 1966. *Id.* at 889.

269. At the trial court level, the merchants were awarded damages for lost profits from a seven-year period on three theories. *Id.* at 893. The Mississippi Supreme Court sustained the entirety of the damages imposed on the theory that the boycotters had agreed to use force, violence, and threats to effectuate the boycott. *Id.* at 895. The theory was that the boycott employed force and threats, which caused otherwise willing patrons to forego the boycotted businesses, rendering the entire boycott unlawful and the organizers liable for the entire cost of the boycott. *Id.* The entire history of the boycott will not be recounted by this Court, here; however, there are some salient details during the boycott that are relevant to the Court's task. On April 1, 1966, the Claiborne County branch of the National Association for the Advancement of Colored People convened and unanimously voted to boycott the white merchants of Port Gibson and Claiborne County. *Id.* at 900. Charles Evers gave a speech on that occasion, and though it was not recorded, the trial court found that Evers told the audience that "they would be watched and that blacks who traded with white merchants would be *answerable to him*." *Id.* at 900, n. 28 (emphasis original). Further, according to the Sheriff, who

attended, Evers told the crowd that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." *Id*. The boycott proceeded for several years. *Id*. at 893.

270. On April 18, 1969, a young black man named Roosevelt Jackson was shot to death by the Port Gibson, Mississippi, police. *Id*. at 902. Crowds gathered and protested the killing. *Id*. On April 19, Charles Evers gave a speech during which he warned that boycott violators would be "disciplined by their own people" and that the Port Gibson Sheriff "could not sleep with boycott violators at night." *Id*. On April 21, Charles Evers (among others) gave another speech stating "if we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id*. The trial court found that several instances of boycott-related violence had occurred over the preceding three years. *Id*. at 903-06. These included, among other things, the publication of the names of boycott-violators and subsequent ostracization and name-calling, instances of shots being fired through windows of homes owned by boycott violators, bricks and stones being thrown through car windows, and the trampling of a flower garden. *Id*. All these instances of violence occurred in 1966. *Id*. at 906.

271. The Supreme Court found that "[t]hrough speech, assembly, and petition – rather than through riot or revolution – petitioners sought to change a social order that had consistently treated them as second-class citizens." *Id*. at 912. The Supreme Court recognized that, though these activities are constitutionally protected, the Mississippi Supreme Court's ruling was not predicated on the theory that state law prohibited a nonviolent, politically-motivated boycott, but rather on the theory that it

had constituted an agreement to use violence, fear, and intimidation. *Id*. at 915. The Supreme Court was emphatic that "the First Amendment does not protect violence," however it may masquerade. *Id*. at 916. The Court found that it was undisputed that some acts of violence had occurred in the context of the boycott. *Id*. However, the Court went on to find that in such circumstances, where violence occurs "in the context of constitutionally protected activity . . . 'precision of regulation' is demanded." *Id*. (quoting *Nat'l Ass'n for the Advancement of Colored People v. Button*, 371 U.S. 415, 438 (1963)).

272. Relevant to the question before the Court is the Supreme Court's analysis of the liability imposed on Charles Evers. After noting that Evers could not be held liable by virtue of his association with the boycott alone, the Supreme Court acknowledged that the content of Evers' speeches was the purported basis for his liability. *Id*. at 926.

273. The Supreme Court found that Evers' speech did not meet the necessary standard. *Id*. at 929. Emphasizing the distinction between mere advocacy for violence in the abstract, which is afforded protection, and incitement, the Supreme Court found that Evers' speech "generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them." *Id*. at 928. Acknowledging that, during Evers' speech, "strong language was used," the Supreme Court noted that, with one possible exception, "the acts of violence identified in 1966 occurred weeks or months after [Evers'] April 1, 1966

speech" and that there was no finding "of any violence after the challenged 1969 speech." *Id*.

274. The Supreme Court held that "Strong and effective extemporaneous rhetoric cannot be nicely channeled into purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech." *Id*. The Supreme Court qualified its findings noting that "[i]f there were other evidence of [Evers'] authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence." *Id*. at 929. But, because there was "no evidence--apart from the speeches themselves--," that Evers authorized, ratified, or directly threatened acts of violence, the theory failed. *Id*.

275. In summarizing its opinion, the Supreme Court noted litigation of this type is an extremely delicate matter, as the circumstances exist on a knife's edge between fundamental rights concerning association and concerted political activity, and the "special dangers" of conspiratorial activity. *Id*. at 932-33.

276. This Court undertakes its task mindful of the necessity of discharging the sort of "precision of regulation" necessary to ensure that the foundational First Amendment rights Petitioners' challenge implicates are not improperly curtailed. *Button*, 371 U.S. at 438. What is also clear, however, is that violence is not protected expression: the Constitution does not protect lawlessness masquerading as political activism.

b. Does *Brandenburg* Apply?

277. The Court first considers Petitioners' contention that *Brandenburg* and its progeny have no application to this case. Petitioners first argue that their requested relief is not based on speech, but on conduct. Specifically, they argue that Trump's conduct, while containing elements of speech, nevertheless constituted conduct, and point to his inaction during the insurrection, despite having knowledge of the violence and the authority (and affirmative duty) to intercede. Petitioners further distinguish *Brandenburg* and related cases by pointing out that the limitation at issue here is imposed by virtue of the Constitution itself (and not state statute or regulation), applies to a limited category of people (*i.e.* those who have taken an oath to support the Constitution) and that the "penalty" imposed is not civil or criminal liability, but merely disqualification, a standard on who may hold office, imposed only by way of Constitutional Amendment. Lastly, they argue that any apparent conflict between Section Three of the Fourteenth Amendment and the First Amendment is easily reconciled, as disqualification for engaging in rebellion or insurrection could not reach mere disloyal sentiments or the abstract teaching of the propriety of disloyalty but instead requires something more.

278. With respect to Petitioners argument that their request for relief is based on conduct and not speech the Court disagrees. The Court has already ruled on the argument's that Trump's inaction constitutes "engagement." Further, the "conduct" leading up to the events of January 6, 2021, are predicated on public speeches and statements and therefore are appropriately analyzed as "speech." The Court

emphasizes, however, that it considers Trump's actions and inactions prior to and on January 6, 2021 as context and history to inform its understanding of his speech on January 6, 2021 and the tweets on January 6, 2021.

279. Regarding the argument that Section Three of the Fourteenth Amendment is nonpunitive and merely imposes a qualification for office, and therefore *Brandenburg*'s exacting standard is inapplicable, there is no direct guidance. The nearest guidance this Court can find on the question is *Bond v. Floyd*, 385 U.S. 116 (1966). There, a duly elected state legislator was prevented from taking his seat because of certain endorsements and statements he had made concerning his opposition to the Vietnam War and the draft. *Id*. at 118-25. His expulsion was affirmed by a federal court on the grounds that his conduct constituted a call to action to resist the draft. *Id*. at 127. The Supreme Court considered the intersection of a legislative oath of loyalty, the requirement under Article VI that he swear one, and the First Amendment. *Id*. at 131-32. The Court found that Bond's disqualification violated the First Amendment, noting the danger that a majority faction might use the oath of loyalty to suppress dissenting political views, and finding that the speech at issue did not constitute a call to unlawfully resist the draft and as such did not demonstrate any "incitement to violation of law." *Id*. at 132-34.

280. The *Bond* Court emphasized the distinction between discussion, contemplation, and advocacy, on one hand, and calls for lawlessness, on the other. *Id*. at 116. *Bond* was cited by the *Brandenburg* Court for this principle. 395 U.S. at 448.

281. While the Court believes that there is certainly room to distinguish the conduct at issue, here, and the conduct at issue in *Bond*, and does not suggest that the factual circumstances between the two cases are at all similar, the lessons from *Brandenburg*-related cases are clear: in order for speech to lose its protection, it must cross the threshold from abstraction to action; it must be used as a means of force, not a means of contemplation of advocacy. *See, e.g.*, *U.S. v. Dellinger*, 472 F.2d 340, 360 (7th Cir. 1972) (the question at the heart of incitement is "whether particular speech is intended to and has such capacity to propel action that it is reasonable to treat such speech as action."). Speech that constitutes an integral tool in furtherance of the lawless act loses its distinction and becomes an instrument of force. *See Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941) ("Utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution."). *Bond* suggests that these same principles apply with equal force in the context of elected officials and loyalty oaths.

282. Acknowledging the foregoing principles, in this Court's view, reconciles the First and Fourteenth Amendments to the extent there is any conflict. Applying the *Brandenburg* standard to questions of incitement as "engagement," even in the context of elected officials and loyalty oaths, ensures that mere "disloyal sentiments, opinions, or sympathies" do not result in disqualification from office. It ensures that elected officials are afforded the appropriate breathing space to discuss public policy. Therefore, to the extent the Petitioners seek Trump's disqualification on the basis that

he engaged in insurrection through incitement, it must be proven that his speech was intended to produce imminent lawless action and was likely to do so.

c. The *Brandenburg* Standard

283. First, before undertaking the *Brandenburg* analysis, the Court addresses the argument Trump made during its motion for a directed verdict that the Court ought to consider only the "objective meaning" of the language at issue. The Sixth Circuit considered and rejected the importation of an "objective analysis" in *Nwanguma*, and this Court likewise finds that "objectivity" is not a required part of the *Brandenburg* test. 903 F.3d at 613.

284. As the U.S. Supreme Court observed, the court is obligated to make an independent examination of the whole record when considering the "content, form, and context" of the speech. *Snyder v. Phelps*, 562 U.S. 443, 453-54 (2011) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)). Unlike in *Nwanguma*, the "whole record" here consists of more than just the Ellipse speech and more than just the plain language used. Ultimately, all language is, at its core, a system of signals (whether through sounds, symbols, or otherwise) designed to convey meaning from a speaker to an audience. An inquiry into a speaker's intent can appropriately probe what the speaker understands or knows about how his audience will perceive his speech. This is not an inquiry into the "reaction of the audience," but rather asks whether, and in what way, the speaker knows how his choice of language will be understood, and, therefore, what he "intends" his speech to mean as evidenced by his use of language. *Watts v. United States*, 394 U.S. 705 (1969) ("taken in context, and regarding the expressly

conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise."); *Hess v. Indiana*, 414 U.S. 105, 108 (1973)("there was no evidence or rational inference from the import of the language that his words were intended to produce, and likely to produce, imminent disorder.").

285. To assess whether Trump intended to produce disorder and whether his words were likely to produce disorder, the Court must consider his knowledge or understanding of how his words would be perceived by his audience. Such an inquiry requires the Court to consider the history of Trump's relationship to and interaction with extremist supporters and political violence. See, *e.g.*, *Claiborne Hardware Co.*, 458 U.S. at 929 (noting that "if there were other evidence of his [Evers'] authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence.").

286. Second, the Court addresses the issue of the intent required to establish incitement. Trump has raised the issue of the requisite level of intent to be applied in this matter and, by the Court's reading, the parties are largely in agreement. The Court finds that the specific intent necessary to sustain a finding of incitement is likewise sufficient to sustain the intent required by Section Three. Under *Brandenburg*, the inquiry is whether the speech at issue is "[1] intended to produce, and [2] likely to produce, imminent disorder." *Counterman v. Colorado*, 600 U.S. 66, 97 (Sotomayor, J., concurring in part) (citation omitted). The U.S. Supreme Court in *Counterman* wrote "when incitement is at issue, we have spoken in terms of specific intent, presumably equivalent to purpose or knowledge." 600 U.S. at 81. "A person acts

purposefully when he 'consciously desires' a result." *Id.* at 79 (citation omitted). "A person acts knowingly when 'he is aware that [a] result is practically certain to follow." *Id.* (citation omitted). The *Counterman* Court noted that knowledge is "not often distinguished from purpose." *Id.*; *see also Tison v. Arizona*, 481 U.S. 137, 150 (1987) ("one intends certain consequences when he desires that his acts cause those consequence or knows that those consequences are substantially certain to result from his acts.").

287. For this Court to find that Trump incited an insurrection, the Court must first find that he had the specific intent (either purpose or knowledge) to produce the insurrection. A finding that Trump had the purpose or knowledge of producing the insurrection is sufficient to satisfy the requirement that he "engaged" in insurrection through an intentional act.

5. Application of *Brandenburg*

288. The Court concludes, based on its findings of fact and the applicable law detailed above, that Trump incited an insurrection on January 6, 2021 and therefore "engaged" in insurrection within the meaning of Section Three of the Fourteenth Amendment. First, the Court concludes that Trump acted with the specific intent to disrupt the Electoral College certification of President Biden's electoral victory through unlawful means; specifically, by using unlawful force and violence. Next, the Court concludes that the language Trump employed was likely to produce such lawlessness.

289. Regarding Trump's specific intent (either purpose or knowledge), the Court considers highly relevant Trump's history of courting extremists and endorsing

political violence as legitimate and proper, as well as his efforts to undermine the legitimacy of the 2020 election results and hinder the certification of the Electoral College results in Congress. Trump's history of reacting favorably to political violence committed at his rallies or in his name, as well as his cultivation of relationships with extremist political actors who frequently traffic in violent rhetoric, is well-established. Trump has consistently endorsed violence and intimidation as not only legitimate means of political expression, but as necessary, even virtuous. Further, the Court has found that Trump was aware that his supporters were willing to engage in political violence and that they would respond to his calls for them to do so.

290. In addition to his consistent endorsement of political violence, Trump undertook efforts to undermine the legitimacy of the 2020 presidential election well in advance of the election, making accusations of widespread corruption, voter fraud, and election rigging. These efforts intensified when the election results were returned showing that he had lost the election, despite a complete lack of evidence showing any such fraud and his knowledge that there was no evidence. As the electoral college votes were cast, and the certification date drew closer, Trump further intensified his public efforts at disrupting the certification, even as violence, intimidation, and calls for political violence escalated. In the wake of this, Trump supported calls for protests in Washington, D.C., and focused his call on the date of the certification, January 6, 2021. Trump continued to inflame his supporters with false accusations of historic levels of election corruption. Leading up to January 6, 2021, federal law enforcement and security agencies identified significant threats of violence associated with the planned

January 6, 2021 rallies. Despite these warnings, Trump undertook no effort to prepare law enforcement or discourage violence among the prospective attendees. Importantly, he did not tell law enforcement he intended to direct the crowd to protest at the Capitol.

291. On the morning of January 6, 2021, Trump focused the attention of his supporters on Vice President Mike Pence and his role in certifying the electoral college results, falsely claiming Vice President Pence had the authority to "send back" the electoral votes for recertification. Trump proceeded to give a speech at the Ellipse, wherein he again inflamed his supporters by contending that the election was "stolen," that the country was in existential danger from endemic corruption, that strength and action were needed to save the country, and that it was time to do something about it. He continued to focus the crowd on Vice President Pence and directed the crowd to march to the Capitol building, claiming that he would be joining them. The crowd reacted predictably, marched on the Capitol, violently clashed with police officers attempting to secure the building, and breached the building with the intent to disrupt the certification.

292. After being informed of the attack, Trump did little. Trump first sent out a tweet condemning Vice President Pence for refusing to illegally interrupt the electoral vote certification and continued to promote his false claims that the 2020 presidential election was fraudulent. He later sent out tweets encouraging his supporters to "remain peaceful" and "stay peaceful" despite knowing that they were not peaceful. Predictably, these tweets had no effect. Trump resisted calls from advisors and members of his party to intercede and took no immediate action to quell the violence. It was not until 4:17

p.m. that Trump released a video that unmistakably called for the mob to disperse while simultaneously praising their conduct. Trump continued to praise the violent conduct of the mob after it had dispersed.

293. The Court concludes that Trump acted with the specific intent to incite political violence and direct it at the Capitol with the purpose of disrupting the electoral certification. Trump cultivated a culture that embraced political violence through his consistent endorsement of the same. He responded to growing threats of violence and intimidation in the lead-up to the certification by amplifying his false claims of election fraud. He convened a large crowd on the date of the certification in Washington, D.C., focused them on the certification process, told them their country was being stolen from them, called for strength and action, and directed them to the Capitol where the certification was about to take place.

294. When the violence began, he took no effective action, disregarded repeated calls to intervene, and pressured colleagues to delay the certification until roughly three hours had passed, at which point he called for dispersal, but not without praising the mob and again endorsing the use of political violence. The evidence shows that Trump not only knew about the potential for violence, but that he actively promoted it and, on January 6, 2021, incited it. His inaction during the violence and his later endorsement of the violence corroborates the evidence that his intent was to incite violence on January 6, 2021 based on his conduct leading up to and on January 6, 2021. The Court therefore holds that the first *Brandenburg* factor has been established.

295. Regarding the second *Brandenburg* factor, the Court finds that the language Trump used throughout January 6, 2021 was likely to incite imminent violence. The language Trump employed must be understood within the context of his promotion and endorsement of political violence as well as within the context of the circumstances as they existed in the winter of 2020, when calls for violence and threats relating to the 2020 election were escalating. For years, Trump had embraced the virtue and necessity of political violence; for months, Trump and others had been falsely claiming that the 2020 election had been flagrantly rigged, that the country was being "stolen," and that something needed to be done.

296. Knowing of the potential for violence, and having actively primed the anger of his extremist supporters, Trump called for strength and action on January 6, 2021, posturing the rightful certification of President Biden's electoral victory as "the most corrupt election in the history, maybe of the world" and as a "matter of national security," telling his supporters that they were allowed to go by "very different rules" and that if they didn't "fight like hell, [they're] not going to have a country anymore." Such incendiary rhetoric, issued by a speaker who routinely embraced political violence and had inflamed the anger of his supporters leading up to the certification, was likely to incite imminent lawlessness and disorder. The Court, therefore, finds that the second *Brandenburg* factor has been met.

297. Trump has, throughout this litigation, pointed to instances of Democratic lawmakers and leaders using similarly strong, martial language, such as calling on supporters to "fight" and "fight like hell." The Court acknowledges the prevalence of

martial language in the political arena; indeed, the word "campaign" itself has a military history. *See, e.g.*, *Claiborne Hardware Co.*, 458 U.S. at 928 ("Strong an effective extemporaneous rhetoric cannot be nicely channeled into purely dulcet phrases."). This argument, however, ignores both the significant history of Trump's relationship with political violence and the noted escalation in Trump's rhetoric in the lead up to, and on, January 6, 2021. It further disregards the distinct atmosphere of threats and calls for violence existing around the 2020 election and its legitimacy. When interpreting Trump's language, the Court must consider not only the content of his speech, but the form and context as well. *See Id.* at 929 (noting that, if there had been "other evidence" of Evers' "authorization of wrongful conduct," the references to "discipline" in his speeches could be used to corroborate that evidence).

298. Consequently, the Court finds that Petitioners have established that Trump engaged in an insurrection on January 6, 2021 through incitement, and that the First Amendment does not protect Trump's speech.

C. DOES SECTION THREE OF THE FOURTEENTH AMENDMENT APPLY TO PRESIDENT TRUMP?

299. For Section Three of the Fourteenth Amendment to apply to Trump this Court must find both that the Presidency is an "office . . . under the United States" and that Trump took an oath as "an officer of the United States" "to support the Constitution of the United States." U.S. CONST. amend. XIV, § 3.

300. Professor Magliocca provided historical evidence that the Presidency was understood as an "office, civil or military, under the United States" such that

disqualified individuals could not assume the Presidency. 11/01/23 Tr. 59:17-62:6. The most compelling testimony to that effect was an exchange between Senators Morrill and Johnson during the Congressional Debates over Section Three, where one Senator explained to the other that the Presidency was covered by "office, civil or military, under the United States." Professor Magliocca also testified it would be preposterous that Section Three would not cover Jefferson Davis—the President of the Confederacy—should he have wished to run for President of the United States after the civil war. *Id.*

301. The Court holds there is scant direct evidence regarding whether the Presidency is one of the positions subject to disqualification. The disqualified offices enumerated are presented in descending order starting with the highest levels of the federal government and descending downwards. It starts with "Senator or Representatives in Congress," then lists "electors of President and Vice President," and then ends with the catchall phrase of "any office, civil or military, under the United States, or under any State." U.S. CONST. amend. XIV, § 3.

302. To lump the Presidency in with any other civil or military office is odd indeed and very troubling to the Court because as Intervenors point out, Section Three explicitly lists all federal elected positions except the President and Vice President. Under traditional rules of statutory construction, when a list includes specific positions but then fails to include others, courts assume the exclusion was intentional. *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015) (finding that Congress intended to exclude rules or regulations when it included only the word "law" versus elsewhere where it used the phrase "laws, rule or regulation").

303. Finally, the Intervenors point out that an earlier version of the Amendment read "No person shall be qualified or shall hold the office of President or vice president of the United States, Senator or Representative in the national congress…." Kurt Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, 10 (Oct. 28, 2023) (unpublished draft) (on file with the Social Science Research Network). This fact certainly suggests that the drafters intended to omit the office of the Presidency from the offices to be disqualified.[18]

304. The Court holds that it is unpersuaded that the drafters intended to include the highest office in the Country in the catchall phrase "office . . . under the United States."

305. Next the Court addresses whether Trump "previously [took] an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State." U.S. CONST. amend. XIV, § 3. Because President Trump was never a congressman, state legislator, or state officer, Section Three applies only if he was an "officer of the United States." *Id.*

306. Professor Magliocca testified that during Reconstruction, the President of the United States was understood to be an "officer of the United States." 11/01/2023 Tr.

[18] In response to the argument that it would be preposterous that Section Three of the Fourteenth Amendment would not prevent Jefferson Davis from being President of the United States, the Court notes that one possible reason why the Presidency was not included in positions disqualified is that Section Three clearly disqualifies electors for the office of the President and Vice President. Perhaps, the thought process was that by excluding electors who were former oath swearing confederates, there was effectively no chance of a former confederate leader becoming President or Vice President.

51:20-52:3. He points to Attorney General Stanbery's first opinion that stated that the phrase "officer of the United States" was used "in its most general sense and without any qualification" in Section Three. 11/01/23 Tr. 53:12–54:4; The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141, 158 (1867). The next sentence, however, would cut against including a President when Stanbery states "I think, as here used, it was intended to comprehend military as well as civil officers of the United States who had taken the prescribed oath." The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141, 158. To refer to the President of the United States as a mere "civil officer" is counterintuitive.

307. The Court holds that the more obvious reading of Attorney General Stanbery's opinion is that his reference to the "most general sense and without any qualification" was to make it clear that, unlike with State officers, the phrase applied to all lower-level federal officers so long as they took an oath, and did not apply only to the upper echelon of the military and civil ranks.

308. Stanbery's second opinion likewise states that "officers of the United States" applied "without limitation" to any "person who has, at any time prior to the rebellion held any office, civil or military, under the United States and has taken an official oath to support the Constitution of the United States." The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 182, 203(1867); 11/03/23 Tr. 256:22–257:13.

309. In other words, Magliocca testified because the Presidency is an "office," the person who holds that office and swears an oath was understood to be an "officer." Stanbery's second opinion later goes on to say that the President is an "executive officer." The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 182, 196 (1867); 11/01/23 Tr.

59:11–16. But to some extent this reference cuts against the President being included because Section Three explicitly includes "executive . . . officer[s] of any State" but only includes "officer of the United States". U.S. CONST. amend. XIV, § 3.

310. Magliocca further argued that contemporary usage supports the view that the President is an "officer of the United States." Andrew Johnson repeatedly referred to himself as such in presidential proclamations, members of Congress both during the 39th Congress that ratified the Fourteenth Amendment and during Johnson's impeachment several years later repeatedly referred to the President the same way, and earlier presidents in the Nineteenth Century were referred to the same way. 11/01/23 Tr. 56:3–59:16, 69:21–71:21.

311. On the other hand, Intervenors argue that five constitutional provisions show that the President is not an "officer of the United States."

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

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

- The Commissions Clause in Article II, Section 3 specifies that the President "shall Commission all the Officers of the United States." U.S. CONST. art. II, § 3.

- In the Oath and Affirmation Clause of Article VI, Clause 3, the President is explicitly absent from the enumerated list of persons the clause requires to take an oath to support the Constitution. The list includes "[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States." US. CONST. art. VI, cl. 3.

- Article VI provides further support for distinguishing the President from "Officers of the United States" because the oath taken by the President under Article II, Section 1, Clause 8 is not the same as the oath prescribed for officers of the United States under Article VI, Clause 3.

312. The Court agrees with Intervenors that all five of those Constitutional provisions lead towards the same conclusion—that the drafters of the Section Three of the Fourteenth Amendment did not intend to include the President as "an officer of the United States."

313. Here, after considering the arguments on both sides, the Court is persuaded that "officers of the United States" did not include the President of the United States. While the Court agrees that there are persuasive arguments on both sides, the Court holds that the absence of the President from the list of positions to which the Amendment applies combined with the fact that Section Three specifies that the disqualifying oath is one to "support" the Constitution whereas the Presidential oath is to "preserve, protect and defend" the Constitution,[19] it appears to the Court that for

[19] The Court agrees with Petitioners that an oath to preserve, protect and defend the Constitution encompasses the same duties as an oath to support the Constitution. The Court, however, agrees with Intervenors that given there were two oaths in the Constitution at the time, the fact that Section Three references the oath that applies to Article VI, Clause 3 officers suggests that that is the class of officers to whom Section Three applies.

whatever reason the drafters of Section Three did not intend to include a person who had only taken the Presidential Oath. [20]

314. To be clear, part of the Court's decision is its reluctance to embrace an interpretation which would disqualify a presidential candidate without a clear, unmistakable indication that such is the intent of Section Three. As Attorney General Stanbery again noted when construing the Reconstruction Acts, "those who are *expressly* brought within its operation cannot be saved from its operation. Where, from the generality of terms of description, or for any other reason, a reasonable doubt arises, that doubt is to be resolved against the operation of the law and in favor of the voter." The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141, 160 (1867) (emphasis added).[21] Here, the record demonstrates an appreciable amount of tension between the competing interpretations, and a lack of definitive guidance in the text or historical sources.

315. As a result, the Court holds that Section Three of the Fourteenth Amendment does not apply to Trump.

[20] Whether this omission was intentional, or an oversight is not for this Court to decide. It may very well have been an oversight because to the Court's knowledge Trump is the first President of the United States who had not previously taken an oath of office.

[21] The Court is mindful that Stanbery was considering disenfranchisement, not qualification for office, and that he was interpreting a statute he considered "penal and punitive" in nature; the Court nevertheless finds that the principle articulated, that the law ought err on the side of democratic norms except where a contrary indication is clear, is appropriate and applicable to the circumstances.

VI. CONCLUSION

Pursuant to the above, the Court ORDERS the Secretary of State to place Donald J. Trump on the presidential primary ballot when it certifies the ballot on January 5, 2024.

DATED: November 17, 2023.

BY THE COURT:

Sarah B. Wallace
District Court Judge