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Original Proceeding Trial court, City and County of Denver, Colorado, Case No. 2023CV32577	▲COURT USE ONLY▲
In Re: **Cross-Applicants-Appellees/Cross-Appellants:** **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, v. **Intervenor-Appellee:** **COLORADO REPUBLICAN STATE CENTRAL COMMITTEE,** an unincorporated association, **Intervenor-Appellant/Cross-Appellee:** and **DONALD J. TRUMP.**	Supreme Court Case Number: 2023SA00300
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OPENING-ANSWER BRIEF

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s/ Scott E. Gessler
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QUESTIONS PRESENTED

1. Should the court's opinion be vacated because constitutional claims may not be litigated in a Section 113 proceeding?

2. Can a court determine candidate qualifications under C.R.S. § 1-4-204, even when the Election Code does not provide the authority to order that relief?

3. May a state trial court adjudicate Section Three disqualification, absent a Congressional authorizing statute?

4. Does Presidential disqualification under U.S. Const. amend XIV, § 3 present a nonjusticiable political question?

5. Should the court's conclusions that President Trump "engaged" in an "insurrection" be vacated as prejudicial *dicta*?

6. Was the trial court correct to define "engaged in" to include "incite"?

7. Did the trial court depart from First Amendment standards when it held President Trump's words incited violence even though their object meaning did not advocate violence?

8. Did the trial court err when it defined insurrection as "(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?"

9. Was the January 6th Report rendered inadmissible by the Committee's bias and highly unusual procedures and structure, and the report's extensive use of multi-level hearsay?

STATEMENT OF THE CASE

I. Introduction.

This case is about whether Colorado Republicans and unaffiliated voters will be denied their right to vote for President Trump. Cross-Applicants argue that he is barred from Colorado's ballot, because he "engaged" in an "insurrection" under U.S. Const. amend. XIV, § 3, ("Section Three"), advancing legal theories never accepted by any court. Their evidence is a highly biased and untrustworthy Congressional committee, two police officers, and an expert who failed to follow his research methodology here and who explicitly conceded he did not know President Trump's intentions.

Candidate access to the ballot affects not only the constitutional rights of candidates, but also the "right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political

persuasion, to cast their votes effectively. Both of these rights rank among our most precious freedoms."[1]

II. Nature of the Case and Proceedings Below.

Cross-Applicants filed this action under C.R.S. § 1-1-113 and Section Three. President Trump repeatedly moved to dismiss the matter (all of which were denied or deferred) while simultaneously preparing his defense. After a five-day hearing, the trial court ordered President Trump to appear on the ballot, but nonetheless improperly ruled that it had jurisdiction and stated in *dicta* that President Trump "engaged" in an "insurrection."

III. Statement of Facts.

The central facts in this case are straightforward. First, President Trump gave a series of speeches, both before and on January 6th, none of which called for violence or "insurrection." Second, President Trump specifically sought to authorize the National Guard to prevent violence. Third, violence broke out at the Capitol, both before and after President Trump finished his speech at the Ellipse. Fourth, only some of the people at the Capitol engaged in violence. Fifth, different people at the

[1] *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983).

Capitol had different motives. And finally, none of the rioters at the Capitol used deadly force.

SUMMARY OF THE ARGUMENT

The framers excluded the office of President from Section Three purposefully. Section Three does not apply, because the presidency is not an office "under the United States," the president is not an "officer of the United States," and President Trump did not take an oath "to support the Constitution of the United States."

The trial court lacked jurisdiction to hear this constitutional claim under Section 113.

The court's factual findings should be struck because it lacked jurisdiction, and its findings about engagement and insurrection are highly prejudicial *dicta*.

The court lacked jurisdiction because Section Three is not self-executing and Congress has not passed an enabling statute authorizing state courts to address it. Section Three raises non-judiciable political questions, and states cannot create and enforce the additional qualification for a candidate to seek office.

President Trump did not engage in an insurrection: "engaged" does not include "incite," he did not have the "specific intent" to cause the riot and launch an attack on the Capitol, and his speech was protected by the First Amendment. Further, the events of January 6th were not an insurrection.

The Court erred by admitting the January 6th Committee Report.

ARGUMENT

I. The framers excluded the offices of President and Vice-President from Section Three.

This section responds to Cross-Applicants.

A. The President and Vice-President are not "officers … under the United States."

The Constitution creates five positions: President, Vice-President, Senator, Representative, and Presidential Elector; but the plain text of Section Three excludes the President and Vice-President. This omission is controlling. "The expression of one thing implies the exclusion of others."[2]

Next, Section Three uses the disjunctive "or" to create two distinct, separate prohibitions; one may not "be" a Senator, Representative or Elector. *Or* one may not "hold" any office "under the United States, or a State." The first category identifies specific Constitutional positions. The second refers to offices one "holds." "[N]othing is to be added to what the text states or reasonably implies."[3] The exclusion of the President from the first category cannot imply the opposite—that the most important

[2] Bryan A. Garner & Antonin Scalia, Reading Law, 96-98 (West, 2012).

[3] Reading Law at 87-91.

elected, Constitutional position is implicitly (and silently) included in a generalized, catch-all.

Section Three also lists disqualified positions in descending order from the weightiest Constitutional position (Senator) to the lowest (state officers). It is wholly illogical to exclude the most important Constitutional offices in the enumerated list while including them in a general catch-all focused on less important offices.

Legislative history demonstrates that drafters rejected inclusion of the Presidency. Courts properly infer legislative intent by comparing committee drafts to the final language.[4] The first draft began: "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."[5] Congress consciously removed the office of the President from this list, substituting instead presidential Electors.

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[4] *See Nixon v. United States*, 506 U.S. 224, 231-232 (1993) (rejecting second to last draft and relying on the plain textual language); *Lee v. Weisman*, 505 U.S. 577, 613 (1992) (Souter, J., concurring)(looking to sequence of amendments); *Utah v. Evans*, 536 U.S. 452, 474 (2002) (reviewing previous drafts); *District of Columbia v. Heller*, 554 U.S. 570, 604 (2008) (analysis of precursors to amendment); *Id.* at 590n. 12 (Stevens, J. dissenting)(relying on previous draft); *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2180-2181 (2023) (analyzing Thaddeus Stevens' introduced version of the Fourteenth Amendment); *Evenwel v. Abbott*, 578 U.S. 54, 66 (2016) (same).

[5] Cong. Globe 39th Cong., 1stSess. 919 (1866) (emphasis supplied).

Any other inference is speculation. The phrase "any office now held under appointment from the President of the United States, requiring the confirmation of the Senate" was broadened to explicitly include lesser federal offices not subject to Senate consent, and state offices. The counterintuitive inference that the catch-all simultaneously included the higher office of President cannot overcome the decision to remove explicit language identifying the President.

Cross-Applicant's counterarguments fail. They first cite a three-sentence exchange between two Senators. This hardly establishes "clear intent," and courts are loath to rely on isolated statements to infer the intent of an entire Congress.[6] And the exchange refutes Cross-Applicants' argument; Senator Johnson, one of the preeminent constitutional lawyers in Congress,[7] read Section Three to exclude the President. His conciliatory and collegial response does not negate his correct assessment that Section Three excluded the President.

[6] *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982); *Garcia v. United States*, 469 U.S. 70, 78 (1984).

[7] *E.g.,* Phillip Shaw Paludan, A PEOPLE'S CONTEST: THE UNION & CIVIL WAR 1861-1865, at 29 (1996).

Second, Section Three does not track the original Constitution. Senator and Representative are considered officers, both as a matter of binding precedent,[8] as referenced by the Constitution,[9] and as the term is commonly used.[10] And sequentially there is no match; Article I contains the only reference to Chief Justice, and Article II, § 1 first establishes the President and Vice-President, and then Electors.

Third, use of "officer under the United States" in Article I refers to appointed federal offices, not the presidency. That clause prohibits a person from first being elected Senator or Representative and then subsequently being appointed federal office at the same time, or likewise holding an office and subsequently becoming a Senator or Representative. Thus, "holding any office under the United States" parallels "being appointed to any civil Office under the Authority of the United

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[8] *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 804-805 n.17 (1995) ("Constitution treats both the President and Members of Congress as federal officers").

[9] Art. I, §2, cl.5 ("[t]he House of Representatives shall chuse their Speaker and other Officers"); Art. I, §3, cl.5 ("[t]he Senate shall chuse their other Officers, and also a President pro tempore").

[10] *Roudebush v. Hartke*, 405 U.S. 15, 28 (1972) (Senators take an "oath of office"); *Powell v. McCormack*, 395 U.S. 486, 570 (1969) (Stewart, J. dissenting)(Representatives take an "oath of office"); *McGrain v Daugherty*, 273 U.S. 135, 156 (1927) (congressional members protected by "oath of office"); *Shaffer v. Jordan*, 213 F.2d 393, 394 (9th Cir. 1954) ("office of Representative in Congress").

States" and properly refers to an office, not an elected President or Vice-President. And the Framers never considered that a person might hold two federal offices simultaneously.

Fourth, Cross-Applicants wrongly rely on two newspapers from the ratification debates. The first did not even refer to the final version of Section Three; it lamented that the proposed amendment would not bar southern leaders from *any* federal office, not just the presidency.[11] The second stands as a single sentence in a Milwaukee newspaper claiming that Section Three would disqualify Jefferson Davis from the presidency. This one sentence cannot demonstrate electoral knowledge or intent. These articles as close to nothing as one can get.

Fifth, Cross-Applicants cite the Amnesty Act debates—which are the wrong debates. But even so, the cite just one primary historical source—one sentence from the Pulaski Citizen, which did not even discuss the Amnesty Act but rather considered a different bill. Again, thin evidence. And Professor Magliocca's testimony is properly disregarded as "opinion of the applicable law or legal standard [that] usurp[s]the

[11] Gallipolis Journal, February 21, 1867.

function of the court."[12] It is this Court's job to interpret legal terms and evaluate legislative history, not rely on legal conclusions from others.

Finally, Cross-Appellants argue "absurdity."

> "[T]o justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense. And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail."[13]

Absurdity is a high hurdle whereby no reasonable person can intend the outcome, and the absurdity must stem from an obvious technical or ministerial error.[14] Section Three responded to the Civil War. Purposeful removal of the Presidency was not error, but entirely rational. The framers had little concern that a former confederate could become President, based on the restrictions on Presidential Electors, the large Northern population base, and the expected voting strength of emancipated slaves. History proves their views correct, not absurd.

B. The President is not an "officer of the United States," and President Trump did not take an oath to "support the Constitution of the United States."

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[12] *Lawrence v. People*, 2021 CO 28, 40.

[13] *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

[14] Reading Law at 191.

First, Section Three's plain language again includes Senators and Representatives but excludes the President and Vice-President.

Second, the catch-all phrase "officer of the United States" excludes the President. To be sure, the President is an officer. But not an "officer of the United States." Word limits preclude discussion of many cited authorities. But briefly put, despite the many words and citations that treat the President as an "officer" not one authority holds that the President is an "officer of the United States"—no case, no statute, no record of Congressional debate, no common usage, no attorney general opinion. Nothing.

By contrast, three Constitutional provisions—the Appointments Clause, Impeachment Clause, and Commissions Clause in Article II—*all* distinguish the President from "officers of the United States." And "officers of the United States" in Article VI take an oath different from the Presidential oath in Article II. This precise use of "officer of the United States" has not been buried by the "sands of time,"[15] as demonstrated by multiple authorities; pre-ratification, immediately after ratification,

[15] Cross-Applicants' Brief at 49.

and very recent, all of which explicitly state that the President is *not* an "officer of the United States."[16]

Third, Section Three disqualifies only those who have "previously taken an oath … to support the Constitution of the United States," the exact same oath in Article VI. But President Trump took a different oath, to "preserve, protect, and defend" the Constitution.[17] The different oaths are not mere linguistic variants. The original framers saw a difference, the Section Three drafters respected this difference, and importantly Section Three's use of the Article VI oath precisely matches the plain language that includes Senators, Representatives, and officers "under" or "of" the United States, while also respecting the omission of President.

Fourth, there is no contradiction among Section Three's provisions—all support the same conclusion that Section Three was carefully drafted not to apply to the President.

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[16] 2 Joseph Story, Commentaries on the Constitution of the United States § 791 (1833) (President not a civil officer of the United States); David A. McKnight, The Electoral System of the United States 346 (1878) (President not an officer of, or under, the United States); *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 497-98 (2010).

[17] U.S. Const, art. II, cl. 8.

Finally, Cross-Applicants accuse President Trump of taking a contrary position regarding his status as "Officer of the United States" in other litigation, referring to his arguments opposing a motion to remand before the District Court for the Southern District of New York.[18] These statements do not constitute judicial estoppel or an admission. Those unsuccessful arguments solely concerned his status as an officer of the United States for purposes of 28 U.S.C. § 1442(a)(1), and he specifically observed that the meaning of "officer" under the Constitution and under § 1442(a)(1) could differ.[19] As such, his previous arguments do not contradict his current position, estop him, or alter the Constitutional meaning in this case.

II. The trial court did not have jurisdiction to hear this case under state law.

Applicant preserved this issue in his September 22 Motion to Dismiss at pages 1-15. The standard of review is *de novo*.

This is not a close call. This Court has twice disallowed constitutional litigation in Section 113 proceedings, and Colorado courts likewise lack jurisdiction to consider this Fourteenth Amendment claim.

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[18] President Trump's Mem. of Law. In Opp. to Mot. to Remand, *New York v. Trump*, 1:23-cv-3773-AKH, ECF No. 34 (S.D.N.Y., June 15, 2023).

[19] *Id.* at 6.

Section 113 applies exclusively to claims "alleging that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty" and that such breach or neglect be remedied by a court order "requiring substantial compliance with the provisions of this code."[20] "All three grounds for a section 1-1-113 claim—that is, breach of duty, neglect of duty, or other wrongful act—all refer to acts that are inconsistent with the Election Code."[21]

Frazier and *Kuhn,* which prohibited litigants from raising constitutional issues regarding ballot access requirements, control.[22] First, "the last sentence of section 1-1-113 makes clear that section 1983 claims cannot be adjudicated through section 1-1-113 proceedings" because Section 113 limits the remedy to "an order requiring substantial compliance with the provisions of this [election] code."[23]

Yet the court below adjudicated a constitutional claim. It recognized that the Secretary could not "adjudicate Trump's eligibility under Section Three" but erroneously held that the Election Code gave the *court* that authority.[24] But a court

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[20] C.R.S. § 1-1-113(3).

[21] *Frazier v. Williams*, 2017 CO 85, ¶16.

[22] *Kuhn v. Williams*, 2018 CO 30M, ¶58.

[23] *Id.* at 545 (emphasis provided in original).

[24] Order, ¶224.

cannot enforce perceived violations that go beyond an election official's duty, because Section 113's remedy is limited to ordering an election official to comply with her duty under the election code.

Further, nothing in C.R.S. § 1-4-1204 authorizes the Secretary to disqualify a candidate under Section Three, which the Secretary readily admits.[25] Her authority is limited to confirming that a candidate is affiliated with a "major political party," is a bona fide candidate pursuant to that party's rules, and has submitted a proper notarized candidate's statement of intent with the requisite fee or signatures.[26]

The court recognized Section 1204 states that the presidential primary process is intended to "conform to the requirements of federal law,"[27] but an intent for Colorado's *process* to follow federal law is a far cry from enforcement of presidential disqualifications. And the Secretary must always comply with constitutional mandates.

Second, *Frazier* held that Section 1-1-113 does not provide an appropriate procedure for adjudicating Section 1983 claims due to "inconsistencies between section 1983 and a section 1-1-113" proceeding. This includes expedited procedures

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[25] *Secretary of State's Omnibus Response to Motion to Dismiss* at 1.

[26] C.R.S. §1-4-1204(1)(b) and (c).

[27] Order, ¶222.

that do not allow proper consideration of constitutional issues and a limitation on appellate review.[28] And Section 1204 is structurally incompatible with constitutional litigation; it requires a hearing within five days of a Petition, and a decision within 48 hours of the hearing.[29] The trial court followed neither mandate.

This case starkly exemplifies the unfairness of litigating Fourteenth Amendment issues under the expedited procedures that so troubled the *Frazier* court. The Cross-Applicants seek to use Section 113 against a private citizen to terminate his right to run as a candidate without basic, well-established due process protections, such as initial disclosures, the right to test the court's jurisdiction *before* a factual hearing, basic discovery, the ability to subpoena documents or compel witnesses thousands of miles away, workable timeframes to adequately investigate and develop a defense (such as ten days to identify and disclose rebuttal fact witnesses and exhibits and 18 days to identify rebuttal experts).[30] This was not a valid way to litigate complex constitutional legal and factual issues.

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[28] *Id.*

[29] C.R.S. §1-1-1204(4).

[30] *Minute Orders*, September 22, 2023.

III. This Court should vacate the trial court's findings that President Trump engaged in an insurrection.

This issue arises out of the court's *Final Order*.

In the last six pages of its *Order*, the lower court correctly ruled that that Section Three does not apply to President Trump. But that ruling was preceded by 87 pages of *dicta*—such as discussing "engaging" in an "insurrection"—that was wholly unnecessary to the ruling and without precedential effect.[31] And by accusing President Trump of "engaging" in an "insurrection," the Final Order is highly prejudicial to him. Matters that "are redundant or immaterial" may be stricken from a pleading if prejudicial.[32] And such *dicta* may be stricken from an order as well.[33]

Regardless of one's views of President Trump, no court should indulge in 87 pages of inflammatory and prejudicial *dicta*, rendered irrelevant by a six-page legal ruling. In upholding the district court's decision, this Court should also strike its prejudicial *dicta*.

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[31] *People in Interest of Clinton*, 762 P.2d 1381, 1385 (Colo. 1988).

[32] *Koch v. Whitten*, 117 342 P.2d 1011, 1016 (Colo. 1959).

[33] *See Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985, 989-90 (8th Cir. 2010); *Pitcher v. Waldo*, 103 So.3d 980, 982 (Fl.Ct.App. 2012) (striking *dicta* from trial court order).

IV. The trial court lacked jurisdiction to hear claims arising under Section Three.

The standard of review is *de novo*.

A. Section Three is not self-executing.

This issue was preserved in President Trump's September 29, 2023, *Motion to Dismiss*.

Colorado courts lack power to enforce disqualification under Section Three. That provision is not self-executing and thus provides for no private right of action, because there is no congressional enforcement legislation currently in existence. The Supreme Court has repeatedly held that Section Five of the Fourteenth Amendment confers exclusive power on Congress to determine "whether and what legislation is needed to" enforce it.[34] "Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments

[34] *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 33 (1991) (Scalia, J., concurring) ("It cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform.").

fully effective."[35] Thus, absent enforcement legislation—none of which is currently in effect—Section 3 allows no private right of action.

And it is well-established the states do not have this same authority to enforce the Fourteenth Amendment.[36]

Section Three's history confirms that enforcement legislation was required before any disqualification could be enforced. In *Griffin's Case*, issued only one year after the passage of the Fourteenth Amendment, Chief Justice Salmon Chase, sitting as circuit judge for Virginia, held that only Congress can provide the means to enforce

[35] *Ex parte Va.*, 100 U.S. 339, 345 (1879); *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921) ("[T]he Fourteenth Amendment [does not] furnishe[] a universal and self-executing remedy.").

[36] *Cedar-Riverside Assocs. v. City of Minneapolis*, 606 F.2d 254 (8thCir. 1979) (stating Congress intended 42 U.S.C. §1983 as exclusive remedy for municipal constitutional violations and "no reason exists to imply a direct cause of action (for such violations) under the fourteenth amendment."); *Foster v. Michigan*, 573 F. App'x. 377, 391 (6thCir. 2014) ("[W]e have long held that § 1983 provides the exclusive remedy for constitutional violations."); *Burns-Toole v. Byrne*, 11 F.3d 1270, 1273 n.3 (5thCir. 1994) (providing that §1983 is the appropriate vehicle for asserting violations of constitutional rights); *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9thCir. 1992) ("a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. §1983.").

Section Three.[37] That case has never been overruled. And it has been affirmed repeatedly.[38]

Congress then enacted the Enforcement Act, granting federal prosecutors (but not state election officials) authority to enforce section 3 by seeking writs of *quo warranto* from federal (not state) courts. They immediately started doing so, until the Amnesty Act of 1898 removed all Section Three disabilities.

There is no authorization statute currently in force. The Enforcement Act was codified as 13 Judiciary ch. 3, sec. 563 and later recodified into 28 Judicial Code 41, but in 1948, Congress repealed 28 U.S.C. §41 in its entirety.[39] In 2021, legislation to

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[37] *Griffin's Case*, 11 F. Cas. 7, 22 (C.C.D. Va. 1869).

[38] *See In re Brosnahan*, 18 F. 62, 81 n.73 (C.C.W.D. Mo. 1883) (McCrary, J., concurring); *Hansen v. Finchem,* 2022 Ariz. Super. LEXIS 5 (Maricopa Cnty. Sup.Ct. 2022) ("Plaintiffs have no private right of action to assert claims under the Disqualification Clause"), *aff'd on other grounds*, 2022 Ariz. LEXIS 168 (Ariz. S.Ct. May 9, 2022); *Rothermel v. Meyerle*, 136 Pa. 250, 254 (1890) (citing *Griffin's Case*, 11 F. Cas. at 26) ("[T]he fourteenth amendment, as indeed is shown by the provision made in its fifth section, did not execute itself."); *State v. Buckley*, 54 Ala. 599, 616 (Ala. 1875) (same); *Cale v. Covington*, 586 F.2d 311, 316–17 (4thCir. 1978) (no implied cause of action under Fourteenth Amendment because it is not self-executing).

[39] *See* Act of June 25, 1948, ch. 646, §39, 62 Stat. 869, 993; Act of June 25, 1948, ch. 645, §2383, 62 Stat. 683, 808.

create a cause of action to enforce Section Three, failed.[40] Thus, Congress has not enacted any method for enforcing Section Three.

Because Congress has not created a private right of action for Cross-Applicants, the district court's ruling should be vacated.

B. Whether Section Three disqualifies President Trump from serving is a non-justiciable political question reserved for Congress.

This issue was preserved in President Trump's September 29, 2023, Motion to Dismiss at pages 2-8.

The Constitution reserves exclusively to the Electoral College and Congress the power to determine whether a person may serve as President. Cross-Applicants effectively ask this Court to strip those institutions' power to resolve Section Three issues, including Congress's right to waive the disqualification by a two-thirds vote. Federal and state courts have uniformly ruled that disputed challenges to the qualifications of presidential candidates are non-justiciable, taking into account considerations of comity and the deference due federal law under the Constitution's Supremacy Clause.[41]

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[40] H.R. 1405, 117th Cong. (2021).

[41] *See Castro v. N.H. Sec'y of State*, Case No. 23-cv-416-JL at 10-11 (D.N.H. Oct. 27, 2023); *Berg v. Obama,* 586 F.3d 234, 238 (3d Cir. 2009); *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008)(Questioning whether John McCain was a natural-born citizen); *Grinols v. Electoral College*, No. 2:12-cv-02997-MCE-DAD, 2013

The trial court agreed "the weight of cases have held that challenges to an individual's qualifications to be President are barred by the political question doctrine,"[42] but she rejected this authority on two grounds: the cases were decided after a president took office, and the text did not explicitly state that Congress was the sole arbiter of Section Three disqualification. Both arguments fail.

First, the holdings in these cases apply with equal force to a candidate for president as to a president; they are universal and unqualified, and the trial court provided no rationale as to why a candidacy differs from holding office. The cases that arose during the 2008 and 2012 presidential election cycles challenging Barack Obama or John McCain's qualifications failed, oftentimes because the issue of president qualifications was a non-justiciable political question outside the province of the judiciary.[43] In *Robinson,* Judge Alsup explained that whether John McCain was a

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WL 2294885, at *5-7 (E.D. Cal. May 23, 2013) ("the Constitution assigns to Congress, and not to federal courts, the responsibility of determining whether a person is qualified to serve as President"); *Kerchner v. Obama*, 669 F. Supp. 2d 477, 483 n.5 (D.N.J. 2009); *Taitz v. Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373 (S.D. Miss. Mar. 31, 2015); *Strunk v. New York State Bd. Of Elections*, No. 6500/11, 2012 WL 1205117, *12 (Sup.Ct. Kings County NY, Apr. 11, 2012), *Keyes v. Bowen*, 189 Cal.App.4th 647, 660 (2010), and *Jordan v. Secretary of State Sam Reed,* No. 12-2-01763-5, 2012 WL 4739216, at *1.

[42] *Order*, September 29, 2023, at 10.

[43] *See supra.* fn. 42.

natural-born citizen was left to Congress based on the Twelfth Amendment and 3 U.S.C. § 15:

> Issues regarding qualifications for president are quintessentially suited to the foregoing process. 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.[44]

This analysis applied regardless of whether the challenged individual was a candidate (Senator McCain) or sitting president (President Obama).

The trial court did not confront this analysis, instead relying on its own analysis of the text of the various amendments while ignoring the structure of the Constitution and the Fourteenth Amendment as a whole.[45] But this issue cannot be addressed in isolation. The Constitutional structure shows that this issue is left to the electoral college and Congress:

> Courts that have considered the issue have found this textual assignment in varying combinations of the Twelfth Amendment and the Electoral Count Act, 3 U.S.C. § 15, …; the Twentieth Amendment, …; and the Twenty-Fifth amendment and Article I impeachment clauses….[46]

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[44] *Robinson*, 567 F. Supp. 2d at 1147.

[45] Order Re: Donald J. Trump's Motion to Dismiss Filed September 29, 2023, at 10, Oct. 25, 2023.

[46] *Castro*, Case No. 23-cv-416-JL at 10-11.

The Constitution repeatedly puts authority regarding the election of the President in Congress (or a house thereof):

- Article II, Section 1 authorizes Congress to set the time for choosing electors and the date for counting their votes;
- The Twelfth Amendment assigns the President of the Senate to oversee counting the electoral votes;
- The Twelfth Amendment empowers the House of Representatives to choose the president if no one obtains a majority of electoral votes;
- Section 5 of the Fourteenth Amendment authorizes Congress to pass legislation enforcing the Fourteenth Amendment; and,
- The Twentieth Amendment empowers Congress to create procedures to identify a president if neither the president or vice-president qualify.[47]

This Constitutional structure empowers Congress, not the judiciary.[48]

Finally, the trial court erroneously held that the recent changes to the Electoral Count Act[49] showed that Congress abdicated its Section Three enforcement responsibility, thus authorizing state trial courts authority to determine presidential

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[47] *Grinols*, No. 2:12-cv-02997-MCE-DAD, 2013 WL 2294885, at *5-7.

[48] *Strunk*, No. 6500/11, 2012 WL 1205117, *12), *Keyes*, 189 Cal.App.4th at 660, *Jordan,* No. 12-2-01763-5, 2012 WL 4739216, at *1.

[49] 3 U.S.C. §15.

qualifications.[50] Wrong. First, the trial court mischaracterized the changes to the Electoral Count Act. Those changes did not alter how challenges to a presidential candidate's qualifications would be addressed. They changed only the process regarding objections to *electoral* votes, and how the electoral votes would be counted.[51] They did not address procedures for resolving presidential qualifications.

Second, Congress may choose not to exercise authority granted to it. But declination does not suddenly vest that authority in another branch of government, and certainly not in the states. The trial court's unique abdication theory of constitutional law finds no precedent in our Madisonian system of government, and of course no such precedent or authority exists.

C. States cannot create and enforce additional qualifications for being elected President of the United States.

This issue was preserved in Intervenor's Proposed Findings of Fact and Conclusions of Law at 58-63.

[50] Order Re: Donald J. Trump's Motion to Dismiss Filed September 29, 2023, at 10, Oct. 25, 2023.

[51] 3 U.S.C. §15; Ex. D. to Defendant Donald J. Trump's Brief Regarding 3 U.S.C. §15 (tracking 2022 amendments).

The Constitution identifies the qualifications to be President.[52] It does not set forth qualifications to run for President, nor may the states create them. The Fourteenth Amendment prohibits individuals from *holding* various offices; it does not prohibit individuals from *being elected*. Thus, this Court must reverse the lower court's finding that the Colorado Election Code gives it authority to "investigate and adjudicate Trump's eligibility under Section Three of the Fourteenth Amendment."[53]

"'[T]he states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them.'"[54] Otherwise, states could add their own qualifications to individuals running for President, creating a chaotic environment of conflicting qualifications.[55]

While states are delegated some power to impose procedural requirements, such as requiring candidates to "muster a preliminary showing of support" before appearing on the ballot, they cannot add new substantive requirements,[56] even if

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[52] U.S. Const., art. II, §1, cl.5.

[53] Order at ¶224.

[54] *U.S. Term Limits, Inc.*, 514 U.S. at 802 (citation omitted).

[55] *Id.* at 805 (states do not have authority to add qualifications).

[56] *Schaefer v. Townsend*, 215 F.3d 1031, 1038 (9thCir. 2000).

recast as procedural ballot access conditions.[57] Yet, that is precisely what Cross-Applicants have sought, and doing so required adjudication of a qualification for President not found in the Constitution. The Fourteenth Amendment does not prohibit individuals from appearing on the ballot, receiving a party nomination, or being elected to office. Instead, it prohibits them from *holding* office.[58]

This distinction makes sense. Even if there is a "disability" under Section Three, it may be lifted by a two-thirds vote of each House.[59] Thus, a putatively disqualified candidate may still appear on the ballot and win election. Whether they can "hold" the office depends on whether Congress "remove[s] such disability."[60] And the 20th Amendment provides the procedures to identify the President if that disability is not removed.

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[57] *Term Limits*, 514 U.S. at 829-35; *Schaefer*, 215 F.3d at 1037-39.

[58] U.S. Const., amend. XIV, §3. This distinction raises a ripeness issue. Because President Trump has not yet been elected, Cross-Applicants' suit is not ripe.

[59] *Id.*

[60] *See Smith v. Moore*, 90 Ind. 294, 303 (1883) ("[u]nder [Section 3 Congress has admitted] persons … who were ineligible at the date of the election, but whose disabilities had been subsequently removed."); *Privett v. Bickford*, 26 Kan. 52, 58 (1881) (analogizing to Section Three, concluding that voters can vote for ineligible candidates who can only take office once the disability is removed); *Sublett v. Bedwell*, 47 Miss. 266, 274 (1872) ("The practical interpretation put upon [Section Three] has been, that it is a personal disability to 'hold office,' and if that be removed before the term begins… the person may take the office.").

Schaefer illustrates this point. The court evaluated California law requiring Congressional candidates reside in California when filing nomination papers.[61] The court declared that provision unconstitutional because it added qualifications not found in the Constitution; an individual must be an inhabitant of the state "when elected,"[62] which differs from "when nominated" because nonresident candidates can "inhabit" a state after nomination, but before election.[63]

Just like the manner of counting electoral college votes is dictated by federal statute and the Constitution, so too with presidential qualifications. Federal law must reign supreme; states may not add additional qualifications beyond those listed in the Constitution.[64] No precedent permits a lone state to adjudicate the qualifications of a presidential candidate or a president-elect. That is Congress's role.

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[61] *Schaefer*, 215 F.3d at 1032-34 (citing U.S. Const., art. I, §2, cl.2).

[62] *Id.* at 1034.

[63] *Id.* at 1036-37; *accord Greene v. Secretary of State for Georgia*, 52 F.4th 907, 913–16 (11th Cir. 2022) (Branch, J., concurring) ("[B]y requiring Rep. Greene to adjudicate her eligibility under § 3 to run for office through a state administrative process without a chance of congressional override, the State imposed a qualification in direct conflict with the procedure in § 3—which provides a prohibition on being a Representative and an escape hatch.").

[64] *Term Limits*, 514 U.S. at 805.

V. President Trump did not "engage" in an "insurrection."

A. President Trump did not engage in an insurrection on January 6, 2021.

1. *"Engaged" does not include "incited" under Section Three.*

This issue was preserved in President Trump's September 29 *Motion to Dismiss* at 26-32. It is reviewed *de novo.*

"Engage" and "incite" describe two different activities. "Engage" means "to do or take part in something,"[65] whereas incite means to "to move to action."[66] No court has ever equated the two terms. Only two other sources directly confront this issue.

First, the court incorrectly relied on an opinion from former Attorney General Stanbury that "where a person has by speech or by writing, incited others to engage in rebellion, he must come under the disqualification."[67] This citation faces several problems. First, this portion of Stanbery's opinion referred to confederate officeholders using their official positions to "incite others to engage." Thus, it referred to *official, governmental* action. Second, he used the formulation "incite to

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[65] "Engage." Merriam-Webster.com Dictionary, Merriam-Webster, webster.com/dictionary/engage, last visited Nov. 27, 2023.

[66] "Incite." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/incite, last visited Nov. 27, 2023.

[67] The Reconstruction Acts, 12 Op. Att'y Gen. 182, 205 (1867).

engage" which demonstrates causation—thus, an official caused people to engage. Third, Stanbery referred to a "rebellion"—a more concrete and serious activity than "insurrection." In short, Stanbery's opinion was limited to official, government action that caused Southerners to engage in the Civil War.

Second, Congress has taken a different approach, treating "incite" as distinctly separate from "engage," both before and after ratification of Section Three. The Second Confiscation Act of 1862 made it a crime to "incite, set on foot, assist, or engage in any rebellion or insurrection."[68] Thus, Congress knew at the time it passed Section Three that to "incite" an insurrection was a different activity than to "engage" in an insurrection, and courts "presume that Congress is knowledgeable about exiting law pertinent to the legislation it enacts.[69] This is dispositive.

Finally, federal law continues to treat "incite" and "engage" as different actions, for the crime of inciting or engaging in an insurrection.[70] Past and current federal statute has far greater weight than Stanbery's opinion, which itself was limited to official actions taken by Confederate officers.

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[68] 12 Stat. 589 & 627 (1862).

[69] *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-185 (1988).

[70] 18 U.S.C. §2383.

2. *President Trump's statements receive First Amendment protection.*

This issue was preserved in President Trump's September 22 Special Motion to Dismiss and his October 26, 2023, Motion to Dismiss Based on the First Amendment. It is reviewed *de novo.*

The trial court erred in its First Amendment analysis[71] for two reasons. First, it failed to evaluate the words President Trump actually used on January 6th. Second, it expanded the context relevant to a *Brandenburg* analysis beyond anything recognized in precedent.

Courts must harmonize constitutional provisions.[72] Even if "engage" includes "incite" Section Three can easily be harmonized with First Amendment rights protecting political speech under the *Brandenburg* standards.

Speech cannot be punished as incitement unless it (1) "advoca[tes] the use of force or of law violation," (2) is "directed to inciting or producing imminent lawless action," and (3) is "likely to incite or produce such action."[73] All three elements must be met: "the speaker's intent to encourage violence (second factor) and the tendency

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[71] Order ¶¶288-98.

[72] *Zaner v. City of Brighton,* 917 P.2d 280, 283 (Colo. 1996); *People ex rel. Livesay v. Wright*, 6 Colo. 92, 95 (1881).

[73] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

of his statement to result in violence (third factor) are not enough to forfeit First Amendment protection *unless the words used specifically advocated the use of violence*…."[74]

Thus, a court must evaluate the content, form, and context of speech."[75] Foremost is the objective content of the speech— where speech is protected, "its setting, or context, [can] not render it unprotected."[76] Intent is important, but only as an additional hurdle,[77] not as a substitute for the required focus on the words themselves; tests focusing on a speaker's intent or the effect on listeners—rather than the speaker's words—are prohibited.[78]

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[74] *Nwanguma v. Trump,* 903 F.3d 604, 611 (2018) (emphases added); *accord Hess v. Indiana,* 414 U.S. 105, 107-109 (1973).

[75] *Snyder v. Phelps,* 562 U.S. 443, 453-54 (2011).

[76] *Nwanguma*, 903 F.3d at 612.

[77] *Counterman v. Colorado*, 600 U.S. 66, 76-78 (2023).

[78] *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468-69 (2007) ("A test focused on the speaker's intent could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another."); *accord* 551 U.S. at 492-495 (the "fundamental and inescapable problem" with a test that is "tied to…a court's perception of the import, the intent, or the effect of the [speech]" is "that these tests fall short of the clarity that the First Amendment demands") (Scalia, J., concurring).

Despite this clear precedent, the trial court eschewed meaningful analysis of the objective meaning of President Trump's words on January 6th. [79] President Trump's words were not as incendiary as language the Supreme Court has already protected as a matter of law.[80] As a D.C. Circuit judge remarked last year, "you just print out the [President's January 6] speech…and read the words…it doesn't look like it would satisfy the [*Brandenburg*] standard."[81]

On January 6th, President Trump called for protesting "peacefully and patriotically,"[82] to "support our Capitol Police and law enforcement,"[83] to "[s]tay

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[79] The assertion that *Nwanguma* "rejected" an objective test is wrong. *Nwanguma* held that one footnote in a prior case did not expressly adopt an objective standard, but the *Nwanguma* court applied one. *Id.* at 613.

[80] *See Claiborne* 458 U.S. at 902 ("We're gonna break your damn neck."); *Hess*, 414 U.S. at 107 ("We'll take the f[***]ing street again.").

[81] Tr. of Argument at 64:5-7 (Katsas, J.), *Blassingame v. Trump*, No. 22-5069 (D.C.Cir. Dec. 7, 2022).

[82] Transcription of President Trump's January 6, 2021, speech at the Ellipse, Exhibit 1029 at 4.

[83] Exhibit 148 at 83.

peaceful,"[84] and to "remain peaceful."[85] This patently fails to meet the first element of *Brandenburg*.

The trial court nonetheless relied on years of speech that long preceded President Trump's January 6th speech. This broke radically with First Amendment jurisprudence and created a blatant double standard. While acknowledging the "prevalence of martial language in the political arena"—including "calling on supporters to 'fight' and 'fight like hell,'" as Trump did—the trial court still argued that such standard political rhetoric was different *for Trump* because it "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."[86] It concocted a radical new legal rule: in determining whether a defendant had the specific intent required by *Brandenburg*, courts may consider *any speech ever uttered* by the defendant, including to distinct audiences.[87]

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[84] *Id.*

[85] *Id.* at 84.

[86] Order ¶297, see also ¶145.

[87] Order ¶278 (the court "considers Trump's actions and inactions prior to and on January 6, 2021, as context and history").

For this enormous expansion of the context permitted in a *Brandenburg* analysis, the trial court cited a single line of dicta in a Supreme Court case.[88] That case held only that *Brandenburg's* imminence requirement was not satisfied; it did not analyze specific intent and or hold that a speaker's past speech, to distinct audiences, constituted incitement. No court has so held.

Applying this radical test, the trial court held that in determining specific intent for *most* speakers, we should examine the speech in the narrow context in which it was made and afford it the traditional protections—but for Trump, we should examine a curated compilation of speech going back years to decipher a hidden meaning. This runs counter to *Wisconsin Right to Life's* injunction against an inquiry that leads to the "bizarre result" that what is "protected speech for one speaker" can lead to "criminal penalties for another."[89] Simply put, the trial court misapplied *Brandenburg* requiring reversal.

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[88] *Nat'l Ass'n for the Advancement of Colored People v. Claiborne Hardware Co.,* 485 U.S. 886, 929 (1982); Order, ¶¶274; 268-75, 297.

[89] 551 U.S. at 468-69.

B. President Trump did not have the Specific Intent cause a riot and launch an attack on the Capitol.

This issue is preserved because it arose from the *Final Order*.

1. *Section Three requires the specific intent to engage in an insurrection.*

The trial court properly held that Cross-Applicants must show that President Trump specifically intended to cause "the specific result" at issue—namely the prevention of the counting of the electoral votes by a riot.[90] But the evidence falls far short of this standard.

As noted above, President Trump never advocated violence or an attack on the Capitol. Neither in his January 6th speech nor in any of his pre-January 6th speeches. They bore no relation to the violence on January 6th. To infer intent, however, the trial court improperly relied on expert testimony.

First, the trial court disingenuously suggested that President Trump did not challenge Professor Simi because he did not present counterevidence or a rebuttal expert.[91] Counsel had but 18 days to identify a rebuttal expert in a highly charged political case, effectively preventing him from retaining a rebuttal expert.[92]

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[90] "INTENT", Black's Law Dictionary (11th ed. 2019); CJI-CRIM, F:185, "Intentionally (and with intent)."

[91] Order ¶86.

[92] TR. 10/31/23, pp. 8:18-9:1.

More importantly, Simi explicitly conceded that his opinion did not address whether President Trump intended to call far-right extremists to action. Simi was "not in President Trump's mind"[93] and instead inappropriately focused on patterns of communications and how President Trump's statements were likely received by extremists.[94] Further, he admitted these communication patterns are "generic features" of everyday life[95] and that he did not know whether President Trump was even aware that others could interpret them as a call to violence.[96]

Simi testified that interviews and field work were critical to determine intent, but he did not interview anyone involved in the January 6, 2021, events and conducted no field work,[97] thus he did not use his professed methodology and based his opinion on "subjective belief [and] unsupported speculation."[98]

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[93] TR. 11/1/23, pp. 205:19-23, 208:8-11, 199:4-9

[94] *Nwanguma v. Trump*, 903 F.3d at 613.

[95] TR. 11/1/23, pp. 142:3-9, 147:23-25, 143:18-144:11, 144:12-25, 145:24-146:17

[96] *Id.* at pp. 127:25-128:3, 156:25-157:8

[97] TR. 11/1/23, pp. 158:3-5, 133:8-14, 134:4-8, 139:6-19.

[98] *People v. Ramirez,* 155 P.3d 371, 378 (Colo. 2007).

2. *Direct evidence at trial, shows President Trump intended to prevent violence, not incite it.*

President Trump requested National Guard presence on January 6, 2021, telling staff that he wanted 10,000-20,000 National Guard troops to be available.[99] But the trial court abused its discretion in rejecting this testimony.

First, it disregarded the testimony solely because such a request was "illogical," under the erroneous legal theory that the President could not legally authorize more than 2,000 Guard troops. *Nothing* in federal law limits Presidential authority to 2,000 troops or limits him to authorizing use of the Washington, D.C. Guard only[100]—and the court cited no such authority. Second, Patel and Pierson's testimony was uncontested, and President Trump's request was corroborated by two witnesses at a meeting with the President,[101] as well as an official Department of Defense timeline showing the President wanted the Department of Defense to be prepared to deal with the protests on January 6th.[102] And finally, even if President Trump was mistaken about his authority, multiple witnesses testified that he intended to deploy the

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[99] TR. 11/1/2023, pp. 212:17-20, 294:5-295:17.

[100] *See* 32 U.S.C. §502(f)(2)(A)

[101] TR. 11/01/2023, p.216:5-17

[102] Ex. 1031, p. 16, (4th line identifying January 3 White House meeting).

National Guard to *prevent* violence, showing his intent to prevent violence, not cause it.

C. The events on January 6, 2021, did not constitute insurrection.

This issue is preserved because it arose from the Final Order.

The district court wrongly defined insurrection as "(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."[103]

First, this definition lacks support. The court relied on weak and irrelevant authorities; one dictionary definition from 1828,[104] two jury instructions long predating the Civil War,[105] and dicta from a state court dissenting opinion.[106] Meanwhile, amicus Mark Graber argues that a consensus regarding the definition of "insurrection" existed at the time of Section Three's ratification. He relies on a case

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[103] Order ¶240.

[104] *Insurrection*, NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

[105] *See Case of Fries*, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800); *United States v. Hanway*, 26 F. Cas. 105, 127–28 (C.C.E.D. Pa. 1851).

[106] *Chancely v. Bailey*, 37 Ga. 532, 548–49 (1868) (J. Harris, dissenting).

from 1795, and an unreported grand jury instruction.[107] This is not credible. Two isolated, weak authorities – 80 years apart – do not a "consensus" make.

The court recognized that the Civil War is the unignorable context for understanding "insurrection,"[108] yet it ignored contemporaneous authorities that defined "insurrection" in light of the Civil War. These authorities understood "insurrection" as a type of treason, alongside rebellion,[109] or requiring uniformed troops led into battle against the United States,[110] or "levying war" against the United States,[111] or "taking up arms traitorously against the government."[112] Contrary to the court's open-ended definition, the weight of relevant authorities indicates an "insurrection" must be violent enough, potent enough, and organized enough to be considered a significant step on the way to rebellion.

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[107] Brief of Mark Graber, 19-20.

[108] Order ¶226.

[109] 37 Cong. Globe 2173, 2189, 2190-91, 2164-2167 (1862); *United States v. Greathouse*, 26 F. Cas. 18, 21 (C.C.N.D. Cal. 1863).

[110] 41 Cong. Globe 5445-46.

[111] *Greathouse*, 26 F. Cas. at 25.

[112] *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* (Philadelphia, G.W. Childs, 12th ed., rev. and enl. 1868).

Second, the trial court's definition is overbroad; it has no threshold for the scope, potency, or severity required to constitute insurrection, and no limiting principle reflected in any relevant legal authority. Indeed, the court admitted its definition could apply to a group of people forcefully hindering a mailman on his route.[113] Any generic riot or violent protest would be an "insurrection" if it somehow hindered the execution of a function under the Constitution. This ignores the difference between insurrection and obstruction and goes far beyond Section 3's purpose and text.

The trial court found the events on January 6th constituted an insurrection because many of the people at the Capitol were armed with deadly weapons and used them to attack police, because the mob was organized and demonstrated unity of purpose, and because it sought to prevent execution of the Constitution. The factual record does not support this conclusion.

First, there is no evidence the crowd was armed with deadly weapons and attacked police in a manner consistent with a violent insurrection. The trial court incorrectly found there were guns at the Capitol, relying on a single finding in the January 6th report referring to *one* gun, which was never used and was lost in a

[113] Order ¶237, n.16.

scuffle.[114] The court found that knives were used in attacks on police, but the *only* evidence regarding a knife at the Capitol was that police took one off of the belt of a man who never used or brandished it.[115] There is no testimony or evidence police were attacked with guns or knives. The only weapons used were makeshift, improvised, or items taken from police.[116] Hand-to-hand fighting[117] reflects that no weapons were used, and there was little (if any) deadly force consistent with "taking up arms against the United States."

Second, there is no evidence the crowd was organized with a singular purpose. The district court acknowledged the mixed motivations: some were violent, many more nonviolent; some skipped President Trump's speech yet started violence; many went nonviolently to the Capitol after the speech.[118] The court's total evidence was that some in the crowd shouted slogans, waved flags, and "at times worked together."[119] But there was no evidence regarding what they meant by the slogans and

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[114] Order ¶155; Ex. 78, p. 103.

[115] Ex. 16; TR. 10/30/2023, P. 106:19-24.

[116] TR. 10/30/2023, pp. 75:15-76:4.

[117] Order ¶242.

[118] *Id.* ¶¶146-50, 159-61.

[119] *Id.*, ¶¶162-165.

symbols, what percentage of the crowd shouted or agreed with the slogans, or whether cooperation in the crowd was planned or spontaneous. And Simi's testimony that the symbols and slogans in the crowd were consistent with far-right extremism[120] was directly contradicted by his acknowledgement that symbols like these have a mainstream, non-extremist meaning as well.[121] And the crowd's voluntary dispersal after an order from the Mayor and President Trump's "go home" video,[122] reflects a lack of purpose and organization.

Third, even assuming a single purpose, no evidence shows a purpose to hinder or prevent execution of the Constitution itself rather than to (at-most) delay the vote-certification proceeding. The district court's "insurrection" definition, as reflected in its cited authority,[123] requires that a use or threat of force be to hinder execution *of law* as a general matter, not just in a single instance.[124] No evidence showed a purpose to nullify or negate the government's authority to execute any provision of the Constitution generally, such as Congress's power to certify votes.

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[120] *Id.*, ¶165.

[121] TR. 10/31/2023, pp. 151:21-154:9.

[122] Order ¶¶187-88.

[123] *See Fries*, 9 F.Cas. at 930-31; *Hanway*, 9 26 F. Cas. at 128.

[124] Order ¶¶233, 234, 236.

These clear errors show that the district court had no basis for finding January 6th was an insurrection.

VI. The trial court committed reversible error by including the January 6th report.

This issue was raised in President Trump's October 17, 2023, Motion *in Limine* at pages 2-28. The standard is abuse of discretion.

The trial court erred in admitting the January 6th Report (the "Report") and the findings Cross-Applicants submitted in Exhibit No. 78. Appellate courts "review[s] a trial court's evidentiary decisions for an abuse of discretion."[125] "To constitute an abuse of discretion, the trial court's evidentiary ruling must have been manifestly arbitrary, unreasonable, or unfair, or based on a misunderstanding or misapplication of the law."[126] While the trial court noted that it considered and cited "only" 31 statements from the January 6th Report in its *Final Order* (compared to the over 400 Cross-Applicants originally submitted), these were critical findings, and consideration of *any* finding from the Report amounts to reversible error.[127]

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[125] *People v. Kubuugu*, 433 P.3d 1214, 1216 (Colo. 2019) (citation omitted).

[126] *People v. Heredia-Cobos*, 415 P.3d 860, 863 (Colo. 2017) (citation omitted).

[127] Order ¶38, n.7.

The trial court's finding that "it would be inappropriate to exclude the January 6th Report simply because it was in part politically motivated," is incorrect.[128] Political motivation of a congressional committee is central to a court's analysis when judging trustworthiness and reliability of a congressional report.[129]

Courts look to "the possibility that partisan political considerations" and "elected officials' tendency to 'grandstand'" as well as "whether members of both parties joined in the report, or whether the report was filed over the dissent of the minority party." [130] Here, the Report does not meet indicia of trustworthiness; every member of the Committee had already concluded that President Trump incited an insurrection even before beginning work, those same, biased committee members were involved on a daily basis in the Committee's investigation, the Committee's organization was "unprecedented."

Additionally, the trial court erred in admitting conclusions from the Report which blatantly contained hearsay, such as the court's findings 97 ("Trump's advisors

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[128] Order ¶28.

[129] *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1342 (3d Cir. 2002).

[130] *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, 98 (D.D.C. 2006) (collecting cases).

repeatedly told him he had virtually no chance of victory), 103 (President Trump sought to corruptly overturn the election results through direct pressure on Republican officeholders), 95 (the Associated Press made determinations about the Pennsylvania election), 110 (comments purportedly made by Alex Jones, Owen Shroyer, or by Ali Alexander), 132 (an unnamed source recounting President Trump's commentary "from a tent backstage at the Ellipse"), 188 (people were trying to contact President Trump "to do one singular thing"). Other findings were legal conclusions from the Report, or facts unsupported or contradicted by evidence in the record.[131]

And again, the trial court disingenuously concluded that "[b]ecause Trump was unable to provide the Court with any credible evidence which would discredit the factual findings of the January 6th Report, the Court has difficulty understanding the argument that it should not consider its findings which are admissible under C.R.E. 803(8)."[132] This is unfair and absurd. President Trump had less than five weeks to develop evidence rebutting over 400 "findings" from the Committee, with *no* initial disclosures, *no* discovery tools, and no *time*. Following the hearing, Cross-Applicants

[131] *Order*, ¶¶103, 106, 110, 117, 130, 132, 151-53, 163, 179.

[132] *Order* ¶37.

reduced that number to roughly 100,[133] and the court relied on a "mere" 31. Finally, it was not President Trump's burden to rebut the findings, in order to keep them out of evidence—Cross-Applicants bore the burden of proving the Report's admissibility.[134] This Court must reverse the trial court's decision to admit the Report, and, therefore, the findings containing hearsay and those that are unsupported or contradicted by evidence in the record.

CONCLUSION

For the reasons above, this Court should affirm the district court's ruling and vacate the dicta contained in pages eight through 95.

Respectfully submitted this 27th day of November 2023,

GESSLER BLUE LLC

s/ Scott E. Gessler
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Geoffrey N. Blue

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[133] Exhibit 78.

[134] *Feltman v. Culmin Staffing Grp., Inc. (In re Corporate Res. Servs.),* 603 B.R. 888, 895 (Bankr. S.D.NY 2019) (citations omitted)(regarding expert testimony). *See also People v. Phillips*, 315 P.3d 136, 153 (Colo. App. 2012); *Garcia*, 826 P.2d at 1264 (regarding hearsay exceptions).

Trump

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2023, I electronically filed the foregoing with the Clerk of the Court using the CCES system, which notified all parties and their counsel of record.

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