No._____

In the Supreme Court of the United States

DONALD J. TRUMP, PETITIONER

v.

NORMA ANDERSON, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Supreme Court of Colorado held that President Donald J. Trump is disqualified from holding the office of President because he "engaged in insurrection" against the Constitution of the United States—and that he did so after taking an oath "as an officer of the United States" to "support" the Constitution. The state supreme court ruled that the Colorado Secretary of State should not list President Trump's name on the 2024 presidential primary ballot or count any write-in votes cast for him. The state supreme court stayed its decision pending United States Supreme Court review.

The question presented is:

> Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?

PARTIES TO THE PROCEEDING

Petitioner President Donald J. Trump was intervenor-appellee/cross-appellant in the state supreme court.

Respondents Norma Anderson, Michelle Priola, Claudine Cmarada, Krista Kafer, Kathi Wright, and Christopher Castilian were petitioners-appellants/cross-appellees in the state supreme court.

Respondent Jena Griswold was respondent-appellee in the state supreme court.

Respondent Colorado Republican State Central Committee was intervenor-appellee in the state supreme court.

A corporate disclosure statement is not required because President Trump is not a corporation. *See* Sup. Ct. R. 29.6.

STATEMENT OF RELATED CASES

Counsel is aware of no directly related proceedings arising from the same trial-court case as this case other than those proceedings appealed here.

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PETITION FOR WRIT OF CERTIORARI

It is a "'fundamental principle of our representative democracy,' embodied in the Constitution, that 'the people should choose whom they please to govern them.'" *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)). Petitioner President Donald J. Trump ("President Trump") is *the* leading candidate for the Republican Party nomination for President of the United States.[1] Over 74 million Americans voted for President Trump in the 2020 general election, including more than 1.3 million voters in

1. *See 2024 Republican Presidential Nomination*, RealClearPolitics (last accessed Jan. 2, 2024), https://www.realclearpolling.com/polls/president/republican-primary/2024/national (reporting an average lead of over 50% in national polling above his nearest competitor for the Republican nomination.).

the State of Colorado.[2] Yet, on December 19, 2023, the Colorado Supreme Court ordered President Trump removed from the presidential primary ballot—a ruling that, if allowed to stand, will mark the first time in the history of the United States that the judiciary has prevented voters from casting ballots for the leading major-party presidential candidate.

In our system of "government of the people, by the people, [and] for the people,"[3] Colorado's ruling is not and cannot be correct. This Court should grant certiorari to consider this question of paramount importance, summarily reverse the Colorado Supreme Court's ruling, and return the right to vote for their candidate of choice to the voters.

The question of eligibility to serve as President of the United States is properly reserved for Congress, not the state courts, to consider and decide. By considering the question of President Trump's eligibility and barring him from the ballot, the Colorado Supreme Court arrogated Congress' authority.

In addition, even if the Colorado Supreme Court could consider challenges to President Trump's eligibility, which it cannot, it misapplied the law. First, the President is not "an officer of the United States," he took a different oath than the one set forth in section 3, and the presidency is

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2. *Federal Elections 2020: Election Results for the US. President, the U.S. Senate and the U.S. House of Representatives*, Federal Election Commission (Oct. 2022), https://www.fec.gov/resources/cms-content/documents/federalelections2020.pdf.

3. *See* Abraham Lincoln, *Gettysburg address delivered at Gettysburg Pa. Nov. 19th, 1863*, Nat'l Archives, https://www.loc.gov/resource/rbpe.24404500/?st=text.

not an "office under the United States." Thus, President Trump falls outside the scope of section 3. Second, the Colorado Supreme Court erred in how it described President Trump's role in the events of January 6, 2021. It was not "insurrection" and President Trump in no way "engaged" in "insurrection." Third, the proceedings in the Colorado Supreme Court were premature and violated the Electors Clause.

Finally, there are many other grounds for reversal, as many scholars have pointed,[4] including the three grounds for reversal presented in the petition for certiorari filed last week by the Colorado Republican State Central Committee.

OPINIONS BELOW

The state supreme court's opinion is at 2023 WL 8770111, and is reproduced at App. 1a–183a. The district court's opinion is at 2023 WL 8006216, and is reproduced at App. 184a–284a.

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4. *See* Samuel Moyn, *The Supreme Court Should Overturn the Colorado Ruling Unanimously*, New York Times (Dec. 22, 2023), available at http://nyti.ms/3va3CaU; Lawrence Lessig, *The Supreme Court Must Unanimously Strike Down Trump's Ballot Removal*, Slate (Dec. 20, 2023), available at http://bit.ly/4awV7XT; Richard A. Epstein, Misguided Disqualification Efforts, Defining Ideas (Nov. 16, 2023), available at http://hvr.co/48fEX3x; John Harrison and Saikrishna Prakash, *If Trump Is Disqualified, He Can Still Run*, Wall Street Journal (Dec. 20, 2023) , available at http://on.wsj.com/47f7HrS; Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, available at http://bit.ly/48vZ6Sz.

JURISDICTION

The state supreme court entered judgment on December 19, 2023. App. 1a. President Trump timely filed this petition on January 3, 2024. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are at App. 318a–325a.

STATEMENT

Over the last few months, more than 60 lawsuits or administrative challenges have been filed seeking to keep President Trump from appearing on the presidential primary or general-election ballot. The common theory behind these lawsuits and challenges is that President Trump is somehow disqualified from holding office under section 3 of the Fourteenth Amendment because of an allegation that he "engaged in insurrection" on January 6, 2021.[5] Courts considering these claims—including state supreme courts in Michigan and Minnesota—have all rejected them for varying reasons, contrary to the Colorado Supreme Court's ruling of December 19, 2023, which ordered the Colorado Secretary of State to exclude President Trump from the presidential primary ballot. The court stayed its ruling until January 4, 2024, and announced that the stay would automatically continue if

5. *See* William Baude and Michael Stokes Paulsen, *The Sweep and Force of Section 3*, 172 U. Pa. L. Rev. ___ (forthcoming 2024), available at http://bit.ly/3RCboSp.

President Trump sought review in this Court before that date. App. 114a.

The respondents in this case include six individuals eligible to vote in Colorado's Republican presidential primary (the "Anderson litigants")[6] who sued Colorado Secretary of State Jena Griswold in state district court, claiming that section 3 establishes "a constitutional limitation on who can run for President."[7]

The Anderson litigants sued under sections 1-1-113(1) and 1-4-1204(4) of the Colorado Revised Statutes. Section 1-1-113(1) allows an eligible voter to sue any person "charged with a duty" under the Colorado Election Code, but only if that person "has committed or is about to commit a breach or neglect of duty or other wrongful act." Colo. Rev. Stat. § 1-1-113(1) (App. 319a).[8] And section 1-4-

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6. The Anderson litigants are "petitioners" in the state-court proceeding but respondents in this Court. Secretary Griswold is a respondent in both the state-court proceedings and this Court. To avoid confusion, we will use the parties' names rather than their status.

7. *Anderson v. Griswold*, 2023CV32577, Verified Petition at ¶ 343, available at http://bit.ly/3vgwuP2.

8. The full text of Colo. Rev. Stat. § 1-1-113(1) provides:

> 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

(continued…)

1204(4) specifically authorizes an eligible voter to challenge "the listing of any candidate on the presidential primary election ballot" under the procedures in section 1-1-113, although section 1-4-1204(4) imposes additional rules for these types of lawsuits and demands that they be resolved with extraordinary speed: they must be filed with the district court within five days of the filing deadline, heard within five days of filing, and the district court must issue findings of fact and conclusions of law within 48 hours of the hearing. Colo. Rev. Stat. § 1-4-1204(4) (App. 325a).

Nothing in Colorado's Election Code requires the Secretary of State to evaluate the qualifications of presidential primary candidates. Instead, the Colorado statutes require a presidential primary candidate to submit a "notarized statement of intent." Colo. Rev. Stat. § 1-4-1204(1)(c) (App. 324a). This statement-of-intent form, which appears on the Secretary of State's website,[9] requires presidential candidates to "affirm" that they meet the Constitution's age, residency, and natural-born citizenship requirements by checking the following boxes:

Qualifications for Office (You must check each box to affirm that you meet all qualifications for this office)

☐ Age of 35 Years ☐ Resident of the United States for at least 14 years ☐ Natural-born U.S. Citizen

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> 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.

9. *See* http://bit.ly/41xG63P [http://perma.cc/PE28-ZLD5].

The statement-of-intent form also requires candidates to sign an "affirmation" that they "meet all qualifications for the office prescribed by law":

Applicant's Affirmation
I intend to run for the office stated above and solemnly affirm that I meet all qualifications for the office prescribed by law.

A signature line appears below this affirmation, along with an unfilled notarial certificate. Colorado law imposes no duty on the Secretary of State to verify or second-guess the candidate's sworn representations, or to exclude presidential candidates from the ballot if the Secretary disbelieves or disagrees with the candidate's sworn representations.

The Anderson litigants nonetheless insist that Secretary Griswold has a "mandatory duty" to enforce section 3 of the Fourteenth Amendment regardless of what state law might provide,[10] and they derive this "duty" from the Secretary's oath to support the U.S. Constitution.[11] They also incorrectly claim that any decision to include President Trump on the presidential primary ballot would violate the Constitution and therefore qualify as "a breach or neglect of duty or other wrongful act" within the meaning

10. *Anderson v. Griswold*, 2023CV32577, Verified Petition at ¶ 440, available at http://bit.ly/3vgwuP2 ("The Secretary has a mandatory duty to support, obey, consider, apply, and enforce the U.S. Constitution, including Section 3 of the Fourteenth Amendment, in executing her official duties.").

11. *See Anderson v. Griswold*, 2023CV32577, Verified Petition at ¶ 439, available at http://bit.ly/3vgwuP2 ("Both the Secretary and this Court are required by law to take an oath to support the U.S. Constitution, including Section 3 of the Fourteenth Amendment.").

of section 1-1-113(1).[12] Therefore, they sued for relief under section 1-1-113(1), which authorizes a state district court to "issue an order requiring substantial compliance with the provisions of" the Colorado Election Code. *See* Colo. Rev. Stat. § 1-1-113(1).[13]

I. THE DISTRICT COURT PROCEEDINGS

The Anderson litigants filed their petition on September 6, 2023. App. 12a. The district court did not, however, hold a hearing within five days of the filing, as required by section 1-4-1204(4). *See* Colo. Rev. Stat. § 1-4-1204(4). Instead, the district court held a status conference on September 18, 2023, after the statutory deadline for the hearing had passed, and it scheduled a five-day hearing to begin on October 30, 2023—54 days after the petition's filing date.[14] Then, the district court denied the motions to

12. *See Anderson v. Griswold*, 2023CV32577, Verified Petition at ¶ 442, available at http://bit.ly/3vgwuP2 ("Any action by the Secretary to provide ballot access to a presidential primary candidate who fails to meet all constitutional qualifications for the Office of President is . . . 'a breach or neglect of duty or other wrongful act'" (citing Colo. Rev. Stat. 1-1-113(1)).

13. The Anderson litigants also brought a claim for declaratory relief against both Secretary Griswold and President Trump but dropped this count after President Trump moved to dismiss. *See Anderson v. Griswold*, 2023CV32577, Verified Petition at ¶¶ 449–452, available at http://bit.ly/3vgwuP2; *Anderson v. Griswold*, 2023CV32577, Omnibus Ruling on Pending Dispositive Motions at ¶¶ 1, 6, available at http://bit.ly/3veph1O. President Trump then rejoined the case as an intervenor. *See Anderson v. Griswold*, 2023CV32577, President Donald J. Trump's Unopposed Motion to Intervene, available at http://bit.ly/3tupoFU.

14. App. 12a–13a; *see also Anderson v. Griswold*, 2023CV32577, Minute Order, http://bit.ly/3S53Qtb.

dismiss filed by President Trump and the Colorado Republican State Central Committee, which had intervened in the case.[15] The district court denied President Trump basic discovery tools, including the opportunity to depose experts or potential witnesses, compel production of documents, or receive timely disclosures. App. 126a. And the compressed timeframe gave President Trump only 10 days to identify and disclose his rebuttal witnesses and 18 days to identify and disclose his rebuttal experts.[16]

The district court held a five-day hearing that ran from October 30, 2023, through November 3, 2023. But the district court did not issue findings of fact and conclusions of law within 48 hours of that hearing, as required by section 1-4-1204(4). *See* Colo. Rev. Stat. § 1-4-1204(4). Instead, the district court held closing argument on November 15, 2023—12 days after the conclusion of the hearing—and issued findings of fact and conclusions of law on November 17, 2023. App. 14a (¶ 22).

The district court's findings of fact rely heavily on the Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol, HR 117-663, 117th Cong., 2d Sess. (Dec. 22, 2022) ("the January 6 Report"), which the court admitted into evidence over President Trump's hearsay objections.[17] The district court

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15. App. 13a–14a; *see also Anderson v. Griswold*, 2023CV32577, Omnibus Ruling on Pending Dispositive Motions at ¶¶ 1, 6, available at http://bit.ly/3veph1O; *Anderson v. Griswold*, 2023CV32577, Order Re: Donald J. Trump's Motion to Dismiss Filed September 29, 2023, available at http://bit.ly/3GWQit6.

16. *See Anderson v. Griswold*, 2023CV32577, Event Comments, http://bit.ly/3S8vqpq.

17. App. 191a–199a (¶¶ 20–38).

also relied on testimony from Peter Simi, a professor of sociology at Chapman University, whom the district court qualified as an expert on political extremism and "the communication styles of far-right political extremists."[18] The district court based its finding that President Trump intended to incite violence on January 6, 2021, on Simi's analysis of Trump's "history with political extremists,"[19] as well as Simi's opinion that 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."[20] The district court also relied on Simi's testimony in finding that President Trump's speech at the Ellipse on January 6, 2021, was specifically intended to provoke a violent response from his audience. Simi conceding that he relied exclusively on public speeches and the January 6th report to opine on reactions to President Trump's words; he conducted no research, interviews, or fieldwork of his own. Simi also disclaimed any opinion on President Trump's intent or state of mind.[21] According to the district court:

> As Professor Simi testified, Trump's speech took place in the context of a pattern of Trump's

18. App. 201a (¶ 42).

19. App. 209a–214a (¶¶ 61–86).

20. App. 213a–214a (¶ 83).

21. *See* Trial Transcript Day 2, at 205:19–23, available at http://bit.ly/3S3HTuv ("Q. . . . [D]o you have evidence that it was President Trump's intention to call them to action? A. My, you know, opinion is not addressing that issue. Again, not in President Trump's mind.").

> knowing "encouragement and promotion of violence" to develop and deploy a shared coded language with his violent supporters. 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. . . . Trump understood the power that he had over his supporters.

App. 228a–229a (¶¶ 142–143). Yet the district court used Simi's testimony to support its factual finding that President Trump intended to incite violence. App. 228a–229a (¶¶ 142–143).

For its conclusions of law, the district court held that the Colorado Election Code does not allow the Secretary of State to assess a presidential candidate's eligibility under section 3 of the Fourteenth Amendment. App. 248a (¶ 224) ("[T]he Court agrees with Intervenors that the Secretary cannot investigate and adjudicate Trump's eligibility under Section Three of the Fourteenth Amendment"). But it nonetheless held that section 1-4-1204(4) gives *courts* that authority because it requires district courts to "hear the challenge and assess the validity of all alleged improprieties" and "issue findings of fact and conclusions of law." App. 248a (¶ 224). But section 1-4-1204(4) also says that any "challenge to the listing of any candidate on the presidential primary election ballot must be made . . . in accordance with section 1-1-113(1)." Colo. Rev. Stat. § 1-4-1204(4). And section 1-1-113(1) allows relief

only when "*a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act*"—and it allows only the issuance of orders "requiring substantial compliance with the provisions of this [election] code." Colo. Rev. Stat. § 1-1-113 (emphasis added). The district court did not explain how the Anderson litigants could proceed under section 1-1-113 when its opinion admits that Secretary Griswold had done nothing wrong—and when it further acknowledges that the Colorado Election Code *forbids* Secretary Griswold "investigate[ing] and adjudicate[ing] Trump's eligibility under Section Three of the Fourteenth Amendment." App. 248a (¶ 224); *see also* App. 41a (¶ 80) ("[S]ection 1-1-113 . . . proceedings entertain only one type of claim—election officials' violations of the Election Code—and one type of injunctive relief—an order compelling substantial compliance with the Election Code.").

The district court went on to hold that President Trump had "engaged in insurrection" within the meaning of section 3. App. 249a–277a (¶¶ 225–298). But the district court ultimately concluded that section 3 was inapplicable to President Trump because he never took an oath "as an officer of the United States." App. 282a (¶ 313) ("[T]he Court is persuaded that 'officers of the United States' did not include the President of the United States."). It also held that the presidency is not an "office . . . under the United States" for purposes of section 3. App. 278a–279a (¶ 304).

II. THE STATE SUPREME COURT PROCEEDINGS

Both the Anderson litigants and President Trump sought review in the Colorado Supreme Court,[22] which accepted jurisdiction and reversed the district court. App. 1a–183a.

The Colorado Supreme Court first addressed whether the Anderson litigants could pursue their claims under section 1-1-113, which requires an allegation that Secretary Griswold would "commit a breach or neglect of duty or other wrongful act"[23] by allowing President Trump on the ballot. The court acknowledged that the Colorado Election Code imposes no "duty" on Secretary Griswold to determine whether presidential primary candidates satisfy the qualifications for office:

> [I]f the contents of a signed and notarized statement of intent appear facially complete . . . the Secretary has no duty to further investigate the accuracy or validity of the information the prospective candidate has supplied. . . . To that extent, we agree with President Trump that the Secretary has no duty to determine, beyond what is apparent on the face of the required documents, whether a presidential candidate is qualified.

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22. *See* Colo. Rev. Stat. § 1-1-113(3) ("The proceedings may be reviewed and finally adjudicated by the supreme court of this state, if either party makes application to the supreme court within three days after the district court proceedings are terminated, unless the supreme court, in its discretion, declines jurisdiction of the case.").

23. Colo. Rev. Stat. § 1-1-113(1).

App. 32a (¶ 59). Yet the court still held that Secretary Griswold would commit a "wrongful act" within the meaning of section 1-1-113 by allowing a disqualified candidate to appear on a presidential primary ballot. App. 33a–34a (¶ 62).

The court reached this conclusion by claiming that section 1-4-1203(2)(a) allows only "qualified" candidates to participate in Colorado's presidential primary. App. 21–22a (¶ 37); App. 33a (¶ 62). But section 1-4-1203(2)(a) says nothing of the sort. It says (in relevant part):

> [E]ach political party that has a qualified candidate entitled to participate in the presidential primary election pursuant to this section is entitled to participate in the Colorado presidential primary election.

Colo. Rev. Stat. § 1-4-1203(2)(a) (App. 321a). This is a restriction only on the *political parties* that may participate in Colorado's presidential primary—and it requires only that a participating political party have *at least one* "qualified candidate entitled to participate in the presidential primary election pursuant to this section." *Id.* Section 1-4-1203(2)(a) does not say that all of a party's presidential candidates must be "qualified." And it does not require (or even allow) Secretary Griswold or the courts to purge individual candidates from a qualifying party's primary ballot based on their own assessments of a candidate's qualifications. No one contests that the Colorado Republican Party has at least one qualified presidential candidate who is indisputably "entitled to participate in the presidential

primary election."[24] That is all that is needed to show that the Colorado Republican Party is "entitled to participate" in the presidential primary election under section 1-4-1203(2)(a), and section 1-4-1203(2)(a) has no further role to play.

The Colorado Supreme Court also held that a presidential candidate is not "qualified" within the meaning of section 1-4-1203(2)(a) unless he is "qualified to hold office under the provisions of the U.S. Constitution"[25]—and that he must be qualified to hold office *before* his name is added to the primary ballot. App. 36a (¶ 67) ("[A]ll presidential primary candidates [must] be constitutionally 'qualified' *before* their names are added to the presidential primary ballot pursuant to section 1-4-1204(1)."). The court did not consider the possibility that a presidential candidate who is currently disqualified might become qualified before the inauguration, such as a candidate who has not yet turned 35 or reached the 14-year residency mark but will do so before Inauguration Day, or a candidate currently disqualified under section 3 who can seek congressional removal of the disability. The court also dismissed out of hand President Trump's argument that section 3 bars individuals only from holding office, and not from running

24. *See* News Release, State of Colorado Department of State (Dec. 12, 2023), available at http://bit.ly/41Ayuxq (reporting that seven Republican presidential candidates, including Ron DeSantis, Nikki Haley, and Vivek Ramaswamy, "have submitted the necessary paperwork and meet the criteria for candidacy").

25. App. 35a (¶ 64); *see also* App. 34a (¶ 63) ("'[Q]ualified' in section 1-4-1203(2)(a) must mean, at minimum, that a candidate is qualified under the U.S. Constitution to assume the duties of the office of President.").

for or being elected to office. App. 36a (¶ 67) ("Nor are we persuaded by President Trump's assertion that Section Three does not bar him from running for or being elected to office because Section Three bars individuals only from holding office.").[26]

Having concluded that the Anderson litigants could proceed under section 1-1-113, the state supreme court went on to consider the merits. It rejected President Trump's due-process challenge to the district court's expedited consideration of the section 1-1-113 claims. App. 41a–45a. It also held that the disqualification imposed by section 3 is self-executing and attaches automatically without any need for congressional enforcement legislation. App. 45a–55a; *see also* App. 50a–53a (rejecting the rationale of *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815) (*Griffin's Case*)). And it rejected President Trump's argument that section 3 presents a non-justiciable political question. App. 55a–61a.

Finally, the Colorado Supreme Court reversed the district court's conclusions that section 3 is inapplicable to President Trump, holding both that the president is an "officer of the United States," and that the presidency is an "office . . . under the United States." App. 61a–76a. It also affirmed the district court's findings that President Trump "engaged in insurrection,"[27] and rejected

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26. The Colorado Supreme Court appeared to disavow the idea that section 3 itself places a "duty" on Secretary Griswold to keep Trump off the ballot, or that certifying Trump to the ballot would violate the Fourteenth Amendment. App. 37a–38a (¶ 71) ("[T]he Electors do not . . . allege a violation of the Constitution. Instead, they allege a 'wrongful act' under section 1-1-113.").

27. App. 83a–100a.

President Trump's First Amendment arguments.[28] The court concluded by holding that "it would be a wrongful act under the Election Code for the Secretary to list President Trump as a candidate on the presidential primary ballot," and it forbade the Secretary to "list President Trump's name on the 2024 presidential primary ballot" or "count any write-in votes cast for him." App. 114a. But the court stayed its ruling until January 4, 2024, and announced that the stay would automatically continue if President Trump sought review in this Court before that date. App. 114a.

Three justices dissented in separate opinions. Chief Justice Boatright argued that section 1-1-113's "expedited procedures" and strict statutory deadlines make it impossible for section 1-1-113 proceedings to accommodate the "uniquely complex questions" that arise from section 3 and its application to President Trump. App. 115a–124a. Justice Berkenkotter dissented on similar grounds,[29] and she also attacked the majority's false and atextual claim that section 1-4-1203(2)(a) allows only "qualified" candidates to appear on a party's presidential primary ballot. App. 177a–182a. Finally, Justice Samour would have followed the reasoning of *Griffin's Case* and declared section 3 non-self-executing. App. 125a–161a. Justice Samour also argued that the proceedings violated due process, as the district court denied discovery, rushed the proceedings, and based its factual findings on a hearsay congressional report and experts of dubious reliability. App. 158a (¶ 342) ("I have been involved in the justice system for thirty-

28. App. 100a–114a.

29. App. 162a–177a.

three years now, and what took place here doesn't resemble anything I've seen in a courtroom.").[30]

REASONS FOR GRANTING THE PETITION

The Colorado Supreme Court has no authority to deny President Trump access to the ballot. By doing so, the Colorado Supreme Court has usurped Congressional authority and misinterpreted and misapplied the text of section 3.

I. THE ISSUES PRESENTED IN THIS PETITION ARE OF EXCEPTIONAL IMPORTANCE AND URGENTLY REQUIRE THIS COURT'S PROMPT RESOLUTION

The questions presented in this Petition are of the utmost importance. President Trump is the leading candidate for the nomination for President of the United States of one of two major political parties. In 2020, President Trump received more than 74 million votes nationally, and more than 1.3 million votes in Colorado alone, to be re-

30. The federal questions sought to be reviewed were timely and properly raised in the district court and state supreme court. *See* Proposed Findings and Conclusions, http://bit.ly/3vlw9up at 34–38 (meaning of Colorado election statutes); *id.* at 40–58 (section 3 inapplicable to Trump); *id.* at 58–63 (requested relief would unconstitutionally impose additional qualifications for office); *id.* at 63–72 (section 3 non-self-executing); *id.* at 73–83 (political question); *id.* at 101–77 (Trump didn't "engage in insurrection"); Opening-Answer Br., http://bit.ly/3tz8Ht5 at 5–13 (section 3 inapplicable to Trump); *id.* at 13–16 (meaning of Colorado election statutes); *id.* at 18–21 (section 3 non-self-executing); *id.* at 21–25 (political question); *id.* at 25–28 (requested relief would unconstitutionally impose additional qualifications for office); *id.* at 29–43 (Trump didn't "engage in insurrection").

elected as President of the United States. Thus, the Colorado Supreme Court decision would unconstitutionally disenfranchise millions of voters in Colorado and likely be used as a template to disenfranchise tens of millions of voters nationwide. Indeed, the Maine Secretary of State, in an administrative proceeding, has already used the Colorado proceedings as justification for unlawfully striking President Trump from that state's ballot.[31] President Trump has appealed that decision.

II. DISPUTED QUESTIONS OF PRESIDENTIAL QUALIFICATIONS ARE RESERVED FOR CONGRESS TO RESOLVE

Not all claims are "properly suited for resolution by the . . . courts." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019). "Sometimes . . . '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.'" *Id.* at 2494 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality op.)); *see also Baker v. Carr*, 369 U.S. 186, 217 (1962). This presents just such a case.

Congress—not a state court—is the proper body to resolve questions concerning a presidential candidate's eligibility. First, the Constitution provides a role for Congress in resolving disputed presidential elections. To wit, the Constitution expressly provides that:

> [I]f the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified

31. *See* http://bit.ly/48kFqRR.

> . . . and the Congress may by law provide for the case wherein neither a President elect nor a vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

U.S. Const. amend. XX § 3. Similarly, both Article II and the Twelfth Amendment prescribe a role for Congress in Presidential elections. U.S. Const. art. II, cl. 3; U.S. Const. amend. XII. And the Fourteenth Amendment itself embodies a clear textual commitment of authority to Congress, with section 3 giving it the power to lift any "disability" under that Section and section 5 expressly providing that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, §§ 3, 5. There is no similar commitment of questions concerning presidential eligibility to state courts, particularly in the absence of a duly enacted enforcement statute.

Considering the Constitutional role for Congress in addressing presidential qualifications, it is little surprise that every court except Colorado that has addressed the political question doctrine when presented with the question of determining President Trump's eligibility has held that question is nonjusticiable and reserved to Congress. Indeed, every federal court that addressed this issue with regard to the eligibility of President Barack Obama, Sen-

ator John McCain, and Senator Ted Cruz held that the issue was for Congress and not the federal courts.[32]

It would be beyond absurd—particularly in light of the Fourteenth Amendment's enlargement of federal authority—that this issue would be nonjusticiable by

32. *See, e.g.*, *Castro v. N.H. Sec'y of State*, Case No. 23-cv-416-JL, 2023 WL 7110390, at *9 (D.N.H. Oct. 27, 2023) (footnote omitted) *aff'd on other grounds* --- F.4th ----, 2023 WL 8078010 (1st Cir. Nov. 21, 2023) ("[T]he vast weight of authority has held that the Constitution commits to Congress and the electors the responsibility of determining matters of presidential candidates' qualifications."); *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008) ("Arguments concerning qualifications or lack thereof can be laid before the voting public before the election and, once the election is over, can be raised as objections as the electoral votes are counted in Congress. The members of the Senate and the House of Representatives are well qualified to adjudicate any objections to ballots for allegedly unqualified candidates."); *Grinols v. Electoral College,* No. 2:12-cv-02997-MCE-DAD, 2013 WL 2294885, at *5–7 (E.D. Cal. May 23, 2013) ("[T]he Constitution assigns to Congress, and not to federal courts, the responsibility of determining whether a person is qualified to serve as President of the United States."); *Grinols v. Electoral Coll.*, No. 12-CV-02997-MCE-DAD, 2013 WL 211135, at *4 (E.D. Cal. Jan. 16, 2013) ("These various articles and amendments of the Constitution 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."); *Taitz v. Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *12–16 (S.D. Miss. Mar. 31, 2015) ("[T]hese matters are entrusted to the care of the United States Congress, not this court."); *Kerchner v. Obama*, 669 F. Supp. 2d 477, 483 n.5 (D.N.J. 2009) ("The Constitution commits the selection of the President to the Electoral College in Article II, Section 1, as amended by the Twelfth Amendment and the Twentieth Amendment, Section 3," and "[n]one of these provisions evince an intention for judicial reviewability of these political choices.").

federal courts yet properly heard and decided by courts in 51 jurisdictions. The election of the President of the United States is a national matter, with national implications, that arises solely under the federal Constitution and does not implicate the inherent or retained authority of the states. *See generally Cook v. Gralike*, 531 U.S. 510, 552 (2001) ("It is no original prerogative of state power to appoint a representative, a senator, or a president for the union.").

Further, in the absence of enforcement legislation adopted under section 5 of the Fourteenth Amendment, courts lack judicially manageable standards for resolving disputes over presidential disqualifications.

The Colorado Republican State Central Committee has argued that section 3 is not self-executing. This question alone is worthy of consideration by this Court.

Even if section 3 does not *require* enforcement legislation to have effect, the lack of such legislation deprives the courts of judicially manageable standards. Procedurally, section 3 is silent on whether a jury, judge, or lone state election official makes factual determination and is likewise silent on the appropriate standard of review, creating the prospect of some courts adopting a preponderance of the evidence standard, others a clear and convincing evidence standard, while still others requiring a criminal conviction. Similarly, states have different approaches to voter standing. As a result, a voter in one state may be able to challenge a presidential candidate's qualifications, while similarly situated voters in another state cannot. Substantively, the terms "engage" and "insurrection" are unclear and subject to wildly varying standards. The

result is that 51 different jurisdictions may (and have) adopted divergent rulings based on different standards on the same set of operative facts.

Resolving these conflicts requires making policy choices among competing policy and political values. These are fundamentally legislative exercises that are properly suited for Congressional—rather than judicial—resolution.

Moreover, the result of divergent standards and determinations is particularly problematic in presidential elections. As this Court has recognized, "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest" because "the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation" and "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983) (footnotes and citations omitted).

By purporting to determine a presidential candidate's qualification under section 3 of the Fourteenth Amendment, the Colorado Supreme Court has overstepped its authority and usurped power properly allocated to Congress.

III. SECTION 3 IS INAPPLICABLE TO PRESIDENT TRUMP

Section 3 begins "[n]o 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 . . ." It does not list the presidency. Moreover, it lists offices in descending

order, beginning with the highest federal officers and progressing to the catch-all term "any office, civil or military, under the United States." Thus, to find that section 3 includes the presidency, one must conclude that the drafters decided to bury the most visible and prominent national office in a catch-all term that includes low ranking military officers, while choosing to explicitly reference presidential electors. This reading defies common sense and is not correct.

Similarly, Section 3's disqualification can apply only to those who have "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." U.S. Const. amend. XIV, § 3. It is undisputed that President Trump never took such an oath as a member of Congress, as a state legislator, or as a state executive or judicial officer. App. 279a (¶ 305).

Lastly, section 3 cannot apply to President Trump unless the president qualifies as an "officer of the United States." The Constitution's text and structure make clear that the president is not an "officer of the United States." The phrase "officer of the United States" appears in three constitutional provisions apart from section 3, and in each of these constitutional provisions the president is excluded from the meaning of this phrase. The Appointments Clause requires the president to appoint ambassadors, public ministers and consuls, justices 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 (emphasis added). The Commissions Clause similarly requires the President to "Commission *all the Officers of the United States*." U.S. Const. art. II, § 3 (emphasis added). The president does not (and cannot) appoint or commission himself, and he cannot qualify as an "officer of the United States" when the Constitution draws a clear distinction between the "officers of the United States" and the president who appoints and commissions them.

The Impeachment Clause further confirms that the president is not an "officer of the United States." It 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 (emphasis added). The clause treats President and Vice President separately from "all civil Officers of the United States." There would be no basis to separately list the president and vice president as permissible targets of impeachment if they were to fall within the "civil Officers of the United States." If that phrase were to encompasses the president and vice president, then the Impeachment Clause would say that the "President, Vice President and all *other* civil Officers of the United States" are subject to impeachment and removal.

Then, there is the textual requirement that section 3 applies only to those who took an oath to "support" the Constitution of the United States—the oath required by Article VI. *See* U.S. Const. art. VI, § 3 ("The 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, shall be bound by Oath or Affirmation, to *support* this Constitution" (emphasis added)). The president swears a different oath set forth in Article II, in which he promises to "preserve, protect, and defend the Constitution of the United States"—and in which the word "support" is nowhere to be found. *See* U.S. Const. art. II ¶ 8. The argument that an oath to "preserve, protect, and defend" is just another way of promising to "support" the Constitution. App. 74a–76a, fails, because the drafters of section 3 had before them both the Article VI and Article II oaths, and they chose to apply section 3 only to those who took Article VI oaths. Conflating the two oaths would create ambiguity and contradiction, because the president was not understood to be included as an "officer of the United States."

The Colorado Supreme Court made no attempt to explain how "officers of the United States" can include the president when this phrase excludes the president everywhere else it appears in the Constitution. App. 70a–73a. The Court should grant certiorari and hold section 3 inapplicable to President Trump because he never swore an oath as an "officer of the United States."

IV. PRESIDENT TRUMP DID NOT "ENGAGE IN INSURRECTION"

The Court should also reverse the Colorado Supreme Court's holding that President Trump "engaged in insurrection."

First, the events of January 6, 2021, were not "insurrection" as that term is used in Section 3.

"Insurrection" as understood at the time of the passage of the Fourteenth Amendment meant the taking up of arms and waging war upon the United States. When considered in the context of the time, this makes sense. The United States had undergone a horrific civil war in which over 600,000 combatants died, and the very survival of the nation was in doubt. Focusing on war-making was the logical result.

By contrast, the United States has a long history of political protests that have turned violent. In the summer of 2020 alone, violent protestors targeted the federal courthouse in Portland, Oregon, for over 50 days, repeatedly assaulted federal officers and set fire to the courthouse, all in support of a purported political agenda opposed to the authority of the United States. *See Portland Riots Read Out: July 21*, U.S. Department of Homeland Security (Jul. 21, 2020), https://www.dhs.gov/news/2020/07/21/portland-riots-read-out-july-21. In the context of the history of violent American political protests, January 6 was not insurrection and thus no justification for invoking section 3.

Moreover, nothing that President Trump did "engaged" in "insurrection."

President Trump never told his supporters to enter the Capitol, either in his speech at the Ellipse[33] or in any of his statements or communications before or during the events at the Capitol. To the contrary, his only explicit

33. App. 285a–317a (transcript of President Trump's speech at the Ellipse on January 6, 2021).

instructions called for protesting "peacefully and patriotically,"[34] to "support our Capitol Police and Law Enforcement,"[35] to "[s]tay peaceful,"[36] and to "remain peaceful."[37]

The Colorado Supreme Court faulted President Trump for not responding, in their view, with alacrity when he learned that the Capitol had been breached.[38] Even, however, the Colorado Supreme Court conceded that not acting does not constitute "engagement" in insurrection. App. 91a (¶ 195) ("The force of the term to *engage* carries the idea of active rather than passive conduct, and of voluntary rather than compulsory action." (quoting The Reconstruction Acts, 12 Op. Att'y Gen. 141, 158 (1867)).

The Court should also review and reverse the Colorado Supreme Court's holding that President Trump's speech could be constitutionally proscribed incitement under *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The state supreme court relied on Professor Simi's testimony and deferred to the district court's factfinding in wrongfully holding that President Trump had encouraged violence and that his words were likely to have that effect. App. 106a–113a. But constitutional speech protections should not turn on opinions from sociology professors, and constitutional facts of this sort should be reviewed de novo rather than deferentially. *See U.S. Bank National Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 967 n.4 (2018).

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34. App. 292.
35. *See* http://bit.ly/3H6t7g8.
36. App. 98a (¶ 217).
37. App. 98a (¶ 217).
38. App. 98a–99a (¶ 218).

V. THE COLORADO SUPREME COURT VIOLATED THE ELECTORS CLAUSE BY FLOUTING THE STATUTES GOVERNING PRESIDENTIAL ELECTIONS

The Electors Clause requires states to appoint presidential electors "in such Manner as the Legislature thereof may direct." U.S. Const. art. I, § 1, ¶ 2; *see also Moore v. Harper*, 600 U.S. 1, 36 (2023) ("[S]tate courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."); *Bush v. Gore*, 531 U.S. 98, 111–22 (2000) (Rehnquist, C.J., concurring). The Colorado Supreme Court's ruling violates the Electors Clause in two respects.

First, the Colorado legislature allows the state judiciary to intervene in ballot disputes only when a person "charged with a duty" under the Colorado Election Code "has committed or is about to commit a breach or neglect of duty or other wrongful act." Colo. Rev. Stat. § 1-1-113(1). Secretary Griswold cannot breach or neglect any "duty" or commit a "wrongful act" under the Fourteenth Amendment by listing President Trump on the ballot, because section 3 merely bars individuals from *holding* office, not from seeking or winning election to office.

The Colorado Supreme Court tried to concoct a "wrongful act" by claiming that Secretary Griswold would violate section 1-4-1203(2)(a)—a provision of *state* election law—by certifying President Trump to the ballot. But section 1-4-1203(2)(a) limits only the *political parties* that may participate in Colorado's presidential primary

election, and requires only that participating political parties have at least one "qualified candidate":

> [E]ach political party that has a qualified candidate entitled to participate in the presidential primary election pursuant to this section is entitled to participate in the Colorado presidential primary election.

Colo. Rev. Stat. § 1-4-1203(2)(a). The Colorado Supreme Court somehow managed to transform this statutory language into a requirement that *every* candidate that appears on a presidential primary ballot be "qualified,"—and it falsely claimed that Secretary Griswold would violate section 1-4-1203(2)(a) if she failed to remove disqualified presidential candidates from the Republican primary ballot.

Second, the state district court flouted the statutory deadlines in section 1-4-1204(4), which require a hearing to be held "[n]o later than five days after the challenge is filed," and require findings of fact and conclusions of law to issue "no later than forty-eight hours after the hearing." Colo. Rev. Stat. § 1-4-1204(4) (App. 325a). Section 1-4-1204(4) does not permit the type of ballot challenge brought by the Anderson litigants, which compelled the court to disregard the statutory deadlines in an unsuccessful effort to accommodate the complexity of the evidence and arguments presented. The Colorado Supreme Court praised the district court's efforts to "adjudicate this complex section 1-1-113 action" while admitting that the district court had failed to comply with the statutory deadlines. App. 43a (¶ 85). But the district court's "procedural Frankenstein," App. 157a (Samour, J., dissenting)

did not proceed in the "manner" directed by the legislature, as "the statutory timeline for a section 1-1-113 proceeding does not permit a claim as complex" as this one. App. 119a (Boatright, C.J., dissenting) (capitalization removed).

VI. SECTION 3 CANNOT BE USED TO DENY PRESIDENT TRUMP ACCESS TO THE BALLOT

Section 3 of the Fourteenth Amendment prohibits individuals only from *holding* office:

> 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 . . .

U.S. Const. amend. XIV, § 3 (emphasis added). It does not prevent anyone from *running* for office, or from *being elected* to office, because Congress can remove a section 3 disqualification at any time—and Congress can remove that disability after a candidate is elected but before his term begins. *See id.* ("But Congress may by a vote of two-thirds of each House, remove such disability.").

This basis alone merits reversal of the Colorado Supreme Court, and by prohibiting states from using ballot access restrictions to enforce section 3, reversal would ensure that Congress retains its authority under section 3.

The Colorado Supreme Court claimed that it has no less authority to exclude President Trump from the ballot than it would a 28-year-old or a foreign national. App. 36a–37a (¶ 68); *see also Hassan v. Colorado*, 495 F. App'x 947 (10th Cir. 2012) (Gorsuch, J.) (upholding Colorado's decision to exclude a naturalized U.S. citizen from the

presidential ballot). That is wrong. Congress has *no* authority to add additional qualifications to the Constitution's age, residency, or natural-born citizenship requirements.

Forcing President Trump to prove that he is not disqualified before appearing on the ballot effectively adds a new, extra-constitutional requirement to running for office. But *U.S. Term Limits* renders the states powerless to add to or alter the Constitution's qualifications or eligibility criteria for federal officials, and states are equally powerless to exclude federal candidates from the ballot based on state-created qualifications or eligibility criteria not mandated by the Constitution. *See id.* at 799 ("'It is not competent for any State to add to or in any manner change the qualifications for a Federal office, as prescribed by the Constitution or laws of the United States'" (quoting G. McCrary, American Law of Elections § 322 (4th ed. 1897)); *id.* at 803–04 ("States thus 'have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president. . . . It is no original prerogative of state power to appoint a representative, a senator, or president for the union.'" (quoting 1 Story § 627)); *id.* at 828–36 (rejecting state's attempt to deny ballot access to incumbent congressional candidates who had exceeded an allotted number of terms). Even the *Term Limits* dissenters acknowledged that states are forbidden from prescribing qualifications for the presidency beyond those specified in the Constitution. *See id.* at 855 n.6 (Thomas, J., dissenting) ("[T]he people of a single State may not prescribe qualifications for the President of the United States"); *id.* at 861 (Thomas, J., dissenting)

("[A] State has no reserved power to establish qualifications for the office of President"); *id.* at 861 (Thomas, J., dissenting) ("[T]he individual States have no 'reserved' power to set qualifications for the office of President"). And for good reason: The president, unlike members of Congress, represents and is elected by the entire nation,[39] and allowing each of the 51 jurisdictions to prescribe and enforce their own qualifications for a nationwide office would be a recipe for bedlam and voter confusion.

The Colorado Supreme Court's ruling violates *Term Limits* by adding a new qualification for the presidency. It requires that a president be "qualified" under section 3 not only on the dates that he holds office, but also on the dates of the primary and general elections—and on whatever date a court renders judgment on his eligibility for the ballot. This is no different from a state enforcing a pre-election residency requirement for congressional or senatorial candidates, when the Constitution requires only that representatives and senators inhabit the state "when elected." *See* U.S. Const. art. I, § 2, ¶ 2 ("No Person shall be a Representative . . . who shall not, *when elected*, be an Inhabitant of that State in which he shall be chosen" (emphasis added)); *See* U.S. Const. art. I, § 3, ¶ 2 (same rule for senators); *see also Texas Democratic Party v. Benkiser*, 459 F.3d 582, 589–90 (5th Cir. 2006) (holding pre-election residency requirements unconstitutional under *Term Limits*); *Campbell v. Davidson*, 233 F.3d 1229, 1236 (10th Cir. 2000) (same); *Schaefer v. Townsend*,

39. *See Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2203 (2020) ("Only the President (along with the Vice President) is elected by the entire Nation.").

215 F.3d 1031, 1036 (9th Cir. 2000) (same). In each of these situations, a state violates *Term Limits* by altering the timing of a constitutionally required qualification for office.

CONCLUSION

The petition for writ of certiorari should be granted and the decision of the Colorado Supreme Court summarily reversed.

Respectfully submitted.

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January 3, 2024

APPENDIX

APPENDIX

ADVANCE SHEET HEADNOTE
December 19, 2023

2023 CO 63

No. 23SA300, *Anderson v. Griswold*—Election Law—Fourteenth Amendment—First Amendment—Political Questions—Hearsay.

In this appeal from a district court proceeding under the Colorado Election Code, the supreme court considers whether former President Donald J. Trump may appear on the Colorado Republican presidential primary ballot in 2024. A majority of the court holds that President Trump is disqualified from holding the office of President under Section Three of the Fourteenth Amendment to the United States Constitution. Because he is disqualified, it would be a wrongful act under the Election Code for the Colorado Secretary of State to list him as a candidate on the presidential primary ballot. The court stays its ruling until January 4, 2024, subject to any further appellate proceedings.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 63

Supreme Court Case No. 23SA300

Appeal Pursuant to § 1-1-113(3), C.R.S. (2023)

District Court, City and County of Denver, Case No. 23CV32577

Honorable Sarah B. Wallace, Judge

Petitioners-Appellants/Cross-Appellees:

Norma Anderson, Michelle Priola, Claudine Cmarada, Krista Kafer, Kathi Wright, and Christopher Castilian,

v.

Respondent-Appellee:

Jena Griswold, in her official capacity as Colorado Secretary of State,

and

Intervenor-Appellee:

Colorado Republican State Central Committee, an unincorporated association,

Intervenor-Appellee/Cross-Appellant:

Donald J. Trump.

Order Affirmed in Part and Reversed in Part

en banc

December 19, 2023

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PER CURIAM.
CHIEF JUSTICE BOATRIGHT dissented.
JUSTICE SAMOUR dissented.
JUSTICE BERKENKOTTER dissented.

PER CURIAM.[1]

¶1 More than three months ago, a group of Colorado electors eligible to vote in the Republican presidential primary—both registered Republican and unaffiliated voters ("the Electors")—filed a lengthy petition in the District Court for the City and County of Denver ("Denver District Court" or "the district court"), asking the court to rule that former President Donald J. Trump ("President Trump") may not appear on the Colorado Republican presidential primary ballot.

¶2 Invoking provisions of Colorado's Uniform Election Code of 1992, §§ 1-1-101 to 1-13-804, C.R.S. (2023) (the "Election Code"), the Electors requested that the district court prohibit Jena Griswold, in her official capacity as Colorado's Secretary of State ("the Secretary"), from placing President Trump's name on the presidential primary ballot. They claimed that Section Three of the Fourteenth Amendment to the U.S. Constitution ("Section Three") disqualified President Trump from seeking the presidency. More specifically, they asserted that he was ineligible under Section Three because he engaged in insurrection on January 6, 2021, after swearing an oath as President to support the U.S. Constitution.

¶3 After permitting President Trump and the Colorado Republican State Central Committee ("CRSCC"; collectively, "Intervenors") to intervene in the action below, the district court conducted a five-day trial. The court found by clear and convincing evidence that President Trump

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1. Consistent with past practice in election-related cases with accelerated timelines, we issue this opinion per curiam. *E.g.*, *Kuhn v. Williams*, 2018 CO 30M, 418 P.3d 478; *In re Colo. Gen. Assemb.*, 332 P.3d 108 (Colo. 2011); *In re Reapportionment of Colo. Gen. Assemb.*, 647 P.2d 191 (Colo. 1982).

engaged in insurrection as those terms are used in Section Three. *Anderson v. Griswold*, No. 23CV32577, ¶¶ 241, 298 (Dist. Ct., City & Cnty. of Denver, Nov. 17, 2023). But, the district court concluded, Section Three does not apply to the President. *Id.* at ¶ 313. Therefore, the court denied the petition to keep President Trump off the presidential primary ballot. *Id.* at Part VI. Conclusion.

¶4 The Electors and President Trump sought this court's review of various rulings by the district court. We affirm in part and reverse in part. We hold as follows:

- The Election Code allows the Electors to challenge President Trump's status as a qualified candidate based on Section Three. Indeed, the Election Code provides the Electors their only viable means of litigating whether President Trump is disqualified from holding office under Section Three.
- Congress does not need to pass implementing legislation for Section Three's disqualification provision to attach, and Section Three is, in that sense, self-executing.
- Judicial review of President Trump's eligibility for office under Section Three is not precluded by the political question doctrine.
- Section Three encompasses the office of the Presidency and someone who has taken an oath as President. On this point, the district court committed reversible error.
- The district court did not abuse its discretion in admitting portions of Congress's January 6 Report into evidence at trial.

- The district court did not err in concluding that the events at the U.S. Capitol on January 6, 2021, constituted an "insurrection."
- The district court did not err in concluding that President Trump "engaged in" that insurrection through his personal actions.
- President Trump's speech inciting the crowd that breached the U.S. Capitol on January 6, 2021, was not protected by the First Amendment.

¶15 The sum of these parts is this: President Trump is disqualified from holding the office of President under Section Three; because he is disqualified, it would be a wrongful act under the Election Code for the Secretary to list him as a candidate on the presidential primary ballot.

¶16 We do not reach these conclusions lightly. We are mindful of the magnitude and weight of the questions now before us. We are likewise mindful of our solemn duty to apply the law, without fear or favor, and without being swayed by public reaction to the decisions that the law mandates we reach.

¶17 We are also cognizant that we travel in uncharted territory, and that this case presents several issues of first impression. But for our resolution of the Electors' challenge under the Election Code, the Secretary would be required to include President Trump's name on the 2024 presidential primary ballot. Therefore, to maintain the status quo pending any review by the U.S. Supreme Court, we stay our ruling until January 4, 2024 (the day before the Secretary's deadline to certify the content of the presidential primary ballot). If review is sought in the Supreme Court before the stay expires on January 4, 2024, then the stay shall remain in place, and the Secretary will continue to be required to include President Trump's

name on the 2024 presidential primary ballot, until the receipt of any order or mandate from the Supreme Court.

I. Background

¶8 On November 8, 2016, President Trump was elected as the forty-fifth President of the United States. He served in that role for four years.

¶9 On November 7, 2020, Joseph R. Biden, Jr., was elected as the forty-sixth President of the United States. President Trump refused to accept the results, but President Biden now occupies the office of the President.

¶10 On December 14, 2020, the Electoral College officially confirmed the results: 306 electoral votes for President Biden; 232 for President Trump. President Trump continued to challenge the outcome, both in the courts and in the media.

¶11 On January 6, 2021, pursuant to the Twelfth Amendment, U.S. Const. amend. XII, and the Electoral Count Act, 3 U.S.C. § 15, Congress convened a joint session to certify the Electoral College votes. President Trump held a rally that morning at the Ellipse in Washington, D.C. at which he, along with several others, spoke to the attendees. In his speech, which began around noon, President Trump persisted in rejecting the election results, telling his supporters that "[w]e won in a landslide" and "we will never concede." He urged his supporters to "confront this egregious assault on our democracy"; "walk down to the Capitol . . . [and] show strength"; and that if they did not "fight like hell, [they would] not . . . have a country anymore." Before his speech ended, portions of the crowd began moving toward the Capitol. Below, we discuss additional facts regarding the events of January 6, as relevant to the legal issues before us.

¶12 Just before 4 a.m. the next morning, January 7, 2021, Vice President Michael R. Pence certified the electoral

votes, officially confirming President Biden as President-elect of the United States.

¶13 President Trump now seeks the Colorado Republican Party's 2024 presidential nomination.

II. Procedural History

¶14 On September 6, 2023, the Electors initiated these proceedings against the Secretary in Denver District Court under sections 1-4-1204(4), 1-1-113(1), 13-51-105, C.R.S. (2023), and C.R.C.P. 57(a). In their Verified Petition, the Electors challenged the Secretary's authority to list President Trump "as a candidate on the 2024 Republican presidential primary election ballot and any future election ballot, based on his disqualification from public office under Section [Three]."

¶15 President Trump intervened and almost immediately filed a Notice of Removal to federal court, asserting federal question jurisdiction. *See* 28 U.S.C. §§ 1331, 1441(a), 1446. In light of the removal, the Denver District Court closed the case on September 8. On September 12, the federal district court remanded the case back to state court, concluding that it lacked jurisdiction because the Electors had no Article III standing and the Secretary had neither joined nor consented to the removal.

¶16 Once the Electors filed proof with the Denver District Court that all parties had been served, the court reopened the case on September 14. At a status conference four days later, on September 18, the Secretary emphasized that she must certify the candidates for the 2024 presidential primary ballot by January 5. *See* § 1-4-1204(1). The court set the matter for a five-day trial, beginning on October 30. On September 22, with the parties' input, the court issued expedited case management deadlines for a host of matters, including the disclosure of expert reports, witness lists and exhibits, as well as for briefing and

argument on several motions. The court also granted CRSCC's motion to intervene on October 5.

¶17 On October 11, the Secretary's office received (1) President Trump's signed and notarized statement of intent to run as a candidate for a major political party in the presidential primary; (2) the approval form for him to do so, signed by the chair of the Colorado Republican Party, asserting that President Trump was "bona fide and affiliated with the [Republican] party"; and (3) the requisite filing fee. *See* § 1-4-1204(1)(c).

¶18 On October 20, the district court issued an Omnibus Order addressing many outstanding motions. Regarding President Trump's motions, the court reached three conclusions that are relevant now: (1) the Electors' petition involved constitutional questions, but remained "a challenge against an election official based on her alleged duties under the Election Code," and "such a claim [was] proper under [section] 1-1-113 as a matter of procedure"; (2) "[section] 1-4-1204 expressly incorporates [section] 1-1-113, and [section] 1-1-113 does not limit challenges to acts that have already occurred, but rather provides for relief when the Secretary is 'about to' take an improper or wrongful act"—thus, because the Electors had alleged such an act, the matter was ripe for decision; and (3) it could not conclude, as a matter of law, that the Fourteenth Amendment excludes a candidate from the presidential primary ballot or that the Secretary has the authority to determine candidate qualifications, so those issues would be determined at the trial.

¶19 Regarding CRSCC's motions, the court, in relevant part, concluded that the state does not violate a political party's First Amendment associational rights by excluding constitutionally ineligible candidates from the presidential primary ballot, but also rejected CRSCC's argument to the extent it purported to raise an independent

constitutional claim beyond the proper scope of a section 1-1-113 proceeding.

¶120 On October 23, President Trump filed a petition for review in this court, asking us to exercise original jurisdiction to halt the scheduled trial. Four days later, we denied the petition without passing judgment on the merits of any of President Trump's contentions.

¶121 On October 25, the district court denied President Trump's Fourteenth-Amendment-based motion to dismiss. As relevant now, the court concluded that (1) it would not dismiss the case under the political question doctrine, but it reserved the right to revisit the doctrine "to the extent that there is any evidence or argument at trial that provides the Court with additional guidance on whether the issue of presidential eligibility has been delegated to the United States Congress"; (2) whether Section Three is self-executing is irrelevant because section 1-4-1204 allows the Secretary to exclude constitutionally disqualified candidates, and states "can, and have, applied Section [Three] pursuant to state statutes without federal enforcement legislation"; and (3) it would reserve for trial the issues of whether Section Three applies to a President and whether President Trump had engaged in insurrection.

¶122 The trial began, as scheduled, on October 30. The evidentiary portion lasted five days, with closing arguments almost two weeks later, on November 15. During those two weeks, the Electors, the Secretary, President Trump, and CRSCC submitted proposed findings of fact and conclusions of law. The court issued its written final order on November 17, finding, by clear and convincing evidence, that the events of January 6 constituted an insurrection and President Trump engaged in that insurrection. The court further concluded, however, that Section Three does not apply to a President because, as the terms are

used in Section Three, the Presidency is not an "office . . . under the United States" nor is the President "an officer of the United States" who had "previously taken an oath . . . to support the Constitution of the United States." U.S. Const. amend. XIV, § 3; *see Anderson*, ¶¶ 299–315. Accordingly, the Secretary could not exclude President Trump's name from the presidential primary ballot. *Anderson*, Part VI. Conclusion.

¶123 On November 20, both the Electors and President Trump sought this court's review of the district court's rulings under section 1-1-113(3). We accepted jurisdiction of the parties' cross-petitions. Following extensive briefing from the parties and over a dozen amici, we held oral argument on December 6 and now issue this ruling.

III. Analysis

¶124 We begin with an overview of Section Three. We then address threshold questions regarding (1) whether the Election Code provides a basis for review of the Electors' claim, (2) whether Section Three requires implementing legislation before its disqualification provision attaches, and (3) whether Section Three poses a nonjusticiable political question. After concluding that these threshold issues do not prevent us from reaching the merits, we consider whether Section Three applies to a President. Concluding that it does, we address the admissibility of Congress's January 6 Report (the "Report") before reviewing, and ultimately upholding, the district court's findings of fact and conclusions of law in support of its determination that President Trump engaged in insurrection. Lastly, we consider and reject President Trump's argument that his speech on January 6 was protected by the First

Amendment.[2]

A. Section Three of the Fourteenth Amendment and Principles of Constitutional Interpretation

¶25 The end of the Civil War brought what one author has termed a "second founding" of the United States of America. *See* Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (2019). Reconstruction ushered in the Fourteenth Amendment, which includes Section Three, a provision addressing what to do with those individuals who held positions of political power before the war, fought on the side of the Confederacy, and then sought to return to those positions. *See* National Archives, *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, https://www.archives.gov/milestone-documents/14th-amendment#:~:text=Passed%20by%20Congress%20June%2013,Rights%20to%20formerly%20enslaved%20people [https://perma.cc/5EZU-ABV3] (explaining that the Fourteenth Amendment was passed by Congress on June 13, 1866, and officially ratified on July 9, 1868); *see also* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 91–92 (2021).

¶26 Section Three provides:

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2. President Trump also listed a challenge to the traditional evidentiary standard of proof for issues arising under the Election Code as a potential question on appeal, claiming that "[w]hen particularly important individual interests such as a constitutional right [is] at issue, the proper standard of proof requires more than a preponderance of the evidence." As noted above, the district court held that the Electors proved their challenge by clear and convincing evidence. And because President Trump chose not to brief this issue, he has abandoned it. *See People v. Eckley*, 775 P.2d 566, 570 (Colo. 1989).

> 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.

¶27 In interpreting a constitutional provision, our goal is to prevent the evasion of the provision's legitimate operation and to effectuate the drafters' intent. *People v. Smith*, 2023 CO 40, ¶ 20, 531 P.3d 1051, 1055. To do so, we begin with Section Three's plain language, giving its terms their ordinary and popular meanings. *Id.* "To discern such meanings, we may consult dictionary definitions." *Id.*

¶28 If the language is clear and unambiguous, then we enforce it as written, and we need not turn to other tools of construction. *Id.* at ¶ 21, 531 P.3d at 1055. However, if the provision's language is reasonably susceptible of multiple interpretations, then it is ambiguous, and we may consider "the textual, structural, and historical evidence put forward by the parties," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012), and we will construe the provision "in light of the objective sought to be achieved and the mischief to be avoided," *Smith*, ¶ 20, 531 P.3d at 1055 (quoting *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 20, 269 P.3d 1248, 1254).

¶29 These principles of constitutional interpretation apply to all sections of this opinion in which we address the meaning of any constitutional provision.

B. The State Court Has the Authority to Adjudicate a Challenge to Presidential Candidate Qualifications Under the Election Code

¶30 The Electors' claim is grounded in sections 1-4-1204 and 1-1-113 of the Election Code. They argue that it would be a breach of duty or other wrongful act under the Election Code for the Secretary to place President Trump on the presidential primary ballot because he is not a "qualified candidate" based on Section Three's disqualification. § 1-4-1203(2)(a), C.R.S. (2023). The Electors therefore seek an order pursuant to section 1-1-113 directing the Secretary not to list President Trump on the presidential primary ballot for the election to be held on March 5, 2024 (or any future ballot).

¶31 President Trump and CRSCC contend that Colorado courts lack jurisdiction over the Electors' claim and that the Electors cannot state a proper section 1-1-113 claim, in part because the Electors' claim is a "constitutional claim" that cannot be raised in a section 1-1-113 action under this court's decisions in *Frazier v. Williams*, 2017 CO 85, 401 P.3d 541, and *Kuhn v. Williams*, 2018 CO 30M, 418 P.3d 478 (per curiam). CRSCC also argues that the Secretary lacks authority to interfere with a political party's decision-making process or to interfere with the party's First Amendment right of association to select its own candidates. Lastly, President Trump argues that the expedited procedures under section 1-1-113 are insufficient to evaluate the Electors' claim.

¶32 Before considering each of these arguments in turn, we first explain the standard of review for statutory interpretation and then provide an overview of the Election

Code provisions at issue. Turning to Intervenors' contentions, we first conclude that the district court had jurisdiction to adjudicate the Electors' claim under section 1-1-113. But, recognizing that the ability to exercise *jurisdiction* here does not mean the Electors can state a *proper claim* under section 1-1-113, we explore whether states have the constitutional power to assess presidential qualifications. We conclude that they do, provided their legislatures have established such authority by statute. Analyzing the relevant provisions of the Election Code, we then conclude that the General Assembly has given Colorado courts the authority to assess presidential qualifications and, therefore, that the Electors have stated a proper claim under sections 1-4-1204 and 1-1-113. We next address Intervenors' related arguments and conclude that limiting the presidential primary ballot to constitutionally qualified candidates does not interfere with CRSCC's associational rights under the First Amendment. Finally, we conclude that section 1-1-113 provides sufficient due process for evaluating whether a candidate satisfies the constitutional qualifications for the office he or she seeks.

1. Standard of Review

¶33 We review the district court's interpretation of the relevant statutes de novo. *Griswold v. Ferrigno Warren*, 2020 CO 34, ¶ 16, 462 P.3d 1081, 1084. In doing so, "[o]ur primary objective is to effectuate the intent of the General Assembly by looking to the plain meaning of the language used, considered within the context of the statute as a whole." *Mook v. Bd. of Cnty. Comm'rs*, 2020 CO 12, ¶ 24, 457 P.3d 568, 574 (alteration in original) (quoting *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010)). When a term is undefined, "we construe a statutory term in accordance with its ordinary or natural meaning." *Id.* (quoting *Cowen v.*

People, 2018 CO 96, ¶ 14, 431 P.3d 215, 218). If the language is clear, we apply it as written. *Ferrigno Warren*, ¶ 16, 462 P.3d at 1084.

¶34 If, however, the language is reasonably susceptible of multiple interpretations, we may turn to other tools of construction to guide our interpretation. *Cowen*, ¶ 12, 431 P.3d at 218. These may include consideration of the purpose of the statute, the circumstances under which the statute was enacted, the legislative history, and the consequences of a particular construction. § 2-4-203(1), C.R.S. (2023). We also avoid constructions that would yield illogical or absurd results. *Educhildren LLC v. Cnty. of Douglas Bd. of Equalization*, 2023 CO 29, ¶ 27, 531 P.3d 986, 993.

2. Presidential Primaries Under the Election Code

¶35 Before addressing the merits, we provide a brief overview of the Election Code's provisions relating to presidential primary elections. Article VII, Section 11 of the Colorado Constitution commands the General Assembly to "pass laws to secure the purity of elections, and guard against abuses of the elective franchise." Pursuant to this constitutional mandate, the Secretary's duties under the Election Code include supervising the conduct of primary and general elections in the state and enforcing the provisions of the Election Code. § 1-1-107(1)(a)–(b), (5), C.R.S. (2023).

¶36 Part 12 of article 4 of the Election Code governs presidential primary elections. *See generally* §§ 1-4-1201 to -1207, C.R.S. (2023).[3] Section 1-4-1201, C.R.S. (2023), ex-

3. Before 1990, Colorado's political parties used caucuses to nominate their presidential candidates. That year, Colorado voters adopted a referred measure establishing presidential primary elections. *See generally* Ch. 42, sec. 1–2, §§ 1-4-1101 to -1104, (continued…)

plains that "it is the intent of the People of the State of Colorado that the provisions of this part 12 conform to the requirements of federal law and national political party rules governing presidential primary elections." This reference indicates that the legislature envisioned part 12 as operating in harmony with federal law, including requirements governing presidential primary elections. As such, it is instructive when interpreting other provisions of part 12.

¶37 The Election Code limits participation in the presidential primary to "qualified" candidates. § 1-4-1203(2)(a) ("[E]ach political party that has a *qualified* candidate . . .

1990 Colo. Sess. Laws 311, 311–13. The legislature later amended these statutes as part of a 1992 repeal and reenactment of the Election Code. *See* Ch. 118, sec. 7, §§ 1-4-1201 to -1207, 1992 Colo. Sess. Laws 624, 696–99. These amendments added the precursor to current section 1-4-1204(4): they permitted "challenges concerning the right of any candidate's name to appear on the ballot of the presidential primary election" but directed the Secretary (not a court) to hear and assess the validity of such challenges. Ch. 118, sec. 7, § 1-4-1203(4), 1992 Colo. Sess. Laws at 697–98. Colorado eliminated presidential primary elections in 2003. Ch. 24, sec. 6, 2003 Colo. Sess. Laws 495, 496. In 2016, however, voters restored such elections through Proposition 107, a citizen-initiated measure. Proposition 107, Ballot Initiative No. 140, https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2015-2016/140Final.pdf [https://perma.cc/7TX8-J59L]. Proposition 107 largely preserved the pre-2003 version of section 1-4-1204(4) that vested the Secretary with the power to hear challenges to the listing of presidential primary candidates. *Id.* at 61. In a 2017 clean-up bill, the General Assembly adopted several amendments to the citizen-initiated measure "to facilitate the effective implementation of the state's election laws." S.B. 17-305, 71st Gen. Assemb., Reg. Sess. (Colo. 2017). Relevant here, the legislature directed challenges under section 1-4-1204(4) away from the Secretary and instead to the district court through section 1-1-113 proceedings. *Id.* at 4–5. Section 1-4-1204(4) has remained otherwise unchanged since its reenactment.

is entitled to participate in the Colorado presidential primary election."[4] (emphasis added)); *see also* §§ 1-4-1101(1), -1205, C.R.S. (2023) (allowing a write-in candidate to participate in the presidential primary election if he or she submits an affidavit stating he or she is "qualified to assume" the duties of the office if elected). As a practical matter, the mechanism through which a presidential primary hopeful attests that he or she is a "qualified candidate" is the "statement of intent" (or "affidavit of intent") filed with the Secretary.[5] *See* § 1-4-1204(1)(c) (requiring candidates to submit to the Secretary a notarized "statement of intent"); § 1-4-1205 (requiring a write-in candidate to file a notarized "statement of intent" in order for votes to be counted for that candidate and stating that "such affidavit" must be accompanied by the requisite filing fee).

¶38 The Secretary's statement-of-intent form for a major party presidential primary candidate requires the candidate to affirm via checkboxes that he or she meets the qualifications set forth in Article II of the U.S. Constitution for the office of President; specifically, that the candidate is at least thirty-five years old, has been a resident

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4. In full, the quoted language reads: "[E]ach political party that has a qualified candidate entitled to participate in the presidential primary election pursuant to this section is entitled to participate in the Colorado presidential primary election." § 1-4-1203(2)(a). The phrase "pursuant to this section" sheds no light on the meaning of "qualified candidate." Section 1-4-1203 simply establishes the mechanics of presidential primaries, such as the date of the primary, elector party affiliation rules, and the content of primary ballots. § 1-4-1203(1), (2)(a), (4). Thus, "pursuant to this section" modifies the "presidential primary election" in which qualified candidates are entitled to participate: an election conducted in accordance with section 1-4-1203.

5. In this context, the legislature appears to have used "statement" and "affidavit" interchangeably.

of the United States for at least fourteen years, and is a natural-born U.S. citizen. Colo. Sec'y of State, *Major Party Candidate Statement of Intent for Presidential Primary*, https://www.sos.state.co.us/pubs/elections/Candidates/files/MajorPartyCandidateStatementOfIntentForPresidentialPrimary.pdf [https://perma.cc/YA3X-3K9T] ("Intent Form"); *see also* U.S. Const. art. II, § 1, cl. 5. The form further requires the candidate to sign an affirmation that states, "I intend to run for the office stated above and *solemnly affirm that I meet all qualifications for the office prescribed by law*."[6] Intent Form, *supra* (emphasis added). No party has challenged the Secretary's authority to require candidates to provide this information on the statement-of-intent form.

¶139 Section 1-4-1204(1) requires the Secretary to "certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots" not later than sixty days before the presidential primary election. For the 2024 election cycle, that deadline is January 5, 2024.

¶140 Section 1-4-1204(1) further states:

> The only candidates whose names shall be placed on ballots for the election shall be those candidates who:
>
> . . . .
>
> (b) Are seeking the nomination for president of a political party as a bona fide candidate for

6. The Affidavit of Intent for write-in candidates for the presidential primary has the same requirements. *Affidavit of Intent for Presidential Primary Write-In Designation*, Colo. Sec'y of State (last updated June 20, 2023), https://www.sos.state.co.us/pubs/elections/Candidates/files/PresidentialPrimaryWrite-In.pdf [https://perma.cc/V83P-HLAD].

> president of the United States pursuant to political party rules and are 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; and
>
> (c) Have submitted to the secretary not later than eighty-five days before the date of the presidential primary election, a notarized candidate's statement of intent together with either a nonrefundable filing fee of five hundred dollars or a petition signed by at least five thousand eligible electors . . . .

For the 2024 election cycle, the deadline to submit these items was December 11, 2023.

¶141 Section 1-4-1204(4) allows for "challenge[s] to the listing of any candidate on the presidential primary election ballot." Any such challenge must be brought "no later than five days after the filing deadline for candidates" and "must provide notice . . . of the alleged impropriety that gives rise to the complaint." *Id.* The district court must hold a hearing no later than five days after the challenge is filed to "assess the validity of all alleged improprieties." *Id.* The statute does not limit the length or content of the hearing; it does, however, require the district court to issue findings of fact and conclusions of law no later than forty-eight hours after the hearing concludes. *Id.* "The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence." *Id.*

¶142 Challenges under section 1-4-1204(4) must be brought through the special statutory procedure found in section 1-1-113 for adjudicating controversies that arise under the Election Code. § 1-4-1204(4) (providing that any challenge to the listing of a candidate on the presidential primary ballot "must be made in writing and filed with the

district court in accordance with section 1-1-113(1)" and "any order entered by the district court may be reviewed [by the supreme court] in accordance with section 1-1-113(3)").

¶43 Section 1-1-113 has deep roots in Colorado election law. It originated in an 1894 amendment to Colorado's Australian Ballot Law, first adopted by the Eighth General Assembly in 1891. Ch. 7, sec. 5, § 26, 1894 Colo. Sess. Laws 59, 65. Much like its present-day counterpart, the original provision established procedures for adjudicating controversies between election officials and any candidate, political party officers or representatives, or persons making nominations.[7] *Id.*

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7. Over time, the legislature amended the law to strengthen the courts' power to resolve election disputes. For example, in 1910, the General Assembly passed primary election legislation (not then applicable to presidential elections) authorizing district courts to accept verified petitions alleging, among other things, "that the name of any person has been or is about to be wrongfully placed upon" primary ballots and to order the Secretary (among other election officials) to correct such errors. Ch. 4, § 25, 1910 Colo. Sess. Laws. 15, 33. The 1910 law also gave this court the power to review the district court's decision. *Id.* at 34; *see also People v. Republican State Cent. Comm.*, 226 P. 656, 657 (Colo. 1924) (confirming that if a proper entity "has violated a duty with which it is charged under the act, the court has power to direct it to correct the wrong").

   In 1963, the General Assembly repealed and reenacted Colorado's Election Code. *See generally* Ch. 118, 1963 Colo. Sess. Laws 360. The 1963 code allowed for "any elector" to show "by verified petition . . . that any neglect of duty or wrongful act by any person charged with a duty under this act has occurred or is about to occur," mirroring the language in today's section 1-1-113. Ch. 118, § 203, 1963 Colo. Sess. Laws at 457. The legislature's next reenactment of the code in 1992 codified this procedure at section 1-1-113. Ch. 118, sec. 1, § 1-1-113, 1992 Colo. Sess. Laws

(continued…)

¶44 The current version of section 1-1-113 establishes (with exceptions not relevant here) "the *exclusive method* for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of an election." § 1-1-113(4) (emphasis added). It provides:

> 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.

§ 1-1-113(1) (emphases added).

¶45 Section 1-1-113 proceedings also provide for expedited, albeit discretionary, appellate review in this court. § 1-1-113(3). Either party may seek review from this court within three days after the district court proceedings conclude. *Id.* If this court declines jurisdiction of the case, the

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624, 635.

district court's decision is final and is not subject to further appellate review. *Id.*

¶146 Although Colorado's expedited statutory procedure for litigating election disputes may be unfamiliar nationally, our courts, particularly the Denver District Court (the proper venue when the Secretary is the named respondent), are accustomed to section 1-1-113 litigation. Such cases arise during virtually every election cycle, and this court has exercised jurisdiction many times to review these disputes. *E.g.*, *Kuhn*, ¶ 1, 418 P.3d at 480; *Frazier*, ¶ 1, 401 P.3d at 542; *Carson v. Reiner*, 2016 CO 38, ¶ 1, 370 P.3d 1137, 1138; *Hanlen v. Gessler*, 2014 CO 24, ¶ 3, 333 P.3d 41, 42. Moreover, it is not uncommon for section 1-1-113 cases to require courts to take evidence and grapple with complex legal issues. *E.g.*, *Ferrigno Warren*, ¶¶ 9–13, 462 P.3d at 1083–84 (describing a district court hearing, held one month after the petitioner filed her verified petition and after the parties filed briefing, to determine whether "substantial compliance" was the appropriate standard for a minimum signature requirement, how to apply that standard, and whether, based on a four-factor test, a prospective U.S. Senate candidate satisfied that standard); *Kuhn*, ¶¶ 4, 15–18, 418 P.3d at 480–82 (describing a district court hearing to assess evidence and testimony concerning the residency of seven circulators of a petition to reelect a congressional representative); *Meyer v. Lamm*, 846 P.2d 862, 867 (Colo. 1993) (requiring an evidentiary hearing in district court that involved, among other things, the content of ballots cast for a write-in candidate). Even early cases recognized that the original 1894 provision "contemplate[d] the taking of evidence where the issues require[d] it." *Leighton v. Bates*, 50 P. 856, 858 (Colo. 1897).

3. The District Court Had Jurisdiction to Adjudicate

the Electors' Claim Under the Election Code

¶147 President Trump argues that the district court lacked jurisdiction over the Electors' section 1-1-113 action because the Secretary has no duty under the Election Code to investigate a candidate's qualifications. A district court has jurisdiction pursuant to section 1-1-113(1) when: (1) an eligible elector; (2) files a verified petition in a district court of competent jurisdiction; (3) alleging that a person charged with a duty under the Election Code; (4) has committed, or is about to commit, a breach of duty or other wrongful act.

¶148 The district court plainly had jurisdiction under section 1-1-113 to hear the Electors' claim. First, the Electors are "eligible elector[s]" within the meaning of the Election Code because, as Republican and unaffiliated voters, they are "person[s] who meet[] the specific requirements for voting at a specific election"; namely, the Republican presidential primary election. § 1-1-104(16), C.R.S. (2023); *see also* § 1-4-1203(2)(b) (providing that unaffiliated voters may vote in presidential primary elections); § 1-7-201(1), C.R.S. (2023) (identifying eligible electors for the purpose of primary elections). Second, the Electors timely filed their verified petition under sections 1-1-113 and 1-4-1204(4) in the proper district court. Third, their petition was filed against the Secretary, an election official charged with duties under the Election Code. *See* § 1-1-107 (prescribing the powers and duties of the Secretary); § 1-4-1204(1) ("[T]he secretary of state shall certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots."). And fourth, the petition alleged that the Secretary was about to commit a breach of duty or other wrongful act under the Election Code by placing President Trump on the presidential primary ballot because he is not

constitutionally qualified to hold office.

¶49 Though it does not affect the district court's *jurisdiction*, President Trump's assertion that the Secretary does not have a duty under the Election Code to determine a candidate's constitutional qualification raises the question of whether the Electors presented a *proper claim*. To answer that question, we must first determine whether, generally, states have the authority to determine presidential qualifications.

4. States Have the Authority to Assess Presidential Candidates' Qualifications

¶50 "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . . ." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The Constitution delegates to states the authority to prescribe the "Times, Places and Manner" of holding congressional elections, U.S. Const. art. I, § 4, cl. 1, and states retain the power to regulate their own elections, *Burdick*, 504 U.S. at 433. States exercise these powers through "comprehensive and sometimes complex election codes," regulating the registration and qualifications of voters, the selection and eligibility of candidates, and the voting process itself. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) ("*Celebrezze*"); *see also, e.g.*, § 1-4-501(1), C.R.S. (2023) (setting qualifications for state office candidates). These powers are uncontroversial and well-explored in U.S. Supreme Court case law.

¶51 But does the U.S. Constitution authorize states to assess the constitutional qualifications of presidential candidates? We conclude that it does.

¶52 Under Article II, Section 1, each state is authorized to appoint presidential electors "in such Manner as the Legislature thereof may direct." U.S. Const. art. II, § 1, cl. 2. So long as a state's exercise of its appointment power does

not run afoul of another constitutional constraint, that power is plenary. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020); *McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

¶53 But voters no longer choose between slates of electors on Election Day. *Chiafalo*, 140 S. Ct. at 2321. Instead, they vote for presidential candidates who serve as proxies for their pledged electors. *Id.* Accordingly, states exercise their plenary appointment power not only to regulate the electors themselves, but also to regulate candidate access to presidential ballots. Absent a separate constitutional constraint, then, states may exercise their plenary appointment power to limit presidential ballot access to those candidates who are constitutionally qualified to hold the office of President. And nothing in the U.S. Constitution expressly *precludes* states from limiting access to the presidential ballot to such candidates. *See Lindsay v. Bowen*, 750 F.3d 1061, 1065 (9th Cir. 2014).

¶54 No party in this case has challenged the Secretary's authority to require a presidential primary candidate to confirm on the required statement-of-intent form that he or she meets the Article II requirements of age, residency, and citizenship, and to further attest that he or she "meet[s] all qualifications for the office prescribed by law." Moreover, several courts have expressly upheld states' ability to exclude constitutionally ineligible candidates from their presidential ballots. *See id.* (upholding California's refusal to place a twenty-seven-year-old candidate on the presidential ballot); *Hassan v. Colorado*, 495 F. App'x 947, 948–49 (10th Cir. 2012) (affirming the Secretary's decision to exclude a naturalized citizen from the presidential ballot); *Socialist Workers Party of Ill. v. Ogilvie*, 357 F. Supp. 109, 113 (N.D. Ill. 1972) (per curiam) (affirming Illinois's exclusion of a thirty-one-year-old candidate from the presidential ballot).

¶55 As then-Judge Gorsuch recognized in *Hassan*, it is "a

state's legitimate interest in protecting the integrity and practical functioning of the political process" that "permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." 495 F. App'x at 948.

¶56 The question then becomes whether Colorado has exercised this power through the Election Code. We conclude that it has. Section 1-4-1204(4) is Colorado's vehicle for advancing these state interests. When eligible electors challenge the Secretary's listing on the presidential primary ballot of a candidate who is not constitutionally qualified to assume office, section 1-4-1204(4), as exercised through a proceeding under section 1-1-113, offers an exclusive remedy under the Election Code. *See* § 1-1-113(4).

5. The Electors Have Stated a Proper Claim That Is Not Precluded by *Frazier* and *Kuhn*

¶57 President Trump argues that the Electors' claim cannot be properly litigated in a section 1-1-113 action because the Secretary has no duty under the Election Code to investigate a candidate's qualifications and because this court's precedent bars the litigation of constitutional claims in a section 1-1-113 action. Although we agree that the Secretary has no duty to independently investigate the qualifications of a presidential primary candidate, we conclude that the Electors may nevertheless challenge a candidate's qualifications under section 1-4-1204(4), and that the Electors' claim here is not a "constitutional claim" precluded by our decisions in *Frazier* and *Kuhn*.

¶58 In presidential primary elections, the Secretary's duty is to "certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots." § 1-4-1204(1). The conditions that must be satisfied before she can exercise this duty are limited to timely receiving (1) confirmation that the prospective candidate

is a "bona fide candidate" under the party's rules, (2) a notarized statement of intent from the candidate, and (3) the requisite filing fee or a petition signed by at least 5,000 eligible electors affiliated with the candidate's political party who reside in Colorado. § 1-4-1204(1)(b)–(c).

¶159 Where a candidate does not submit (or cannot comply with) the required attestations on the statement of intent form, the Secretary cannot list the candidate on the ballot. *See Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1195 (D. Colo. 2012), *aff'd* 495 F. App'x at 948. But if the contents of a signed and notarized statement of intent appear facially complete (i.e., the candidate has filled out the Secretary's form confirming that he or she meets the Article II requirements of age, residency, and citizenship, and further attesting that he or she "meet[s] all qualifications for the office prescribed by law"), the Secretary has no duty to further investigate the accuracy or validity of the information the prospective candidate has supplied.[8] To that extent, we agree with President Trump that the Secretary has no duty to determine, beyond what is apparent on the face of the required documents, whether a presidential candidate is qualified.

¶160 The fact that the Secretary has complied with her section 1-4-1204(1) duties does not, however, foreclose a challenge under section 1-4-1204(4). As discussed above, section 1-4-1204(4) permits "[a]ny challenge to the listing of

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8. In contrast, with respect to elections for state office, section 1-4-501(1), C.R.S. (2023), provides that "[t]he designated election official shall not certify the name of any designee or candidate . . . *who the designated election official determines is not qualified* to hold the office that he or she seeks based on residency requirements." (Emphasis added.) This provision for state office expressly charges the Secretary with a duty to investigate whether a candidate "meets any requirements of the office relating to registration, residence, or property ownership," among others. *Id.*

any candidate on the presidential primary election ballot," using section 1-1-113(1) as a procedural vehicle. Section 1-1-113(1), in turn, creates a cause of action for electors alleging a breach of duty *or other wrongful act* under the code. *See Frazier*, ¶ 3, 401 P.3d at 542 (construing "wrongful act" in section 1-1-113 as limited to a wrongful act under the Election Code). Section 1-1-113 then requires the district court—not the election official—to adjudicate an eligible elector's challenge to a candidate's eligibility. *Carson*, ¶ 8, 370 P.3d at 1139 (observing that the Election Code reflects an intent for challenges to the qualifications of a candidate to be resolved by the courts); *Hanlen*, ¶ 40, 333 P.3d at 50 ("[T]he election code requires a court, not an election official, to determine the issue of [candidate] eligibility.").

¶61 As we have explained, the Secretary has complied with her limited duty to accept President Trump's properly completed paperwork. But the Electors have alleged an impending "wrongful act," which is "more expansive than a 'breach' or 'neglect of duty.'" *Frazier*, ¶ 16, 401 P.3d at 545 (quoting § 1-1-113(1)). Indeed, section 1-1-113 "clearly comprehends challenges to a broad range of wrongful acts committed by officials charged with duties under the code," *Carson*, ¶ 17, 370 P.3d at 1141, including any act that is "inconsistent with the Election Code," *Frazier*, ¶ 16, 401 P.3d at 545.

¶62 We conclude that certifying an unqualified candidate to the presidential primary ballot constitutes a "wrongful act" that runs afoul of section 1-4-1203(2)(a) and undermines the purposes of the Election Code. Nothing in section 1-4-1204(4) limits challenges under that provision to those based on a breach of the Secretary's duties under section 1-4-1204. And section 1-4-1203(2)(a) clearly limits participation in the presidential primary to political parties fielding "qualified" candidates. Although section 1-4-

1203(2)(a) does not define "qualified," nearby provisions regarding write-in candidates indicate that "qualified" refers to a candidate's qualifications for office. As with bona fide major party candidates under section 1-4-1204(1), write-in candidates for the presidential primary must file a "notarized candidate statement of intent." § 1-4-1205. Under the Election Code, such statements for all write-in candidates (regardless of the type of election) must indicate that the candidate "desires the office and is *qualified* to assume its duties if elected." § 1-4-1101(1) (emphasis added). The Election Code's explicit requirement that a write-in candidate be "qualified" to assume the duties of their intended office logically implies that major party candidates under 1-4-1204(1)(b) must be "qualified" in the same manner.[9]

¶63 Reading the Election Code as a whole, then, we conclude that "qualified" in section 1-4-1203(2)(a) must mean, at minimum, that a candidate is qualified under the U.S. Constitution to assume the duties of the office of President. It has to, as section 1-4-1203(2)(a) supplies the only textual basis in the Election Code for the Secretary's authority to require a presidential primary candidate to attest to his or her qualifications for office in the candidate statement (or affidavit) of intent. Moreover, to read "qualified" *not* to encompass federal constitutional qualifica-

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9. This interpretation is further supported by the Election Code's treatment of uncontested primaries. The Election Code allows the Secretary to cancel a primary when every political party has no more than one affiliated candidate, whether that candidate is certified to the presidential primary ballot pursuant to section 1-4-1204(1) or is a write-in candidate entering under section 1-4-1205. § 1-4-1203(5). Because the General Assembly plainly treats such candidates as equivalent for purposes of 1-4-1203(5), we conclude that the legislature also viewed the "qualified" requirement in both provisions as equivalent.

tions would undermine the purpose of the Election Code—"to secure the purity of elections"—while compromising the Secretary's ability to advance that purpose. Colo. Const. art. VII, § 11; § 1-1-107(1), (5).

¶64 We therefore reject such an interpretation as contrary to the purpose of the Election Code. Instead, we conclude that, under the Election Code, "qualified" candidates for the presidential primary are those who, at a minimum, are qualified to hold office under the provisions of the U.S. Constitution.

¶65 We recognize that the Supreme Court has twice declined to address whether Section Three—which *disqualifies* an oath-breaking insurrectionist from *holding* office—amounts to a qualification for office. *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969) (describing Section Three and similar disqualification provisions in the federal constitution but declining to address whether such provisions constitute "qualification[s]" for office because "both sides agree[d] that [the candidate] was not ineligible under" Section Three or any other, similar provision); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 n.2 (1995) (seeing "no need to resolve" the same question regarding Section Three in a case concerning the propriety of *additional* qualifications for office). But lower courts, when presented squarely with the question, have all but concluded that Section Three is the functional equivalent of a qualification for office. *See, e.g.*, *Greene v. Raffensperger*, 599 F. Supp. 3d 1283, 1316 (N.D. Ga. 2022) ("Section [Three] is an existing constitutional disqualification adopted in 1868—similar to but distinct from the Article I, Section 2 requirements that congressional candidates be at least 25 years of age, have been citizens of the United States for 7 years, and reside in the states in which they seek to be elected."); *State v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at *24 (N.M.

Dist. Ct. Sept. 6, 2022) ("Section Three imposes a qualification for public office, much like an age or residency requirement . . . .").

¶66 We perceive no logical distinction between a *disqualification* from office and a *qualification* to assume office, at least for the purposes of the section 1-1-113 claim here. Either way, it would be a wrongful act for the Secretary to list a candidate on the presidential primary ballot who is not "qualified" to assume the duties of the office. Moreover, because Section Three is a "part of the text of the Constitution," assessing a candidate's compliance with it for purposes of determining their eligibility for office does not improperly "add qualifications to those that appear in the Constitution." *U.S. Term Limits*, 514 U.S. at 787 n.2. Doing so merely renders the list of constitutional qualifications more complete.

¶67 Nor are we persuaded by President Trump's assertion that Section Three does not bar him from *running for* or *being elected to* office because Section Three bars individuals only from *holding* office. *Hassan* specifically rejected any such distinction. 495 Fed. App'x at 948. There, the candidate argued that even if Article II "properly holds him ineligible to *assume the office* of president," Colorado could not "deny him *a place on the ballot*." *Id.* The *Hassan* panel concluded otherwise. *Id.* In any event, the provisions in the Election Code governing presidential primary elections do not recognize such a distinction. Rather, as discussed above, those provisions require all presidential primary candidates to be constitutionally "qualified" *before* their names are added to the presidential primary ballot pursuant to section 1-4-1204(1).

¶68 Were we to adopt President Trump's view, Colorado could not exclude from the ballot even candidates who plainly do not satisfy the age, residency, and citizenship requirements of the Presidential Qualifications Clause of

Article II. *See* U.S. Const. art. II, § 1, cl. 5 (setting forth the qualifications to be "*eligible to the Office of President*" (emphasis added)). It would mean that the state would be powerless to exclude a twenty-eight-year-old, a non-resident of the United States, or even a foreign national from the presidential primary ballot in Colorado. Yet, as noted, several courts have upheld states' exclusion from ballots of presidential candidates who fail to meet the qualifications for office under Article II. *See Lindsay*, 750 F.3d at 1065; *Hassan*, 495 F. App'x at 948; *Ogilvie*, 357 F. Supp. at 113.

¶169 Lastly, we reject President Trump and CRSCC's argument that state courts may not hear the Electors' claim because this court's precedent bars the litigation of constitutional claims in a section 1-1-113 action. *See Frazier*, ¶ 3, 401 P.3d at 542; *Kuhn*, ¶ 55, 418 P.3d at 489. The Electors have not asserted a constitutional claim, so *Frazier* and *Kuhn* do not control here.

¶170 Both *Frazier* and *Kuhn* addressed whether a petitioner could shoehorn a claim challenging the constitutionality of the Election Code into a section 1-1-113 proceeding. *Frazier*, ¶ 6, 401 P.3d at 543; *Kuhn*, ¶ 55, 418 P.3d at 489. In *Frazier*, we concluded that section 1-1-113 is not a proper vehicle to resolve claims under 42 U.S.C. § 1983 because they do not arise under the Election Code and because the sole remedy available under section 1-1-113 is a court order directing compliance with the Election Code. *Frazier*, ¶¶ 17–18, 401 P.3d at 545. Similarly, in *Kuhn*, we held that to the extent the candidate sought to challenge the constitutionality of the petition circulator residency requirement under the Election Code, the court lacked jurisdiction to address such arguments in a section 1-1-113 proceeding. ¶ 55, 418 P.3d at 489.

¶171 Here, however, the Electors do not challenge the constitutionality of the Election Code. Nor do they allege a

violation of the Constitution. Instead, they allege a "wrongful act" under section 1-1-113. That the Electors' claim has constitutional implications or requires interpretation of a constitutional provision does not make it a separate "constitutional claim" of the sort prohibited by *Frazier* and *Kuhn*. And neither President Trump nor CRSCC suggests that a section 1-1-113 claim cannot have constitutional implications. Indeed, as the Secretary notes in her brief, there is nothing "particularly unusual about a section 1-1-113 proceeding raising constitutional issues."

¶172 As discussed above, the Electors' claim is that the Secretary will commit a wrongful act under the Election Code if she lists a candidate on the presidential primary ballot who is not qualified for office. While this claim requires resolving constitutional questions, it remains a challenge brought by eligible electors against an election official regarding an alleged wrongful act under the Election Code. Section 1-1-113 is the "exclusive" vehicle for litigating such challenges prior to an election; the Electors have no other viable option. § 1-1-113(4).

6. Limiting Presidential Primary Ballot Access to Constitutionally Qualified Candidates Does Not Interfere with CRSCC's First Amendment Rights

¶173 CRSCC argues that section 1-4-1204(1)(b) vests it with the sole authority to determine who the Republican nominees will be on a ballot—a reflection, CRSCC contends, of its constitutional right to freely associate and exercise its political decisions. *See* U.S. Const. amend. I; *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) ("The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas."). Taken to its logical end, CRSCC's position is that it has a First Amendment right to deem any person to be a "bona

fide candidate" pursuant to their party rules, § 1-4-1204(1)(b), and subsequently mandate that individual's placement on the presidential ballot, without regard to that candidate's age, residency, citizenship, *see* U.S. Const. art. II, § 1, cl. 5, or even whether the candidate has already served two terms as President, *see id.* at amend. XXII ("No person shall be elected to the office of the President more than twice . . . ."). We disagree with this position.

¶74 As a threshold matter, we acknowledge that the district court dismissed CRSCC's argument on this issue, ruling that it raised a separate constitutional claim improperly litigated in a section 1-1-113 action. *Anderson*, ¶ 12. We agree that a claim challenging the constitutionality of the Election Code cannot be reviewed under section 1-1-113. *See Kuhn*, ¶ 55, 418 P.3d at 489; *Frazier*, ¶ 3, 401 P.3d at 542. But to the extent that CRSCC argues in its Answer Brief that the Secretary lacks authority to interfere with CRSCC's associational rights, we respond briefly to those concerns.

¶75 We distinguish between (1) CRSCC's right to decide the candidates with whom it affiliates and recognizes as bona fide, and (2) CRSCC's ability to place candidates on the presidential primary ballot. CRSCC's "claim that it has a right to select its own candidate is uncontroversial, so far as it goes." *Timmons*, 520 U.S. at 359. Partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986), and "[a]s a result, political parties' government, structure, and activities enjoy constitutional protection," *Timmons*, 520 U.S. at 358. In other words, CRSCC is well within its rights to choose with whom it affiliates and to decide which candidates it recognizes as bona fide. "It does not follow, though, that a party is absolutely entitled

to have its nominee appear on the ballot as that party's candidate." *Id.* at 359 (noting that a "particular candidate might be ineligible for office," for example).

¶176 As a practical matter, any state election law governing the selection and eligibility of candidates affects, to some degree, the fundamental right to associate with others for political ends. *Celebrezze*, 460 U.S. at 788. Even so, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

¶177 Accordingly, to determine if a state election law impermissibly burdens a party's associational rights, courts must weigh the "'character and magnitude'" of the burden imposed by the rule "against the interests the State contends justify that burden," and then consider whether the state's interests make the burden necessary. *Timmons*, 520 U.S. at 358 (quoting *Burdick*, 504 U.S. at 434). Limiting ballot access "to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable." *Burdick*, 504 U.S. at 440 n.10.

¶178 Here, the Election Code limits presidential primary ballot access to only qualified candidates. Such a restriction is an "eminently reasonable" regulation that does not severely burden CRSCC's associational rights. To hold otherwise would permit political parties to disregard the requirements of the law and the Constitution whenever they decide, as a matter of "political expression" or "political choice," that those requirements do not apply. That cannot be. The Constitution—not any political party rule—is the supreme law of the land. U.S. Const. art. VI, cl. 2.

7. Section 1-1-113 Proceedings Provide Adequate Due Process for Litigants

¶79 Lastly, President Trump asserts that section 1-1-113 is not a valid way to litigate complex constitutional legal and factual issues. He complains of unfairness inherent in the expedited procedures that section 1-1-113 demands. But President Trump's argument disregards how the Electors' claim proceeded here.

¶80 Initially, we note that to the extent President Trump purports to challenge the constitutionality of section 1-1-113 under the Fourteenth Amendment's Due Process clause as a defense to the Electors' claim, he raises precisely the type of independent constitutional claim he recognizes is barred by *Kuhn*. *See Kuhn*, ¶ 55, 418 P.3d at 489. As discussed above, constitutional challenges to provisions of the Election Code fall outside the scope of a proper section 1-1-113 challenge because these expedited statutory proceedings entertain only one type of claim — election officials' violations of the Election Code — and one type of injunctive relief — an order compelling substantial compliance with the Election Code. *See Kuhn*, ¶ 55, 418 P.3d at 489; § 1-1-113(1); *accord Frazier*, ¶¶ 17–18, 401 P.3d at 545.

¶81 Furthermore, because section 1-1-113 proceedings are designed to address election-related disputes, they move quickly out of necessity. *Frazier*, ¶ 11, 401 P.3d at 544 ("Given the tight deadlines for conducting elections, section 1-1-113 is a summary proceeding designed to quickly resolve challenges brought by electors, candidates, and other designated plaintiffs against state election officials prior to election day."). Lawyers who practice in this area are well-aware of this. Looming elections trigger a cascade of deadlines under both state and federal law that cannot accommodate protracted litigation schedules,

particularly when the dispute concerns a candidate's access to the ballot. And a state's interest in "protecting the integrity of the election process and avoiding voter confusion," *Lindsay*, 750 F.3d at 1063 (citing *Timmons*, 520 U.S. at 364–65), allows a state to expedite the process by which a candidate's qualifications, once challenged, are subsequently determined. That the form of section 1-1-113 proceedings reflects their function—to expeditiously resolve pre-election disputes over an election official's wrongful act—does not mean these proceedings lack due process.

¶82 Nor does the need for expedited proceedings in election disputes preclude a district court from using traditional means of case management in a section 1-1-113 proceeding to construct a schedule that accommodates legally or factually complex issues. *See Ferrigno Warren*, ¶¶ 8–13, 462 P.3d at 1083 (explaining that the district court ordered briefing and held a hearing one month after the candidate filed a section 1-1-113 petition). President Trump contends that the expedited nature of section 1-1-113 proceedings do not provide time for the kinds of procedures he believes the complexities of this case require—for example, filing C.R.C.P. 12 motions testing the legal sufficiency of the Electors' claims before the litigation proceeds, allowing for extended discovery and disclosure procedures, and providing the opportunity to depose expert witnesses. But he has never specifically articulated how the district court's approach lacked due process. He certainly does not contend that he was prejudiced because the district court moved too *slowly* or failed to resolve the case in a week. He made no specific offer of proof regarding other discovery he would have conducted or other evidence he would have tendered. Moreover, his arguments throughout this case have focused predominantly on questions of law and not on disputed issues of

material fact.

¶183 In addition, the district court took many steps to address the complexities of the case. For example, the first hearing in this case was a status conference on September 18—four days after the case was reopened after being remanded from federal court. In recognition of the complexity of the case, the district court—with the parties' input—adopted a civil-case-management approach to the litigation that afforded the parties the opportunity to be heard on a wide range of substantive issues.

¶184 The district court's case-management approach worked. After permitting multiple intervenors to participate, the district court allowed sufficient time for extensive prehearing motions in which all parties vigorously engaged. It then issued three substantive rulings on these motions, including an omnibus ruling addressing four of Intervenors' motions, all in advance of the trial. The trial took place over five days and included opening and closing statements, the direct-and cross-examination of fifteen witnesses, and the presentation of ninety-six exhibits. Moreover, the legal and factual complexity of this case did not prevent the district court from issuing a comprehensive, 102-page order within the forty-eight-hour window section 1-4-1204(4) requires.

¶185 In short, the district court admirably—and swiftly—discharged its duty to adjudicate this complex section 1-1-113 action, substantially complying with statutory deadlines while demonstrating the flexibility inherent in such a proceeding to address the various issues raised by Intervenors. And nothing about the district court's process suggests that President Trump was deprived of notice or opportunity to fully respond to the claim against him or to mount a vigorous defense. If any case suggests that it is *not* impossible to "fully litigate a complex constitutional issue within days or weeks," this is it. *Frazier*, ¶ 18 n.3,

401 P.3d at 545 n.3.

¶86 For these reasons, we conclude that the Election Code allows Colorado's courts, through challenges brought under sections 1-4-1204(4) and 1-1-113, to assess the constitutional qualifications of a candidate—and to order the Secretary to exclude from the ballot candidates who are not qualified. These provisions advance Colorado's "legitimate interest in protecting the integrity and practical functioning of the political process" by allowing the Secretary to "exclude from the ballot [presidential] candidates who are constitutionally prohibited from assuming office." *Hassan*, 495 F. App'x at 948. Moreover, these provisions neither infringe on a political party's associational rights nor compromise the validity of a court's rulings on complex factual and legal issues. Rather, they provide a robust vehicle through which to protect the purity of Colorado's elections.[10] *See* Colo. Const. art. VII, § 11.

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10. We note that Colorado's Election Code differs from other states' election laws. Michigan's election law, for example, does not include the term "qualified candidate," does not establish a role for Michigan courts in assessing the qualifications of a presidential primary candidate, and strictly limits the Michigan Secretary of State's responsibilities in the context of presidential primary elections. *See* Mich. Comp. Laws §§ 168.613, 168.620a (governing presidential primary elections in Michigan). The Michigan code also excludes presidential and vice presidential candidates from the requirement to submit the "affidavit of identity" that other candidates must submit to indicate that they "meet[] the constitutional and statutory qualifications for the office sought." *See Davis v. Wayne Cnty. Election Comm'n*, No. 368615, 2023 WL 8656163, at *14 (Mich. Ct. App. Dec. 14, 2023) (unpublished order) (quoting Mich. Comp. Laws § 168.558(1)–(2)). Given these statutory constraints, it is unsurprising that the Michigan Court of Appeals recently concluded that the Michigan Secretary of State had no discretion to refrain from placing President Trump on the presidential primary ballot once his party identified him as a candidate. *Id.* at *16.

¶87 Because the Electors have properly invoked Colorado's section 1-1-113 process to challenge the listing of President Trump on the presidential primary ballot as a wrongful act, we proceed to the other threshold questions raised by Intervenors.

C. The Disqualification Provision of Section Three Attaches Without Congressional Action

¶88 The Electors' challenge to the Secretary's ability to certify President Trump as a qualified candidate presumes that Section Three is "self-executing" in the sense that it is enforceable as a constitutional disqualification without implementing legislation from Congress. Because Congress has not authorized state courts to enforce Section Three, Intervenors argue that this court may not consider President Trump's alleged disqualification under Section Three in this section 1-1-113 proceeding.[11] We disagree.

¶89 The only mention of congressional power in Section Three is that "Congress may by a vote of two-thirds of each House, remove" the disqualification of a former officer who had "engaged in insurrection." U.S. Const.

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11. Intervenors and their supporting amici occasionally assert that the Electors' claim is brought pursuant to Section Three and that the Section is not self-executing in the sense that it does not create an independent private right of action. But as mentioned above, the Electors do not bring any claim directly under Section Three. Their claim is brought under Colorado's Election Code, and resolution of that claim requires an examination of President Trump's qualifications in light of Section Three. The question of "self-execution" that we confront here is not whether Section Three creates a cause of action or a remedy, but whether the disqualification from office defined in Section Three can be evaluated by a state court when presented with a proper vehicle (like section 1-1-113), without prior congressional authorization.

amend. XIV, § 3. Section Three does not determine who decides whether the disqualification has attached in the first place.

¶190 Intervenors, however, look to Section Five of the Fourteenth Amendment, which provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article," to argue that congressional authorization is necessary for any enforcement of Section Three. *Id.* at § 5. This argument does not withstand scrutiny.

¶191 The Supreme Court has said that the Fourteenth Amendment "is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances." *The Civil Rights Cases*, 109 U.S. 3, 20 (1883). To be sure, in the *Civil Rights Cases*, the Court was directly focused on the Thirteenth Amendment, so this statement could be described as dicta. But an examination of the Thirteenth, Fourteenth, and Fifteenth Amendments ("Reconstruction Amendments") and interpretation of them supports the accuracy and broader significance of the statement.

¶192 Section Three is one of four substantive sections of the Fourteenth Amendment:

- Section One: "No State *shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor *shall* any State deprive any person of life, liberty, or property, without due process of law . . . ."
- Section Two: "Representatives *shall* be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . ."

- Section Three: "No person *shall* be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office . . . under the United States . . . who, having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same . . . ."
- Section Four: "The validity of the public debt of the United States . . . . *shall* not be questioned."

U.S. Const. amend. XIV, §§ 1–4 (emphases added). Section Five is then an enforcement provision that applies to each of these substantive provisions. *Id.* at § 5. And yet, the Supreme Court has held that Section One is self-executing. *E.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) ("As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing."), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803, *on other grounds as recognized in Ramirez v. Collier*, 595 U.S. 411, 424 (2022). Thus, while Congress *may* enact enforcement legislation pursuant to Section Five, congressional action is not *required* to give effect to the constitutional provision. *See Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (holding that Section Five gives Congress authority to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," but not disputing that the Fourteenth Amendment is self-executing).

¶93 Section Two, moreover, was enacted to eliminate the constitutional compromise by which an enslaved person was counted as only three-fifths of a person for purposes of legislative apportionment. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three,*

172 U. Pa. L. Rev. (forthcoming 2024) (manuscript at 51–52), https://ssrn.com/abstract=4532751. The self-executing nature of that section has never been called into question, and in the reapportionment following passage of the Fourteenth Amendment, Congress simply treated the change as having occurred. *See* The Apportionment Act of 1872, 17 Stat. 28 (42nd Congress) (apportioning Representatives to the various states based on Section Two's command without mentioning, or purporting to enforce, the Fourteenth Amendment). Similarly, Congress never passed enabling legislation to effectuate Section Four.

¶194 The same is true for the Thirteenth Amendment, which abolished slavery and involuntary servitude. Section One provides the substantive provision: "Neither slavery nor involuntary servitude . . . *shall* exist within the United States . . . ." U.S. Const. amend. XIII, § 1 (emphasis added). Section Two provides the enforcement provision: "Congress shall have power to enforce this article by appropriate legislation." *Id.* at § 2. Discussing this Amendment, the Supreme Court recognized that "legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it," but that "[b]y its own unaided force it abolished slavery" and was "undoubtedly self-executing without any ancillary legislation." *The Civil Rights Cases*, 109 U.S. at 20.

¶195 Like the other Reconstruction Amendments, the Fifteenth Amendment, which established universal male suffrage, contains a substantive provision—"[t]he right of citizens of the United States to vote *shall* not be denied or abridged . . . on account of race, color, or previous condition of servitude"—followed by an enforcement provision—"[t]he Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XV, §§ 1–2 (emphasis added). As with Section One of both the Thirteenth and Fourteenth Amendments, the

Supreme Court has explicitly confirmed that the Fifteenth Amendment is self-executing. *E.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (holding that Section One of the Fifteenth Amendment "has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice").

¶96 There is no textual evidence that Congress intended Section Three to be any different.[12] Furthermore, we agree with the Electors that interpreting any of the Reconstruction Amendments, given their identical structure, as not self-executing would lead to absurd results. If these Amendments required legislation to make them operative, then Congress could nullify them by simply not passing enacting legislation. The result of such inaction would mean that slavery remains legal; Black citizens would be counted as less than full citizens for reapportionment; non-white male voters could be disenfranchised;

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12. It would also be anomalous to say this disqualification for office-holding requires enabling legislation when the other qualifications for office-holding do not. *See* U.S. Const. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id.* at § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."); *id.* at art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.").

and any individual who engaged in insurrection against the government would nonetheless be able to serve in the government, regardless of whether two-thirds of Congress had lifted the disqualification. Surely that was not the drafters' intent.

¶197 Intervenors argue that certain historical evidence requires a different conclusion as to Section Three. We generally turn to historical and other extrinsic evidence only when the text is ambiguous, which it is not here. Nonetheless, we will consider these historical claims in the interest of providing a thorough review.

¶198 Intervenors first highlight a statement Representative Thaddeus Stevens made during the Congressional framing debates: "[Section Three] will not execute itself, but as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have the right to do." Cong. Globe, 39th Cong., 1st Sess. 2544 (1866); *see also* Kurt T. Lash, The Meaning and Ambiguity of Section Three of the Fourteenth Amendment 42 (Oct. 3, 2023) (unpublished manuscript), https://ssrn.com/abstract=4591838. But as one of the amici points out, this statement referenced a deleted portion of Section Three that disenfranchised all former Confederates until 1870. In any event, given the complex patchwork of perspectives and intentions expressed when drafting these constitutional provisions, we refuse to cherry-pick individual statements from extensive debates to ground our analysis. *See generally* Baude & Paulsen, *supra* (manuscript at 39–53).

¶199 Intervenors next direct us to the non-binding opinion written by Chief Justice Salmon Chase while he was riding circuit: *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869)

(No. 5,815) ("*Griffin's Case*").[13] There, Caesar Griffin challenged his criminal conviction as null and void because under Section Three, the judge who had entered his conviction was disqualified from holding judicial office, having formerly sworn a relevant oath as a state legislator and then engaged in insurrection by continuing to serve as a legislator in Virginia's Confederate government. *Id.* at 22–23. It was undisputed that the judge fell within Section Three's scope, but the question Chief Justice Chase sought to answer was whether Section Three "operat[ed] directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power." *Id.* at 23.

¶100 In interpreting the scope of the provision, Chief Justice Chase observed that, after the end of the Civil War but before the Fourteenth Amendment was ratified, many southern states had established, with the approval of the federal government, provisional governments to keep society functioning. *Id.* at 25; *see also* Baude & Paulsen, *supra* (manuscript at 36). And, within these provisional governments, many offices were filled with citizens who would fall within Section Three's scope. *Griffin's Case*, 11 F. Cas. at 25. Chief Justice Chase observed that giving Section Three a literal construction, as Griffin advocated, would "annul all official acts performed by these officers. No sentence, no judgment, no decree, . . . no official act [would be] of the least validity." *Id.* He reasoned that it

13. Between 1789 and 1911, U.S. Supreme Court justices traveled across the country and, together with district court judges, sat on circuit courts to decide cases. *See generally* Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 Cardozo L. Rev. 1753 (2003). Decisions written by the justices while they were riding circuit were not decisions of the Supreme Court.

would be "impossible to measure the evils which such a construction would add to the calamities which have already fallen upon the people of these states." *Id.*

¶101 And so, Chief Justice Chase turned to what he termed the "argument from inconveniences" and the interpretive canon that, when faced with two or more reasonable interpretations, the interpretation "is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended." *Id.* He then explained that, while it was not "improbable that one of the objects of this section was to provide for the security of the nation and of individuals, by the exclusion of a class of citizens from office," it could also "hardly be doubted that the main purpose was to inflict upon the leading and most influential characters who had been engaged in the Rebellion, exclusion from office as a punishment for the offense." *Id.* at 25–26. To find the provision self-executing under the circumstances, he argued, would be contrary to due process because it would, "at once without trial, deprive[] a whole class of persons of offices held by them." *Id.* at 26.

¶102 Chief Justice Chase therefore concluded that the object of the Amendment—"to exclude from certain offices a certain class of persons"—was impossible to do "by a simple declaration, whether in the constitution or in an act of congress . . . . For, in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate." *Id.* To accomplish "this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions . . . are indispensable; and . . . can only be provided for by congress." *Id.* Thus, Chief Justice Chase concluded that Section Three was not self-executing. *Id.*

¶103 *Griffin's Case* concludes that congressional action is needed before Section Three disqualification attaches, but

this one case does not persuade us of that point. Intervenors and amici assert that *Griffin's Case* "remains good law and has been repeatedly relied on." Because the case is not binding on us, the fact that it has not been reversed is of no particular significance. And the cases that cite it do so either with no analysis—*e.g.*, *State v. Buckley*, 54 Ala. 599 (1875), and *Rothermel v. Meyerle*, 136 Pa. 250 (1890)—or for the inapposite proposition that Section Three does not create a self-executing cause of action—*e.g.*, *Cale v. City of Covington*, 586 F.2d 311, 316 (4th Cir. 1978), and *Hansen v. Finchem*, CV 2022-004321 (Sup. Ct. of Ariz., Maricopa Cnty. Apr. 22, 2022), *aff'd on other grounds*, 2022 WL 1468157 (May 9, 2022). Moreover, *Griffin's Case* has been the subject of persuasive criticism. *See, e.g.*, Magliocca, *Amnesty and Section Three*, *supra*, at 105–08 (critiquing the case because the other provisions of the Fourteenth Amendment were understood as self-executing and the notion that Section Three was not self-executing was inconsistent with congressional behavior at the time); Baude & Paulsen, *supra* (manuscript at 37–49) (criticizing Chief Justice Chase's interpretation as wrong and constituting a strained interpretation based on policy and circumstances rather than established canons of construction).

¶104 Although we do not find *Griffin's Case* compelling, we agree with Chief Justice Chase that "it must be ascertained what particular individuals are embraced by the definition." 11 F. Cas. at 26. While the disqualification of Section Three attaches automatically, the determination that such an attachment has occurred must be made before the disqualification holds meaning. And Congress has the power under Section Five to establish a process for making that determination. But the fact that Congress *may* establish such a process does not mean that disqualification pursuant to Section Three can be determined

only through a process established by Congress. Here, the Colorado legislature has established a process—a court proceeding pursuant to section 1-1-113—to make the determination whether a candidate is qualified to be placed on the presidential primary ballot. And, for the reasons we have already explained, that process is sufficient to permit a judicial determination of whether Section Three disqualification has attached to a particular individual.

¶105 We are similarly unpersuaded by Intervenors' assertions that Congress created the only currently available mechanism for determining whether a person is disqualified pursuant to Section Three with the 1994 passage of 18 U.S.C. § 2383. That statute makes it a crime to "assist[] or engage[] in any rebellion or insurrection against the authority of the United States." True, with that enactment, Congress criminalized the same conduct that is disqualifying under Section Three. All that means, however, is that a person charged and convicted under 18 U.S.C. § 2383 would *also* be disqualified under Section Three. It cannot be read to mean that *only* those charged and convicted of violating that law are constitutionally disqualified from holding future office without assuming a great deal of meaning not present in the text of the law.

¶106 In summary, based on Section Three's plain language; Supreme Court decisions declaring its neighboring, parallel Reconstruction Amendments self-executing; and the absurd results that would flow from Intervenors' reading, we conclude that Section Three is self-executing in the sense that its disqualification provision attaches without congressional action. Intervenors' contrary arguments do not persuade us otherwise.

¶107 That said, our conclusion that implementing legislation from Congress is unnecessary for us to proceed under section 1-1-113 does not resolve the question of whether

doing so would violate the separation of powers among the three branches of government. We turn to this justiciability question next.

D. Section Three Is Justiciable

¶108 President Trump next asserts that presidential disqualification under Section Three presents a nonjusticiable political question. Again, we disagree.

¶109 "In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky*, 566 U.S. at 194 (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). The political question doctrine is a narrow exception to this rule, and a court may not avoid its responsibility to decide a case merely because it may have "political implications." *Id.* at 195–96 (quoting *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 943 (1983)).

¶110 A controversy involves a nonjusticiable political question when, as relevant here, "there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Id.* at 195 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)); *see also Baker v. Carr*, 369 U.S. 186, 210, 217 (1962) (noting that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers" and identifying the above-described instances, and four others not relevant here, as examples of political questions). The requisite textual commitment must be "[p]rominent on the surface of any case." *Baker*, 369 U.S. at 217.

¶111 Here, President Trump argues that this case is nonjusticiable because, in his view, the Constitution and federal law commit the question of the qualifications of a presidential candidate to Congress. The Electors point

out that President Trump did not argue before us that the questions presented in this appeal are also nonjusticiable based on a lack of judicially discoverable and manageable standards, and therefore, he arguably waived any such argument. We nevertheless address that issue, again in the interest of providing a thorough review.

1. No Textually Demonstrable Constitutional Commitment to Congress of Section Three Disqualification

¶112 Contrary to President Trump's assertions, we perceive no constitutional provision that reflects a textually demonstrable commitment to Congress of the authority to assess presidential candidate qualifications. Conversely, the Constitution commits certain authority concerning presidential elections to the states and in no way precludes the states from exercising authority to assess the qualifications of presidential candidates.

¶113 As discussed in Part B.4 above, Article II, Section 1, Clause 2 of the Constitution empowers state legislatures to direct how presidential electors are appointed, and the Supreme Court has recognized that this provision affords the states "far-reaching authority over presidential electors, absent some other constitutional constraint." *Chiafalo*, 140 S. Ct. at 2324. In furtherance of this delegation of authority, "the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections," the "selection and qualification of candidates," among other things. *Storer*, 415 U.S. at 730. The Election Code is an example of such a "comprehensive" code to regulate state and federal elections. And the fact that Article II, Section 1, Clause 4 authorizes Congress to determine the time for choosing the electors and the date on which they vote does not undermine the substantial

authority provided to the states to regulate state and federal elections.

¶114 In our view, Section Three's text is fully consistent with our conclusion that the Constitution has not committed the matter of presidential candidate qualifications to Congress. As we have noted, although Section Three requires a "vote of two-thirds of each House" to remove the disqualification set forth in Section Three, it says nothing about who or which branch should determine disqualification in the first place. *See* U.S. Const. amend. XIV, § 3. Moreover, if Congress were authorized to decide by a simple majority that a candidate is qualified under Section Three, as President Trump asserts, then this would nullify Section Three's supermajority requirement.

¶115 President Trump's reliance on Article II, Section 1, Clause 5 of the Constitution and on the Twelfth, Fourteenth, and Twentieth Amendments is misplaced. We address each of these provisions, in turn.

¶116 Article II, Section 1, Clause 5 provides that no person shall be eligible to serve as President unless that person is "a natural born Citizen" who is at least thirty-five years of age and who has resided in the United States for at least fourteen years. This provision, however, says nothing about who or which branch should determine whether a candidate satisfies the qualification criteria either in the first instance or when a candidate's qualifications are challenged. *See id.*

¶117 The Twelfth Amendment charges the Electoral College with the task of selecting a candidate for President and then transmitting the electors' votes to the "seat of the government of the United States," and it provides the procedure by which the electoral votes are to be counted. U.S. Const. amend. XII. Nothing in the Twelfth Amendment, however, vests the Electoral College with the power to determine the eligibility of a presidential candidate. *See*

Elliott v. Cruz, 137 A.3d 646, 650–51 (Pa. Commw. Ct. 2016), *aff'd*, 134 A.3d 51 (Pa. 2016) (mem.). Nor does the Twelfth Amendment give Congress "control over the process by which the President and Vice President are normally chosen, other than the very limited one of determining the day on which the electors were to 'give their votes.'" *Id.* at 651 (citing U.S. Const. amend. XII). And although the Twelfth Amendment provides for the scenario in which no President is selected by March 4 and specifies that no person constitutionally ineligible to serve as President shall be eligible to serve as Vice President, the Amendment does not assign to Congress (nor to any other branch) the task of determining whether a candidate is qualified in the first place.

¶118 Section Five of the Fourteenth Amendment authorizes Congress to pass legislation to enforce the provisions of the Fourteenth Amendment, but as discussed above, the Fourteenth Amendment is self-executing, and congressional action under Section Five is not required to animate Section Three's disqualification of insurrectionist oath-breakers. Nor does Section Five delegate to Congress the authority to determine the qualifications of presidential candidates to hold office. U.S. Const. amend. XIV, § 5.

¶119 Finally, the Twentieth Amendment, in relevant part, empowers Congress to enact procedures to address the scenario in which neither the President nor the Vice President qualifies for office before the time fixed for the beginning of their terms. U.S. Const. amend. XX, § 3. By its express language, however, this Amendment applies post-election. *Id.* (referring to the "President elect" and "Vice President elect"). Moreover, the Amendment says nothing about who determines in the first instance whether the President and Vice President are qualified to hold office.

¶120 For these reasons, we perceive no textually demonstr-

able constitutional commitment to Congress of the authority to assess presidential candidate qualifications, and neither President Trump nor his amici identify any constitutional provision making such a commitment. In reaching this conclusion, we are unpersuaded by the cases on which President Trump and his amici rely, which are predicated on inferences they assert can be drawn from one or more of the foregoing constitutional provisions or on the fact that the cases had political implications. *See, e.g.*, *Taitz v. Democrat Party of Miss.*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *12–16 (S.D. Miss. Mar. 31, 2015); *Grinols v. Electoral Coll.*, No. 2:12-cv-02997-MCE-DAD, 2013 WL 2294885, at *5–7 (E.D. Cal. May 23, 2013), *aff'd*, 622 F. App'x 624 (9th Cir. 2015); *Kerchner v. Obama*, 669 F. Supp. 2d 477, 483 n.5 (D.N.J. 2009), *aff'd*, 612 F.3d 204 (3d Cir. 2010); *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1146–47 (N.D. Cal. 2008); *Keyes v. Bowen*, 117 Cal. Rptr. 3d 207, 216 (Cal. Ct. App. 2010); *Strunk v. N.Y. State Bd. of Elections*, No. 6500/11, 2012 WL 1205117, at *11–12 (N.Y. Sup. Ct. Apr. 11, 2012), *aff'd in part, dismissed in part*, 5 N.Y.S.3d 483 (N.Y. App. Div. 2015). As noted above, such inferences are insufficient to establish the requisite clear textual commitment to a coordinate branch of government, *see Baker*, 369 U.S. at 217, and we may not avoid our duty to decide a case merely because it may have political implications, *Zivotofsky*, 566 U.S. at 195–96.

¶121 Moreover, we may not conflate "actions that are textually *committed*" to a coordinate political branch with "actions that are textually *authorized*." *Stillman v. Dep't of Defense*, 209 F. Supp. 2d 185, 202 (D.D.C. 2002), *rev'd on other grounds sub nom.*, *Stillman v. C.I.A.*, 319 F.3d 546 (D.C. Cir. 2003). The Supreme Court has prohibited courts from adjudicating only the former. *Zivotofsky*, 566 U.S. at 195. Absent an affirmative constitutional *commit-*

ment, we cannot abdicate our responsibility to decide a case that is properly before us. *Id.* at 194.

2. Section Three Involves Judicially Discoverable and Manageable Standards

¶122 The question of whether there are judicially discoverable and manageable standards for determining a case is not wholly separate from the question of whether the matter has been textually committed to a coordinate political department. *Nixon*, 506 U.S. at 228. "[T]he lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Id.* at 228–29.

¶123 As we have said, President Trump has not argued before us that Section Three lacks judicially discoverable and manageable standards, and we believe for good reason. Section Three disqualifies from certain delineated offices persons who have "taken an oath . . . to support the Constitution of the United States" as an "officer of the United States" and who have thereafter "engaged in insurrection or rebellion." U.S. Const. amend. XIV, § 3. Although, as we discuss below, the meanings of some of these terms may not necessarily be precise, we can discern their meanings using "familiar principles of constitutional interpretation" such as "careful examination of the textual, structural, and historical evidence put forward by the parties." *Zivotofsky*, 566 U.S. at 201.

¶124 Indeed, in this and other contexts, courts have readily interpreted the terms that we are being asked to construe and have reached the substantive merits of the cases before them. *See, e.g.*, *United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D.N.C. 1871) (No. 16,079) (defining "engage" as that term is used in Section Three); *United States v. Rhine*, No. 210687 (RC), 2023 WL 2072450, at *8 (D.D.C. Feb. 17, 2023) (defining "insurrection" in the

context of ruling on a motion in limine in a criminal prosecution arising out of the events of January 6); *Holiday Inns Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460, 1487 (S.D.N.Y. 1983) (defining "insurrection" in the context of an insurance policy exclusion); *Gitlow v. Kiely*, 44 F.2d 227, 233 (S.D.N.Y. 1930) (defining "insurrection" as that term is used in a section of the U.S. Code), *aff'd*, 49 F.2d 1077 (2d Cir. 1931); *Hearon v. Calus*, 183 S.E. 13, 20 (S.C. 1935) (defining "insurrection" as that term is used in a provision of the South Carolina constitution).

¶125 Accordingly, we conclude that interpreting Section Three does not "turn on standards that defy judicial application." *Zivotofsky*, 566 U.S. at 201 (quoting *Baker*, 369 U.S. at 211). In so concluding, we respectfully disagree with the Michigan Court of Claims' finding that the interpretation of the terms now before us constitutes a nonjusticiable political question merely because "there are . . . many answers and gradations of answers." *Trump v. Benson*, No. 23000151-MZ, slip op. at 24 (Mich. Ct. Cl. Nov. 14, 2023), *aff'd sub nom. Davis v. Wayne Cnty. Election Comm'n*, No. 368615, 2023 WL 8656163 (Mich. Ct. App. Dec. 14, 2023). In our view, declining to decide an issue simply because it requires us to address difficult and weighty questions of constitutional interpretation would create a slippery slope that could lead to a prohibited dereliction of our constitutional duty to adjudicate cases that are properly before us.

¶126 For these reasons, we conclude that the issues presented here do not, either alone or together, constitute a nonjusticiable political question. We thus proceed to the question of whether Section Three applies to the President.

E. Section Three Applies to the President

¶127 The parties debate the scope of Section Three. The

Electors claim that this potential source of disqualification encompasses the President. President Trump argues that it does not, and the district court agreed. On this issue, we reverse the district court.

¶128 Section Three prohibits a person from holding any "office, civil or military, under the United States" if that person, as "an officer of the United States," took an oath "to support the Constitution of the United States" and subsequently engaged in insurrection. U.S. Const. amend. XIV, § 3. Accordingly, Section Three applies to President Trump only if (1) the Presidency is an "office, civil or military, under the United States"; (2) the President is an "officer of the United States"; and (3) the presidential oath set forth in Article II constitutes an oath "to support the Constitution of the United States." *Id.* We address each point in turn.

1. The Presidency Is an Office Under the United States

¶129 The district court concluded that the Presidency is not an "office, civil or military, under the United States" for two reasons. *Anderson*, ¶¶ 303–04; *see* U.S. Const. amend. XIV, § 3. First, the court noted that the Presidency is not specifically mentioned in Section Three, though senators, representatives, and presidential electors are. The court found it unlikely that the Presidency would be included in a catch-all of "any office, civil or military." *Anderson*, ¶ 304; *see* U.S. Const. amend. XIV, § 3. Second, the court found it compelling that an earlier draft of the Section specifically included the Presidency, suggesting that the drafters intended to omit the Presidency in the version that passed. *See Anderson*, ¶ 303. We disagree with the district court's conclusion, as our reading of both the constitutional text and the historical record counsel that the Presidency is an "office . . . under the United States"

within the meaning of Section Three.

¶130 When interpreting the Constitution, we prefer a phrase's normal and ordinary usage over "secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008). Dictionaries from the time of the Fourteenth Amendment's ratification define "office" as a "particular duty, charge or trust conferred by public authority, and for a public purpose," that is "undertaken by . . . authority from government or those who administer it." Noah Webster, An American Dictionary of the English Language 689 (Chauncey A. Goodrich ed., 1853); *see also* 5 Johnson's English Dictionary 646 (J.E. Worcester ed., 1859) (defining "office" as "a publick charge or employment; magistracy"); *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) ("An office is defined to be 'a public charge or employment,'. . . ."). The Presidency falls comfortably within these definitions.

¶131 We do not place the same weight the district court did on the fact that the Presidency is not specifically mentioned in Section Three. It seems most likely that the Presidency is not specifically included because it is so evidently an "office." In fact, no specific *office* is listed in Section Three; instead, the Section refers to "any office, civil or military." U.S. Const. amend. XIV, § 3. True, senators, representatives, and presidential electors are listed, but none of these positions is considered an "office" in the Constitution. Instead, senators and representatives are referred to as "members" of their respective bodies. *See* U.S. Const. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."); *id.* at § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."); *id.* at

art. II, § 1, cl. 2 ("[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.").

¶132 Indeed, even Intervenors do not deny that the Presidency is an office. Instead, they assert that it is not an office "under the United States." Their claim is that the President and elected members of Congress *are* the government of the United States, and cannot, therefore, be serving "under the United States." *Id.* at amend. XIV, § 3. We cannot accept this interpretation. A conclusion that the Presidency is something other than an office "under" the United States is fundamentally at odds with the idea that all government officials, including the President, serve "we the people." *Id.* at pmbl. A more plausible reading of the phrase "under the United States" is that the drafters meant simply to distinguish those holding federal office from those held "under any State." *Id.* at amend. XIV, § 3.

¶133 This reading of the language of Section Three is, moreover, most consistent with the Constitution as a whole. The Constitution refers to the Presidency as an "Office" twenty-five times. *E.g.*, *id.* at art. I, § 3, cl. 5 ("The Senate shall chuse [sic] their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise *the Office of President of the United States*." (emphasis added)); *id.* at art. II, § 1, cl. 5 (providing that "[n]o Person except a natural born Citizen . . . shall be eligible to the *Office of President*" and "[t]he executive Power shall be vested in a President of the United States of America [who] shall hold *his Office* during the Term of four Years" (emphases added)). And it refers to an office "under the United States" in several contexts that clearly support the conclusion that the Presidency is such an office.

¶134 Consider, for example, the Impeachment Clause,

which reads that Congress can impose, as a consequence of impeachment, a "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States." *Id.* at art. I, § 3, cl. 7. If the Presidency is not an "office . . . under the United States," then anyone impeached—including a President—could nonetheless go on to serve as President. *See id.* This reading is nonsensical, as recent impeachments demonstrate. The Articles of Impeachment brought against both President Clinton and President Trump asked for each man's "removal from office[,] and disqualification to hold and enjoy any office of honor, trust, or profit under the United States." Articles of Impeachment Against William Jefferson Clinton, H. Res. 611, 105th Cong. (Dec. 19, 1998); *see also* Articles of Impeachment Against Donald J. Trump, H. Res. 755, 116th Cong. (Dec. 8, 2019); Articles of Impeachment Against Donald J. Trump, H. Res. 24, 117th Cong. (Jan 13, 2021). Surely the impeaching members of Congress correctly understood that either man, if convicted and subsequently disqualified from future federal office by the Senate, would be unable to hold the Presidency in the future.

¶135 Similarly, the Incompatibility Clause states that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const. art. I, § 6, cl. 2. To read "office under the United States" to exclude the Presidency would mean that a sitting President could also constitutionally occupy a seat in Congress, a result foreclosed by basic principles of the separation of powers. *See Buckley v. Valeo*, 424 U.S. 1, 124 (1976) ("The principle of separation of powers . . . was woven into the [Constitution] . . . . The further concern of the Framers of the Constitution with maintenance of the separation of powers is found in the so-called 'Ineligibility' and 'Incompatibility' Clauses contained in Art. I, s 6 . . . ."), *superseded by statute on other grounds*,

Bipartisan Campaign Reform Act of 2002, 116 Stat. 81, *as recognized in McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

¶136 Finally, the Emoluments Clause provides that "no Person holding any Office of Profit or Trust under [the United States] shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. To read the Presidency as something other than an office under the United States would exempt the nation's chief diplomat from these protections against foreign influence. But Presidents have long sought dispensation from Congress to retain gifts from foreign leaders, understanding that the Emoluments Clause required them to do so.[14]

¶137 The district court found it compelling that an earlier draft of the proposed Section listed the Presidency, but

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14. *See, e.g.*, H. Rep. No. 23-302, at 1–2 (Mar. 4, 1834) (discussing the receipt of gifts from the Emperor of Morocco and noting that the President's "surrender of the articles to the Government" satisfied the "constitutional provision in relation to their acceptance"); 14 Abridgement of the Debates of Congress from 1789 to 1856, 140–41 (Thomas Hart Benton ed., 6 1860) (displaying (1) a letter from the Secretary of State to the Imaum of Muscat indicating that the President "directed" the Secretary to refuse the Imaum's gifts "under existing constitutional provisions" and (2) a letter from the President requesting that Congress allow him to accept the gifts); An Act to authorize the sale of two Arabian horses, received as a present by the Consul of the United States at Zanzibar, from the Imaum of Muscat, Mar. 1, 1845, 5 Stat. 730 (providing that the President is "authorized" to sell some of the Imaum's gifts and place the proceeds in the U.S. Treasury); Joint Resolution No. 20, A Resolution providing for the Custody of the Letter and Gifts from the King of Siam, Mar. 15, 1862, 12 Stat. 616 (directing the King of Siam's gifts and letters to be placed in "the collection of curiosities at the Department of the Interior").

the version ultimately passed did not. *Anderson*, ¶ 303. As a starting point, however, we are mindful that "it is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process." *Heller*, 554 U.S. at 590. And the specifics of the change from the earlier draft to what was ultimately passed do not demonstrate an intent to exclude the Presidency from the covered offices.

¶138 The draft proposal provided that insurrectionist oath-breakers could not hold "the office of President or Vice President of the United States, Senator or Representative in the national Congress, or any office now held *under appointment from the President of the United States, and requiring the confirmation of the Senate*." Cong. Globe., 39th Cong., 1st Sess. 919 (1866) (emphasis added). Later versions of the Section—including the enacted draft—removed specific reference to the President and Vice President and expanded the category of office-holder to include "any office, civil or military" rather than only those offices requiring presidential appointment and Senate confirmation. *See* U.S. Const. amend. XIV, § 3.

¶139 It is hard to glean from the limited available evidence what the changes across proposals meant. But we find persuasive amici's suggestion that Representative McKee, who drafted these proposals, most likely took for granted that his second proposal included the President. While nothing in Representative McKee's speeches mentions why his express reference to the Presidency was removed, his public pronouncements leave no doubt that his subsequent draft proposal still sought to ensure that rebels had absolutely no access to political power. Representative McKee explained that, under the proposed amendment, "the loyal alone shall rule the country" and that traitors would be "cut[] off . . . from all political power in the nation." Cong. Globe, 39th Cong., 1st Sess. 2505

(1866); *see also* Mark Graber, *Section Three of the Fourteenth Amendment: Our Questions, Their Answers*, 22–23 (Univ. of Md. Legal Stud. Rsch. Paper No. 2023-16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591133 ("*Our Questions, Their Answers*"); Mark A. Graber, *Punish Treason, Reward Loyalty: The Forgotten Goals of Constitutional Reform After the Civil War* 106, 114 (2023) (indicating that Representative McKee desired to exclude all oath-breaking insurrectionists from all federal offices, including the Presidency). When considered in light of these pronouncements, the shift from specifically naming the President and Vice President in addition to officers appointed and confirmed to the broadly inclusive "any officer, civil or military" cannot be read to mean that the two highest offices in the government are excluded from the mandate of Section Three.

¶140 The importance of the inclusive language—"any officer, civil or military"— was the subject of a colloquy in the debates around adopting the Fourteenth Amendment. Senator Reverdy Johnson worried that the final version of Section Three did not include the office of the Presidency. He stated, "[T]his amendment does not go far enough" because past rebels "may be elected President or Vice President of the United States." Cong. Globe, 39th Cong., 1st Sess. 2899 (1866). So, he asked, "why did you omit to exclude them? I do not understand them to be excluded from the privilege of holding the two highest offices in the gift of the nation." *Id.* Senator Lot Morrill fielded this objection. He replied, "Let me call the Senator's attention to the words 'or hold any office, civil or military, under the United States.'" *Id.* This answer satisfied Senator Johnson, who stated, "Perhaps I am wrong as to the exclusion from the Presidency; no doubt I am; but I was misled by noticing the specific exclusion in the case of Senators and Representatives." *Id.* This colloquy further

supports the view that the drafters of this Amendment intended the phrase "any office" to be broadly inclusive, and certainly to include the Presidency.

¶141 Moreover, Reconstruction-Era citizens—supporters and opponents of Section Three alike—understood that Section Three disqualified oath-breaking insurrectionists from holding the office of the President. *See* Montpelier Daily Journal, Oct. 19, 1868 (writing that Section Three "excludes leading rebels from holding offices . . . from the Presidency downward"). Many supporters of Section Three defended the Amendment on the ground that it would exclude Jefferson Davis from the Presidency. *See* John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. (forthcoming 2023) (manuscript at 7–10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4440157; *see also, e.g.*, *Rebels and Federal Officers*, Gallipolis J., Feb. 21, 1867, at 2 (arguing that foregoing Section Three would "render Jefferson Davis eligible to the Presidency of the United States," and "[t]here is something revolting in the very thought").

¶142 Post-ratification history includes more of the same. For example, Congress floated the idea of blanket amnesty to shield rebels from Section Three. *See* Vlahoplus, *supra*, (manuscript at 7–9). In response, both supporters and dissenters acknowledged that doing so would allow the likes of Jefferson Davis access to the Presidency. *See id.*; *see also, e.g.*, The Pulaski Citizen, *The New Reconstruction Bill*, Apr. 13, 1871, at 4 (acknowledging as a supporter of amnesty that it would "make even Jeff. Davis eligible again to the Presidency"); The Chicago Tribune, May 24, 1872 (asserting that amnesty would make rebels "eligible to the Presidency of the United States"); Indiana Progress, Aug. 24, 1871 (similar).

¶143 We conclude, therefore, that the plain language of Section Three, which provides that no disqualified person

shall "hold any office, civil or military, under the United States," includes the office of the Presidency. This textual interpretation is bolstered by constitutional context and by history surrounding the enactment of the Fourteenth Amendment.

2. The President Is an Officer of the United States

¶144 We next consider whether a President is an "officer of the United States." U.S. Const., amend. XIV, § 3. The district court found that the drafters of Section Three did not intend to include the President within the catch-all phrase "officer of the United States," and, accordingly, that a current or former President can engage in insurrection and then run for and hold any office. *Anderson*, ¶ 312; *see* U.S. Const., amend. XIV, § 3. We disagree for four reasons.

¶145 First, the normal and ordinary usage of the term "officer of the United States" includes the President. As we have explained, the plain meaning of "office . . . under the United States" includes the Presidency; it follows then that the President is an "officer of the United States." *See Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1372 (Fed. Cir. 2006) (Gajarsa, J., concurring in part) ("An interpretation of the Constitution in which the holder of an 'office' is not an 'officer' seems, at best, strained."). Indeed, Americans have referred to the President as an "officer" from the days of the founding. *See, e.g.*, The Federalist No. 69 (Alexander Hamilton) ("The President of the United States would be an officer elected by the people . . . ."). And many nineteenth-century presidents were described as, or called themselves, "chief executive officer of the United States." *See* Vlahoplus, *supra* (manuscript at 17–18) (listing presidents).

¶146 Second, Section Three's drafters and their contemporaries understood the President as an officer of the United States. *See* Graber, *Our Questions, Their Ans-*

wers, *supra*, at 18–19 (listing instances); *see also* Cong. Globe, 39th Cong., 1st Sess. 915 (1866) (referring to the "chief executive officer of the country"); *The Floyd Acceptances*, 74 U.S. 666, 676–77 (1868) ("We have no *officers* in this government, *from the President* down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority." (emphases added)).

¶147 President Trump concedes as much on appeal, stating that "[t]o be sure, the President is an officer." He argues, however, that the President is an officer of the Constitution, not an "officer of the United States," which, he posits, is a constitutional term of art. Further, at least one amicus contends that the above-referenced historical uses referred to the President as an officer only in a "colloquial sense," and thus have no bearing on the term's use in Section Three. We disagree.

¶148 The informality of these uses is exactly the point: If members of the Thirty-Ninth Congress and their contemporaries all used the term "officer" according to its ordinary meaning to refer to the President, we presume this is the same meaning the drafters intended it to have in Section Three. We perceive no persuasive contemporary evidence demonstrating some other, technical term-of-art meaning. And in the absence of a clear intent to employ a technical definition for a common word, we will not do so. *See Heller*, 554 U.S. at 576 (explaining that the "normal and ordinary as distinguished from technical meaning" should be favored (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931))).

¶149 We also find Attorney General Stanbery's opinions on the meaning of Section Three significant. In one opinion on the subject, Stanbery explained that the term "'officer of the United States,' within [Section Three] . . . is used in its most general sense, and without any qualification, as

legislative, or executive, or judicial." The Reconstruction Acts, 12 Op. Att'y. Gen. 141, 158 (1867) ("*Stanbery I*"). And in a second opinion on the topic, he observed that the term "Officers of the United States" includes "without limitation" 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 Op. Att'y. Gen. 182, 203 (1867) ("*Stanbery II*").

¶150 Third, the structure of Section Three persuades us that the President is an officer of the United States. The first half of Section Three describes the offices protected and the second half addresses the parties barred from holding those protected offices. There is a parallel structure between the two halves: "Senator or Representative in Congress" (protected office) corresponds to "member of Congress" (barred party); "any office . . . under the United States" (protected office) corresponds to "officer of the United States" (barred party); and "any office . . . under any State" (protected office) also has a corresponding barred party in "member of any State legislature, or as an executive or judicial officer of any State." U.S. Const. amend. XIV, § 3. The only term in the first half of Section Three that has no corresponding officer or party in the second half is "elector of President and Vice President," which makes sense because electors do not take constitutionally mandated oaths so they have no corresponding barred party. *Id.*; *see also id.* at art. II, § 1 (discussing a presidential elector's duties without reference to an oath); *id.* at art. VI (excluding presidential electors from the list of positions constitutionally obligated to take an oath to support the Constitution). Save electors, there is a perfect parallel structure in Section Three. *See* Baude & Paulsen, *supra* (manuscript at 106).

¶151 Fourth, the clear purpose of Section Three—to ensure that disloyal officers could never again play a role in governing the country—leaves no room to conclude that "officer of the United States" was used as a term of art. *Id.* The drafters of Section Three were motivated by a sense of betrayal; that is, by the existence of a broken oath, not by the type of officer who broke it: "[A]ll of us understand the meaning of the third section," Senator John Sherman stated, "[it includes] those men who have once taken an oath of office to support the Constitution of the United States and have violated that oath in spirit by taking up arms against the Government of the United States are to be deprived for a time at least of holding office . . . ." Cong. Globe, 39th Cong., 1st Sess. 2899 (1866); *see also id.* at 2898 (Senator Thomas Hendricks of Indiana, who opposed the Fourteenth Amendment, agreeing that "the theory" of Section Three was "that persons who have violated the oath to support the Constitution of the United States ought not to be allowed to hold any office."); *id.* at 3035–36 (Senator John B. Henderson explaining that "[t]he language of this section is so framed as to disfranchise from office . . . the leaders of any rebellion hereafter to come."); *Powell*, 27 F. Cas. at 607 (summarizing the purpose of Section Three: "[T]hose who had been once trusted to support the power of the United States, and proved false to the trust reposed, ought not, as a class, to be entrusted with power again until congress saw fit to relieve them from disability."). A construction of Section Three that would nevertheless *allow* a former President who broke his oath, not only to participate in the government again but to run for and hold the highest office in the land, is flatly unfaithful to the Section's purpose.

¶152 We therefore conclude that "officer of the United States," as used in Section Three, includes the President.

3. The Presidential Oath Is an Oath to Support the Constitution

¶153 Finally, we consider whether the oath taken by the President to "preserve, protect and defend the Constitution," U.S. Const. art. II, § 1, cl. 8, is an oath "to support the Constitution of the United States," *id.* at amend. XIV, § 3. The district court found that, because the presidential oath's language is more particular than the oath referenced in Section Three, the drafters did not intend to include former Presidents. *Anderson*, ¶ 313. We disagree.

¶154 Article VI of the Constitution provides that "all executive and judicial Officers . . . of the United States . . . shall be bound by Oath or Affirmation, to support this Constitution."[15] U.S. Const. art. VI, cl. 3. Article II specifies that the President shall swear an oath to "preserve, protect and defend the Constitution." *Id.* at art. II, § 1, cl. 8. Intervenors contend that because the Article II oath does not include a pledge to "support" the Constitution, an insurrectionist President cannot be disqualified from holding future office under Section Three on the basis of that oath.

¶155 This argument fails because the President is an "executive . . . Officer[]" of the United States under Article VI, albeit one for whom a more specific oath is prescribed. *Id.* at art. VI, cl. 3 ("The 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, shall be bound by Oath or Affirmation, to support this Constitution . . . ."). This conclusion follows logically from the accepted fact that the Vice President is also an executive officer. True,

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15. Article VI, however, does not provide any specific form of oath or affirmation.

the Vice President takes the more general oath prescribed by federal law, *see* 5 U.S.C. § 3331 (noting that anyone "except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take" an oath including a pledge to "support and defend the Constitution"), but it makes no sense to conclude that the Vice President is an executive officer under Article VI but the President is not.

¶156 The language of the presidential oath—a commitment to "preserve, protect, and defend the Constitution"—is consistent with the plain meaning of the word "support." U.S. Const. art. II, § 1, cl. 8. Modern dictionaries define "support" to include "defend" and vice versa. *See, e.g.*, *Support*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/*support* [https://perma.cc/WGH6-D8KU] (defining "support" as "to uphold or defend as valid or right"); *see also Defend*, at *id.*, https://www.merriam-webster.com/dictionary/*defend* [https://perma.cc/QXQ7-LRKX] (defining "defend" as "to maintain or support in the face of argument or hostile criticism"). So did dictionaries from the time of Section Three's drafting. *See, e.g.*, Samuel Johnson, A Dictionary of the English Language (5th ed. 1773) ("defend": "to stand in defense of; to protect; to support"); Noah Webster, An American Dictionary of the English Language 271 (Chauncey A. Goodrich, ed., 1857) ("defend": "to support or maintain").

¶157 The specific language of the presidential oath does not make it anything other than an oath to support the Constitution. Indeed, as one Senator explained just a few years before Section Three's ratification, "the language in [the presidential] oath of office, that he shall protect, support [sic], and defend the Constitution, makes his obligation more emphatic and more obligatory, if possible, than ours, which is simply to support the Constitution." Cong.

Globe, 37th Cong., 3d Sess. 89 (1862). And, in fact, several nineteenth-century Presidents referred to the presidential oath as an oath to "support" the Constitution. *See* James D. Richardson, A Compilation of the Messages and Papers of the Presidents, 1789–1897, Vol. 1 at 232, 467 (Adams, Madison), Vol. 2 at 625 (Jackson), Vol. 8 at 381 (Cleveland).

¶158 In sum, "[t]he simplest and most obvious interpretation of a Constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption." *Lake County v. Rollins*, 130 U.S. 662, 671 (1889). The most obvious and sensible reading of Section Three, supported by text and history, leads us to conclude that (1) the Presidency is an "office under the United States," (2) the President is an "officer . . . of the United States," and (3) the presidential oath under Article II is an oath to "support" the Constitution.

¶159 President Trump asks us to hold that Section Three disqualifies every oath-breaking insurrectionist *except the most powerful one* and that it bars oath-breakers from virtually every office, both state and federal, *except the highest one in the land*. Both results are inconsistent with the plain language and history of Section Three.

¶160 We therefore reverse the district court's finding that Section Three does not apply to a President and conclude that Section Three bars President Trump from holding the office of the President if its other provisions are met; namely, if President Trump "engaged in insurrection." U.S. Const. amend. XIV, § 3.

¶161 Before addressing the district court's findings that President Trump engaged in insurrection, however, we consider President Trump's challenge to the admissibility of a congressional report on which the district court premised some of its findings.

F. The District Court Did Not Err in Admitting Portions of the January 6 Report

¶162 President Trump asserts that the district court wrongly admitted into evidence thirty-one findings from a congressional report drafted by the Select Committee to Investigate the January 6th Attack on the U.S. Capitol ("the Committee"), which recounted the Committee's investigation of the facts, circumstances, and causes of the attack on the Capitol. *See* H.R. Rep. No. 117-663 (Dec. 22, 2022) ("the Report"). In President Trump's view, the Report is an untrustworthy, partisan political document and therefore constituted inadmissible hearsay under Rule 803(8)(C) of the Colorado Rules of Evidence. We are unpersuaded. Under the deferential standard of review that governs, we perceive no error by the district court in admitting portions of the Report into evidence at trial.

¶163 We review a district court's evidentiary rulings for an abuse of discretion. *Zapata v. People*, 2018 CO 82, ¶ 25, 428 P.3d 517, 524. "A court abuses its discretion only if its decision is 'manifestly arbitrary, unreasonable, or unfair.'" *Churchill v. Univ. of Colo. at Boulder*, 2012 CO 54, ¶ 74, 285 P.3d 986, 1008 (quoting *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 899 (Colo. 2008)). We may not consider "whether we would have reached a different result," but only "whether the trial court's decision fell within a range of reasonable options." *Id.* (quoting *E-470 Pub. Highway Auth. v. Revenig*, 140 P.3d 227, 230–31 (Colo. App. 2006)).

¶164 Hearsay statements are out-of-court statements offered in court for the truth of the matter asserted. CRE 801(c). Such statements are generally inadmissible, CRE 802, but CRE 803(8) creates an exception for "reports . . . of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to

authority granted by law." This exception, however, applies only if the report is trustworthy. *Id.*

¶165 The Federal Rules of Evidence (on which our evidentiary rules were modeled) contain a near-identical exception to Colorado Rule 803(8), *see* Fed. R. Evid. 803(8), so we may look to federal case law interpreting the federal rule for guidance on how to assess trustworthiness, *see Garcia v. Schneider Energy Servs., Inc.*, 2012 CO 62, ¶ 10, 287 P.3d 112, 115 (noting that, although we are "not bound to interpret our rules . . . the same way the United States Supreme Court has interpreted its rules, we do look to the federal rules and federal decisions interpreting those rules for guidance"); *Harding Glass Co. v. Jones*, 640 P.2d 1123, 1125 n.3 (Colo. 1982) ("[C]ase law interpreting the federal rule is persuasive in analysis of the Colorado rule."). Under federal law, courts are instructed to "assume[] admissibility in the first instance." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988). Thus, "the party challenging the admissibility of a public or agency report . . . bears the burden of demonstrating that the report is not trustworthy." *Barry v. Trs. of Int'l Ass'n*, 467 F. Supp. 2d 91, 96 (D.D.C. 2006). The federal courts have also identified four non-exclusive factors to help courts determine 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." *Id.* at 97; *see Beech Aircraft*, 488 U.S. at 167 n.11.

¶166 The district court employed the foregoing presumption and four factors to analyze the Report.[16] The court

16. We also review a district court's trustworthiness analysis for an abuse of discretion. *See United States v. Versaint*, 849 F.2d 827, 831–32 (3d Cir. 1988) ("Under [Fed. R. Evid. 803(8)], this Court (continued…)

determined that "the first three *Barry* factors weigh strongly in favor of reliability." *Anderson*, ¶ 24. President Trump focuses his admissibility challenge on the fourth factor: "possible motivation problems." *Barry*, 467 F. Supp. 2d at 97.

¶167 First, President Trump claims the Report was biased against him because all nine Committee members voted in favor of impeaching him before their investigation began. Timothy Heaphy, Chief Investigative Counsel for the Committee, testified at trial, however, that although members "certainly had . . . hypotheses that were a starting point," such hypotheses did not impair the members' ability to be fair and impartial. *Anderson*, ¶ 26. The district court found "Mr. Heaphy's testimony on this subject to be credible and h[eld] that any perceived animus of the committee members towards [President] Trump did not taint the conclusions of the January 6th Report in such a way that would render them unreliable." *Id.* We see no abuse of discretion. *See People v. Pitts*, 13 P.3d 1218, 1221

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analysis for an abuse of discretion. *See United States v. Versaint*, 849 F.2d 827, 831–32 (3d Cir. 1988) ("Under [Fed. R. Evid. 803(8)], this Court must decide whether the district court abused its discretion by '[g]iving undue weight to trustworthiness factors of slight relevance while disregarding factors more significant.'" (quoting *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 266 (3d Cir. 1983))); *Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19, 22 (6th Cir. 1984) ("Rule 803(8)(C) also requires that the report not be subject to circumstances indicating a lack of trustworthiness. This determination is within the discretion of the trial court."); *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 821–22 (10th Cir. 1981) ("We believe that 'the trial court is the first and best judge of whether tendered evidence meets th[at] standard of trustworthiness and reliability . . .' and [w]e cannot say the trial court abused its discretion by refusing to admit the report." (quoting *Franklin v. Skelly Oil Co.*, 141 F.2d 568, 572 (10th Cir. 1944))).

(Colo. 2000) ("It is the function of the trial court, and not the reviewing court, to weigh evidence and determine the credibility of the witnesses.").

¶168 Second, President Trump believes that the political backdrop against which the Report was created makes it unreliable. This argument proves too much. All congressional reports contain some level of political motivation, yet neither CRE 803(8) nor the corresponding federal rule declares such reports per se inadmissible; instead, as the district court explained, a court is at liberty to admit what it deems trustworthy. *See Anderson*, ¶ 28; *see, e.g.*, *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) (admitting Congressional Committee report), *aff'd in part, rev'd in part*, 737 F.2d 1 (D.C. Cir. 1984).

¶169 Third, President Trump asserts that because Democrats outnumbered Republicans seven to two on the Committee, the Report's findings are necessarily biased. The district court determined that although the Report "would have further reliability had there been greater Republican participation," that deficit did not demonstrate "motivation problems." *Anderson*, ¶¶ 29–30. The district court observed that House Republicans opted to boycott the Committee after then-Speaker of the House Nancy Pelosi agreed to seat only three of the five Republicans recommended to her. *Id.* at ¶ 30. Despite then-Speaker Pelosi's "unprecedented" move, *id.*, the district court noted that "the two Republicans who did sit . . . were both duly elected Republicans," *id.* at ¶ 31; "[t]he investigative staff included . . . many Republican[]" lawyers, *id.* at ¶ 32; "the staffing decisions did not include any inquiry into political affiliation," *id.*; and "[t]he overwhelming majority of

witnesses . . . were [President] Trump administration officials and Republicans," *id.* at ¶ 33. The court reasoned that "[t]hese facts all cut against Intervenors' argument that lack of participation of the minority party resulted in . . . unreliable conclusions." *Id.* at ¶ 34.

¶170 Again, we perceive no abuse of discretion. CRE 803(8) assumes admissibility, *Barry*, 467 F. Supp. 2d at 96, and President Trump has not met his burden of demonstrating that, contrary to the evidence the district court highlighted, the Report suffered from motivation problems. *See id.* Moreover, we remain mindful that this is a four-factor inquiry. No single factor is dispositive. Instead, any perceived shortcomings as to one must be weighed against the strengths of the others. Whatever the "possible motivation problems," the weight of the other three factors remains. As the district court explained, (1) passage of time does not impugn the Report, as the investigation began six months after the attack and was completed in under two years; (2) the investigative staff consisted of highly skilled lawyers, including two former U.S. Attorneys; and (3) there was a formal ten-day hearing in which seventy witnesses testified under oath. *Anderson*, ¶ 24. So, not only was the court's analysis of the fourth factor reasonable, but it also did not abuse its discretion in reaching its broader conclusion that the Report was trustworthy.

¶171 President Trump nonetheless argues that, even if the Report is generally admissible under the CRE 803(8) exception, there were eleven admitted findings within the Report that remained independently inadmissible. Even if the general admissibility of the Report does not necessarily give a green light to multiple layers of hearsay, we conclude that only two of the eleven challenged findings

constituted hearsay within hearsay.[17] And even if there was error in admitting those findings, neither is of sufficient consequence to warrant reversal. *See Liggett v. People*, 135 P.3d 725, 733 (Colo. 2006) (explaining that, under harmless error review, we will reverse only if, viewing the evidence as a whole, the error substantially influenced the outcome or impaired the fairness of the trial and that, "[i]n the context of a bench trial, the prejudicial effect of improperly admitted evidence is generally presumed innocuous").

¶172 First, the Report cited a newspaper article stating that the election was called for President Biden. Although this is hearsay, the district court did not rely on the statement in its analysis, so President Trump was not prejudiced by any error in admitting this statement. *See Raile v. People*, 148 P.3d 126, 136 (Colo. 2006) ("[T]here is no reasonable probability that Raile was prejudiced by the admission of the statements; thus, the trial court's error

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17. The nine remaining statements fall into three categories: statements made (1) by President Trump, (2) to President Trump, and (3) by his supporters during chants. First, President Trump's own statements are not hearsay under the party-opponent rule. *See* CRE 801(d)(2)(A). Second, various statements made to President Trump on January 6 are not hearsay because they were offered to show the statements' effect on the listener (i.e., that President Trump had knowledge of certain issues). *See* CRE 801(c); *People v. Vanderpauye*, 2023 CO 42 ¶ 21 n.4, 530 P.3d 1214, 1221 n.4 (accepting that a "statement was not hearsay because it was offered for its effect on the listener . . . not for the truth of the matter asserted"). Third, chants by President Trump's supporters were not offered to prove the truth of the chants, but simply to establish that the statements were made. That is not hearsay. CRE 801(c); *see People v. Dominguez*, 2019 COA 78 ¶ 20, 454 P.3d 364, 369 (stating that "verbal acts aren't hearsay" because such a statement is "offered not for its truth, but to show that it was made"). Thus, none of the findings in these three classes constitutes hearsay within the Report.

was harmless.").

¶173 Second, the Report explained that Chief of Staff Mark Meadows told White House Counsel Pat Cipollone that President Trump "doesn't want to do anything" to stop the violence. H.R. Rep. No. 117 663, at 110. The fact that this statement is hearsay is irrelevant: The district court expressly noted 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," *Anderson*, ¶ 38, and it did not mention this statement in its order, nor did it rely on it to reach any conclusions. Thus, President Trump's embedded hearsay argument is unavailing.

¶174 For these reasons, we conclude that the district court did not abuse its discretion by admitting portions of the Report into evidence.

¶175 We now consider the district court's findings that President Trump "engaged in" an "insurrection" within the meaning of Section Three.

G. President Trump Engaged in Insurrection

¶176 President Trump challenges the district court's findings that he "engaged in" an "insurrection." The Constitution leaves these terms undefined. Therefore, we must make a legal determination regarding what the drafters and ratifiers meant when they chose to deploy these words in Section Three. Mindful of the deferential standard of review afforded a district court's factual findings, we conclude that the district court did not clearly err in concluding that the events of January 6 constituted an insurrection and that President Trump engaged in that insurrection.

1. Standard of Review

¶177 As a general matter, we review findings of fact under

either a clear error or abuse of discretion standard, and we review legal conclusions de novo. *E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 22 (Colo. 2000); *accord State ex rel. Weiser v. Ctr. for Excellence in Higher Educ., Inc.*, 2023 CO 23, ¶ 33, 529 P.3d 599, 607. When, however, the issue before an appellate court presents a mixed question of law and fact, Colorado courts have taken different approaches, depending on the circumstances. *455 Co.*, 3 P.3d at 22. For example, courts have sometimes treated the ultimate conclusion as one of fact and applied the clear error standard. *Id.* In other cases, courts have concluded that a mixed question of law and fact mandates de novo review. *Id.* And when a trial court made evidentiary findings of fact in support of its application of a legal principle from another jurisdiction, we have found it appropriate to conduct an abuse of discretion review of the evidentiary factual findings supporting the legal conclusion and a de novo review of the legal conclusion itself. *Id.* at 23.

¶178 For our purposes here, where we are called on to review the district court's construction of certain terms used in Section Three to the facts established by the evidence, we will review the district court's factual findings for clear error and its legal conclusions de novo.

2. "Insurrection"

¶179 Dictionaries (both old and new), the district court's order, and the briefing by the parties and the amici curiae suggest several definitions of the word "insurrection."

¶180 For example, Noah Webster's dictionary from 1860 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 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 613 (1860); *accord* John Bouvier, A Law Dictionary Adapted to the Constitution and Laws of the United States of America and of the Several States to the American Union (6th ed. 1856), available at https://wzukusers.storage.googleapis.com/user-32960741/documents/5ad525c314331myoR8FY/1856_bouvier_6.pdf [https://perma.cc/PXK4-M75N] (defining "insurrection" as "[a] rebellion of citizens or subjects of a country against its government").

¶181 Webster's Third New International Dictionary defines "insurrection" as "an act or instance of revolting against civil or political authority or against an established government" or "an act or instance of rising up physically." *Insurrection*, Webster's Third New International Dictionary (2002).

¶182 In light of these and other proffered definitions, the district court concluded that "an insurrection as used in Section Three is (1) a public use of force or threat of force (2) by a group of people (3) to hinder or prevent execution of the Constitution of the United States." *Anderson*, ¶ 240.

¶183 Finally, we note that at oral argument, President Trump's counsel, while not providing a specific definition, argued that an insurrection is more than a riot but less than a rebellion. We agree that an insurrection falls along a spectrum of related conduct. *See The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 666 (1862)

("Insurrection 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."); *Case of Davis*, 7 F. Cas. 63, 96 (C.C.D. Va. 1871) (No. 3,621a) ("Although treason by levying war, in a case of civil war, may involve insurrection or rebellion, and they are usually its first stages, they do not necessarily reach to the actual levying of war."); 77 C.J.S. *Riot; Insurrection* § 36, Westlaw (database updated August 2023) ("Insurrection is distinguished from rout, riot, and offenses connected with mob violence by the fact that, in insurrection, there is an organized and armed uprising against authority or operations of government, while crimes growing out of mob violence, however serious they may be and however numerous the participants, are simply unlawful acts in disturbance of the peace which do not threaten the stability of the government or the existence of political society."). But we part company with him when he goes one step further. No authority supports the position taken by President Trump's counsel at oral argument that insurrectionary conduct must involve a particular length of time or geographic location.

¶184 Although we acknowledge that these definitions vary and some are arguably broader than others, for purposes of deciding this case, we need not adopt a single, all-encompassing definition of the word "insurrection." Rather, it suffices for us to conclude that any definition of "insurrection" for purposes of Section Three would encompass a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish a peaceful transfer of power in this country. The required force or threat of force need not involve bloodshed, nor must the dimensions of the effort be so substantial as to ensure probable success. *In re Charge to Grand Jury*, 62 F. 828,

830 (N.D. Ill. 1894). Moreover, although those involved must act in a concerted way, they need not be highly organized at the insurrection's inception. *See Home Ins. Co. of N.Y. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954) ("[A]t its inception an insurrection may be a pretty loosely organized affair. . . . It may start as a sudden surprise attack upon the civil authorities of a community with incidental destruction of property by fire or pillage, even before the military forces of the constituted government have been alerted and mobilized into action to suppress the insurrection.").

¶185 The question thus becomes whether the evidence before the district court sufficiently established that the events of January 6 constituted a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish the peaceful transfer of power in this country. We have little difficulty concluding that substantial evidence in the record supported each of these elements and that, as the district court found, the events of January 6 constituted an insurrection.

¶186 It is undisputed that a large group of people forcibly entered the Capitol and that this action was so formidable that the law enforcement officers onsite could not control it. Moreover, contrary to President Trump's assertion that no evidence in the record showed that the mob was armed with deadly weapons or that it attacked law enforcement officers in a manner consistent with a violent insurrection, the district court found—and millions of people saw on live television, recordings of which were introduced into evidence in this case—that the mob was armed with a wide array of weapons. *See Anderson*, ¶ 155. The court also found that many in the mob stole objects from the Capitol's premises or from law enforcement officers to use as weapons, including metal bars from the

police barricades and officers' batons and riot shields and that throughout the day, the mob repeatedly and violently assaulted police officers who were trying to defend the Capitol. *Id.* at ¶¶ 156–57. The fact that actual and threatened force was used that day cannot reasonably be denied.

¶187 Substantial evidence in the record further established that this use of force was concerted and public. As the district court found, with ample record support, "The mob was coordinated and demonstrated a unity of purpose . . . . They marched through the [Capitol] building chanting in a manner that made clear they were seeking to inflict violence against members of Congress and Vice President Pence." *Id.* at ¶ 243. And upon breaching the Capitol, the mob immediately pursued its intended target—the certification of the presidential election—and reached the House and Senate chambers within minutes of entering the building. *Id.* at ¶ 153.

¶188 Finally, substantial evidence in the record showed that the mob's unified purpose was to hinder or prevent Congress from counting the electoral votes as required by the Twelfth Amendment and from certifying the 2020 presidential election; that is, to preclude Congress from taking the actions necessary to accomplish a peaceful transfer of power. As noted above, soon after breaching the Capitol, the mob reached the House and Senate chambers, where the certification process was ongoing. *Id.* This breach caused both the House and the Senate to adjourn, halting the electoral certification process. In addition, much of the mob's ire—which included threats of physical violence—was directed at Vice President Pence, who, in his role as President of the Senate, was constitutionally tasked with carrying out the electoral count. *Id.* at ¶¶ 163, 179–80; *see* U.S. Const. art. I, § 3, cl. 4; *id.* at art. II, § 1, cl. 3. As discussed more fully below, these actions were the product of President Trump's conduct in singling out Vice Presi-

dent Pence for refusing President Trump's demand that the Vice President decline to carry out his constitutional duties. *Anderson*, ¶¶ 148, 170, 172–73.

¶189 In short, the record amply established that the events of January 6 constituted a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish the peaceful transfer of power in this country. Under any viable definition, this constituted an insurrection, and thus we will proceed to consider whether President Trump "engaged in" this insurrection.

3. "Engaged In"

¶190 Dictionaries, historical evidence, and case law all shed light on the meaning of "engaged in," as that phrase is used in Section Three.

¶191 Noah Webster's dictionary from 1860 defined "engage" as "to embark in an affair." Noah Webster, An American Dictionary of the English Language 696 (1860). Similarly, Webster's Third New International Dictionary defines "engage" as "to begin and carry on an enterprise" or "to take part" or "participate." *Engage*, Webster's Third New International Dictionary (2002). And Merriam-Webster defines "engage" as including both "to induce to participate" and "to do or take part in something." *Engage*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/engage [https://perma.cc/7JDM-4XSB].

¶192 Attorney General Stanbery's opinions on the meaning of "engage," which he issued at the time the Fourteenth Amendment was being debated, are in accord with these historical and modern definitions. Attorney General Stanbery opined that a person may "engage" in insurrection or rebellion "without having actually levied war or taken arms." *Stanbery I*, 12 Op. Att'y Gen. at 161. Thus, in

Attorney General Stanbery's view, when individuals acting in their official capacities act "in the furtherance of the common unlawful purpose" or do "any overt act for the purpose of promoting the rebellion," they have "engaged" in insurrection or rebellion for Section Three disqualification purposes. *Id.* at 161–62; *see also Stanbery II*, 12 Op. Att'y. Gen. at 204 (defining "engaging in rebellion" to require "an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose"). Accordingly, "[d]isloyal sentiments, opinions, or sympathies would not disqualify; but when a person has, by speech or by writing, incited others to engage in rebellion, [h]e must come under the disqualification." *Stanbery II*, 12 Op. Att'y. Gen. at 205; *accord Stanbery I*, 12 Op. Att'y Gen. at 164.

¶193 Turning to case law construing the meaning of "engaged in" for purposes of Section Three, although we have found little precedent directly on point, cases concerning treason that had been decided by the time the Fourteenth Amendment was ratified provide some insight into how the drafters of the Fourteenth Amendment would have understood the term "engaged in." For example, in *Ex parte Bollman*, 8 U.S. 75, 126 (1807), Chief Justice Marshall explained that "if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." In other words, an individual need not directly participate in the overt act of levying war or insurrection for the law to hold him accountable as if he had:

> [I]t is not necessary to prove that the individual accused, was a direct, personal actor in the

> violence. If he was present, directing, aiding, abetting, counselling, or countenancing it, he is in law guilty of the forcible act. Nor is even his personal presence indispensable. Though he be absent at the time of its actual perpetration, yet if he directed the act, devised or knowingly furnished the means, for carrying it into effect, instigating others to perform it, he shares their guilt. In treason there are no accessories.

In re Charge to Grand Jury-Treason, 30 F. Cas. 1047, 1048 (C.C.E.D. Pa. 1851).

¶194 We find the foregoing definitions and authorities to be generally consistent, and we believe that the definition adopted and applied by the district court is supported by the plain meaning of the term "engaged in," as well as by the historical authorities discussed above. Accordingly, like the district court, we conclude that "engaged in" requires "an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose." *Anderson*, ¶ 254.

¶195 In so concluding, we hasten to add that we do not read "engaged in" so broadly as to subsume mere silence in the face of insurrection or mere acquiescence therein, at least absent an affirmative duty to act. Rather, as Attorney General Stanbery observed, "The force of the term to *engage* carries the idea of active rather than passive conduct, and of voluntary rather than compulsory action." *Stanbery I*, 12 Op. Att'y Gen. at 161; *see also* Baude & Paulsen, *supra* (manuscript at 67) (noting that "passive acquiescence, resigned acceptance, silence, or inaction is not typically enough to have 'engaged in' insurrection or rebellion . . . [unless] a person possesses an affirmative duty to speak or act").

¶196 The question remains whether the record supported

the district court's finding that President Trump engaged in the January 6 insurrection by acting overtly and voluntarily with the intent of aiding or furthering the insurrectionists' common unlawful purpose. Again, mindful of our applicable standard of review, we conclude that it did, and we proceed to a necessarily detailed discussion of the evidence to show why this is so.

¶197 Substantial evidence in the record showed that even before the November 2020 general election, President Trump was laying the groundwork for a claim that the election was rigged. For example, at an August 17, 2020 campaign rally, he said that "the only way we're going to lose this election is if the election is rigged." *Anderson*, ¶ 88. Moreover, when asked at a September 23, 2020 press briefing whether he would commit to a peaceful transfer of power after the election, President Trump refused to do so. *Id.* at ¶ 90.

¶198 President Trump then lost the election, and despite the facts that his advisors repeatedly advised him that there was no evidence of widespread voter fraud and that no evidence showed that he himself believed the election was wrought with fraud, President Trump ramped up his claims that the election was stolen from him and undertook efforts to prevent the certification of the election results. For example, in a December 13, 2020 tweet, he stated, "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." *Id.* at ¶ 101. And President Trump sought to overturn the election results by directly exerting pressure on Republican officeholders in various states. *Id.* at ¶ 103.

¶199 On this point, and relevant to President Trump's intent in this case, many of the state officials targeted by President Trump's efforts were subjected to a barrage of

harassment and violent threats by his supporters. *Id.* at ¶ 104. President Trump was well aware of these threats, particularly after Georgia election official Gabriel Sterling issued a public warning to President Trump to "stop inspiring people to commit potential acts of violence" or "[s]omeone's going to get killed." *Id.* President Trump responded by retweeting a video of Sterling's press conference with a message repeating the very rhetoric that Sterling warned would result in violence. *Id.* at ¶ 105.

¶200 And President Trump continued to fan the flames of his supporters' ire, which he had ignited, with ongoing false assertions of election fraud, propelling the "Stop the Steal" movement and cross-country rallies leading up to January 6. *Id.* at ¶ 106. Specifically, between Election Day 2020 and January 6, Stop the Steal organizers held dozens of rallies around the country, proliferating President Trump's election disinformation and recruiting attendees, including members of violent extremist groups like the Proud Boys, the Oath Keepers, and the Three Percenters, QAnon conspiracy theorists, and white nationalists, to travel to Washington, D.C. on January 6. *Id.* at ¶ 107.

¶201 Stop the Steal leaders also joined two "Million MAGA Marches" in Washington, D.C. on November 14, 2020, and December 12, 2020. *Id.* at ¶ 108. Again, as relevant to President Trump's intent here, after the November rally turned violent, President Trump acknowledged the violence but justified it as self-defense against "ANTIFA SCUM." *Id.* at ¶ 109.

¶202 With full knowledge of these sometimes-violent events, President Trump sent the following tweet on December 19, 2020, urging his supporters to travel to Washington, D.C. on January 6: "Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6. Be there, will be wild!" *Id.* at ¶ 112.

¶203 At this point, the record established that President

Trump's "plan" was that when Congress met to certify the election results on January 6, Vice President Pence could reject the true electors who voted for President Biden and certify a slate of fake electors supporting President Trump or he could return the slates to the states for further proceedings. *Id.* at ¶ 113.

¶204 Far right extremists and militias such as the Proud Boys, the Oath Keepers, and the Three Percenters viewed President Trump's December 19, 2020 tweet as a "call to arms," and they began to plot activities to disrupt the January 6 joint session of Congress. *Id.* at ¶ 117. In the meantime, President Trump repeated his invitation to come to Washington, D.C. on January 6 at least twelve times. *Id.* at ¶ 118.

¶205 On December 26, 2020, President Trump 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 [McConnell] & the Republicans do NOTHING, just want to let it pass. NO FIGHT!

Id. at ¶ 121.

¶206 And on January 1, 2021, President Trump retweeted a post from Kylie Jane Kremer, an organizer of the scheduled January 6 March for Trump, that stated, "The calvary [sic] is coming, Mr. President! JANUARY 6 |Washington, D.C." President Trump added to his retweet, "A great honor!" *Id.* at ¶ 119.

¶207 The foregoing evidence established that President Trump's messages were a call to his supporters to fight and that his supporters responded to that call. Further supporting such a conclusion was the fact that multiple federal agencies, including the Secret Service, identified

significant threats of violence in the days leading up to January 6. *Id.* at ¶ 123. These threats were made openly online, and they were widely reported in the press. *Id.* Agency threat assessments thus stated that domestic violent extremists planned for violence on January 6, with weapons including firearms and enough ammunition to "win a small war." *Id.*

¶208 Along the same lines, the Federal Bureau of Investigation received many tips regarding the potential for violence on January 6. *Id.* at ¶ 124. One 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.

Id.

¶209 The record reflects that President Trump had reason to know of the potential for violence on January 6. As President, he oversaw the agencies reporting the foregoing threats. *Id.* at ¶ 123. In addition, Katrina Pierson, a senior advisor to both of President Trump's presidential campaigns, testified, on behalf of President Trump, that at a January 5, 2021 meeting, President Trump chose the speakers for the January 6 event at which he, too, would speak (avoiding at least some extremist speakers) and that he knew that radical political extremists were going to be in Washington, D.C. on January 6 and would likely attend his speech. *Id.* at ¶¶ 48, 126.

¶210 January 6 arrived, and in the early morning, President 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!" *Id.* at ¶ 127. He followed this tweet later that morning with another that said, "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.*

¶211 These tweets had the obvious effect of putting a significant target on Vice President Pence's back, focusing President Trump's supporters on the Vice President's role in overseeing the counting of the electoral votes and certifying the 2020 presidential election to ensure the peaceful transfer of power. *Id.* at ¶¶ 128, 291.

¶212 At about this same time, tens of thousands of President Trump's supporters began gathering around the Ellipse for his speech. *Id.* at ¶ 129. To enter the Ellipse itself, attendees were required to pass through magnetometers. *Id.* at ¶ 130. Notably, from the approximately 28,000 attendees who passed through these security checkpoints, the Secret Service confiscated hundreds of weapons and other prohibited items, including knives or blades, pepper spray, brass knuckles, tasers, body armor, gas masks, and batons or blunt instruments. *Id.* at ¶¶ 130–31. Approximately 25,000 additional attendees remained outside the Secret Service perimeter, thus avoiding the magnetometers. *Id.* at ¶ 132.

¶213 President Trump then gave a speech in which he literally exhorted his supporters to fight at the Capitol. Among other things, he told the crowd:

- "We're gathered together in the heart of our nation's capital for one very, very basic reason: to save our democracy." *Id.* at ¶ 135.
- "Republicans are constantly fighting like a boxer with his hands tied behind his back. It's like a

boxer. And we want to be so nice. We want to be so respectful of everybody, including bad people. And we're going to have to fight much harder." *Id.*

- "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 . . . ." *Id.*
- "[W]e'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." *Id.*
- "When you catch somebody in a fraud, you're allowed to go by very different rules." *Id.*
- "This the most corrupt election in the history, maybe of the world. . . . This is not just a matter of domestic politics—this is a matter of national security." *Id.*
- "And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore." *Id.*

¶214 Unsurprisingly, the crowd at the Ellipse reacted to President Trump's words with calls for violence. Indeed, after President Trump instructed his supporters to march to the Capitol, members of the crowd shouted, "[S]torm the capitol!"; "[I]nvade the Capitol Building!"; and "[T]ake the Capitol!" *Id.* at ¶ 141. And before he had even concluded his speech, President Trump's supporters followed his instructions. *Id.* at ¶ 146. The crowd marched to the Capitol, many carrying Revolutionary War flags

and Confederate battle flags; quickly breached the building; and immediately advanced to the House and Senate chambers to carry out their mission of blocking the certification of the 2020 presidential election. *Id.* at ¶¶ 146–53.

¶215 By 1:21 p.m., President Trump was informed that the Capitol was under attack. *Id.* at ¶ 169. Rather than taking action to end the siege, however, approximately one hour later, at 2:24 p.m., 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!" *Id.* at ¶ 170.

¶216 This tweet was read over a bullhorn to the crowd at the Capitol, and produced further violence, necessitating the evacuation of Vice President Pence from his Senate office to a more secure location to ensure his physical safety. *Id.* at ¶¶ 171–75.

¶217 President Trump's next public communications were two tweets sent at 2:38 p.m. and 3:13 p.m., encouraging the mob to "remain peaceful" and to "[s]tay peaceful" (obviously, the mob was not at all peaceful), but neither tweet condemned the violence nor asked the mob to disperse. *Id.* at ¶ 178 (alteration in original).

¶218 Throughout these several hours, President Trump ignored pleas to intervene and instead called on Senators, urging them to help delay the electoral count, which is what the mob, upon President Trump's exhortations, was also trying to achieve. *Id.* at ¶ 180. And President Trump took no action to put an end to the violence. To the contrary, as mentioned above, when told that the mob was chanting, "Hang Mike Pence," President Trump responded that perhaps the Vice President deserved to be hanged. *Id.* President Trump also rejected pleas from House Republican Leader Kevin McCarthy, imploring him to tell

his supporters to leave the Capitol, stating, "Well, Kevin, I guess these people are more upset about the election than you are." *Id.*

¶219 Finally, at 4:17 p.m., President Trump released a video urging the mob "to go home now." *Id.* at ¶ 186. Even then, he did not condemn the mob's actions. *Id.* at ¶ 187. Instead, he sympathized with those who had violently overtaken the Capitol, telling them that he knew their pain. *Id.* at ¶¶ 186–87. He told them that he loved them and that they were "very special." *Id.* at ¶ 186. And he repeated his false claim that the election had been stolen notwithstanding his "landslide" victory, thereby further endorsing the mob's effort to try to stop the peaceful transfer of power. *Id.* at ¶¶ 186–87.

¶220 A short while later, President Trump reiterated this supportive message to the mob by justifying its actions, tweeting at 6:01 p.m., "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." *Id.* at ¶ 189. President Trump concluded by encouraging the country to "[r]emember this day forever!" *Id.*

¶221 We conclude that the foregoing evidence, the great bulk of which was undisputed at trial, established that President Trump engaged in insurrection. President Trump's direct and express efforts, over several months, exhorting his supporters to march to the Capitol to prevent what he falsely characterized as an alleged fraud on the people of this country were indisputably overt and voluntary. Moreover, the evidence amply showed that President Trump undertook all these actions to aid and further a common unlawful purpose that he himself conceived and set in motion: prevent Congress from certifying the 2020 presidential election and stop the peaceful transfer of

power.

¶222 We disagree with President Trump's contentions that the record does not support a finding that he engaged in an insurrection because (1) "engage" does not include "incite," and (2) he did not have the requisite intent to aid or further the insurrectionists' common unlawful purpose.

¶223 As our detailed recitation of the evidence shows, President Trump did not merely incite the insurrection. Even when the siege on the Capitol was fully underway, he continued to support it by repeatedly demanding that Vice President Pence refuse to perform his constitutional duty and by calling Senators to persuade them to stop the counting of electoral votes. These actions constituted overt, voluntary, and direct participation in the insurrection.

¶224 Moreover, the record amply demonstrates that President Trump fully intended to—and did—aid or further the insurrectionists' common unlawful purpose of preventing the peaceful transfer of power in this country. He exhorted them to fight to prevent the certification of the 2020 presidential election. He personally took action to try to stop the certification. And for many hours, he and his supporters succeeded in halting that process.

¶225 For these reasons, we conclude that the record fully supports the district court's finding that President Trump engaged in insurrection within the meaning of Section Three.

H. President Trump's Speech on January 6 Was Not Protected by the First Amendment Right to Freedom of Speech

¶226 President Trump contends that his speech on January 6 was protected by the First Amendment and, therefore, cannot be used to justify his disqualification from office under Section Three. The district court concluded that

this speech was unprotected by the First Amendment. *Anderson*, ¶ 298. We agree with the district court.

1. Standard of Review

¶227 In considering President Trump's First Amendment challenge, we undertake an "independent review of the record . . . to be sure that the speech in question actually falls within [an] unprotected category" of communication. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984). We have interpreted this independent review as being akin to de novo review. *See Air Wis. Airlines Corp. v. Hoeper*, 2012 CO 19, ¶ 46, 320 P.3d 830, 841, *rev'd on other grounds*, 571 U.S. 237 (2014); *Lewis v. Colo. Rockies Baseball Club, Ltd.*, 941 P.2d 266, 271 (Colo. 1997). *Bose* recognizes, however, that we may give some "presumption of correctness" to factual findings, 466 U.S. at 500, especially those that do not involve the application of standards of law, *id.* at 500 n.16, or those that arise from complex cases such as this one, where the district judge has "lived with the controversy," *id.* at 500. Focusing on the findings by the district court, we therefore "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." *Id.* at 508 (first alteration in original) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)).

2. First Amendment Protections and Incitement

¶228 The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. This robust protection for speech functions to "invite dispute," *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), and "was fashioned to assure unfettered interchange of ideas for the

bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484 (1957); *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

¶229 Even so, "the right of free speech is not absolute at all times and under all circumstances." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). The First Amendment does not protect, for example, true threats, *Watts v. United States*, 394 U.S. 705, 708 (1969); speech essential to criminal conduct, *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017); or speech that incites lawless action, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). It is this last strand of First Amendment jurisprudence that the parties debate here.

¶230 As the Supreme Court explained in *Brandenburg*, the First Amendment's "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." 395 U.S. at 447. Under *Brandenburg* and its progeny, the modern test to determine whether speech is unprotected under the First Amendment because it incited lawless action is whether (1) the speech explicitly or implicitly encouraged the use of violence or lawless action; (2) the speaker intended that the speech would result in the use of violence or lawless action; and (3) the imminent use of violence or lawless action was the likely result of the speech. *Nwanguma v. Trump*, 903 F.3d 604, 609 (6th Cir. 2018); *accord Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 246 (6th Cir. 2015).[18]

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18. This tripartite formulation incorporates the holdings from *Brandenburg* and its progeny. *See Brandenburg*, 395 U.S. at 447 (continued…)

3. Applying the *Brandenburg* Test

a. Context

¶231 President Trump contends that the district court erred by examining the broader context in which President Trump's speech was made, thereby "expand[ing] the context relevant to a *Brandenburg* analysis beyond anything recognized in precedent." He asserts that we should examine his speech only in the narrow context in which it was made. We disagree.

¶232 In *Schenck v. United States*, 249 U.S. 47, 52 (1919), the Supreme Court addressed, for the first time, advocacy of illegal conduct, and it recognized the importance of context in holding that "the character of every act depends upon the circumstances in which it is done." Although the Supreme Court has said little about how to analyze incitement since *Brandenburg*, it offered some guidance regarding a court's use of other statements for context in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

¶233 In *Claiborne Hardware*, the Court considered speeches given by Charles Evers, the field secretary of the Mississippi NAACP, in connection with the NAACP's boycott of white merchants in Claiborne County from

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("[T]he 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."); *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (holding there was "no evidence or *rational inference* from the *import* of the language" that the defendant's words were intended to produce imminent disorder and thereby indicating that although illegal action must be imminent, advocacy of lawless action could be implicit (emphases added)); *NAACP v. Claiborne Hardware*, 458 U.S. 886, 928 (1982) ("When such [emotional] appeals [for unity and action in a common cause] do not incite lawless action, they must be regarded as protected speech.").

1966 to 1969. 458 U.S. at 890. Evers declared to Black residents of Claiborne County that "blacks who traded with white merchants would be *answerable to him*," and that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." *Id.* at 900 n.28. Evers's statements also included that "boycott violators would be 'disciplined' by their own people," and he "warned that the Sheriff could not sleep with boycott violators at night." *Id.* at 902. The Court held that Evers's speeches were protected by the First Amendment but said that "[i]f there [was] other evidence of [Evers's] authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence." *Id.* at 929. By considering and placing value in the *absence* of corroborating evidence of Evers's violent intentions, the Court implied that courts may look to circumstances beyond the speech itself to determine intent. *See United States v. White*, 610 F.3d 956, 961–62 (7th Cir. 2010) (relying on *Claiborne Hardware* in denying a motion to dismiss in a solicitation case based on the existence of "further evidence of . . . the relationship between [the defendant] and his followers which will show the posting was a specific request to [the defendant's] followers").

¶234 While incitement precedent is sparse, the case law on "true threats" is instructive regarding the importance of context. True threats and incitement are doctrinally distinct,[19] but true threats are the "closest cousin" to incitement under the First Amendment. *Counterman v. Colo-*

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19. *Compare Brandenburg*, 395 U.S. at 447 (defining unprotected incitement as that "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action"), *with Virginia v. Black*, 538 U.S. 343, 359 (2003) (defining true threats as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals").

rado, 600 U.S. 66, 97 (2023) (Sotomayor, J., concurring in part); *accord United States v. Howell*, 719 F.2d 1258, 1260 (5th Cir. 1983) ("The line between the two forms of speech [incitement and true threats] may be difficult to draw in some instances . . . ."); *see also* G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 B.Y.U. L. Rev. 829, 1069 (2002) (explaining that both exceptions involve exhortations regarding violence that derive from *Schenck*'s "clear and present danger" test).

¶235 And multiple federal circuit courts conducting a true-threat analysis confirm what common sense suggests: When assessing whether someone means to threaten another with unlawful violence, we sometimes need to consider more than the behavior exhibited on one occasion. *See, e.g.*, *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1078 (9th Cir. 2002) (rejecting an argument that "'context' means the direct circumstances surrounding delivery of the threat," and instead concluding that "[w]e, and so far as we can tell, other circuits as well, consider the whole factual context and 'all of the circumstances' in order to determine whether a statement is a true threat" (internal citation omitted) (quoting *United States v. Merrill*, 746 F.2d 458, 462 (9th Cir. 1984), *overruled on other grounds by Planned Parenthood*, 290 F.3d at 1066–77, *and United States v. Hanna*, 293 F.3d 1080, 1088 n.5 (9th Cir. 2002))); *United States v. Hart*, 212 F.3d 1067, 1071 (8th Cir. 2000) (considering "whether the maker of the threat had made similar statements to the victim on other occasions" and "whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence" when determining whether a true threat exists). So too with incitement. Context matters.

¶236 This is not to say, as President Trump contends the

district court found, that we "may consider *any speech ever uttered* by [President Trump]" in evaluating incitement. Of course, there are limits. But we need not define those outer limits now. Instead, we simply conclude that it was appropriate for the district court to consider President 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." *Anderson*, ¶ 289.

¶237 With this in mind, we review the district court's application of *Brandenburg*'s three-pronged test.

b. Encouraging the Use of Violence or Lawless Action

¶238 Again, the first prong of the test for incitement is that "the speech explicitly or implicitly encouraged the use of violence or lawless action." *Nwanguma*, 903 F.3d at 609.

¶239 The district court made dozens of findings regarding the general atmosphere of political violence that President Trump created before January 6, many of which we have already outlined in discussing why the district court concluded that President Trump "engaged in" insurrection. We incorporate those observations here by reference and supplement them with other illuminating evidence from the record below. For example, the district court found that "[a]t [a] February 2016 rally, [President] 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.'" *Anderson*, ¶ 68. In March 2016, President Trump responded to questions about his supporters' violence by saying it was "very, very appropriate" and "we need a little bit more of" it. *Id.* at ¶ 69. And during the 2020 election cycle, "President Trump threatened to deploy 'the Military' to Minneapolis

to shoot 'looters' amid protests over the police killing of George Floyd," *id.* at ¶ 76, and told the Proud Boys to "stand back and stand by" during a debate for the 2020 presidential election. *id.* at ¶ 77.

¶240 The district court also credited the testimony of Professor Peter Simi, a professor of sociology at Chapman University, whom it had "qualified . . . as an expert in political extremism, including how extremists communicate, and how the events leading up to and including the January 6 attack relate to longstanding patterns of behavior and communication by political extremists." *Id.* at ¶ 42. He testified, according to the court's summary, that (1) "violent far-right extremists understood that [President] Trump's calls to 'fight,' which most politicians would mean only symbolically, were, when spoken by [President] Trump, literal calls to violence by these groups, while [President] Trump's statements negating that sentiment were insincere and existed to obfuscate and create plausible deniability," *id.* at ¶ 84; and that (2) "[President] Trump's speech took place in the context of a pattern of [President] Trump's knowing 'encouragement and promotion of violence' to develop and deploy a shared coded language with his violent supporters," *id.* at ¶ 142.

¶241 As we described in the foregoing section, the district court further found that President Trump encouraged and supported violence before and after the 2020 election by telling his supporters that "the only way we're going to lose this election is if the election is rigged. Remember that," *id.* at ¶ 88; that the election was "a fraud on the American public," *id.* at ¶ 92; *see also id.* at ¶ 101 ("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"); and that the Democrats had stolen an election that rightfully belonged to President

Trump and his supporters, *id.* at ¶¶ 93, 96. The district court also found that "[m]any of the state officials targeted by [President] Trump's campaign of intimidation were subject to a barrage of harassment and violent threats by [his] supporters—prompting Georgia election official Gabriel Sterling to issue a public warning to [President] Trump to 'stop inspiring people to commit potential acts of violence' or '[s]omeone's going to get killed.'" *Id.* at ¶ 104 (last alteration in original); *see also id.* at ¶ 105 (finding that "[f]ar-right extremists understood [President] Trump's refusal to condemn the violence [Sterling condemned] . . . as an endorsement of the use of violence to prevent the transfer of presidential power").

¶242 The district court then identified specific incendiary language in President Trump's speech at the Ellipse on January 6, some of which we alluded to earlier in this opinion. To reiterate: President Trump announced, "we're going to walk down, and I'll be with you, we're going to walk down . . . to the Capitol . . . ." *Id.* at ¶ 135. He "used the word 'fight' or variations of it [twenty] times during his Ellipse speech." *Id.* at ¶ 137; *see also, e.g., id.* at ¶ 135 ("And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore."). He declared, "[w]hen you catch somebody in a fraud," a sentiment he had repeatedly said had occurred with the 2020 election, "you're allowed to go by very different rules." *Id.* at ¶ 135; *see also id.* at ¶ 138 ("You don't concede when there's theft involved."). And he claimed that "our election victory [was] stolen by emboldened radical-left Democrats . . . ." *Id.* at ¶ 135.

¶243 In short, the district court found that President Trump's speech at the Ellipse "was understood by a portion of the crowd as, a call to arms." *Id.* at ¶ 145. And the district court here is not the first or only court to reach this conclusion. In *Thompson v. Trump*, 590 F. Supp. 3d

46, 118 (D.D.C. 2022), the U.S. District Court for the District of Columbia found that President Trump

> 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 . . . where those very politicians were at work to certify an election that he had lost.

The court concluded that President Trump's speech was, therefore "plausibly . . . a positive instigation of a mischievous act."[20] *Id.* (quoting John Stuart Mill, On Liberty 100 (London, John W. Parker & Son, 2d ed. 1859)). Our independent review of the record in this case brings us to the same conclusion: President Trump incited and encouraged the use of violence and lawless action to disrupt the peaceful transfer of power. The tenor of President Trump's messages to his supporters in exhorting them to travel to Washington, D.C. on January 6 was obvious and unmistakable: the allegedly rigged election was an act of war and those victimized by it had an obligation to fight back and to fight aggressively. And President Trump's supporters did not miss or misunderstand the message: the cavalry was coming to fight.

¶244 The fact that, at one point during his speech, President Trump said that "everyone here will soon be marching to

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20. *Thompson* involved a motion to dismiss. As a result, the court determined only that President Trump's speech "plausibly [involved] words of incitement not protected by the First Amendment." *Thompson*, 590 F. Supp. 3d at 115; *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (requiring plaintiffs to show that their complaints are plausible to survive a motion to dismiss for failure to state a claim).

the Capitol building to *peacefully and patriotically* make your voices heard" does not persuade us that the district court erred in finding that the first prong of the *Brandenberg* test was met. *See Thompson*, 590 F. Supp. 3d at 113–14. This isolated reference "cannot inoculate [President Trump] against the conclusion that his exhortation, made nearly an hour later, to 'fight like hell' immediately before sending rally-goers to the Capitol, within the context of the larger Speech and circumstances, was not protected expression." *Id.* at 117.

c. Intent to Produce Violent or Lawless Action

¶245 The second prong of the test for incitement is that "the speaker intends that his speech will result in the use of violence or lawless action." *Nwanguma*, 903 F.3d at 609. The Supreme Court has interpreted this second prong of the *Brandenburg* test to require specific intent.[21] *Counterman*, 600 U.S. at 79, 81 (establishing that "when incitement is at issue, we have spoken in terms of specific intent, presumably equivalent to purpose or knowledge,"

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21. There is some uncertainty as to whether *specific intent* to incite imminent lawless action is needed in civil cases such as the one before us now because most of the modern incitement cases arose in a criminal context. *See Counterman*, 600 U.S. at 70; *Hess*, 414 U.S. at 105; *Brandenburg*, 395 U.S. at 444; *but see Claiborne Hardware*, 458 U.S. at 890 (adjudicating complainants' request for injunctive relief and damages). The *Counterman* Court's justification for the specific intent standard was therefore tied to criminal liability. *Counterman*, 600 U.S. at 81 ("A strong intent requirement . . . was a way to ensure that efforts to *prosecute* incitement would not bleed over . . . to dissenting political speech at the First Amendment's core." (emphasis added)). But we need not resolve the issue because, regardless of whether it is required, we agree with the district court that President Trump acted with specific intent.

and defining acting purposely as "'consciously desir[ing]' a result"). So, we must consider whether President Trump's exhortations at the Ellipse on January 6 to "fight like hell," and his urgings that his followers "go[] to the Capitol" and that they would get to "go by 'very different rules,'" were intended to produce imminent lawless action.

¶246 The district court concluded that President Trump exhibited the requisite intent here. It found that, before the January 6 rally, "[President] 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," *Anderson*, ¶ 128, and that President Trump's response to the events following his speech "support . . . that [President] Trump endorsed and intended the actions of the mob on January 6," *id.* at ¶ 193 (second alteration in original). Based on these findings of fact, the court "conclude[d] that [President] Trump acted with the specific intent to incite political violence and direct it at the Capitol with the purpose of disrupting the electoral certification." *Id.* at ¶ 293.

¶247 The district court found that President Trump knew, before he gave his speech, that there was the potential for violence on January 6. It found that "[President] Trump himself agrees that his supporters 'listen to [him] like no one else,'" *id.* at ¶ 63 (second alteration in original), and that federal agencies that President Trump oversaw identified threats of violence ahead of January 6, including "threats to storm the U.S. Capitol and kill elected officials," *id.* at ¶¶ 123–24.

¶248 The court also found that President Trump's conduct and tweets, which we outlined above, from the time he was told of the attack on the Capitol at 1:21 p.m. until Congress reconvened later that night, indicated his intent to produce lawless or violent conduct. *See id.* at ¶¶ 169–73,

178, 183, 186, 189.

¶249 In conducting our independent review of the district court's factual findings, we agree that President Trump intended that his speech would result in the use of violence or lawless action on January 6 to prevent the peaceful transfer of power. Despite his knowledge of the anger that he had instigated, his calls to arms, his awareness of the threats of violence that had been made leading up to January 6, and the obvious fact that many in the crowd were angry and armed, President Trump told his riled-up supporters to walk down to the Capitol and fight. He then stood back and let the fighting happen, despite having the ability and authority to stop it (with his words or by calling in the military), thereby confirming that this violence was what he intended.

¶250 We therefore conclude that the second prong of the *Brandenburg* test has also been met.

d. Likely to Incite or Produce Imminent Lawless Action

¶251 Finally, for speech to be unprotected, we must conclude that "the imminent use of violence or lawless action is the likely result of the speech." *Nwanguma*, 903 F.3d at 609.

¶252 The district court found that:

> Professor Simi reviewed [President] 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 [President] 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.

Id. at ¶ 62.

¶253 Professor Simi then "testified about . . . examples of [these] patterns of call-and-response that [President] Trump developed and used to incite violence by his supporters." *Id.* at ¶ 64. In one such instance, a November 2015 political rally, "[President] Trump . . . t[old] 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.'" *Id.* at ¶ 66 (third and fourth alterations in original).

¶254 Further, the district court found that "on January 1, 2021, [President] Trump retweeted a post from Kylie Jane Kremer, an organizer of March for Trump on January 6, saying, 'The calvary [sic] is coming, Mr. President!'" *Id.* at ¶ 119. It found that, according to Professor Simi, "[President] Trump's December 19, 2020 ['will be wild'] tweet had an immediate effect on far-right extremists and militias . . . , who viewed the tweet as a 'call to arms' and began to plot activities to disrupt the January 6, 2021 joint session." *Id.* at ¶ 117.

¶255 These findings support the conclusion that President Trump's calls for imminent lawlessness and violence during his speech were likely to incite such imminent lawlessness and violence. When President Trump told his supporters that they were "allowed to go by very different rules" and that if they did not "fight like hell," they would not "have a country anymore," it was likely that his supporters would heed his encouragement and act violently. We therefore hold that this final prong of the *Brandenburg* test has been met.

¶256 In sum, we conclude that President Trump's speech on January 6 was not protected by the First Amendment.

IV. Conclusion

¶257 The district court erred by concluding that Section Three does not apply to the President. We therefore reverse the district court's judgment. As stated above, however, we affirm much of the district court's reasoning on other issues. Accordingly, we conclude that because President Trump is disqualified from holding the office of President under Section Three, it would be a wrongful act under the Election Code for the Secretary to list President Trump as a candidate on the presidential primary ballot. Therefore, the Secretary may not list President Trump's name on the 2024 presidential primary ballot, nor may she count any write-in votes cast for him. *See* § 1-7-114(2), C.R.S. (2023) ("A vote for a write-in candidate shall not be counted unless that candidate is qualified to hold the office for which the elector's vote was cast."). But we stay our ruling until January 4, 2024 (the day before the Secretary's deadline to certify the content of the presidential primary ballot). If review is sought in the Supreme Court before the stay expires, it shall remain in place, and the Secretary will continue to be required to include President Trump's name on the 2024 presidential primary ballot until the receipt of any order or mandate from the Supreme Court.

CHIEF JUSTICE BOATRIGHT dissented.

JUSTICE SAMOUR dissented.

JUSTICE BERKENKOTTER dissented.

CHIEF JUSTICE BOATRIGHT dissenting.

¶258 I agree with the majority that an action brought under section 1-1-113, C.R.S. (2023) of Colorado's election code ("Election Code") may examine whether a candidate is qualified for office under the U.S. Constitution. But section 1-1-113 has a limited scope. *Kuhn v. Williams*, 2018 CO 30M, ¶ 1 n.1, 418 P.3d 478, 480 n.1 (per curiam, unanimous) (emphasizing "the narrow nature of our review under section 1-1-113"). In my view, the claim at issue in this case exceeds that scope. The voters' (the "Electors") action to disqualify former President Donald J. Trump under Section Three of the Fourteenth Amendment presents uniquely complex questions that exceed the adjudicative competence of section 1-1-113's expedited procedures. Simply put, section 1-1-113 was not enacted to decide whether a candidate engaged in insurrection. In my view, this cause of action should have been dismissed. Accordingly, I respectfully dissent.

I. The Electors' Challenge Is Incompatible with a Section 1-1-113 Proceeding

¶259 Section 1-1-113 provides for the resolution of potential election code violations in a timely manner. In many scenarios, Colorado voters can challenge the Secretary of State's (the "Secretary") certification of a candidate's qualifications. *Carson v. Reiner*, 2016 CO 38, ¶ 17, 370 P.3d 1137, 1141 (acknowledging that section 1-1-113 "clearly comprehends challenges to a broad range of wrongful acts committed by [Colorado's election] officials charged with duties under the code [and] comprehends a specific challenge to a designated election official's certification of a candidate"). While section 1-1-113 only offers voters a "narrow opportunity," *Kuhn*, ¶ 28, 418 P.3d at 484, that opportunity has proven effective as voters have

compelled the Secretary to omit from the ballot unqualified candidates whom they would have otherwise listed. *E.g.*, *id.* at ¶ 57, 418 P.3d at 489 (barring a candidate from the ballot because his petition circulator was not a Colorado resident). Section 1-1-113's grant of discretionary review to this court has also vindicated voters' rights by preventing a decision that would have compelled the Secretary to place an unqualified candidate on the ballot. *Griswold v. Ferrigno Warren*, 2020 CO 34, ¶ 26, 462 P.3d 1081, 1087 (barring a candidate from the ballot because she failed to gather sufficient signatures).

¶260 Further, our election code suggests that a petitioner may base a challenge to the Secretary's certification of an aspiring presidential primary candidate on federal law. *Compare* § 1-4-1203(2)(a), C.R.S. (2023) (stating that a candidate must be "qualified"), *with* §1-4-1201, C.R.S. (2023) (declaring that the code conforms to federal law); *see also Coats v. Dish Network, LLC*, 2015 CO 44, ¶ 20, 350 P.3d 849, 853 (relying on federal law to interpret "lawful activity" in a Colorado statute). We have previously held, however, that some federal law claims cannot be adjudicated under section 1-1-113. *E.g.*, *Frazier v. Williams*, 2017 CO 85, ¶ 19, 401 P.3d 541, 545 (concluding that a 42 U.S.C. § 1983 claim cannot be the basis of, or joined to, a section 1-1-113 action).

¶261 But not all federal questions exceed the scope of section 1-1-113. A qualification challenge under Article II,

Section 1[1] or the Twenty-Second Amendment[2] lends itself to section 1-1-113's procedures. Although a claim that a candidate is not thirty-five years old may be easier to resolve than a claim that a candidate is not a natural born citizen, these presidential qualifications are characteristically objective, discernible facts. Age, time previously served as president, and place of birth all parallel core qualification issues under Colorado's election code.[3] Conversely, all these questions pale in comparison to the complexity of an action to disqualify a candidate for engaging in insurrection.

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1. U.S. Const. art. II, § 1, cl. 5 provides the presidential qualifications:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

2. U.S. Const. amend. XXII, § 1 provides further presidential qualifications:

> No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.

3. *See also* Colorado Secretary of State, *Presidential Primary 2024 Candidate Qualification Guide* 3, https://www.coloradosos.gov/pubs/elections/Candidates/packets/2024PresidentialPrimaryGuide.pdf [https://perma.cc/KK3L-X8BM] (listing the "basic qualifications" for the presidency including the qualifications from Article II and the Twenty-Second Amendment but not mentioning the Fourteenth Amendment's disqualification for insurrectionists).

¶262 Far from presenting a straightforward biographical question, Section Three of the Fourteenth Amendment proscribes insurrectionist U.S. officers from again holding office. U.S. Const. amend. XIV, § 3. Unlike qualifications such as age and place of birth, an application of Section Three requires courts to define complex terms, determine legislative intent from over 150 years ago, and make factual findings foreign to our election code. The Electors contend that there is nothing "particularly unusual about a section 1-1-113 proceeding raising constitutional issues." However, the framework that section 1-1-113 offers for identifying qualified candidates is not commensurate with the extraordinary determination to disqualify a candidate because they engaged in insurrection against the Constitution. *See* Dis. op. ¶ 352 (Berkenkotter, J., dissenting) (noting that "the historical application of section 1-1-113 . . . has been limited to challenges involving relatively straightforward issues, like whether a candidate meets a residency requirement for a school board election."). Recognizing this limitation of section 1-1-113 is not novel. *See Kuhn*, ¶ 1 n.1, 418 P.3d at 480 n.1 (emphasizing "the narrow nature of our review under section 1-1-113" and declining to address a First Amendment challenge to Colorado's residency requirement for petition circulators "because such claims exceed this court's jurisdiction in a section 1-1-113 action").

¶263 Dismissal is particularly appropriate here because the Electors brought their challenge without a determination from a proceeding (e.g., a prosecution for an insurrection-related offense) with more rigorous procedures to ensure adequate due process. Instead, the Electors relied on section 1-1-113 and its "breakneck pace" to declare President Trump a disqualified insurrectionist. *See Frazier*, ¶ 11, 401 P.3d at 544.

II. As Demonstrated by the Proceeding Below, the Statutory Timeline for a Section 1-1-113 Proceeding Does Not Permit a Claim as Complex as the Electors'

¶264 In addition to qualitative incompatibilities, the complexity of the Electors' claims cannot be squared with section 1-1-113's truncated timeline for adjudication. Section 1-1-113 actions for presidential primary ballots fulfill a need for speed by requiring the district court to hold a hearing within *five days* and issue its decision within forty-eight hours of the hearing:

> Any such challenge must provide notice in a summary manner of an alleged impropriety that gives rise to the complaint. No later than five days after the challenge is filed, a hearing must be held at which time the district court shall hear the challenge and assess the validity of all alleged improprieties. The district court shall issue findings of fact and conclusions of law no later than forty-eight hours after the hearing. The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence.

§ 1-4-1204, C.R.S. (2023). This speed comes with consequences, namely, the absence of procedures that courts, litigants, and the public would expect for complex constitutional litigation. As President Trump, argues and the Electors do not contest, section 1-1-113's procedures do not provide common tools for complex fact-finding: preliminary evidentiary or pre-trial motions hearings, subpoena powers, basic discovery, depositions, and time for disclosure of witnesses and exhibits. This same concern was raised in *Frazier*; the then-Secretary argued that "it

is impossible to fully litigate a complex constitutional issue within days or weeks, as is typical of a section 1-1-113 proceeding." ¶ 18 n.3, 401 P.3d at 545 n.3. While we avoided deciding if a claim could be too complex for a section 1-1-113 proceeding in *Frazier*, that question is unavoidable here, and it demands that we reconcile the complexity of this issue with the breakneck pace of a section 1-1-113 procedure. In my view, the answer to this question is dispositive.

¶265 This case's procedural history proves my point. Despite clear requirements, the district court did not follow section 1-4-1204's statutory timeline for section 1-1-113 claims. The proceeding below involved two delays that, respectively, violated (1) the requirement that the merits hearing be held within five days of the challenge being lodged, and (2) the requirement that the district court issue its order within forty-eight hours of the merits hearing.

¶266 The Electors filed their challenge on September 6, 2023. Although the question of whether this action should be removed to federal court was resolved by September 14, the district court did not hold an evidentiary hearing until October 30. The majority appears to imply that a "status conference" on September 18 fulfills the statutory requirement that the hearing be held within five days of the Electors' challenge. Maj. op. ¶ 83. However, a status conference plainly does not satisfy the requirement: "No later than five days after the challenge is filed, a hearing must be held *at which time the district court shall hear the challenge and assess the validity of all alleged improprieties*." § 1-4-1204 (emphasis added); *see Carson*, ¶ 21, 370 P.3d at 1142 (ruling that section 1-1-113 "does not permit a challenge to an election official's certification of a candidate to the ballot, solely on the basis of the certified

candidate's qualification, once the period . . . for challenging the qualification of the candidate directly has expired . . . ."). It is no mystery why the statutory timeline could not be enforced: This claim was too complex.[4] The fact it took a week shy of two months to hold a hearing that "must" take place within five days proves that section 1-1-113 is an incompatible vehicle for this claim. The majority recognizes the five-day requirement, Maj. op. ¶ 38, but it does not acknowledge the violation of section 1-4-1204's timeline or give consequence to that violation.

¶267 Nonetheless, the majority touts the fact that a hearing was held and lauds the district court's timely issuance of its decision as evidence that this matter was not too complex for a section 1-1-113 proceeding. Maj. op. ¶¶ 84–85. But was the order timely issued? Substantially, I think not. *Compare* Maj. op. ¶ 22 ("The trial began, as scheduled, on October 30 [a Monday]. The evidentiary portion lasted five days [through Friday, November 3], with closing arguments almost two weeks later, on November 15. . . . The court issued its written final order on November 17 . . . ."), *with* § 1-4-1204 ("The district court shall issue findings of fact and conclusions of law no later than forty-eight hours after the hearing."). Section 1-4-1204 only mandates two deadlines, and neither were honored. After all the evidence had been presented at a week-long hearing, the court suspended proceedings for two weeks. I find nothing in the record offering a reason grounded in the election code for the interval between the five consecu-

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4. The intervals between the challenge and the hearing, and the hearing and the order, should not cast aspersions on the district court, which made valiant efforts to add some process above and beyond what the election code provides. However, the Colorado General Assembly, not the district court, decides when and how to change statutory requirements.

tive days of the hearing and the solitary closing arguments. However, I understand the necessity to postpone the closing arguments for one reason: The complexity of the case required more time than "no later than forty-eight hours after the hearing" for the court to draft its 102-page order. Thus, while the district court formally issued its order within forty-eight hours of the closing arguments, the interval between the evidentiary hearings and the closing arguments was not in compliance with section 1-4-1204.

¶268 The majority condoned the district court's failure to observe the statutory timeline by concluding that it "substantially compl[ied]." *See* Maj. op. ¶ 85. This renders the statute's five-day and forty-eight-hour requirements meaningless. *Contra Ferrigno Warren*, ¶ 20, 462 P.3d at 1085 (holding that, under Colorado's election code, a "specific statutory command could not be ignored in the name of substantial compliance"); *Gallegos Fam. Props., LLC v. Colo. Groundwater Comm'n*, 2017 CO 73, ¶ 25, 398 P.3d 599, 608 ("Where the language is clear, we must apply the language as written."). If a court must contort a special proceeding's statutory timeline to process a claim, then that claim is not proper for the special proceeding.

¶269 From my perspective, just because a hearing was held and Intervenors participated, it doesn't mean that due process was observed. Nor should it be inferred that section 1-1-113's statutory procedures, which were not followed, were up to the task. I cannot agree with the majority that the district court's extra-statutory delays and select procedure augmentations indicate that the Electors' claim was fit for adjudication under sections 1-4-1204(4) and 1-1-113. *Contra*, Maj. op. ¶ 81 ("In short, the district court admirably—and swiftly—discharged its duty to adjudicate this complex section 1-1-113 action.").

Dragging someone through a "makeshift proceeding" is not an indication that it was an appropriate process. *See* Dis. op. ¶ 274 (Samour, J., dissenting). Importantly, the Electors were not rushed into the process; they didn't have to file their challenge until they were prepared. Only Intervenors arguably had inadequate time to prepare.

¶270 Finally, only a two-thirds majority of both houses of Congress can overturn a Section Three disqualification. U.S. Const. amend. XIV, § 3. This remedy is extraordinary and speaks volumes about the gravity of the disqualification. Such a high bar indicates that an expedited hearing absent any discovery procedures and with a preponderance of the evidence standard is not the appropriate means for adjudicating a matter of this magnitude.[5] *See Frazier*, ¶¶ 17–18, 401 P.3d at 545 (holding that "inconsistencies" between the procedures of section 1-1-113 and a claim under 42 U.S.C. § 1983 "reinforce" the conclusion that not all federal law claims can be raised in section 1-1-113 proceedings).

III. Conclusion

¶271 My opinion that this is an inadequate cause of action is dictated by the facts of this case, particularly the absence of a criminal conviction for an insurrection-related offense.

¶272 The questions presented here simply reach a magnitude of complexity not contemplated by the Colorado General Assembly for its election code enforcement statute. The proceedings below ran counter to the letter and spirit

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5. Although the district court made its findings using the clear and convincing standard, the election code calls for a preponderance standard. § 1-4-1204 ("The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence.").

of the statutory timeframe because the Electors' claim overwhelmed the process. In the absence of an insurrection-related conviction, I would hold that a request to disqualify a candidate under Section Three of the Fourteenth Amendment is not a proper cause of action under Colorado's election code. Therefore, I would dismiss the claim at issue here. Accordingly, I respectfully dissent.

JUSTICE SAMOUR dissenting.

> Now it is undoubted that those provisions of the constitution which deny to the legislature power to deprive any person of life, liberty, or property, without due process of law, or to pass a bill of attainder or an ex post facto, are inconsistent in their spirit and general purpose with a provision which, at once without trial, deprives a whole class of persons of offices . . . for cause, however grave.

In re Griffin, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (No. 5,815) ("*Griffin's Case*").

¶273 These astute words, uttered by U.S. Supreme Court Chief Justice Salmon P. Chase a century and a half ago, eloquently describe one of the bedrock principles of American democracy: Our government cannot deprive someone of the right to hold public office without due process of law. Even if we are convinced that a candidate committed horrible acts in the past—dare I say, engaged in insurrection—there must be procedural due process before we can declare that individual disqualified from holding public office. Procedural due process is one of the aspects of America's democracy that sets this country apart.

¶274 The decision to bar former President Donald J. Trump ("President Trump")—by all accounts the current leading Republican presidential candidate (and reportedly the current leading overall presidential candidate)—from Colorado's presidential primary ballot flies in the face of the due process doctrine. By concluding that Section Three of the Fourteenth Amendment is self-executing, the majority approves the enforcement of that federal constitutional provision by our state courts through the truncated procedural mechanism that resides in our state

Election Code.[1] Thus, based on its interpretation of Section Three, our court sanctions these makeshift proceedings employed by the district court below—which lacked basic discovery, the ability to subpoena documents and compel witnesses, workable timeframes to adequately investigate and develop defenses, and the opportunity for a fair trial—to adjudicate a federal constitutional claim (a complicated one at that) masquerading as a run-of-the-mill state Election Code claim. And because most other states don't have the Election Code provisions we do, they won't be able to enforce Section Three. That, in turn, will inevitably lead to the disqualification of President Trump from the presidential primary ballot in less than all fifty states, thereby risking chaos in our country. This can't possibly be the outcome the framers intended.

¶275 I agree that Section Three bars from public office anyone who, having previously taken an oath as an officer of the United States to support the federal Constitution, engages in insurrection. But Section Three doesn't spell out the procedures that must be followed to determine whether someone has engaged in insurrection after taking the prerequisite oath. That is, it sheds no light on whether a jury must be empaneled or a bench trial will suffice, the proper burdens of proof and standards of

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1. As pertinent here, Section Three provides that:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office . . . under the United States, or under any State, 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 . . . .

U.S. Const. amend. XIV, § 3.

review, the application of discovery and evidentiary rules, or even whether civil or criminal proceedings are contemplated. This dearth of procedural guidance is not surprising: Section Five of the Fourteenth Amendment specifically gives Congress absolute power to enact legislation to enforce Section Three. My colleagues in the majority concede that there is currently no legislation enacted by Congress to enforce Section Three. This is of no moment to them, however, because they conclude that Section Three is self-executing, and that the states are free to apply their own procedures (including compressed ones in an election code) to enforce it.[2] That is hard for me to swallow.

¶276 Significantly, there is a federal statute that specifically criminalizes insurrection and requires that anyone convicted of engaging in such conduct be fined or imprisoned *and be disqualified from holding public office. See* 18 U.S.C. § 2383. If any federal legislation arguably enables the enforcement of Section Three, it's section 2383. True,

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2. The majority repeatedly uses "self-executing" to describe Section Three, but then reasons that this part of the Fourteenth Amendment is enforceable in Colorado only because of the procedures our legislature has enacted as part of the state's Election Code. This strikes me as an oxymoron. If a constitutional provision is truly *self-executing*, it needs no legislation to be enforced. *See Self-executing*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/self-executing [https://perma.cc/4X7W-Y8AR] (defining "self-executing" as "taking effect immediately without implementing legislation"); *see also Self-enforcing*, Black's Law Dictionary (11th ed. 2019) ("self-enforcing" means "effective and applicable without the need for any other action; self-executing"). Much like Inigo Montoya advised Vizzini, "I do not think [self-executing] means what [my colleagues in the majority] think it means." *The Princess Bride* (20th Century Fox 1987) ("You keep using that word [inconceivable]. I do not think it means what you think it means.").

President Trump has not been charged under that statute, so it is not before us. But the point is that this is the only federal legislation in existence at this time to potentially enforce Section Three. Had President Trump been charged under section 2383, he would have received the full panoply of constitutional rights that all defendants are afforded in criminal cases. More to the point for our purposes, had he been so charged, I wouldn't be writing separately to call attention to the substandard due process of law he received in these abbreviated Election Code proceedings.

¶277 I recognize the need to defend and protect our democracy against those who seek to undermine the peaceful transfer of power. And I embrace the judiciary's solemn role in upholding and applying the law. But that solemn role necessarily includes ensuring our courts afford everyone who comes before them (in criminal and civil proceedings alike) due process of law. Otherwise, as relevant here, how can we ever be confident that someone who is declared ineligible to hold public office pursuant to Section Three actually engaged in insurrection or rebellion after taking the prerequisite oath?

¶278 In my view, what transpired in this litigation fell woefully short of what due process demands. Because I perceive the majority's ruling that Section Three is self-executing to be the most concerning misstep in today's lengthy opinion, I focus on that aspect of the legal analysis.

¶279 Context is key here. The Fourteenth Amendment was designed to address a particular juncture in American history. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024) (manuscript at 3), https://ssrn.com/abstract=4532751. The postbellum framers were con-

fronted with the unprecedented nexus of historical events that gave rise to and shaped secession, the Civil War, and Reconstruction. Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28(2) Tex. Rev. L. & Pol. (forthcoming 2024) (manuscript at 214–15), https://ssrn.com/abstract=4568771. And their response, in some measure, sounded the clarion call of "a constitutional revolution." *Id.* at 99.

¶280 Indeed, the Fourteenth Amendment ushered in an expansion of federal power that undercut traditional state power. *See United States v. Washington*, 20 F. 630, 631 (C.C.W.D. Tex. 1883) ("The fourteenth amendment is a limitation upon the powers of the state and an enlargement of the powers of congress."); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 255 (1995) (Stevens, J., dissenting) ("The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States."). Forefront in the minds of the framers was the evident concern that the states would again seek to undermine the national government. In short, the states — state institutions, state officials, and state courts — were not to be trusted. *Ex parte Virginia*, 100 U.S. 339, 346 (1879) ("The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power.").

¶281 Thus, the indelible trespass of the former confederate states was met squarely by an overarching goal to render federal institutional authority paramount. Such is the contextual framework informing my view of the instant matter. To my mind, it compels the conclusion, soundly supported by the framers' intent and the weight of the relevant authorities, that Section Three of the Fourteenth Amendment is not self-executing, and that Congress alone is empowered to pass any enabling legislation.

¶282 My colleagues in the majority turn Section Three on its head and hold that it licenses states to supersede the federal government. Respectfully, they have it backwards. Because no federal legislation currently exists to power Section Three and propel it into action, because President Trump has not been charged under section 2383, and because there is absolutely no authority permitting Colorado state courts to use Colorado's Election Code as an engine to provide the necessary thrust to effectuate Section Three, I respectfully dissent.[3] I would affirm the district court's judgment in favor of President Trump, but I would do so on other grounds.[4]

I. Analysis

A. Pertinent Procedural Posture

¶283 The district court gave short shrift to the question of whether Section Three is self-executing. In its Omnibus Order, which denied President Trump's September 29 motion to dismiss, the court found the issue "irrelevant." The court ruled, in conclusory fashion, that states are empowered to execute Section Three via their own enabling legislation and that Colorado's Election Code constitutes such an enactment. This analytical shortcut, though convenient, is inconsistent with both the text of the Four-

3. There is a colorable argument that the majority incorrectly holds that Section Three applies to the President of the United States. Other parts of the majority's analysis, including the determinations that President Trump engaged in insurrection and that his remarks deserve no shelter under the First Amendment's rather expansive protective canopy, are at least questionable. Because I conclude that Section Three is not self-executing, and because that conclusion is dispositive, I don't address any other issue.

4. The district court decided that Section Three does not apply to the President of the United States.

teenth Amendment and persuasive authority interpreting it.

¶284 *Griffin's Case* is the jumping-off point for any Section Three analysis.

B. *Griffin's Case*: The Fountainhead

¶285 In 1869, less than a year after the ratification of the Fourteenth Amendment, U.S. Supreme Court Chief Justice Chase presided over *Griffin's Case* in the federal circuit court for the district of Virginia.[5] *Griffin's Case* is the wellspring of Section Three jurisprudence. And, given the temporal proximity of Chief Justice Chase's pronouncements on the topic of self-execution to the passage and ratification of the Fourteenth Amendment, I consider the holding in *Griffin's Case* compelling.

¶286 Judge Hugh W. Sheffey presided over Caesar Griffin's criminal trial after the Fourteenth Amendment went into effect. *Griffin's Case*, 11 F. Cas. at 22. Before the Civil War, Sheffey held a Section Three-triggering position, and so, had taken an oath to support the Constitution of the United States. *Id.* Subsequently, Sheffey served in Virginia's confederate legislature. *Id.* It was not until after the war that Sheffey was appointed to a state court judgeship, the position he held at the time of Griffin's trial. *Id.* at 16. Following the jury's guilty verdict on the charge of assault with intent to kill, Judge Sheffey sentenced Griffin to two years' imprisonment. *Id.* at 22–23.

¶287 Griffin filed a collateral attack in federal district court. He argued that his sentence was null because Section Three had "instantly, on the day of its promulgation, vacated all offices held by persons within the category

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5. At the time, Supreme Court justices rode the circuit and sat in regional federal courts.

of prohibition," thereby rendering Judge Sheffey ineligible to be on the bench. *Id.* at 24. More specifically, Griffin claimed that Sheffey was disqualified from being a judge because he had engaged in conduct prohibited by Section Three. *Id.* The federal district court agreed and ordered Griffin's immediate discharge from custody. *Id.*

¶288 On appeal, Chief Justice Chase framed the issue in the following terms: "[W]hether upon a sound construction of the amendment, it must be regarded as operating directly, *without any intermediate proceeding whatever*, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power." *Id.* at 23 (emphasis added). Chief Justice Chase grounded his resolution of this self-execution inquiry in the "character of the third section of the amendment." *Id.* at 25. In other words, he focused on the context in which the disqualification clause of the Fourteenth Amendment was enacted. Of course, he recognized that the ultimate object of this part of the Fourteenth Amendment was "to exclude from certain offices a certain class of persons." *Id.* at 26. But his prefatory statements echo the bugle blow of constitutional revolution: "The amendment itself was the first of the series of measures proposed or adopted by congress with a view to the reorganization of state governments acknowledging the constitutional supremacy of the national government, in those states which had attempted . . . to establish an independent Confederacy." *Id.* at 25.

¶289 Crucially, he observed that "it is obviously impossible to [disqualify certain officers] by a simple declaration, whether in the constitution or in an act of congress." *Id.* at 26. He added that to carry out Section Three's punitive mandate and enforce "any sentence of exclusion," it must first "be ascertained what particular individuals are

embraced by the definition." *Id.* Chief Justice Chase explained that "[t]o accomplish this ascertainment and ensure effective results," considerable procedural and normative mechanisms would need to be introduced; certainly, "proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable." *Id.* And here's the kicker, the beating heart of *Griffin's Case*: Chief Justice Chase declared that these indispensable mechanisms "*can only be provided for by congress*." *Id.* (emphasis added).

¶290 It was the very language of the Fourteenth Amendment, Chief Justice Chase continued, that put this proposition beyond doubt: "Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that 'congress shall have power to enforce, *by appropriate legislation*, the provision[s] of this article.'" *Id.* (emphasis added) (quoting U.S. Const. amend. XIV, § 3). Chief Justice Chase noted that Section Five "qualifies [Section Three] to the same extent as it would if the whole amendment consisted of these two sections." *Id.* And pivoting back to Section Three, he pointed out that, consistent with Section Five, its final clause "gives to congress absolute control of the whole operation of the amendment." *Id.*; *see* U.S. Const. amend. XIV, § 3 ("But Congress may by a vote of two-thirds of each House, remove such disability.").

¶291 Chief Justice Chase, therefore, concluded:

> Taking the third section then, in its completeness with this final clause, *it seems to put beyond reasonable question* the conclusion that the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability, to be removed in proper

> cases by a two-thirds vote, and *to be made operative in other cases by the legislation of congress in its ordinary course*.

Griffin's Case, 11 F. Cas. at 26 (emphases added).

¶292 I extract three seminal, and related, takeaways from this review of *Griffin's Case*. First, Section Three is not self-executing. Second, only Congress can pass the "appropriate legislation" needed to execute it. And third, this grant of power to Congress was not merely formalistic; it was also pragmatic. Indeed, it was indicative of the complex nature of the disqualification function. Chief Justice Chase perceived that Section Three would require an array of mechanisms—procedural, evidentiary, and definitional—to ascertain who was subject to disqualification and how they could be disqualified. More on this third notion later.

¶293 For now, though, it is worth stressing that, despite detractors in some quarters, the other premises have withstood the test of time: Section Three is not self-executing, and Congress has the exclusive authority to enforce it. *See Cale v. City of Covington*, 586 F.2d 311, 316 (4th Cir. 1978) (citing *Griffin's Case* for the proposition that Section Three is "not self-executing absent congressional action"); *State v. Buckley*, 54 Ala. 599, 616–17 (1875) (same); *Hansen v. Finchem*, No. CV-22-0099-AP/EL, 2022 WL 1468157, *1 (Ariz. May 9, 2022) (affirming the lower court's ruling against disqualification on state law grounds but stating that "Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause"); *see also* Va. Op. Att'y Gen. No. 21-003, at 3 (Jan. 22, 2021) (citing *Griffin's Case* and stating that "the weight of authority appears to be that Section 3 of

the Fourteenth Amendment is not 'self-executing'").

¶294 I now address the criticisms launched by the Electors against the enduring vintage of *Griffin's Case*. For the reasons I articulate, I am not persuaded by any of the contentions advanced.

C. Harmonizing *Griffin's Case* and *Case of Davis*

¶295 The Electors argue that Chief Justice Chase took the opposite tack on Section Three a couple of years before deciding *Griffin's Case*. *See Case of Davis*, 7 F. Cas. 63 (C.C.D. Va. 1871). But *Griffin's Case* was decided after *Case of Davis*, and unlike *Griffin*'s *Case*, *Case of Davis* is a two-judicial-officer, unwritten, split decision.[6] Hence, to put it mildly, *Case of Davis* is of questionable precedential value. Indeed, the majority doesn't rely on *Case of Davis* in its attempt to undermine *Griffin's Case*.

¶296 In *Case of Davis*, Chief Justice Chase, again sitting as a circuit court judge, presided over the treason prosecution of former confederate president, Jefferson Davis. *Id.* The question before the court was whether Section Three displaced the federal criminal treason charges levied against Davis. *Id.* at 102. Defense counsel asserted that Section Three provided the exclusive punishment for those within its reach, thus foreclosing prosecution under

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6. Although the year in the citation for *Case of Davis* (1871) postdates the year in the citation for *Griffin's Case* (1869), it was in fact *Case of Davis* that came first. *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 100 n.66 (2021). Chief Justice Chase announced on December 5, 1868, that the court had failed to reach consensus in *Case of Davis*. *Case of Davis*, 7 F. Cas. at 102; Certificate of Division, *Case of Jefferson Davis*, 7 F. Cas. 63 (C.C.D. Va. 1867–1871) (No. 324), https://joshblackman.com/wp-content/uploads/2023/08/5220.pdf [https://perma.cc/K7QC-4YZJ].

the federal treason statute. *Id.* at 90–91. Furthermore, defense counsel maintained that Section Three "executes itself" and "needs no legislation on the part of congress to give it effect." *Id.* at 90.

¶297 Due to the structure of the federal judiciary at the time, the case was heard by both a federal district court judge and Chief Justice Chase sitting together. *See* Judiciary Act of 1802, 2 Stat. 156, 159, § 6. The judicial officers, however, failed to reach consensus on the defense's motion to quash the indictment. *Case of Davis*, 7 F. Cas. at 102. Accordingly, a certificate of disagreement was submitted for review by the Supreme Court at its next session. *Id.* Notably, though, the case was never heard by the Supreme Court because President Johnson issued a proclamation of general amnesty in December 1868, effectively disposing of the treason charges. *Id.*

¶298 Although the certificate of disagreement did not indicate the judicial officers' votes, the final sentence in the 1894 report of the case in the *Federal Reports* states that Chief Justice Chase "instructed the reporter to record him as having been of opinion on the disagreement, that the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment to the constitution of the United States." *Id.* Over the years, some have clung to this hearsay to posit that Chief Justice Chase was inconsistent in his application of Section Three, waffling on the issue of self-execution.

¶299 Certain legal scholars have sought to explain this purported incongruence by surmising that Chief Justice Chase's application of Section Three in *Griffin's Case* was politically motivated. Consequently, they criticize *Griffin's Case* as wrongly decided and the result of flawed logic. *See* Baude & Paulsen, *supra* (manuscript at 35–49). Other legal scholars, however, question whether the

statement quoted above from the *Federal Reports* accurately represented Chief Justice Chase's views. They point out that the case reporter, a former confederate general, was the very attorney who represented Judge Sheffey in *Griffin's Case*.[7] *See* Blackman & Tillman, *supra* (manuscript at 15). Even assuming *Case of Davis* warrants any consideration at all, there is no need to join this affray because these cases can be reconciled in a principled manner by recognizing that there are two distinct senses of self-execution. *Id.* at 19. I find this distinction both helpful and borne out by the case law.

¶300 First, there is self-execution as a *shield*, allowing individuals to raise the Constitution defensively, in response to an action brought by a third party. Second, there is self-execution as a *sword*—such as when individuals invoke the Constitution in advancing a theory of liability or cause of action that supports affirmative relief. When acting as a *shield*, the Fourteenth Amendment is self-executing. *Cale*, 586 F.2d at 316. The Fourteenth Amendment, however, cannot act as a self-executing *sword*; rather, an individual seeking affirmative relief under the Amendment must rely on legislation from Congress. *Id.*

¶301 The Fourth Circuit aptly adopted this distinction in *Cale*, thereby reconciling any apparent inconsistencies in Fourteenth Amendment jurisprudence. That case implicated a wrongful discharge action in which the plaintiff asked the court to sanction an implied cause of action arising under the Fourteenth Amendment's due process clause. *Id.* at 313. In examining whether an implied cause of action exists under the due process clause of the

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7. *Griffin's Case* was decided in 1869 and the statement from the case reporter regarding *Case of Davis* appeared in the 1894 *Federal Reports*. Blackman & Tillman, *supra* (manuscript at 140).

Fourteenth Amendment, the court turned to cases that have construed Section Five. It began by discussing *Ex parte Virginia*, where the Supreme Court explained that the Fourteenth Amendment derives much of its force from Section Five, which envisions enabling legislation from Congress to effectuate the prohibitions of the amendment:

> It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged[.] *Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.*

Ex parte Virginia, 100 U.S. at 345–46 (first emphasis in original, second emphasis added).

¶302 But shortly after deciding *Ex parte Virginia*, the Supreme Court declared the Fourteenth Amendment to be "undoubtedly self-executing without any ancillary legislation," while simultaneously making the seemingly inconsistent statement that Section Five "invests Congress with power to enforce" the Fourteenth Amendment "in order that the national will, thus declared, may not be a mere brutum fulmen." *The Civil Rights Cases*, 109 U.S. 3, 11, 20 (1883). Although at first blush the opinion in the *Civil Rights Cases* appears to be both internally inconsistent and inconsistent with *Ex parte Virginia*, the *Cale* court did not so hold. *Cale*, 586 F.2d at 316. Instead, the *Cale* court resolved any apparent inconsistencies by

distinguishing between, on the one hand, "the protection the Fourteenth Amendment provide[s] of its own force as a shield under the doctrine of judicial review," and on the other, affirmative relief sought under the amendment as a sword, which is unavailable without legislation from Congress. *Id.*

¶303 In supporting this distinction, the *Cale* court found refuge in the *Slaughter-House Cases*. 83 U.S. 36 (1872). There, the defendants invoked the Fourteenth Amendment as a shield by arguing that a local law restricting where animals could be slaughtered deprived the city's butchers of their "right to exercise their trade." *Id.* at 60. The Supreme Court, however, held that given the history of the Reconstruction Amendments and their purpose of preventing discrimination against the newly liberated enslaved people, the butchers' "right to exercise their trade" was not a right that fell within the purview of the privileges-and-immunities provision of Section One of the Fourteenth Amendment. *Id.* at 81. Of particular interest for our purposes is the fact that the Court did not reject the use of the Fourteenth Amendment as a self-executing shield, but rather rejected the argument that the particular right in question fit within the Fourteenth Amendment's protection.

¶304 Importantly, based on its examination of *Ex parte Virginia*, the *Civil Rights Cases*, and the *Slaughter-House Cases*, the *Cale* court observed that "the Congress and Supreme Court of the time were in agreement that affirmative relief under the amendment should come from Congress." *Cale*, 586 F.2d at 316. The *Cale* court added that it's only when state laws or proceedings are asserted "in hostility to rights and privileges" that the Fourteenth Amendment, and specifically Section One, may be raised as a self-executing defense to those laws or proceedings.

Id. (discussing the *Civil Rights Cases*, 109 U.S. at 46 (Harlan, J., dissenting)); *see also The Slaughter-House Cases*, 83 U.S. at 81 (explaining that when "it is a State that is to be dealt with, and not alone the validity of its laws," the matter should be left in the hands of Congress).

¶305 The defensive-offensive dynamic of the Fourteenth Amendment is best exemplified by the interplay between 42 U.S.C. § 1983 and *Ex parte Young*, 209 U.S. 123 (1908). *See Cale*, 586 F.2d at 316–17. In *Ex parte Young*, multiple railroad companies wielded the Fourteenth Amendment's due process clause as a shield to request enjoinment of the future enforcement of Minnesota's mandatory railroad rates. 209 U.S. at 130. The Court ruled in their favor, holding that they could prospectively bring suit against a state official to prevent the enforcement of an act that violated the federal constitution. *Id.* at 167. But an *Ex parte Young* claim is not so much an affirmative cause of action as it is a defense that may be asserted in anticipation of the enforcement of state laws alleged to be unconstitutional. *See Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014). Hence, *Ex parte Young* provides a means of vindicating Fourteenth Amendment rights without violating the grant of exclusive enforcement power to Congress. When a party wishes to assert its Fourteenth Amendment rights offensively, however, it must bring a cause of action under legislation enacted by Congress, such as section 1983.

¶306 Between affirmative relief provided by Congress and defensive *Ex parte Young* claims, constitutional rights are "protected in all instances." *Cale*, 586 F.2d at 316–17. Not surprisingly, after declining to find an implied cause of action permitting affirmative relief within the Fourteenth Amendment, the Fourth Circuit in *Cale* remanded to the district court with instructions to determine whether the

plaintiff's wrongful discharge claim could be brought under section 1983, the proper enforcement mechanism. *Id.* at 312.

¶307 The majority devotes all of one sentence to *Cale* and disregards most of the Supreme Court jurisprudence to which that thoughtful opinion is moored. Maj. op. at ¶ 103. It is true that *Cale* was a Section One, not a Section Three, case. But *Cale* cited to *Griffin's Case* (a Section Three case) in determining that the Fourteenth Amendment cannot be used as a self-executing sword, thus tethering the distinction to both Sections. *Cale*, 586 F.2d at 316. Accordingly, while courts have seldom had occasion to interpret Section Three, the case law on Section One is instructive on the issue of self-execution.

¶308 Critically, the Supreme Court has affirmed that the Fourteenth Amendment, while offering protection under certain circumstances, does not provide a self-executing cause of action. *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921) ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, [n]ot affirmative, and it carries no mandate for particular measures of reform."). Moreover, as pertinent here, the Supreme Court has retreated from recognizing implied causes of action, instead holding that for a cause of action to exist, Congress must expressly authorize it. *Alexander v. Sandoval*, 532 U.S. 275, 276 (2001) (refusing to recognize a private right of action because, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress").

¶309 The majority nevertheless protests that interpreting any section of the Fourteenth Amendment as requiring legislation yields absurd results because the rest of the Reconstruction Amendments are self-executing. Maj. op. ¶ 96. I do not dispute that the Thirteenth and Fifteenth

Amendments are self-executing. But I disagree that Section Three must therefore be deemed self-executing as well. The Thirteenth and Fifteenth Amendments, on the one hand, and the Fourteenth Amendment, on the other, are different.

¶310 The Thirteenth and Fifteenth Amendments speak in affirmative, universal terms to abolish slavery, create the right to vote, and restrain not only government actors, but also private individuals. *See* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 Va. L. Rev. 1367, 1367 (2008); *Guinn v. United States*, 238 U.S. 347, 363 (1915) (recognizing "the right of suffrage" created by the Fifteenth Amendment's "generic character"). The Fourteenth Amendment, however, was born out of a deep suspicion of the states and acts as a negative policing mechanism intended solely to curtail state power. *Adarand*, 515 U.S. at 255 (Stevens, J. dissenting) ("The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States."); *The Civil Rights Cases*, 109 U.S. at 11 (holding that the Fourteenth Amendment applies to state action, not private action). This curtailment applies both to state laws or actions abridging rights and to a state's selection of government officials. To give effect to this amendment while respecting our federalist system, courts have turned to the sword-shield paradigm of self-execution, thereby striking "a balance between delegated federal power and reserved state power" without forsaking the protection of constitutional rights "in all instances." *Michigan Corr. Org.*, 774 F.3d at 900; *Cale*, 586 F.2d at 317.

¶311 To draw a yet deeper line in the sand, unlike the Thirteenth and Fifteenth Amendments, Section Three does not indelibly ensure a right but instead allows the federal government to act as a protective check against a state's

selection of government officials so as to preclude elected insurrectionists and safeguard democracy. This shift in power between the authority of the states to choose their own government officials and the authority of the federal government as a last defense is all the more reason to require a congressionally created cause of action to direct the execution of this federal oversight.

¶312 In sum, Chief Justice Chase's holding in *Griffin's Case* appears consistent and in alignment with both his alleged vote in *Case of Davis* and our framework for Fourteenth Amendment litigation. Griffin wielded Section Three as a self-executing sword, invoking the provision as a cause of action to disqualify Judge Sheffey. Davis, on the other hand, took a defensive posture and invoked Section Three as a self-executing shield, arguing that it provided the exclusive punishment for insurrection, thus displacing the federal criminal treason charges brought against him.

¶313 Having said that, I do not rely solely on *Griffin's Case*. Congress's own actions corroborate my understanding of Section Three.

D. Erstwhile Enabling Legislation

¶314 The majority's ruling that Section Three self-executes without the need for any federal enforcement legislation is further undermined by Congress's promulgation of just such legislation. One year after *Griffin's Case* was decided, and perhaps in response to it, Congress enacted the Enforcement Act of 1870. The Enforcement Act contained two provisions for the specific purpose of *enforcing Section Three*. Enforcement Act of 1870, ch. 114, 16 Stat. 140, 143–44. The first provided a quo warranto mechanism whereby a federal district attorney could bring a civil suit in federal court to remove from office a person who was disqualified by Section Three. *Id.* at 143. The second per-

mitted a criminal prosecution for knowingly accepting or holding office in violation of Section Three, and included punishment by imprisonment of not more than a year, a fine of not more than $1,000, or both. *Id.* at 143–44.

¶315 The enforcement purpose behind the Act was evident in the congressional debates held on these very two provisions. Speaking in support of their adoption, Senator Lyman Trumbull, referring to Section Three, stated, "But notwithstanding that constitutional provision we know that hundreds of men are holding office who are disqualified by the Constitution. *The Constitution provides no means for enforcing itself, and this is merely a bill to give effect to the fundamental law embraced in the Constitution*." Cong. Globe, 41st Cong., 1st Sess. 626 (1869) (emphasis added). He later reiterated this point as he explained that "[s]ome statute is certainly necessary to enforce the constitutional provision." *Id.* The debate on the floor focused not on whether the provisions were necessary for enforcing Section Three—that seemed to be a foregone conclusion—but instead on whether the second provision and its attendant punishments were necessary. The need for the first provision was so self-evident that it was not even debated. As Senator Garrett Davis put it, the first provision simply provided an "adequate remedy to prevent any of the criminals under the fourteenth amendment of the Constitution from holding office in defiance of its letter." *Id.* at 627.

¶316 While the quo warranto provision in the Enforcement Act would have provided a civil cause of action to challenge President Trump's eligibility to appear on Colorado's presidential primary ballot, Congress repealed it in 1948. *See* Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 Wm. & Mary Bill Rts. J. 153, 206 n.365 (2021) (citing

Act of June 25, 1948, ch. 646, § 39, 62 Stat. 869, 993); *see also* Act of June 25, 1948, ch. 645, § 2383, 62 Stat. 683, 808. The Enforcement Act's criminal provision, however, appears to have survived: As best I can tell, 18 U.S.C. § 2383 is its descendant. *Id.*

¶317 Presumably recognizing the civil-action gap created by the 1948 repeal, just months after the January 6, 2021 incident, legislation was proposed to allow the Attorney General of the United States to bring a civil action "against any Officeholder who engages in insurrection or rebellion, including any Officeholder who, after becoming an Officeholder, engaged in insurrection or rebellion." H.R. 1405, 117th Cong. (2021). H.R. 1405 would have disqualified such an Officeholder from federal or state office. *Id.* Furthermore, it would have provided what has been so apparently lacking from this state proceeding—clear designations of the appropriate procedures, forum, and standard of evidence, as well as the definition of "insurrection or rebellion." *Id.*

¶318 H.R. 1405 made it no further than introduction in the House. But the relevant point for our purposes remains: As recently as 2021, just months after the January 6 incident, Congress considered legislation to enforce Section Three through a civil proceeding. Why would Congress do so if, as the majority insists, Section Three is self-executing? Along the same lines, if the majority is correct that Section Three is self-executing, why did Congress pass the *Enforcement* Act to begin with (on the heels of *Griffin's Case*) and then allow it to remain in effect in its entirety until 1948? The majority offers no salient explanation.

¶319 If there is any enforcing legislation for Section Three currently on the books, it is arguably what remains from the Enforcement Act, 18 U.S.C. § 2383. Similar to its

ancestor, that statute states that:

> Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.

While section 2383 might provide an enforcement mechanism for Section Three, it is not presently before us. That's because President Trump has never been charged with, let alone convicted of, violating it. The instant litigation feels to me like an end run around section 2383.

¶320 To the extent there is interest in seeking to disqualify President Trump from holding public office (one of the mandatory punishments provided in section 2383) based on the allegation that he engaged in insurrection (one of the acts prohibited by section 2383), why wasn't he charged under section 2383? And, relatedly, why isn't he entitled to more due process than that which he received in this constricted Election Code proceeding? To be sure, unlike section 2383, Section Three prescribes neither a fine nor a term of imprisonment as a consequence for engaging in an insurrection after taking the prerequisite oath. So, I'm not suggesting that President Trump should have been afforded all the rights to which a defendant would be entitled in a criminal case. But here, the district court found that he engaged in insurrection after taking the prerequisite oath, despite affording him subpar due process (even under civil-procedure standards).

¶321 Compellingly, although H.R. 1405 wouldn't have called for a criminal proceeding, it would have provided more due process than that available in a civil action. For

example, H.R. 1405 would have required any action brought to be "heard and determined by a district court of three judges." H.R. 1405, § 1(d)(1). Additionally, any allegation of insurrection would have demanded proof by clear and convincing evidence, and any final order or injunction would have been reviewable by appeal directly to the U.S. Supreme Court. *Id.* at § (1)(d)(1)–(4). I infer from these provisions that at least some members of Congress acknowledged the need to provide ample due process (more than is available in typical civil cases) to anyone alleged to have violated Section Three.

¶322 My colleagues in the majority necessarily view as acceptable the diminished due process afforded President Trump as a result of enforcing Section Three through our Election Code. Instead, they prioritize their fear that a ruling disallowing the disqualification of President Trump from the primary ballot pursuant to Section Three would mean that "Colorado could not exclude from the ballot even candidates who plainly do not satisfy the age, residency, and citizenship requirements of the Presidential Qualifications Clause of Article II." Maj. op. ¶ 68. They see this as a more insidious evil. As I discuss in the following section, however, my colleagues are mistaken in their understanding of the law, and their worry is therefore unjustified.

E. Section Three of the Fourteenth Amendment Is Unlike Other Constitutional Qualification Clauses

¶323 The U.S. Supreme Court has acknowledged a non-exhaustive list of constitutional Qualification Clauses. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 n.2 (1995) (quoting *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969), which lists "qualifications" codified in the following provisions of the U.S. Constitution: (1) Art. I, § 2,

cl. 2; (2) Art. I, § 3, cl. 7; (3) Art. I, § 6, cl. 2; (4) Art. IV, § 4; (5) Art. VI, cl. 3; and (6) Amend. XIV, § 3). This list can fairly be expanded to include Article II, Section One, Clause Five, and perhaps also Section One of the Twenty-Second Amendment. *See* U.S. Const. art. II, § 1, cl. 5 (laying out three presidential eligibility requirements related to birth ("natural born Citizen"), age ("thirty five Years"), and residency ("fourteen Years a Resident"), which are similar to those specified in Art. I, § 2, cl. 2); U.S. Const. amend. XXII, § 1 (using the same "No person shall" language found in Art. I, § 2, cl. 2 and specifying a two-term limit for the presidency).

¶324 Although Section Three was included in *Powell* among the so-called Qualification Clauses, closer scrutiny reveals that it is unique and deserving of different treatment. That's because Section Three is the only one that is "qualifie[d]" by the following language: "[C]ongress shall have power to enforce, *by appropriate legislation*, the provision[s] of this article." *Griffin's Case*, 11 F. Cas. at 26 (emphasis added) (quoting U.S. Const. amend. XIV, § 5 and stating that "[t]he fifth section qualifies the third"). None of the other Qualification Clauses—even when viewed in the context of the original Articles in toto—contains the "appropriate legislation" modifier. Indeed, that modifier only appears in certain other Amendments, none of which are objectively relevant to the instant matter. I need not contemplate what bearing, if any, this has on the self-executing nature of constitutional provisions more generally. While that might be an open question, *see* Blackman & Tillman, *supra* (manuscript at 23) (noting that there appears to be "no deep well of consensus that constitutional provisions are automatically self-executing or even presumptively self-executing"), the demands of the instant matter counsel in favor of limiting my exposition to the

Constitution's presidential qualifications, especially those found in Article II, Section One, Clause Five.

¶325 Here, once again, the interplay between Sections Three and Five of the Fourteenth Amendment is of great significance. *See Griffin's Case*, 11 F. Cas. at 26. As mentioned, Article II, Section One, Clause Five contains nothing akin to the "appropriate legislation" language in Section Five of the Fourteenth Amendment. Thus, unlike Section Three's disqualification clause, which is modified by Section Five's "appropriate legislation" language, the Article II presidential qualifications do not appear to have a constitutionally mandated reliance on congressional enabling legislation.

¶326 We are not at liberty to ignore this blistering lacuna in Article II's language. But that is exactly what my colleagues in the majority do. And in so doing, they err. Even if the presidential qualifications contained in Article II are self-executing or allow for state enabling legislation—thereby providing the Electors with a cause of action to enjoin the Secretary of State ("the Secretary") from certifying a candidate disqualified by birth, age, or residency, to the Colorado presidential primary ballot, *see, e.g.*, *Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1194–95 (D. Colo. 2012), *aff'd*, 495 F. App'x 947 (10th Cir. 2012); *see also* § 1-4-1203(2)(a), C.R.S. (2023)—the same does not hold true for Section Three's disqualification clause.

¶327 Moreover, I detect a principled reason underlying this discrepancy in the language of Article II and Section Three. It relates to what I previously identified as my third takeaway from *Griffin's Case*. Recall that the Fourteenth Amendment's grant of absolute power to Congress vis-à-vis Section Three's enforcement was pragmatic, not merely formalistic. It was motivated by the complex nature of the disqualification function. Chief Justice Chase

presciently observed that to "ascertain what particular individuals are embraced" by Section Three's disqualifying function, and to "ensure effective results" in a disqualification case, considerable "proceedings, evidence, decisions, and enforcements of decisions . . . are indispensable." *Griffin's Case*, 11 F. Cas. at 26. In my view, the unwieldy experience of the instant litigation proves beyond any doubt the foresight of Chief Justice Chase's pronouncements. It doesn't require much process, procedure, or legal acumen to determine whether a candidate is barred by the binary and clerical requirements of birth, age, residency, and term limits. Typically, a notarized statement of intent will do the trick. *See* § 1-4-1204(1)(c), C.R.S. (2023). By contrast, Section Three disqualification necessarily requires substantial procedural and normative mechanisms to ensure a fair and constitutionally compliant outcome. These include, to name but a few, instruction on discovery and evidentiary rules; guidance as to whether a jury must be empaneled or a bench trial will suffice; direction as to the proper standards of review and burdens of proof; and clarification about whether civil or criminal proceedings are contemplated. Additionally, there's a vital need for definitional counsel on such questions as who is an "officer of the United States"? What is an "insurrection"? What does it mean to "engage[] in" the same? Does "incitement" count?

¶328 By no means do I intend to undermine the sacred role of the judiciary in directing the course of similar issues through precedential pathways. Nor would I have the third branch hamstrung in its task of setting the metes and bounds of litigation practice. But when the enforcement power of a punitive constitutional mandate is delegated to Congress in such unequivocal terms, it would appear decidedly outside the judicial bailiwick to furnish the

scaffolding that only "appropriate legislation" can supply. Because the Constitution gives this job to Congress, *and only Congress*, I consider it equally improper—indeed, constitutionally impossible—for state legislatures, in the absence of federal legislation, to create pseudo causes of action pursuant to Section Three's disqualification clause. This is precisely what the framers sought to prevent.

¶329 For this reason, the cases cited by the district court for the proposition that "states can, and have, applied Section [Three] pursuant to state statute without federal legislation" do not alter my analysis. *See Worthy v. Barrett*, 63 N.C. 199, 200 (1869), *appeal dismissed sub no. Worthy v. Comm'rs*, 76 U.S. 611 (1869); *In re Tate*, 63 N.C. 308, 309 (1869); *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 631–34 (La. 1869); *State v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at *15–22 (N.M. Dist. Sept. 6, 2022); *Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot, 1 (Ga. Off. Admin. Hearings May 6, 2022). To the extent other state courts have concluded that their own state statutes allow them to adjudicate Section Three claims, I respectfully submit that they are flat out wrong. Unfortunately, the majority joins company with these misguided decisions and holds that our General Assembly not only can, but has, empowered Colorado's state courts to adjudicate Section Three claims via our Election Code.[8] Maj. op. ¶ 88 n.11. I turn next to

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8. Interestingly, the majority does not explain what should happen moving forward if nobody challenges a candidate whom the Secretary believes previously engaged in insurrection after taking the prerequisite oath. Without the state courts' involvement, is the Secretary supposed to decide on her own whether the candidate is disqualified from public office by Section Three? And if so, how would the Secretary go about doing that? Would the

(continued…)

why Colorado's Election Code cannot rescue the majority.

F. Colorado's Election Code Cannot Supply What Congress Has Withheld

¶330 There is zero authority permitting state legislatures to do that which, though delegated to it, Congress has declined to do. The majority, however, holds that the Electors' Fourteenth Amendment claim can be brought under sections 1-1-113 and 1-4-1204(4), C.R.S. (2023), of the Colorado Election Code because the Secretary's listing of a constitutionally disqualified candidate on the presidential primary ballot would be a "wrongful act," as that term is used in section 1-1-113. *See* § 1-1-113(1). Maj. op. ¶¶ 4–5. But the truncated procedures and limited due process provided by sections 1-1-113 and 1-4-1204(4) are wholly insufficient to address the constitutional issues currently at play.

¶331 Section 1-1-113(1) provides that "when any eligible elector files a verified petition . . . 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*, . . . upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code." (Emphases added.) Section 1-4-1204(4) outlines the procedures to be followed when a section 1-1-113 challenge concerns the listing of a candidate on the presidential primary ballot. It provides that the challenge "must be made in writing and filed with the district court . . . no later than five days after the filing deadline for candidates." § 1-4-1204(4). The written challenge "must provide notice in a summary manner of an

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majority expect her to act as investigator, prosecutor, and adjudicator in that type of situation?

alleged impropriety that gives rise to the complaint." *Id.* Once the challenge is filed, the district court must hold a hearing within five days. *Id.* At that hearing, the district court must "hear the challenge and assess the validity of all alleged improprieties." *Id.* The filing party has the burden of sustaining the challenge by a preponderance of the evidence. *Id.* After the hearing, the district court must issue its findings of fact and conclusions of law within forty-eight hours. *Id.* An appeal from the district court's ruling must be brought before this court within three days of the district court's order, and this court has discretion to accept or decline jurisdiction over the case. § 1-4-1204(4); § 1-1-113(3).

¶332 As these statutory provisions make clear, a section 1-1-113 challenge to the certification of a candidate to the presidential primary ballot is meant to be handled on an expedited basis. *See Frazier v. Williams*, 2017 CO 85, ¶ 11, 401 P.3d 541, 544 ("[S]ection 1-1-113 is a summary proceeding designed to quickly resolve challenges brought by electors, candidates, and other designated plaintiffs against state election officials prior to election day."). Indeed, "such proceedings generally move at a breakneck pace." *Id.* It's unsurprising, then, that this court has previously limited the types of claims that can be brought under section 1-1-113 to those "alleging a breach or neglect of duty or other wrongful act *under the Colorado Election Code*." *Id.* at ¶ 10, 401 P.3d at 543 (emphasis added).

¶333 Because section 1-1-113 constitutes a modest grant of power, until today, this court has expressly declined to use that section's reference to "other wrongful act[s]" to expand its scope to include constitutional claims and other claims that do not arise specifically under the Election Code. *Id.* at ¶ 14, 401 P.3d at 544. The "accelerated" na-

ture of a section 1-1-113 proceeding and the limited remedy available in such a proceeding (i.e., an order requiring "substantial compliance with the provisions of [the Election Code]") render the statute incompatible with complex constitutional claims such as the one involved here. *See id.* at ¶¶ 16–18, 401 P.3d at 544–45.

¶334 An examination of the proceedings below highlights why a section 1-1-113 proceeding is a mismatch for a constitutional claim rooted in Section Three. The Electors filed their verified petition on September 6, 2023. The verified petition, far from being a "summary" notice of the alleged impropriety, *see* § 1-4-1204(4), was 105 pages in length. The district court did not hold a hearing within five days as required by section 1-4-1204(4). In fact, the court didn't hold its first status conference until September 18, twelve days after the verified petition was filed.[9] During that status conference, the court set deadlines for initial briefing. The district court gave the parties just four days, or until September 22, to file initial motions to dismiss with briefing on those motions to be completed by October 6. *Cf.* C.R.C.P. 12(b) (allowing twenty-one days from service of the complaint in a civil case to file motions to dismiss). The court also scheduled a five-day hearing to begin on October 30, or roughly eight weeks after the verified petition was filed. That's fifty-four days, which is nearly ten times the amount of time permitted by the Election Code. *See* § 1-4-1204(4) ("No later than five days after the challenge is filed, a hearing must be held . . .").

¶335 At the next status conference, on September 22, the

9. I recognize that the case was removed to federal court on September 7, the day after it was filed. But the federal court returned the case to the state court on September 12, six days before the first status conference was held.

court set more deadlines, this time related to exhibit lists, expert disclosures, and proposed findings of fact and conclusions of law. With respect to expert disclosures, the court ordered the Electors to provide expert reports by October 6, or twenty-four days before the hearing. *Cf.* C.R.C.P. 26(a)(2)(C)(I) (providing that in a civil case the claiming party's expert disclosures are typically due "at least 126 days (18 weeks) before the trial date"). It ordered President Trump to provide his expert reports no later than October 27, three days before the hearing was to begin. *Cf.* C.R.C.P. 26(a)(2)(C)(II) (stating that a defending party in a civil case is generally not required to provide expert reports "until 98 days (14 weeks) before the trial date"). And even though it was apparent from very early on in these proceedings that the Electors would rely heavily on expert testimony regarding both legal and factual matters to attempt to prove their challenge, the district court did not allow experts to be deposed. *Cf.* C.R.C.P. 26(b)(4)(A) (setting forth the default rule on the deposition of experts in civil cases: "A party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2) of this Rule whose opinions may be presented at trial."). Instead, the court ordered that expert reports must be "fulsome" and that experts would not be allowed to testify to anything outside their reports.

¶336 As planned, the hearing began on October 30 and concluded on November 3. The district court gave each side eighteen hours to present its case. The parties presented closing arguments on November 15, and the court issued its final order on November 17, two weeks after the hearing concluded and seventy-two days after the verified petition was filed.

¶337 This was a severe aberration from the deadlines set

forth in the Election Code, *see* § 1-4-1204(4), which require a district court to issue its ruling no more than forty-eight hours after the hearing and roughly a week after the verified petition is filed. Despite this clear record, my colleagues in the majority curiously conclude that the district court "substantially compl[ied]" with all the statutory deadlines. Maj. op. ¶ 85. That's simply inaccurate (unless the majority views complete failure as substantial compliance). The majority's reading of the record, while creative, doesn't hold water.

¶338 Given the complexity of the legal and factual issues presented in this case, it's understandable why the district court may have felt that adhering to the deadlines in section 1-4-1204(4) wouldn't allow the parties to adequately litigate the issues. But the district court didn't have the discretion to ignore those statutory deadlines. Section 1-4-1204(4) states that "a hearing *must* be held" no later than five days after a challenge is filed and that the district court "*shall* issue findings of fact and conclusions of law no later than forty-eight hours after the hearing." *See Waddell v. People*, 2020 CO 39, ¶ 16, 462 P.3d 1100, 1106 ("[T]he 'use of the word "shall" in a statute generally indicates [the legislature's] intent for the term to be mandatory.'" (alteration in original) (quoting *People v. Hyde*, 2017 CO 24, ¶ 28, 393 P.3d 962, 969)); *Ryan Ranch Cmty. Ass'n v. Kelley*, 2016 CO 65, ¶ 42, 380 P.3d 137, 146 (noting that "shall" and "must" both "connote[] a mandatory requirement").

¶339 Rather than recognize that the Section Three challenge brought by the Electors was a square constitutional peg that could not be jammed into our Election Code's round hole, the district court forged ahead and improvised as it went along, changing the statutory deadlines on the fly as if they were mere suggestions. If, as the majority

liberally proclaims, sections 1-1-113 and 1-4-1204(4) provide such a "robust vehicle" for handling the constitutional claim brought here, Maj. op. ¶ 86, why didn't the district court just drive it? Why, instead, did the district court feel compelled to rebuild such a "robust vehicle" by modifying the procedural provisions of the Election Code? I submit that, in reality, while sections 1-1-113 and 1-4-1204(4) are plenty adequate to handle ordinary challenges arising under the Election Code, they did not measure up to the task of addressing the Electors' Section Three claim. The result was a proceeding that was neither the "summary proceeding" envisioned by section 1-1-113 nor a full-blown trial; rather, it was a procedural Frankenstein created by stitching together fragments from sections 1-1-113 and 1-4-1204(4) and remnants of traditional civil trial practice.

¶340 Even with the unauthorized statutory alterations made by the district court, the aggressive deadlines and procedures used nevertheless stripped the proceedings of many basic protections that normally accompany a civil trial, never mind a criminal trial. There was no basic discovery, no ability to subpoena documents and compel witnesses, no workable timeframes to adequately investigate and develop defenses, and no final resolution of many legal issues affecting the court's power to decide the Electors' claim before the hearing on the merits.

¶341 There was no fair trial either: President Trump was not offered the opportunity to request a jury of his peers; experts opined about some of the facts surrounding the January 6 incident and theorized about the law, including as it relates to the interpretation and application of the Fourteenth Amendment generally and Section Three specifically; and the court received and considered a partial congressional report, the admissibility of which is not

beyond reproach.

¶342 I have been involved in the justice system for thirty-three years now, and what took place here doesn't resemble anything I've seen in a courtroom. In my experience, in our adversarial system of justice, parties are always allowed to conduct discovery, subpoena documents and compel witnesses, and adequately prepare for trial, and experts are never permitted to usurp the role of the judge by opining on how the law should be interpreted and applied.

¶343 The majority tries to excuse the due process shortcomings I have discussed by noting that section 1-1-113 proceedings "move quickly out of necessity" because "[l]ooming elections trigger a cascade of deadlines . . . that cannot accommodate protracted litigation schedules, particularly when the dispute concerns a candidate's access to the ballot." Maj. op. ¶ 81. But that's exactly my point. The necessarily expedited nature of section 1-1-113 proceedings is precisely why the Electors should not have been allowed to piggyback a Section Three claim — an admittedly complex constitutional claim — on their Election Code claim in the first place. In any event, the majority's acknowledgement that section 1-1-113 proceedings "cannot accommodate protracted litigation" seems to directly contradict its determination that the Election Code endowed the district court with the "flexibility" to adequately accommodate the needs of this complex litigation. *Id.* at ¶¶ 81, 85.[10] The majority can't have its cake and eat

10. Even if the majority were correct about the district court's flexibility" to accommodate a constitutional claim, the limit[ed] appellate review" available under the letter of section 1-1-113 further demonstrates why the Election Code is not an appropriate avenue for the prosecution of a Section Three claim. *Frazier*, ¶ 18,

(continued…)

it too.

¶344 The irregularity of these proceedings is particularly troubling given the stakes. The Electors ask us to hold that President Trump engaged in insurrection and is thus disqualified from being placed on the ballot for this upcoming presidential primary.[11]

¶345 Today's decision will have sweeping consequences beyond just this election. The majority's ruling that President Trump is disqualified under Section Three means that he can never again run for a Senate or House of Representatives position, or become an elector, or hold any office (civil or military) under the United States or under any state. In other words, he will be barred from holding any public office, state or federal, for the rest of time. His only possible out is if Congress at some point decides to remove the disqualification through a two-thirds vote by each House (which is no small feat). "A declaration that a person is permanently barred from any future public office raises constitutional issues that simple removal from office does not . . . . The serious nature of any such holding demands that the rules of procedural due process be

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401 P.3d at 545. This court has the sole discretion to review section 1-1-113 proceedings, § 1-1-113(3); § 1-4-1204(4), so, whenever we decline such review, "the decision of the district court shall be final and not subject to further appellate review," *Frazier*, ¶ 18, 401 P.3d at 545 (quoting § 1-1-113(3)). Imagine, then, if we had declined to review the instant matter. Alarmingly, the adjudication of *federal* constitutional provisions, disqualifying President Trump from office, would have met its road's end in state district court. How can this court give its imprimatur to such an inverted conception of the supremacy doctrine? I, for one, cannot.

11. This same ask has been made of other courts based on their state election codes. *See, e.g.*, *Trump v. Benson*, No. 23-00151-MZ (Mich. Ct. Cl. Nov. 14, 2023); *Growe v. Simon*, 997 N.W.2d 81 (Minn. 2023). Ours is the first to take the bait.

complied with strictly." *Bohannan v. Arizona ex rel Smith*, 389 U.S. 1, 4 (1967) (Douglas, J., dissenting).

¶346 There was no strict compliance with procedural due process here. How is this result fair? And how can we expect Coloradans to embrace this outcome as fair?

¶347 I cannot agree with the majority that the chimeric proceedings below gave President Trump process commensurate to the interest of which he has been deprived. Nor did the proceedings below protect the interest Coloradans have in voting for a candidate of their choosing. Of course, if President Trump committed a heinous act worthy of disqualification, he should be disqualified for the sake of protecting our hallowed democratic system, regardless of whether citizens may wish to vote for him in Colorado. But such a determination must follow the appropriate procedural avenues. Absent adequate due process, it is improper for our state to bar him from holding public office.

¶348 More broadly, I am disturbed about the potential chaos wrought by an imprudent, unconstitutional, and standardless system in which each state gets to adjudicate Section Three disqualification cases on an ad hoc basis. Surely, this enlargement of state power is antithetical to the framers' intent.

II. Conclusion

¶349 In the first American Declaration of Rights in 1776, George Mason wrote that "no free government, nor the blessings of liberty, can be preserved to any people, but by . . . the recognition by all citizens that they have . . . rights, and that such rights cannot be enjoyed save in a society where law is respected and due process is observed." Va. Const. art. I, § 15. Some two and a half centuries later, those words still ring true. In 2023, just as in 1776, all, including those people who may have committed

horrendous acts, are entitled to procedural due process.

¶350 Because I cannot in good conscience join my colleagues in the majority in ruling that Section Three is self-executing and that the expedited procedures in our Election Code afforded President Trump adequate due process of law, I respectfully dissent. Given the current absence of federal legislation to enforce Section Three, and given that President Trump has not been charged pursuant to section 2383, the district court should have granted his September 29 motion to dismiss. It erred in not doing so. I would therefore affirm its judgment on other grounds.

JUSTICE BERKENKOTTER dissenting.

¶351 Today, the majority holds that former President Donald J. Trump ("President Trump") cannot be certified to Colorado's presidential primary ballot. Maj. op. ¶ 5. He is, the majority concludes, disqualified from being President of the United States again because he, as an officer of the United States, took an oath to support the Constitution and thereafter engaged in insurrection. *See* U.S. Const. amend. XIV, § 3[1]; Maj. op. ¶¶ 4–5. In reaching this conclusion, the majority determines as an initial matter that a group of Colorado Republican and unaffiliated electors eligible to vote in the Republican presidential primary ("the Electors") asserted a proper claim for relief under Colorado's Election Code ("Election Code"). *See* §§ 1-1-101 to 1-13-804, C.R.S. (2023); Maj. op. ¶ 57.

¶352 I write separately to dissent because I disagree with the majority's initial conclusion that the Election Code—as currently written—authorizes Colorado courts to

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1. Section Three of the Fourteenth Amendment is a Civil War era amendment to the United States Constitution that was ratified in 1868. Its aim was to prohibit loyalists to the confederacy who had taken an oath to support the Constitution from taking various state and federal offices. It provides:

> 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.

decide whether a presidential primary candidate is disqualified under Section Three of the Fourteenth Amendment to the U.S. Constitution ("Section Three") from being listed on Colorado's presidential primary ballot. Maj. op. ¶¶ 62–63, 66. In my view, the majority construes the court's authority too broadly. Its approach overlooks some of part 12 of the Election Code's plain language and is at odds with the historical application of section 1-1-113, C.R.S. (2023), which up until now has been limited to challenges involving relatively straightforward issues, like whether a candidate meets a residency requirement for a school board election. Plus, the majority's approach seems to have no discernible limits.

¶353 To explain why the majority — to my mind — is wrong, first, I explain the process for challenging the listing of a candidate on the presidential primary ballot in Colorado and describe sections 1-1-113 and 1-4-1204(4), C.R.S. (2023), since those sections of the Election Code define the scope of the district court's authority to hear the case below. Then, I lay out the procedural history of this case. After that, I turn to the question of whether the district court erred in interpreting these two statutes and consider the majority's analysis with respect to each. In doing so, I conclude that the General Assembly has not granted courts the authority the district court exercised in this case and that the court, accordingly, erred in denying President Trump's motion to dismiss.

I. The Process for Challenging the Listing of a Candidate on the Presidential Primary Ballot in Colorado

¶354 Part 12 of the Election Code charges Jena Griswold, in her official capacity as Colorado's Secretary of State ("the Secretary"), with certifying the names and party

affiliations of the candidates to be placed on presidential primary ballots no later than sixty days before the presidential primary election. *See* § 1-4-1204(1). Section 1-4-1204(4) details the process through which an eligible petitioner can challenge a candidate's listing on the presidential primary ballot. It states:

> Any challenge to the listing of any candidate on the presidential primary election ballot must be made in writing and filed with the district court in accordance with section 1-1-113(1) no later than five days after the filing deadline for candidates. Any such challenge must provide notice in a summary manner of an alleged impropriety that gives rise to the complaint. No later than five days after the challenge is filed, a hearing must be held at which time the district court shall hear the challenge and assess the validity of all alleged improprieties. The district court shall issue findings of fact and conclusions of law no later than forty-eight hours after the hearing. The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence. Any order entered by the district court may be reviewed in accordance with section 1-1-113(3).

§ 1-4-1204(4).

¶355 Section 1-1-113 is Colorado's fast-track procedural process under the Election Code that allows candidates; political parties; individuals who have made nominations; and, as pertinent here, eligible electors to file section 1-4-1204(4) and other challenges in court, alleging that the Secretary or one of Colorado's sixty-four county clerks and recorders has committed or is about to commit a

breach or neglect of duty or other wrongful act. It provides:

> 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.

§ 1-1-113(1) (emphasis added).

II. Procedural History

A. The Electors' Petition

¶356 On September 6, 2023, the Electors sued the Secretary under sections 1-1-113 and 1-4-1204(4) of the Election Code, alleging that the Secretary certifying President Trump to the primary ballot would constitute an "impropriety" under section 1-4-1204(4), and thus a "breach or neglect of duty or other wrongful act" under section 1-1-113(1) because Section Three—which disqualifies insurrectionists from holding office—prohibits him from being

listed. The Secretary's "breach or neglect of duty or other wrongful act," the Electors argued, authorized the district court to "issue an order requiring" the Secretary to "substantial[ly] compl[y]" with the Election Code by not certifying President Trump to the ballot. *See* § 1-1-113(1).

B. The Parties' Arguments in the District Court

¶357 Before trial, President Trump moved to dismiss the Electors' complaint. He argued that the court's authority to determine a claim under section 1-4-1204(4) is limited to the three criteria explicitly identified in section 1-4-1204(1)(b) and (c), which provide that the only candidates whose names shall be placed on the ballots for election are those who:

> (b) Are 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 are 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; and
>
> (c) Have submitted to the secretary, not later than eighty-five days before the date of the presidential primary election, a notarized candidate's statement of intent together with either a nonrefundable filing fee of five hundred dollars or a petition signed by at least five thousand eligible electors affiliated with the candidate's political party who reside in the state. Candidate petitions must meet the requirements of parts 8 and 9 of this article 4, as applicable.

¶358 President Trump acknowledged that the Secretary's "Major Candidates Statement of Intent" form requires a

candidate to affirm that they meet the three qualifications set forth in Article II of the U.S. Constitution,[2] but emphasized that the form says nothing about Section Three. Thus, he urged the court to adopt a very narrow reading of section 1-4-1204(4): So long as a party candidate (1) is a bona fide presidential candidate; (2) timely submits a notarized statement of intent affirming that they meet the three Article II qualifications; and (3) pays the $500 fee, the Secretary must certify the candidate to the presidential primary ballot, thus fulfilling her duty under the Election Code.

¶359 Challenges based on anything other than those three criteria, including but not limited to a Section Three challenge, President Trump asserted in his motion, fall outside the court's authority to decide and fail to state a proper claim for relief under sections 1-4-1204(4) and 1-1-113. Any such claim, he posited, must be dismissed.

¶360 The Electors countered in their response to the motion to dismiss that section 1-4-1204(4) must be read in conjunction with the other provisions of the Election Code, including, specifically, section 1-4-1201, C.R.S. (2023), which states that "it is the intent of the People of the State of Colorado that the provisions of this part 12 conform to the requirements of *federal law* and national political party rules governing presidential primary elections . . . ." § 1-4-1201 (emphasis added).

¶361 The Electors also pointed to section 1-4-1203(2)(a),

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2. Article II, Section 1, Clause 5 of the U.S. Constitution states: No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

C.R.S. (2023), which states:

> Except as provided for in subsection (5) of this section, each political party that has a *qualified candidate* entitled to participate in the presidential primary election pursuant to this section is entitled to participate in the Colorado presidential primary election. At the presidential primary election, an elector that is affiliated with a political party may vote only for a candidate of that political party.

(Emphasis added.) And they leaned on section 1-4-1203(3), which provides, in part, that the Secretary and county clerk and recorders have "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." Based on this section, they argued that, in all "other primary elections and general elections," only candidates who meet all the qualifications to hold office may access the ballot. Finally, the Electors emphasized the text of section 1-4-1204(4), which allows for "*[a]ny challenge to the listing of any candidate*" and directs the district court to assess the validity of "*all alleged improprieties.*" (Emphases added.) In the Electors' view, part 12 of the Election Code, when read as a whole, necessarily encompasses challenges under Section Three.

C. The District Court's Final Order

¶362 In its final order, the district court rejected President Trump's argument in his motion to dismiss that the Electors failed to state a proper claim under sections 1-4-1204(4) and 1-1-113. *Anderson v. Griswold*, No. 23CV32577, ¶ 224 (Dist. Ct., City & Cnty. of Denver, Nov.

17, 2023). It concluded that the Secretary lacked the authority under the Election Code to *investigate and determine* presidential primary candidate qualifications. *Id.* at ¶ 216. It then turned to whether it had the authority to adjudicate the Electors' complaint. *Id.* at ¶ 217. The court considered three cases in which this court concluded that the Election Code requires courts — not election officials — to determine candidate eligibility. *Id.* at ¶¶ 219–21; *see Hanlen v. Gessler*, 2014 CO 24, ¶ 40, 333 P.3d 41, 50 (holding that the Secretary exceeded his authority by passing a rule that permitted election officials to determine whether a candidate appearing on the state ballot was not qualified for office because "the election code requires a court, not an election official, to determine the issue of eligibility"); *Carson v. Reiner*, 2016 CO 38, ¶ 8, 370 P.3d 1137, 1139 ("[W]hen read as a whole, the statutory scheme evidences an intent that challenges to the qualifications of a candidate be resolved only by the courts . . . ."); *Kuhn v. Williams*, 2018 CO 30M, ¶ 40, 418 P.3d 478, 485 (per curiam) (a court may review the validity of a challenged candidate-nomination petition and consider extrinsic evidence in doing so). The district court found particularly instructive this court's conclusion in *Kuhn* that a challenger 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." ¶ 39, 418 P.3d at 485; *Anderson*, ¶ 219.

¶363 The court then interpreted two provisions of the Election Code to implicitly incorporate Section Three, which it concluded grants courts broad authority to review, through section 1-1-113's expedited procedures, whether a candidate is disqualified as an insurrectionist. *Anderson*, ¶¶ 222, 224. Specifically, the court interpreted the language in section 1-4-1201 stating that the provisions of

part 12 of the Election Code are intended to "conform to the requirements of federal law" as incorporating the entire U.S. Constitution, including Section Three. *Anderson*, ¶ 222. And the court noted that section 1-4-1203(2)(a) provides that only political parties that have a "qualified candidate" are entitled to participate in the presidential primary process. *Anderson*, ¶ 222. Relying on these provisions, the court held that, while the Secretary is not empowered to investigate and adjudicate a candidate's potential disability under Section Three, courts are not so constrained. *Id.* at ¶ 224.

D. The Majority's Opinion

¶364 The majority also appears to construe part 12 very broadly. In sum, its view is that section 1-4-1201's reference to "federal law" speaks to the General Assembly's intent, that section 1-4-1203(2)(a) limits participation in the presidential primary to "qualified" candidates, and that certification of a candidate who is not "qualified" thus constitutes a "wrongful act" within the scope of section 1-1-113. Maj. op. ¶¶ 36–37, 62–64. The majority draws on other provisions of the Election Code to inform the meaning of the term "qualified candidate." *Id.* at ¶¶ 37, 62 (citing § 1-4-1205, C.R.S. (2023) (requiring presidential primary write-in candidates to file a "notarized . . . statement of intent"); § 1-4-1101(1), C.R.S. (2023) (a write-in candidate's "affidavit of intent" must affirm that the candidate "desires the office and is qualified to assume its duties if elected"); § 1-4-1203(5) (when every party has no more than one certified candidate, whether party-nominated or write-in, the Secretary may cancel the presidential primary for all parties and declare the sole candidate the winner)). According to the majority, these provisions suggest that major party candidates—who are also

required to submit a statement of intent—must also be "qualified to assume [the office's] duties if elected." *Id.* at ¶ 62; *see* § 1-4-1101(1).

¶365 Read as a whole, the majority thus interprets the Election Code to provide that a major party candidate in a presidential primary must, at a minimum, be qualified to hold the Office of President under the U.S. Constitution. Maj. op. ¶ 63. As such, it concludes that the General Assembly, through the Election Code, granted courts broad authority to determine presidential primary candidates' constitutional eligibility, including eligibility under Section Three. *Id.* at ¶¶ 60–62, 65–66. In the majority's view, a reading of the Election Code that constrains courts from considering a candidate's constitutional qualifications would produce a result "contrary to the purpose of the Election Code." *Id.* at ¶ 64.

III. The Electors Failed to State a Cognizable Claim for Relief

¶366 Sections 1-4-1204(4) and 1-1-113 frame the threshold question this court must address before turning to the merits of the parties' appeal: Did the General Assembly intend to grant Colorado courts the authority to decide Section Three challenges? Based on my reading of sections 1-4-1204(4), 1-4-1201, and 1-4-1203(2)(a), I conclude that the answer to this question is no. As a result, I conclude that the Electors have not stated a cognizable claim for relief and their complaint should have been dismissed.

A. Section 1-4-1204(4) Allows for a Broad, but Not Unlimited, Range of Claims for Relief

¶367 As an initial matter, I acknowledge that the language in section 1-4-1204(4) is fairly broad insofar as it allows expedited challenges to the listing of any candidate on the

presidential primary election ballot based on "alleged improprieties." And I agree with the majority that "section 1-1-113 'clearly comprehends challenges to a broad range of wrongful acts committed by officials charged with duties under the code,'" Maj. op. ¶ 61 (quoting *Carson*, ¶ 17, 370 P.3d at 1141), "including any act that is 'inconsistent with the Election Code,'" *id.* (quoting *Frazier v. Williams*, 2017 CO 85, ¶ 16, 401 P.3d 541, 545). I also agree with the majority that a "wrongful act" is "more expansive than a 'breach' or 'neglect of duty.'" *Id.* (quoting *Frazier*, ¶ 16, 401 P.3d at 545).

¶368 But this language can only do so much. As we also held in *Frazier*, "other wrongful act" is limited to acts that are wrongful under the Election Code. ¶ 16, 401 P.3d at 545. We have also emphasized that section 1-1-113 is a *summary* proceeding designed to quickly resolve challenges brought by designated plaintiffs against state election officials prior to election day. *Id.* Indeed, past cases decided by this court reflect the generally straightforward nature of the cases filed under section 1-1-113, the lion's share of which involved disputes over state or local election residency or signature requirements. *See, e.g.*, *Griswold v. Ferrigno Warren*, 2020 CO 34, ¶ 15, 462 P.3d 1081, 1084 (deciding whether the Election Code's minimum signature requirement mandates substantial compliance and whether a U.S. Senate candidate satisfied that standard); *Kuhn*, ¶¶ 1–6, 418 P.3d at 480–81 (deciding whether a nonresident signature circulator could legally collect signatures for a candidate's petition); *Frazier*, ¶ 1, 401 P.3d at 542 (considering whether the Secretary improperly invalidated signatures included on a U.S. Senate candidate's petition to appear on the primary election ballot); *Carson*, ¶ 21, 370 P.3d at 1142 (considering whether a challenge to a candidate's qualifications based on their residency was

permitted after the Secretary certified the candidate to the ballot).

¶369 Don't get me wrong, the almost 450 entries in the district court register of actions in the two months and eleven days between September 6, 2023, the date on which the petition was filed, and November 17, 2023, the date on which the district court issued its 102-page final order, illustrate the extraordinary effort that the attorneys and the district court dedicated to this case. But that effort also proves too much. The deadlines under the statute were not met, nor could they have been. Setting aside the factual questions, an insurrection challenge is necessarily going to involve complex legal questions of the type that no district court—no matter how hard working—could resolve in a summary proceeding.

¶370 And that's to say nothing of the appellate deadline. Three days to appeal a district court's order regarding a challenge to a candidate's age? Sure. But a challenge to whether a former President engaged in insurrection by inciting a mob to breach the Capitol and prevent the peaceful transfer of power? I am not convinced this is what the General Assembly had in mind.

¶371 The various provisions of the Election Code on which the district court and the majority rely to suggest otherwise do not persuade me either.

B. The Term "Federal Law" Does Not Support a Broad Grant of Authority to Colorado Courts to Enforce Section Three

¶372 The district court relied on the declaration of intent in part 12. *Anderson*, ¶ 222. It explains the intent of the People of the State of Colorado in the context of presidential primary elections. It provides: "In recreating and reenacting this part 12, it is the intent of the People of the

State of Colorado that the provisions of this part 12 conform to the requirements of *federal law* and national political party rules governing presidential primary elections . . . ." § 1-4-1201 (emphasis added).[3] In adopting a broad view of section 1-4-1204(4)'s reach, the court assumed that the term "federal law," as used in this section, refers to the entire U.S. Constitution, including Section Three. *Anderson*, ¶¶ 222–24.

¶373 The majority also leans on this reference to "federal law" in section 1-4-1201, though more obliquely, suggesting it means the General Assembly intended for part 12 to operate "in harmony" with federal law. Maj. op. ¶ 36. I am not persuaded.

¶374 In my view, the term "federal law" is ambiguous at best. A brief dive into the history of part 12 explains why. *See McCoy v. People*, 2019 CO 44, ¶ 38, 442 P.3d 379, 389 ("If, however, the statute is ambiguous, then we may consider other aids to statutory construction, including the consequences of a given construction, the end to be achieved by the statute, and the statute's legislative history.").

¶375 Part 12 was enacted as part of the return to a primary system in Colorado. *See* § 1-4-1102, C.R.S. (1990) (governing Colorado's presidential primary system in the 1990s). From 2002 to 2016, presidential candidates were selected through a closed party caucus system. But in 2016, after "Colorado voters experienced disenfranchisement and

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3. As Professor Muller notes in his amicus brief, "A postpositive modifier like ['governing presidential primary elections'] attaches to both 'federal law' and 'national political party rules.'" Brief for Professor Derek T. Muller as Amicus Curiae Supporting Neither Party. Hence, the term "federal law" is properly understood not as a standalone term but as only relating to presidential primary elections.

profound disappointment with the state's [caucus] system," voters considered Proposition 107, which promised to restore presidential primary elections in Colorado, with one significant change—unlike prior iterations of its primary system, beginning in 2020, Colorado would host open presidential primaries, allowing unaffiliated voters to participate in these primary elections. *See* Proposition 107, § 1, https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2015-2016/140Final.pdf [https://perma.cc/2GA9-ZY7U] (noting that "restor[ing] [Colorado's] presidential primary" to an open primary system would enable the "35% of Colorado voters who are independent of a party" to "participat[e] in the presidential nomination process," and "encourage candidates who are responsive to the viewpoints of more Coloradans").

¶376 When Proposition 107 passed, the General Assembly amended the Election Code and adopted part 12 to formally re-introduce the presidential primary process. Nothing in this history indicates that one of the concerns animating either the proponents of Proposition 107 or the General Assembly was a need to challenge, through the courts, issues concerning candidates' constitutional disqualifications. In fact, the language in the current version of section 1-4-1201 mostly mirrors the 1990 version of part 12 (then, part 11): "It is the intent of the general assembly that the provisions of this part 11 *conform to the requirements of federal law and national political parties for presidential primary elections*." § 1-4-1104(3), C.R.S. (1990) (emphasis added).

¶377 There is some history surrounding Proposition 107 and part 12 which suggests that proponents of this new open presidential primary system were concerned about one specific constitutional issue: a potential First Amendment challenge to the new law based on political parties'

private right of association. *See Independent Voters*, Denver Metro Chamber of Com., https://denverchamber.org/policy/policy-independent-voters-white-paper/ [https://perma.cc/T2TT-A2UD] (The Denver Chamber of Commerce, which launched Proposition 107, noted that a semi-open primary system, because it would permit unaffiliated voters to affiliate with the Republican or Democratic parties in a presidential primary, could face legal challenges based on parties' First Amendment rights of association.); *see also* Christopher Jackson, *Colorado Election Law Update*, 46-SEP Colo. Law. 52, 53 (2017) (noting that the law was likely crafted in a manner designed to "stave off a First Amendment challenge" given the U.S. Supreme Court's 2000 decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), which struck down California's "blanket primary" law).

¶378 Curiously, the earlier version of the statute required the Secretary to provide a "written report" to the General Assembly "concerning whether the provisions of this part 11 conform to the requirements of federal law and national political party rules for presidential primary elections[,]" and provided that "the general assembly shall make such reasonable changes to this part 11 as are necessary to conform to federal law and national political parties' rules." § 1-4-1104(3), C.R.S. (1990). It is unclear if those reports were intended to speak to potential First Amendment concerns or some other issue, as any reports that may have been submitted to the General Assembly appear to have been lost to the sands of time (or, according to the State Archivist's Office, possibly a flood).

¶379 At bottom, this legislative history does little to illuminate what the 2016 General Assembly meant by this language in section 1-4-1201. What this history does show, however, is that the term "federal law" is most certainly

not an affirmative grant of authority to state courts to enforce Section Three in expedited proceedings under the Election Code.

C. The Term "Qualified Candidate" Does Not Support a Broad Grant of Authority to Colorado Courts

¶380 The other principal support for the district court's broad interpretation of section 1-4-1204(4) rests on the term "qualified candidate." The majority relies heavily on this language as well. Maj. op. ¶¶ 37, 62–64.

¶381 To understand the meaning of this term, it is critical to consider it in its full context. Recall, it states:

> Except as provided for in subsection (5) of this section, each political party that has a *qualified candidate* entitled to participate in the presidential primary election *pursuant to this section* is entitled to participate in the Colorado presidential primary election. At the presidential primary election, an elector that is affiliated with a political party may vote only for a candidate of that political party.

§ 1-4-1203(2)(a) (emphases added).

¶382 The district court construed this section expansively. It looked to the term "qualified candidate" as evidence of the General Assembly's intent to grant the court authority to determine if President Trump was disqualified under Section Three. The district court, like the Electors, appears to have read section 1-4-1203(2)(a) like a syllogism, such that if (1) participation in the presidential primary is limited to *qualified candidates*, and if (2) Section Three disqualifies insurrectionists, then (3) a court may appropriately consider a Section Three challenge. But that is not what the statute says. Rather, it provides:

"[E]ach political party that has a *qualified candidate* entitled to participate in the presidential primary election *pursuant to this section* is entitled to participate in the Colorado presidential primary election." *Id.* (emphases added).

¶383 Section 1-4-1203(2)(a) addresses when and how presidential primary elections are conducted. It does not prescribe additional qualifications through its use of the term "qualified candidate." *See People ex rel. Rein v. Meagher*, 2020 CO 56, ¶ 22, 465 P.3d 554, 560 ("[W]e do not add words to or subtract words from a statute."). Nor can it be read, given the fact that the term is explicitly tethered to subsection 1203, as expanding the criteria outlined in section 1-4-1204(1)(b) and (c): A candidate is eligible to be certified to the ballot by (1) being a bona fide candidate for president; (2) submitting a notarized candidate's statement of intent, and (3) paying the $500 filing fee or submitting a valid write-in petition. *See* § 1-4-1204(1)(b), (c).

¶384 It is significant, as well, that this part of the statute describes when a *political party* can participate in a presidential primary election. The consequence for a party that does not have a qualified candidate — that is, a candidate who does not meet the three-part criteria laid out in section 1-4-1204(1)(b) and (c) — is that the party cannot participate in the primary. Considered in context, then, the term "qualified candidate" does not offer support for an expansive reading of the court's authority to determine a challenge under Section Three.

¶385 The majority takes a slightly different approach. It points to section 1-4-1201's "federal law" declaration and suggests it means that the General Assembly intended part 12 to operate "in harmony" with federal law. Maj. op. ¶ 36. Then, like the district court, it gives great weight to the language in section 1-4-1203(2)(a), which it construes

to mean that participation in the presidential primary is limited to "qualified candidates." *Id.* at ¶¶ 37, 62–64. It effectively reads "pursuant to this section" out of the statute by concluding that the phrase "sheds no light on the meaning of 'qualified candidate.'" *Id.* at ¶ 37 n.3 (quoting § 1-4-1203(2)(a)). The majority then asserts that, "[a]s a practical matter, the mechanism through which a presidential primary hopeful attests that he or she is a 'qualified candidate' is the 'statement of intent' (or 'affidavit of intent') filed with the Secretary." *Id.* at ¶ 37 (quoting § 1-4-1204(1)(c)).

¶386 And, it explains, the Secretary's statement of intent for a major party presidential candidate requires the candidate to affirm via checkboxes that the candidate meets the qualifications set forth in Article II of the U.S. Constitution for the Office of President, i.e., that the candidate is at least thirty-five years old, has been a resident of the United States for at least fourteen years, and is a natural-born U.S. citizen. *Id.* at ¶ 38; U.S. Const. art. II, § 1, cl. 5; *Major Party Candidate Statement of Intent for Presidential Primary*, Colo. Sec'y of State, https://www.sos.state.co.us/pubs/elections/Candidates/files/MajorPartyCandidateStatementOfIntentForPresidentialPrimary.pdf [https://perma.cc/RY72-ASSD]. As well, the form requires the candidate to sign an affirmation that states: "I intend to run for the office stated above and *solemnly affirm that I meet all qualifications for the office prescribed by law*." *Major Party Candidate Statement of Intent for Presidential Primary*, *supra*.

¶387 The majority stitches these various parts of the Election Code together to conclude the General Assembly intended to grant state courts the authority to decide Section Three challenges. Maj. op. ¶¶ 36–38, 62. This approach falls short for five reasons.

¶388 First, there is nothing in section 1-4-1201's "federal law" declaration that indicates the General Assembly meant to refer to Section Three. Perhaps the declaration refers to the General Assembly's concern regarding a potential First Amendment right of association challenge to the open primary system created by part 12, perhaps not. The declaration's history is muddy at best.

¶389 Second, the term "qualified candidate" cannot be fairly read to grant Colorado courts authority to adjudicate Section Three disqualification claims. The term is best understood as describing when a political party can participate in the presidential primary process, not as the foundation for a wrongful act claim under section 1-4-1204(4) and section 1-1-113.

¶390 Third, even assuming the General Assembly intended to grant some authority to the courts through its reference to the candidate's statement of intent in the exceptionally roundabout manner suggested by the majority, there is no basis for concluding that authority extends beyond the fairly basic types of Article II challenges that have come before this court in the past, such as those involving a candidate's age, or other challenges like those alleging that petition circulators did not reside in Colorado.

¶391 Fourth, I am not persuaded by the majority's reliance on sections 1-4-1205 and 1-4-1101, which govern the requirements write-in candidates must satisfy before being certified to the ballot. *See* Maj. op. ¶¶ 37, 62. Like major party presidential primary candidates, write-in candidates for the presidential primary must file a "notarized . . . statement of intent" and submit to the Secretary "a nonrefundable fee of five hundred dollars . . . no later than the close of business on the sixty-seventh day before the presidential primary election." § 1-4-1205. Section 1-4-

1101(1), which applies to all write-in candidates regardless of office, requires that the write-in candidate confirm "that he or she desires the office and *is qualified to assume its duties if elected.*" (Emphasis added.) According to the majority, "[t]he Election Code's explicit requirement that a write-in candidate be 'qualified' to assume the duties of their intended office logically implies that major party candidates under 1-4-1204(1)(b) must be 'qualified' in the same manner." Maj. op. ¶ 62.

¶392 It is true that both major party candidates and write-in candidates must fill out statement of intent forms, and that the forms are similar in some respects. But, if anything, the General Assembly's decision to include a specific qualification provision for write-in candidates shows that when it wants to include an explicit qualifications requirement, like the one in section 1-4-1101(1), it knows how to do so. *See People v. Diaz*, 2015 CO 28, ¶ 15, 347 P.3d 621, 625 ("But, in interpreting a statute, we must accept the General Assembly's choice of language and not add or imply words that simply are not there." (quoting *People v. Benavidez*, 222 P.3d 391, 393–94 (Colo. App. 2009))).

¶393 Fifth and finally, there is the problem that Section Three is a disqualification for office, not a qualification to serve. As the majority acknowledges, the U.S. Supreme Court has twice declined to address whether Section Three—which is described in the text as a "disability" and is referred to as the Disqualification Clause—amounts to a qualification for office. *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969) (observing that an academic suggested in a law review article in 1968 that the three grounds for disqualification (impeachment, Section Three, and the Congressional incompatibility clause) and two other similar provisions were each no less of a

"qualification" than the Article II, Section 5 qualifications); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 n.2 (1995) (seeing "no need to resolve" the same question regarding Section Three in a case concerning the propriety of additional qualifications for office); Maj. op. ¶ 65.

¶394 Given the fact that the U.S. Supreme Court has not weighed in on whether Section Three is a qualification for office, it seems all the more important to look for some affirmative expression by the General Assembly of its intent to grant state courts the authority to consider Section Three challenges through Colorado's summary hearing and appeal process under the Election Code. I see no such expression.

IV. Conclusion

¶395 The Electors' arguments below and before this court are, to my mind, unavailing. Too much of their position rests on text like "federal law" and "qualified candidate" that — on closer examination — does not appear to mean what they say it means because it is taken out of context. In short, these sections do not show an affirmative grant by the General Assembly to state courts to decide Section Three cases through Colorado's summary election challenge process.

¶396 Because it too relied on the provisions of part 12 regarding "federal law" and "qualified candidate," the district court's reasoning suffers from the same shortcomings.

¶397 And, at the end of the day, while the majority's approach charts a new course — one not entirely presented by the parties — its approach has many of the same problems. It stitches together support from the Secretary's general authority to supervise the conduct of primary and other elections, § 1-1-107(1), C.R.S. (2023); the inference

that section 1-4-1201's "federal law" declaration means something pertinent to Section Three; part, but not all, of the "qualified candidate" statute, § 1-4-1203(2)(a); inferences from the write-in candidate process statute, § 1-4-1101(1); and the novel suggestion that the General Assembly granted authority to state courts to adjudicate a Section Three challenge by virtue of its reference to the Secretary's statement of intent form in section 1-4-1204(1)(c). *See* Maj. op. ¶¶ 35–37, 62–63.

¶398 I agree with the majority that, if the General Assembly wants to grant state courts the authority to adjudicate Section Three challenges through the Election Code, it can do so. *See* U.S. Const. art. II, § 1, cl. 2 (authorizing states to appoint presidential electors "in such Manner as the Legislature thereof may direct"); *see also Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (recognizing that it is "a state's legitimate interest in protecting the integrity and practical functioning of the political process" that "permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office"). I just think it needs to say so.

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

1. The Court adopts and incorporates all its prior rulings in this Order.

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, 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

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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.

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 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 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

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3. Intervenors ultimately did not call Congressman Nehls, but the Court did consider his previously submitted declaration.

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

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.

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); *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]

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

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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 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

(continued…)

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).

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,

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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.

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.

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.

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

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.

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.

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

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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.

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 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

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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.

Court in 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

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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.

Presidential Oath of Office, swearing to "faithfully execute the Office of President of 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 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,

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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.").

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 extremists or militia groups planned for violence on January 6, 2021, with weapons including firearms, and enough ammunition to "win a small

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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.

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.

A. 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

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.

> 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 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 oath-breakers 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 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

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.

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,

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.

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.

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

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.

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. 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 whatever reason the drafters of Section Three did not intend to include a person who

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.

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.

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.

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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.

DATED: November 17, 2023.

BY THE COURT:

Sarah B. Wallace
District Court Judge

CNN Transcript
Donald Trump, January 6
The Ellipse

The media will not show the magnitude of this crowd. Even I, when I turned on today, I looked, and I saw thousands of people here, but you don't see hundreds of thousands of people behind you because they don't want to show that. We have hundreds of thousands of people here, and I just want them to be recognized by the fake news media. Turn your cameras, please, and show what's really happening out here, because these people are not going to take it any longer. They're not going to take it any longer. Go ahead. Turn your cameras, please. Would you show?

They came from all over the world, actually, but they came from all over our country. I just really want to see what they do. I just want to see how they covered. I've never seen anything like it. But it would be really great if we could be covered fairly by the media. The media is the biggest problem we have, as far as I'm concerned, single biggest problem—the fake news and the big tech. Big tech is now coming into their own. We beat them four years ago. We surprised them. We took them by surprise and this year, they rigged an election. They rigged it like they've never rigged an election before. And by the way, last night they didn't do a bad job either, if you notice. I'm honest.

Just, again, I want to thank you. It's just a great honor to have this kind of crowd and to be before you and hundreds of thousands of American patriots who are committed to the honesty of our elections and the integrity of our glorious republic. 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.

You know, I say sometimes jokingly, but there's no joke about it, I've been in two elections. I won them both and the second one, I won much bigger than the first. OK? Almost 75 million people voted for our campaign, the most of any incumbent president by far in the history of our country, 12 million more people than four years ago. And I was told by the real pollsters, we do have real pollsters. They know that we were going to do well, and we were going to win. What I was told, if I went from 63 million, which we had four years ago, to 66 million, there was no chance of losing. Well, we didn't go to 66. We went to 75 million, and they say we lost. We didn't lose.

And by the way, does anybody believe that Joe had 80 million votes? Does anybody believe that? He had 80 million computer votes. It's a disgrace. There's never been anything like that. You could take Third World countries. Just take a look, take Third World countries. Their elections are more honest than what we've been going through in this country. It's a disgrace. It's a disgrace. Even when you look at last night, they're all running around like chickens with their heads cut off, with boxes. Nobody knows what the hell is going on. There's never been anything like this. We will not let them silence your

voices. We're not going to let it happen. Not going to let it happen.

[Crowd noise]

Thank you. And I'd love to have, if those tens of thousands of people would be allowed, the military, the Secret Service, and we want to thank you, and the police, law enforcement. Great. You're doing a great job. But I'd love it if they could be allowed to come up here with us. Is that possible? Can you just let them come up, please? And Rudy [Giuliani], you did a great job. He's got guts. You know what? He's got guts, unlike a lot of people in the Republican Party. He's got guts. He fights. He fights, and I'll tell you. Thank you very much, John [Eastman]. Fantastic job. I watched.

That's a tough act to follow, those two. John is one of the most brilliant lawyers in the country, and he looked at this and he said, "What an absolute disgrace, that this could be happening to our Constitution." And he looked at Mike Pence, and I hope Mike is going to do the right thing.

I hope so. I hope so, because if Mike Pence does the right thing, we win the election. All he has to do. All — 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. We're supposed to protect our country, support our country, support our Constitution and protect our Constitution. States want to revote. The states got defrauded. They were given false information. They voted on it. Now they want to recertify. They want it back. All Vice President Pence has to do is send it back to the states to recertify, and we become president, and you are the happiest people.

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. Many of you have traveled from all across the nation to be here, and I want to thank you for the extraordinary love. That's what it is. There's never been a movement like this ever, ever, for the extraordinary love for this amazing country and this amazing movement. Thank you.

[Crowd noise]

By the way, this goes all the way back past the Washington Monument. Do you believe this? Look at this. Unfortunately, they gave the press the prime seats. I can't stand that. No, but you look at that, behind. I wish they'd flip those cameras and look behind you. That is the most amazing sight. When they make a mistake, you get to see it on television. Amazing, amazing, all the way back. And don't worry, we will not take the name off the Washington Monument. We will not. Cancel culture. You know, they wanted to get rid of the Jefferson Memorial, either take it down or just put somebody else in there. I don't think that's going to happen. It damn well better not. Although with this administration, if this happens, it could happen. You'll see some really bad things happen.

They'll knock out Lincoln too, by the way. They've been taking his statue down. But then we signed a little law. You hurt our monuments, you hurt our heroes, you go to jail for 10 years, and everything stopped. You notice that? It stopped. It all stopped. And they could use Rudy back in New York City. Rudy, they could use you. Your city is going to hell. They want Rudy Giuliani back in New York. We'll get a little younger version of Rudy. Is that OK, Rudy?

We're gathered together in the heart of our nation's capital for one very, very basic and simple reason: to save

our democracy. Most candidates on election evening—of course this thing goes on so long, they still don't have any idea what the votes are. We still have congressional seats under review. They have no idea. They've totally lost control. They've used the pandemic as a way of defrauding the people in a proper election. But you know, you know, when you see this and when you see what's happening, number one, they all say, "Sir, we'll never let it happen again." I said, "That's good, but what about eight weeks ago?" You know, they try and get you to go. They say, "Sir, in four years, you're guaranteed." I said, "I'm not interested right now. Do me a favor, go back eight weeks. I want to go back eight weeks. Let's go back eight weeks." 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. We have great ones, Jim Jordan, and some of these guys. They're out there fighting. The House guys are fighting, but it's incredible. Many of the Republicans, I helped them get in. I helped them get elected. I helped Mitch [McConnell] get elected. I helped—I could name 24 of them, let's say. I won't bore you with it, and then all of a sudden you have something like this. It's like, "Oh, gee, maybe I'll talk to the President sometime later." No, it's amazing. The weak Republicans, they're pathetic Republicans and that's what happens. 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.

The weak Republicans, and that's it. I really believe it. I think I'm going to use the term, the weak Republicans. You got a lot of them, and you got a lot of great ones, but you got a lot of weak ones. They've turned a blind eye even as Democrats enacted policies that chipped away our jobs, weakened our military, threw open our borders and put America last. Did you see the other day where Joe Biden said, "I want to get rid of the America First policy"? What's that all about, get rid of—how do you say, "I want to get rid of America First"? Even if you're going to do it, don't talk about it, right? Unbelievable, what we have to go through, what we have to go through, and you have to get your people to fight. And if they don't fight, we have to primary the hell out of the ones that don't fight. You primary them. We're going to let you know who they are. I can already tell you, frankly.

But this year, using the pretext of the China virus and the scam of mail-in ballots, Democrats attempted the most brazen and outrageous election theft. There's never been anything like this. It's a pure theft in American history. Everybody knows it. That election, our election was over at 10 o'clock in the evening. We're leading Pennsylvania, Michigan, Georgia by hundreds of thousands of votes, and then late in the evening or early in the morning, boom, these explosions of bullshit, and all of a sudden. All of a sudden it started to happen.

Don't forget when [Mitt] Romney got beat. Romney. Did you see his—I wonder if he enjoyed his flight in last night? But when Romney got beaten, you know, he stands up like you're more typical—"Well, I'd like to congratulate the victor." The victor? Who was the victor, Mitt? "I'd like to congratulate." They don't go and look at the facts.

Now, I don't know. He got slaughtered probably, maybe it was OK. Maybe it was—that's what happened. But we look at the facts, and our election was so corrupt that in the history of this country we've never seen anything like it. You can go all the way back. You know, America is blessed with elections. All over the world, they talk about our elections. You know what the world says about us now? They say we don't have free and fair elections. And you know what else? We don't have a free and fair press.

Our media is not free. It's not fair. It suppresses thought. It suppresses speech, and it's become the enemy of the people. It's become the enemy of the people. It's the biggest problem we have in this country. No Third World countries would even attempt to do what we caught them doing, and you'll hear about that in just a few minutes. 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 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 any one you want, but I think right here. We're going 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. I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard. Today we will see whether Republicans stand strong for integrity of our elections, but whether or not they stand strong for our country, our country. Our country has been under siege for a long time, far longer than this four-year period. We've set it on a much straighter course, a much . . . I thought four more years. I thought it would be easy.

We created the greatest economy in history. We rebuilt our military. We get you the biggest tax cuts in history. Right? We got you the biggest regulation cuts. There's no president, whether it's four years, eight years, or in one case more, got anywhere near the regulation cuts. It used to take 20 years to get a highway approved. Now we're down to two. I want to get it down to one, but we're down to two. And it may get rejected for environmental or safety reasons, but we got it down the safety. We created Space Force. Look at what we did. Our military has been totally rebuilt. So we create Space Force, which by and of itself is a major achievement for an administration. And with us, it's one of so many different things.

Right to try. Everybody knows about right to try. We did things that nobody ever thought possible. We took care of our vets. Our vets, the VA now has the highest rating, 91%, the highest rating that it's had from the beginning, 91% approval rating. Always you watch the VA, when it was on television. Every night people living in a horrible, horrible manner. We got that done. We got accountability done. We got it so that now in the VA, you don't have to wait for four weeks, six weeks, eight weeks, four months to see a doctor. If you can't get a doctor, you go outside, you get the doctor, you have them taken care

of. And we pay the doctor. And we've not only made life wonderful for so many people, we've saved tremendous amounts of money, far secondarily, but we've saved a lot of money.

And now we have the right to fire bad people in the VA. We had 9,000 people that treated our veterans horribly. In prime time, they would not have treated our veterans badly. But they treated our veterans horribly. And we have what's called the VA Accountability Act. And the Accountability says if we see somebody in there that doesn't treat our vets well, or they steal, they rob, they do things badly, we say, "Joe, you're fired. Get out of here." Before, you couldn't do that. You couldn't do that before.

So we've taken care of things. We've done things like nobody's ever thought possible. And that's part of the reason that many people don't like us, because we've done too much, but we've done it quickly.

And we were going to sit home and watch a big victory. And everybody had us down for a victory. It was going to be great. And now we're out here fighting. I said to somebody, I was going to take a few days and relax after our big electoral victory. Ten o'clock, it was over. But I was going to take a few days.

And I can say this, since our election, I believe, which was a catastrophe when I watch and even these guys knew what happened, they know what happened. They're saying, "Wow, Pennsylvania's insurmountable. Wow, Wisconsin, look at the big leads we had." Even though the press said we were going to lose Wisconsin by 17 points. Even though the press said Ohio is going to be close, we set a record. Florida's going to be close—we set a record. Texas is going to be close. Texas is going to be close—we set a record. And we set a record with Hispanic, with the Black community. We set a record with everybody.

Today, we see a very important event though, because right over there, right there, we see the event going to take place. And I'm going to be watching, because history is going to be made. We're going to see whether or not we have great and courageous leaders or whether or not we have leaders that should be ashamed of themselves throughout history, throughout eternity, they'll be ashamed. 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. With only three of the seven states in question, we win the presidency of the United States.

And by the way, it's much more important today than it was 24 hours ago. Because I spoke to David Perdue, what a great person, and Kelly Loeffler, two great people, but it was a setup. And, you know, I said, "We have no back line anymore." The only back line, the only line of demarcation, the only line that we have is the veto of the President of the United States. So this is now what we're doing, a far more important election than it was two days ago.

I want to thank the more than 140 members of the House. Those are warriors. They're over there working like you've never seen before, studying, talking, actually going all the way back, studying the roots of the Constitution, because they know we have the right to send a bad vote that was illegally got. They gave these people bad things to vote for and they voted, because what did they know? And then when they found out a few weeks later—again, it took them four years to devise history. And the only unhappy person in the United States, single most unhappy, is Hillary Clinton because she said, "Why didn't you do this for me four years ago? Why didn't you do this for me four years ago? Change the votes! 10,000 in

Michigan. You could have changed the whole thing!" But she's not too happy. You notice you don't see her anymore. What happened? Where is Hillary? Where is she?

But I want to thank all of those congressmen and women. I also want to thank our 13 most courageous members of the US Senate, Sen. Ted Cruz, Sen. Ron Johnson, Sen. Josh Hawley, Kelly Loeffler. And Kelly Loeffler, I'll tell you, she's been so great. She works so hard. So let's give her and David a little special — because it was rigged against them. Let's give her and David. Kelly Loeffler, David Perdue. They fought a good race. They never had a shot. That equipment should never have been allowed to be used, and I was telling these people don't let them use this stuff. Marsha Blackburn, terrific person. Mike Braun, Indiana. Steve Daines, great guy. Bill Hagerty, John Kennedy, James Lankford, Cynthia Lummis. Tommy Tuberville, the coach. And Roger Marshall. We want to thank them, senators that stepped up, we want to thank them.

I actually think, though, it takes, again, more courage not to step up. And I think a lot of those people are going to find that out, and you better start looking at your leadership because the leadership has led you down the tubes. You know? "We don't want to give $2,000 to people. We want to give them $600." Oh, great. How does that play politically? Pretty good? And this has nothing to do with politics. But how does it play politically? China destroyed these people. We didn't destroy — China destroyed them, totally destroyed them. We want to give them $600, and they just wouldn't change. I said, "Give them $2,000. We'll pay it back. We'll pay it back fast. You already owe 26 trillion. Give them a couple of bucks. Let them live. Give them a couple of bucks!"

And some of the people here disagree with me on that. But I just say, look, you got to let people live. And how

does that play though? OK, number one, it's the right thing to do. But how does that play politically? I think it's the primary reason, one of the primary reasons, the other was just pure cheating. That was the super primary reason. But you can't do that. You got to use your head.

As you know the media has constantly asserted the outrageous lie that there was no evidence of widespread fraud. You ever see these people? "While there is no evidence of fraud"—oh, really? Well, I'm going to read you pages. I hope you don't get bored listening to it. Promise? Don't get bored listening to it, all those hundreds of thousands of people back there. Move them up, please. Yeah. All these people, don't get bored. Don't get angry at me because you're going to get bored because it's so much. The American people do not believe the corrupt fake news anymore. They have ruined their reputation.

But it used to be that they'd argue with me, I'd fight. So I'd fight, they'd fight. I'd fight, they'd fight. Boop-boop. You'd believe me, you'd believe them. Somebody comes out. You know. They had their point of view, I had my point of view. But you'd have an argument. Now what they do is they go silent. It's called suppression. And that's what happens in a communist country. That's what they do. They suppress. You don't fight with them anymore, unless it's a bad story. If they have a little bad story about me, they'll make it 10 times worse and it's a major headline. But Hunter Biden, they don't talk about him. What happened to Hunter? Where's Hunter? Where is Hunter? They don't talk about him.

Now watch, all the sets will go off. Well, they can't do that because they get good ratings. The ratings are too good. Now where is Hunter? And how come Joe was allowed to give a billion dollars of money to get rid of the prosecutor in Ukraine? How does that happen? I'd ask

you that question. How does that happen? Can you imagine if I said that? If I said that it would be a whole different ball game. And how come Hunter gets three and a half million dollars from the mayor of Moscow's wife, and gets hundreds of thousands of dollars to sit on an energy board even though he admits he has no knowledge of energy, and millions of dollars up front, and how come they go into China and they leave with billions of dollars to manage? "Have you managed money before?" "No, I haven't." "Oh, that's good. Here's about $3 billion."

No, they don't talk about that. No, we have a corrupt media. They've gone silent. They've gone dead. I now realize how good it was if you go back 10 years. I realize how good, even though I didn't necessarily love him, I realized how good, it was like a cleansing motion. Right? But we don't have that anymore. We don't have a fair media anymore. It's suppression, and you have to be very careful with that. And they've lost all credibility in this country. We will not be intimidated into accepting the hoaxes and the lies that we've been forced to believe over the past several weeks. We've amassed overwhelming evidence about a fake election. This is the presidential election. Last night was a little bit better because of the fact that we had a lot of eyes watching one specific state, but they cheated like hell anyway.

You have one of the dumbest governors in the United States. And, you know, when I endorsed him, I didn't know this guy. At the request of David Perdue. He said, "A friend of mine is running for governor." "What's his name?" And you know the rest. He was in fourth place, fifth place. I don't know. He was way—He was doing poorly. I endorsed him. He went like a rocket ship and he won. And then I had to beat Stacey Abrams with this guy, Brian Kemp. I had to beat Stacey Abrams and I had to

beat Oprah, used to be a friend of mine. I was on her last show. Her last week she picked the five outstanding people. I don't think she thinks that anymore. Once I ran for president, I didn't notice there were too many calls coming in from Oprah. Believe it or not, she used to like me, but I was one of the five outstanding people.

And I had a campaign against Michelle Obama and Barack Hussein Obama against Stacey. And I had Brian Kemp, he weighs 130 pounds. He said he played offensive line in football. I'm trying to figure that. I'm still trying to figure that out. He said that the other night, "I was an offensive lineman." I'm saying, "Really? That must've been a very small team." But I look at that and I look at what's happened, and he turned out to be a disaster. This stuff happens.

You know, look, I'm not happy with the Supreme Court. They love to rule against me. I picked three people. I fought like hell for them, one in particular I fought. They all said, "Sir, cut him loose. He's killing us." The senators, you know, very loyal senators. They're very loyal people. "Sir, cut him loose. He's killing us, sir. Cut him loose, sir." I must've gotten half of the senators. I said, "No, I can't do that. It's unfair to him. And it's unfair to the family. He didn't do anything wrong. They're made-up stories. They were all made-up stories. He didn't do anything wrong." "Cut him loose, sir." I said, "No, I won't do that." We got him through. And you know what? They couldn't give a damn. They couldn't give a damn. Let them rule the right way, but it almost seems that they're all going out of their way to hurt all of us, and to hurt our country. To hurt our country.

You know, I read a story in one of the newspapers recently, how I control the three Supreme Court justices. I control them. They're puppets. I read it about Bill Barr,

that he's my personal attorney. That he'll do anything for me. And I said, "You know, it really is genius," because what they do is that, and it makes it really impossible for them to ever give you a victory, because all of a sudden Bill Barr changed, if you hadn't noticed. I like Bill Barr, but he changed, because he didn't want to be considered my personal attorney. And the Supreme Court, they rule against me so much. You know why? Because the story is I haven't spoken to any of them, any of them, since virtually they got in. But the story is that they're my puppet. That they're puppets. And now that the only way they can get out of that, because they hate that, it's not good in the social circuit. And the only way they get out is to rule against Trump. So let's rule against Trump, and they do that. So I want to congratulate them.

But it shows you the media's genius. In fact, probably, if I was the media, I'd do it the same way. I hate to say it. But we got to get them straightened out. Today, for the sake of our democracy, for the sake of our Constitution, and for the sake of our children, we lay out the case for the entire world to hear. You want to hear it?

In every single swing state, local officials, state officials, almost all Democrats made illegal and unconstitutional changes to election procedures without the mandated approvals by the state legislatures, that these changes paved the way for fraud on a scale never seen before. And I think we'd go a long way outside of our country when I say that.

So just in a nutshell, you can't make a change on voting for a federal election unless the state legislature approves it. No judge can do it. Nobody can do it, only a legislature. So as an example in Pennsylvania or whatever, you have a Republican legislature, you have a Democrat mayor, and you have a lot of Democrats all over the place. They go to

the legislature, the legislature laughs at them. Says, "We're not going to do that." They say, "Thank you very much." And they go and make the changes themselves. They do it anyway. And that's totally illegal. That's totally illegal. You can't do that.

In Pennsylvania, the Democrat secretary of state and the Democrat state Supreme Court justices illegally abolished the signature verification requirements just 11 days prior to the election. So think of what they did. No longer is there signature verification. Oh, that's OK. We want voter ID, by the way. But no longer is there signature verification, 11 days before the election! They say, "We don't want it." You know why they don't want it? Because they want to cheat. That's the only reason. Who would even think of that? We don't want to verify a signature? There were over 205,000 more ballots counted in Pennsylvania. Now think of this. You had 205,000 more ballots than you had voters. That means you had 200—where did they come from? You know where they came from? Somebody's imagination. Whatever they needed. So in Pennsylvania you had 205,000 more votes than you had voters! And it's—the number is actually much greater than that now. That was as of a week ago. And this is a mathematical impossibility, unless you want to say it's a total fraud. So Pennsylvania was defrauded.

Over 8,000 ballots in Pennsylvania were cast by people whose names and dates of birth match individuals who died in 2020 and prior to the election. Think of that. Dead people! Lots of dead people, thousands. And some dead people actually requested an application. That bothers me even more. Not only are they voting, they want an application to vote. One of them was 29 years ago died. It's incredible.

Over 14,000 ballots were cast by out-of-state voters. So these are voters that don't live in the state. And by the way, these numbers are what they call outcome determinative. Meaning these numbers far surpass — I lost by a very little bit. These numbers are massive. Massive. More than 10,000 votes in Pennsylvania were illegally counted, even though they were received after Election Day. In other words, "They were received after Election Day, let's count them anyway!" And what they did in many cases is they did fraud. They took the date and they moved it back, so that it no longer is after Election Day. And more than 60,000 ballots in Pennsylvania were reported received back. They got back before they were ever supposedly mailed out. In other words, you got the ballot back before you mailed it! Which is also logically and logistically impossible, right? Think of that one. You got the ballot back. Let's send the ballots. Oh, they've already been sent. But we got the ballot back before they were sent. I don't think that's too good.

Twenty-five thousand ballots in Pennsylvania were requested by nursing home residents, all in a single giant batch — not legal — indicating an enormous illegal ballot-harvesting operation. You're not allowed to do it. It's against the law. The day before the election, the state of Pennsylvania reported the number of absentee ballots that had been sent out. Yet this number was suddenly and drastically increased by 400,000 people. It was increased. Nobody knows where it came from — by 400,000 ballots. One day after the election, it remains totally unexplained. They said, "Well, we can't figure that." Now that's many, many times what it would take to overthrow the state. Just that one element. 400,000 ballots appeared from nowhere, right after the election.

By the way, Pennsylvania has now seen all of this. They didn't know because it was so quick. They had a vote, they voted, but now they see all this stuff. It's all come to light. Doesn't happen that fast. And they want to recertify their votes. They want to recertify. But the only way that can happen is if Mike Pence agrees to send it back.

Mike Pence has to agree to send it back. And many people in Congress want it sent back, and think of what you're doing. Let's say you don't do it. Somebody says, "Well, we have to obey the Constitution." And you are, because you're protecting our country and you're protecting the Constitution, so you are. 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." Even though Pennsylvania and other states want to redo their votes, they want to see the numbers. They already have the numbers. Go very quickly and they want to redo their legislature because many of these votes were taken, as I said, because it wasn't approved by their legislature. That in itself is illegal and then you have the scam and that's all of the things that we're talking about. But think of this: If you don't do that, that means you will have a president of the United States for four years, with his wonderful son.

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 things. You will have an illegitimate president, that's what you'll have. And we can't let that happen. These are the facts that you won't hear from the fake news media. It's all part of the suppression effort. They don't want to talk about it. They don't want to talk about it. In fact, when I started talking about that, I guarantee you a lot of the television sets and a lot of those cameras went off and that's how a lot of cameras back there. But a lot of

them went off, but these are the things you don't hear about. You don't hear what you just heard. And I'm going to go over a few more states. But you don't hear it by the people who want to deceive you and demoralize you and control you—big tech, media.

Just like the suppression polls that said we're going to lose Wisconsin by 17 points. Well, we won Wisconsin. They don't have it that way because they lose just by a little sliver. But they had me down the day before. Washington Post/ABC poll: down 17 points. I called up a real pollster. I said, "What is that?" "Sir, that's called a suppression poll. I think you're going to win Wisconsin, sir." I said, "But why do they make it 4 or 5 points?" "Because then people vote. But when you're down 17, they say, 'Hey, I'm not going to waste my time. I love the President, but there's no way.'" Despite that, despite that, we won Wisconsin. We're going to see. We're going to see. But that's called suppression because a lot of people, when they see that, it's very interesting. This pollster said, "Sir, if you're down 3, 4 or 5, people vote. When you go down 17, they say, 'Let's save, let's go and have dinner, and let's watch the presidential defeat tonight on television darling.'"

And just like the radical left tries to blacklist you on social media, every time I put out a tweet, even if it's totally correct, totally correct, I get a flag. I get a flag. And they also don't let you get out. On Twitter, it's very hard to come onto my account. It's very hard to get out a message. They don't let the message get out nearly like they should, but I've had many people say, "I can't get on your Twitter." I don't care about Twitter. Twitter is bad news. They're all bad news. But you know what? If you want to get out of message, and if you want to go through big tech, social media, they are really, if you're a conservative, if

you're a Republican, if you have a big voice, I guess they call it shadow ban, right? Shadow ban. They shadow ban you, and it should be illegal. I've been telling these Republicans get rid of Section 230.

And for some reason, Mitch and the group, they don't want to put it in there. And they don't realize that that's going to be the end of the Republican Party as we know it, but it's never going to be the end of us, never. Let them get out. Let the weak ones get out. This is a time for strength. They also want to indoctrinate your children in school by teaching them things that aren't so. They want to indoctrinate your children. It's all part of the comprehensive assault on our democracy and the American people to finally standing up and saying no. This crowd is, again, a testament to it. I did no advertising. I did nothing. You do have some groups that are big supporters. I want to thank that—Amy [Kremer] and everybody. We have some incredible supporters, incredible, but we didn't do anything. This just happened.

Two months ago, we had a massive crowd come down to Washington. I said, "What are they there for?" "Sir, they're there for you." We have nothing to do with it. These groups, they're forming all over the United States. And we got to remember, in a year from now, you're going to start working on Congress. And we got to get rid of the weak congresspeople, the ones that aren't any good, the Liz Cheneys of the world, we got to get rid of them. We got to get rid—you know, she never wants a soldier brought home. I've brought a lot of our soldiers home. I don't know, some like it. They're in countries that nobody even knows the name. Nobody knows where they are. They're dying. They're great, but they're dying. They're losing their arms, their legs, their face. I brought them back home, largely back home, Afghanistan, Iraq.

Remember I used to say in the old days, "Don't go into Iraq. But if you go in, keep the oil." We didn't keep the oil. So stupid. So stupid, these people. And Iraq has billions and billions of dollars now in the bank. And what did we do? We get nothing. We never get. But we do actually, we kept the oil here. We did good. We got rid of the ISIS caliphate. We got rid of plenty of different things that everybody knows and the rebuilding of our military in three years, people said it couldn't be done. And it was all made in the USA, all made in the USA. Best equipment in the world. In Wisconsin, corrupt Democrat run cities deployed more than 500 illegal unmanned, unsecured drop boxes, which collected a minimum of 91,000 unlawful votes. It was razor thin, the loss. This one thing alone is much more than we would need, but there are many things.

They have these lockboxes and they pick them up and they disappear for two days. People would say, "Where's that box?" They disappeared. Nobody even knew where the hell it was. In addition, over 170,000 absentee votes were counted in Wisconsin without a valid absentee ballot application. So they had a vote, but they had no application. And that's illegal in Wisconsin. Meaning those votes were blatantly done in opposition to state law. And they came 100% from Democrat areas, such as Milwaukee and Madison, 100%. In Madison, 17,000 votes were deposited in so-called human drop boxes. You know what that is, right? Where operatives stuff thousands of unsecured ballots into duffel bags on park benches across the city in complete defiance of cease and desist letters from state legislatures. Your state legislature said, "Don't do it." They're the only ones that could approve it. They gave tens of thousands of votes.

They came in, in duffel bags. Where the hell did they come from? According to eyewitness testimony, postal service workers in Wisconsin were also instructed to illegally backdate approximately 100,000 ballots. The margin of difference in Wisconsin was less than 20,000 votes. Each one of these things alone wins us the state. Great state, we love the state, we won the state. In Georgia, your secretary of state, who—I can't believe this guy's a Republican. He loves recording telephone conversations. I thought it was a great conversation personally, so did a lot of other—people love that conversation, because it says what's going on. These people are crooked. They're 100%, in my opinion, one of the most corrupt between your governor and your secretary of state. And now you have it again last night, just take a look at what happened, what a mess. And the Democrat party operatives entered into an illegal and unconstitutional settlement agreement that drastically weakened signature verification and other election security procedures.

Stacey Abrams, she took them to lunch. And I beat her two years ago with a bad candidate, Brian Kemp. But they took—the Democrats took the Republicans to lunch because the secretary of state had no clue what the hell was happening, unless he did have a clue. That's interesting. Maybe he was with the other side, but we've been trying to get verifications of signatures in Fulton County. They won't let us do it. The only reason they won't is because we'll find things in the hundreds of thousands. Why wouldn't they let us verify signatures in Fulton County, which is known for being very corrupt? They won't do it. They go to some other county where you would live. I said, "That's not the problem. The problem is Fulton County." Home of Stacey Abrams. She did a good job. I congratu-

late her, but it was done in such a way that we can't let this stuff happen.

We won't have a country if it happens. As a result, Georgia's absentee ballot rejection rate was more than 10 times lower than previous levels, because the criteria was so off. Forty-eight counties in Georgia with thousands and thousands of votes rejected zero ballots. There wasn't one ballot. In other words, in a year in which more mail-in ballots were sent than ever before, and more people were voting by mail for the first time, the rejection rate was drastically lower than it had ever been before. The only way this can be explained is if tens of thousands of illegitimate votes were added to the tally. That's the only way you could explain it. By the way, you're talking about tens of thousands. If Georgia had merely rejected the same number of unlawful ballots, as in other years, there should have been approximately 45,000 ballots rejected—far more than what we needed to win, just over 11,000.

They should find those votes. They should absolutely find that. Just over 11,000 votes, that's all we need. They defrauded us out of a win in Georgia, and we're not going to forget it. There's only one reason the Democrats could possibly want to eliminate signature matching, oppose voter ID and stop citizenship confirmation. Are you a citizenship? (sic) You're not allowed to ask that question. Because they want to steal the election. 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. In Fulton County, Republican poll watchers were ejected, in some

cases physically, from the room under the false pretense of a pipe burst.

Water main burst, everybody leave. Which we now know was a total lie. Then election officials pulled boxes — Democrats — and suitcases of ballots out from under a table. You all saw it on television. Totally fraudulent. And illegally scanned them for nearly two hours totally unsupervised. Tens of thousands of votes, as that coincided with a mysterious vote dump of up to 100,000 votes for Joe Biden, almost none for Trump. Oh, that sounds fair. That was at 1:34 a.m. The Georgia secretary of state and pathetic governor of Georgia — although he says, I'm a great president. You know, I sort of maybe have to — He said the other day, "Yes, I disagree with (the) president but he's been a great president." OK. Thank you very much. Because of him and others — Brian Kemp, vote him the hell out of office, please.

Well, his rates are so low, his approval rating now, I think it just reached a record low. They've rejected five separate appeals for an independent and comprehensive audit of signatures in Fulton County. Even without an audit, the number of fraudulent ballots that we've identified across the state is staggering. Over 10,300 ballots in Georgia were cast by individuals whose names and dates of birth match Georgia residents who died in 2020 and prior to the election. More than 2,500 ballots were cast by individuals whose names and dates of birth match incarcerated felons in Georgia prison. People who are not allowed to vote. More than 4,500 illegal ballots were cast by individuals who do not appear on the state's own voter rolls. Over 18,000 illegal ballots were cast by individuals who registered to vote using an address listed as vacant, according to the Postal Service. At least 88,000 ballots in

Georgia were cast by people whose registrations were illegally backdated.

Sixty-six thousand votes—each one of these is far more than we need. Sixty-six thousand votes in Georgia were cast by individuals under the legal voting age. And at least 15,000 ballots were cast by individuals who moved out of the state prior to (the) November 3 election. They say they moved right back. They move right back. Oh, they moved out. They moved right back. OK. They miss Georgia that much. I do. I love Georgia, but it's a corrupt system. Despite all of this, the margin in Georgia is only 11,779 votes. Each and every one of these issues is enough to give us a victory in Georgia, a big, beautiful victory. Make no mistake, this election stolen from you, from me and from the country. And not a single swing state has conducted a comprehensive audit to remove the illegal ballots. This should absolutely occur in every single contested state before the election is certified.

In the state of Arizona, over 36,000 ballots were illegally cast by non-citizens. Two-thousand ballots were returned with no address. More than 22,000 ballots were returned before they were ever supposedly mailed out. They returned, but we haven't mailed them yet. Eleven thousand six hundred more ballots and votes were counted more than there were actual voters. You see that? So you have more votes, again, than you have voters.

One hundred fifty thousand people registered in (Maricopa) County after the registration deadline. One hundred three thousand ballots in the county were sent for electronic adjudication with no Republican observers. In Clark County, Nevada, the accuracy settings on signature verification machines were purposely lowered before they were used to count over 130,000 ballots. If you signed your name as Santa Claus, it would go through. There were

also more than 42,000 double votes in Nevada. Over 150,000 people were hurt so badly by what took place. And 1,500 ballots were cast by individuals whose names and dates of birth match Nevada residents who died in 2020, prior to (the) November 3 election. More than 8,000 votes were cast by individuals who had no address and probably didn't live there. The margin in Nevada is down at a very low number. Any of these things would have taken care of the situation.

We would have won Nevada, also. Every one of these we're going over, we win. In Michigan quickly, the secretary of state, a real great one, flooded the state with unsolicited mail-in ballot applications, sent to every person on the rolls, in direct violation of state law. More than 17,000 Michigan ballots were cast by individuals whose names and dates of birth matched people who were deceased. In Wayne County—that's a great one, that's Detroit—174,000 ballots were counted without being tied to an actual registered voter. Nobody knows where they came from. Also in Wayne County, poll watchers observed canvassers re-scanning batches of ballots over and over again, up to three or four or five times. In Detroit, turnout was 139% of registered voters. Think of that. So you had 139% of the people in Detroit voting. This is in Michigan—Detroit, Michigan.

A career employee of the Detroit, City of Detroit, testified under penalty of perjury that she witnessed city workers coaching voters to vote straight Democrat, while accompanying them to watch who they voted for. When a Republican came in, they wouldn't talk to him. The same worker was instructed not to ask for any voter ID and not to attempt to validate any signatures if they were Democrats. She (was) also told to illegally and was told, backdate ballots received after the deadline and reports that

thousands and thousands of ballots were improperly backdated. That's Michigan. Four witnesses have testified under penalty of perjury that after officials in Detroit announced the last votes had been counted, tens of thousands of additional ballots arrived without required envelopes. Every single one was for a Democrat. I got no votes.

At 6:31 a.m., in the early morning hours after voting had ended, Michigan suddenly reported 147,000 votes. An astounding 94% went to Joe Biden, who campaigned brilliantly from his basement. Only a couple of percentage points went to Trump. Such gigantic and one-sided vote dumps were only observed in a few swing states and they were observed in the states where it was necessary. You know what's interesting, President Obama beat Biden in every state other than the swing states where Biden killed him. But the swing States were the ones that mattered. There were always just enough to push Joe Biden barely into the lead. We were ahead by a lot and within the number of hours we were losing by a little.

In addition, there is the highly troubling matter of Dominion Voting Systems. In one Michigan county alone, 6,000 votes were switched from Trump to Biden and the same systems are used in the majority of states in our country. Sen. William Ligon, a great gentleman, chairman of Georgia Senate Judiciary Subcommittee, Senator Ligon, highly respected on elections has written a letter describing his concerns with Dominion in Georgia.

He wrote, and I quote, "The Dominion voting machines employed in Fulton County had an astronomical and astounding 93.67% error rate." It's only wrong 93% of the time. "In the scanning of ballots requiring a review panel to adjudicate or determine the voter's interest, in over 106,000 ballots out of a total of 113,000." Think of it, you go in and you vote and then they tell people who

you're supposed to be voting for. They make up whatever they want. Nobody's ever even heard. They adjudicate your vote. They say, "Well, we don't think Trump wants to vote for Trump. We think he wants to vote for Biden. Put it down for Biden." The national average for such an error rate is far less than 1% and yet you're at 93%. "The source of this astronomical error rate must be identified to determine if these machines were set up or destroyed to allow for a third party to disregard the actual ballot cast by the registered voter."

The letter continues, "There is clear evidence that tens of thousands of votes were switched from President Trump to former Vice President Biden in several counties in Georgia. For example, in Bibb County, President Trump was reported to have 29,391 votes at 9:11 PM eastern time. While simultaneously Vice President Joe Biden was reported to have 17,213. Minutes later, just minutes, at the next update, these vote numbers switched with President Trump going way down to 17,000 and Biden going way up to 29,391." And that was very quick, a 12,000 vote switch, all in Mr. Biden's favor.

So, I mean, I could go on and on about this fraud that took place in every state and all of these legislatures want this back. I don't want to do it to you because I love you and it's freezing out here, but I could just go on forever. I can tell you this.

So when you hear, when you hear, "While there is no evidence to prove any wrongdoing," this is the most fraudulent thing anybody's — This is a criminal enterprise. This is a criminal enterprise and the press will say, and I'm sure they won't put any of that on there because that's no good, do you ever see, "While there is no evidence to back President Trump's assertion," I could go on for another hour reading this stuff to you and telling you about it.

There's never been anything like it. Think about it, Detroit had more votes than it had voters. Pennsylvania had 205,000 more votes than it had more—but you don't have to go any—Between that, I think that's almost better than dead people, if you think, right? More votes than they had voters, and many other States are also.

It's a disgrace that the United States of America, tens of millions of people are allowed to go vote without so much as even showing identification. In no state is there any question or effort made to verify the identity, citizenship, residency, or eligibility of the votes cast. 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. It is also widely understood that the voter rolls are crammed full of non-citizens, felons and people who have moved out of state and individuals who are otherwise ineligible to vote. Yet Democrats oppose every effort to clean up their voter rolls. They don't want to clean them up. They are loaded. And how many people here know other people that when the hundreds of thousands and then millions of ballots got sent out, got three, four, five, six, and I heard one who got seven ballots. And then they say, "You didn't quite make it, sir." We won. We won in a landslide. This was a landslide.

They said, "It's not American to challenge the election." This is the most corrupt election in the history, maybe of the world. You know, you could go (to) 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. So today, in addition to challenging the certification of the election, I'm calling on Congress and the state legislatures to quickly pass sweeping election reforms, and you better do it before we have no country left. Today is not the end. It's just the beginning.

With your help over the last four years, we built the greatest political movement in the history of our country and nobody even challenges that. I say that over and over, and I never get challenged by the fake news, and they challenge almost everything we say. But our fight against the big donors, big media, big tech and others is just getting started. This is the greatest in history. There's never been a movement like that. You look back there all the way to the Washington Monument. It's hard to believe. We must stop the steal and then we must ensure that such outrageous election fraud never happens again, can never be allowed to happen again, but we're going forward. We'll take care of going forward. We got to take care of going back. Don't let them talk, "OK, well we promise," I've had a lot of people, "Sir, you're at 96% for four years." I said, "I'm not interested right now. I'm interested in right there."

With your help we will finally pass powerful requirements for voter ID. You need an ID to cash your check.

You need an ID to go to a bank, to buy alcohol, to drive a car. Every person should need to show an ID in order to cast your most important thing, a vote. We will also require proof of American citizenship in order to vote in American elections. We just had a good victory in court on that one, actually. We will ban ballot harvesting and prohibit the use of unsecured drop boxes to commit rampant fraud. These drop boxes are fraudulent. There for, they get—they disappear and then all of a sudden they show up. It's fraudulent. We will stop the practice of universal, unsolicited mail-in balloting. We will clean up the voter rolls that ensure that every single person who cast a vote is a citizen of our country, a resident of the state in which they vote and their vote is cast in a lawful and honest manner. We will restore the vital civic tradition of in-person voting on Election Day so that voters can be fully informed when they make their choice. We will finally hold big tech accountable and if these people had courage and guts, they would get rid of Section 230, something that no other company, no other person in America, in the world, has.

All of these tech monopolies are going to abuse their power and interfere in our elections and it has to be stopped and the Republicans have to get a lot tougher and so should the Democrats. They should be regulated, investigated and brought to justice under the fullest extent of the law. They're totally breaking the law. Together we will drain the Washington swamp and we will clean up the corruption in our nation's capital. We have done a big job on it, but you think it's easy, it's a dirty business. It's a dirty business. You have a lot of bad people out there. Despite everything we've been through, looking out all over this country and seeing fantastic crowds, although this I

think is our all-time record. I think you have 250,000 people. Two hundred fifty thousand!

Looking out at all the amazing patriots here today, I have never been more confident in our nation's future. Well, I have to say we have to be a little bit careful. That's a nice statement, but we have to be a little careful with that statement. If we allow this group of people to illegally take over our country, because it's illegal when the votes are illegal, when the way they got there is illegal, when the States that vote are given false and fraudulent information. We are the greatest country on Earth and we are headed, and were headed, in the right direction. You know, the wall is built. We're doing record numbers at the wall. Now they want to take down the wall. Let's let everyone flow in. Let's let everybody flow in.

We did a great job in the wall. Remember the wall? They said it could never be done. One of the largest infrastructure projects we've ever had in this country and it's had a tremendous impact and we got rid of catch and release, we got rid of all of the stuff that we had to live with. But now the caravans, they think Biden's getting in, the caravans are forming again. They want to come in again and rip off our country. Can't let it happen. As this enormous crowd shows, we have truth and justice on our side. We have a deep and enduring love for America in our hearts. We love our country. We have overwhelming pride in this great country, and we have it deep in our souls. Together we are determined to defend and preserve government of the people, by the people and for the people.

Our brightest days are before us. Our greatest achievements still wait. I think one of our great achievements will be election security because nobody until I came along, had any idea how corrupt our elections were. And again, most people would stand there at 9:00 in the

evening and say, "I want to thank you very much," and they go off to some other life, but I said, "Something's wrong here. Something's really wrong. Can't have happened." And we fight. We fight like hell and if you don't fight like hell, you're not going to have a country anymore.

Our exciting adventures and boldest endeavors have not yet begun. My fellow Americans, for our movement, for our children and for our beloved country, and I say this, despite all that's happened, the best is yet to come.

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

So let's walk down Pennsylvania Avenue. I want to thank you all. God bless you and God bless America. Thank you all for being here. This is incredible. Thank you very much. Thank you.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 3 provides:

> 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. XX, § 3 provides:

> If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly

until a President or Vice President shall have qualified.

Colo. Rev. Stat. § 1-1-113 provides:

> **1-1-113. Neglect of duty and wrongful acts—procedures for adjudication of controversies—review by supreme court.**
>
> (1) 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.
>
> (2) Repealed.
>
> (3) The proceedings may be reviewed and finally adjudicated by the supreme court of this state, if either party makes application to the supreme court within three days after the district court proceedings are terminated, unless the supreme court, in its discretion, declines jurisdic-

tion of the case. If the supreme court declines to review the proceedings, the decision of the district court shall be final and not subject to further appellate review.

(4) Except as otherwise provided in this part 1, the procedure specified in this section shall be the exclusive method for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of an election.

(5) Notwithstanding any other provision of law, the procedures specified in section 1-1.5-105 shall constitute the exclusive administrative remedy for a complaint arising under Title III of the federal "Help America Vote Act of 2002", Pub. L. 107-252.

Colo. Rev. Stat. § 1-4-1203 provides:

1-4-1203. Presidential primary elections — when — conduct.

(1) A presidential primary election shall be held on a Tuesday on a date designated by the governor. The date selected for the primary must be no earlier than the date the national rules of the major political parties provide for state delegations to the party's national convention to be allocated without penalty and not later than the third Tuesday in March in years in which a United States Presidential Election will be held. The governor shall, in consultation with the secretary of state, designate the date of the presidential primary election no later than the first

day of September in the year before the presidential primary election will be held.

(2) (a) Except as provided for in subsection (5) of this section, each political party that has a qualified candidate entitled to participate in the presidential primary election pursuant to this section is entitled to participate in the Colorado presidential primary election. At the presidential primary election, an elector that is affiliated with a political party may vote only for a candidate of that political party.

(b) An unaffiliated eligible elector may vote in a political party's presidential primary election without affiliating with that party or may declare an affiliation with a political party to the election judges at the presidential primary election in accordance with section 1-7-201. Notwithstanding any other provision of law, no elector affiliated with a major or minor political party or political organization may change or withdraw his or her affiliation in order to vote in the presidential primary election of another political party unless the elector has changed or withdrawn such affiliation no later than the twenty-ninth day preceding the presidential primary election as provided in section 1-2-219 (1).

(3) Except as otherwise provided in this part 12, a presidential primary election must be conducted in the same manner as any other primary election to the extent statutory provisions governing other primary elections are

applicable to this part 12. The election officers and county clerk and recorders have 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.

(4) (a) A ballot used in a presidential primary election must only contain the names of candidates for the office of the president of the United States of America. The ballot shall not be used for the purpose of presenting any other issue or question to the electorate unless expressly authorized by law.

(b) Each political party that is entitled to participate in the presidential primary election shall have a separate party ballot for use by electors affiliated with that political party.

(c) The county clerk and recorder shall send to all active electors in the county who have not declared an affiliation or provided a ballot preference with a political party a ballot packet that contains the ballots of all the major political parties. In this ballot packet, the clerk shall also provide written instructions advising the elector of the manner in which the elector will be in compliance with the requirements of this code in selecting and casting the ballot of a major political party. An elector may cast the ballot of only one major political party. After selecting and casting a ballot of a single major political party, the elector shall return the ballot

to the clerk. If an elector casts and returns to the clerk the ballot of more than one major political party, all such ballots returned will be rejected and will not be counted.

(d) The secretary of state may by rule adopt additional ballot requirements necessary to avoid voter confusion in voting in presidential primary elections.

(5) If, at the close of business on the sixtieth day before a presidential primary election, there is not more than one candidate for president affiliated with a political party certified to the presidential primary ballot pursuant to section 1-4-1204(1) or who has filed a write-in candidate statement of intent pursuant to 1-4-1205, the secretary of state may cancel the presidential primary election for that political party and declare that candidate the winner of the presidential primary election of such political party.

(6) The secretary of state may by rule adopt additional ballot requirements necessary to avoid voter confusion in voting in presidential primary elections.

(7) Repealed.

Colo. Rev. Stat. § 1-4-1204 provides:

1-4-1204. Names on ballots.

(1) Not 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. The only candidates

whose names shall be placed on ballots for the election shall be those candidates who:

(a) Are eligible to receive payments pursuant to the federal "Presidential Primary Matching Payment Account Act", 26 U.S.C. sec. 9031 et seq., or any successor section of federal law, at the time candidates' names are to be certified by the secretary of state pursuant to this subsection (1);

(b) Are 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 are 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; and

(c) Have submitted to the secretary, not later than eighty-five days before the date of the presidential primary election, a notarized candidate's statement of intent together with either a nonrefundable filing fee of five hundred dollars or a petition signed by at least five thousand eligible electors affiliated with the candidate's political party who reside in the state. Candidate petitions must meet the requirements of parts 8 and 9 of this article 4, as applicable.

(2) The names of candidates appearing on any presidential primary ballot must be in an order determined by lot. The secretary of state shall determine the method of drawing lots.

(3) Except as otherwise prohibited by political party rules, the state chairperson of a political party may request the secretary to provide a place on the primary ballot for electors who have no presidential candidate preference to register a vote to send a noncommitted delegate to the political party's national convention. To be valid, this request must be received by the secretary of state no later than seventy days before the presidential primary election.

(4) Any challenge to the listing of any candidate on the presidential primary election ballot must be made in writing and filed with the district court in accordance with section 1-1-113 (1) no later than five days after the filing deadline for candidates. Any such challenge must provide notice in a summary manner of an alleged impropriety that gives rise to the complaint. No later than five days after the challenge is filed, a hearing must be held at which time the district court shall hear the challenge and assess the validity of all alleged improprieties. The district court shall issue findings of fact and conclusions of law no later than forty-eight hours after the hearing. The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence. Any order entered by the district court may be reviewed in accordance with section 1-1-113 (3).