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THE SUPREME COURT OF THE STATE OF COLORADO 2 E. 14th Avenue Denver, CO 80203	
Appeal Pursuant to § 1-1-113(3), C.R.S. District Court, City and County of Denver, Case No. 2023CV032577 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, v. **Intervenor-Appellee:** COLORADO REPUBLICAN STATE CENTRAL COMMITTEE, and **Intervenor-Appellee/ Cross-Appellant:** DONALD J. TRUMP.	▲ COURT USE ONLY ▲
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PETITIONERS' ANSWER-REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g), because it contains 9493 words.

/s/ Eric Olson

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Attorney for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

TREATISES

CONSTITUTIONAL PROVISIONS

REPLY IN SUPPORT OF PETITIONERS' APPEAL

I. Section 3 Covers the Office of the Presidency

Trump claims the Presidency is not an "office," while failing to acknowledge that the Constitution repeatedly and explicitly calls the Presidency an "office." Opening Br. 18-23. Ignoring that dispositive fact does not change it.

One of Trump's amici admits the Presidency is an "office" but claims it is not a "civil or military" office "under the United States." *See* Lash Br. 2-7. That makes little sense. First, the President is both chief executive and Commander-in-Chief, so his office is both "civil" *and* "military." Second, the Presidency is an office "of" the United States and so is "under" the United States. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 3939-3940 (1866) (Constitution uses the terms "officers of" and "officers under" "indiscriminately" and "no argument can be based on the different sense of the word 'of' and 'under'"); Graber Br. 13-14. Third, other constitutional uses of "office under" make clear this term includes the Presidency. Opening Br. 19-20; *D.C. v. Trump*, 315 F. Supp. 3d 875, 883-86 (D. Md. 2018) ("an avalanche" of textual and

historical evidence "buries [the] fanciful claim[]" that the President is not an office "under the United States").

Trump likewise cannot rebut the overwhelming historical consensus that Section 3 disqualified rebels from the Presidency. Opening Br. 23-28; *see also*, *e.g.*, Ex. AO, Pittsburgh Commercial, June 29, 1867 (Section 3 applies to "any office civil or military, State or Federal, even to the Presidency"); Ex. AC, Montpelier Daily Journal, Oct. 19, 1868 (Section 3 "excludes leading rebels from holding offices . . . from the Presidency downward"); Ex. AD, Public Ledger, Oct. 3, 1871 (same, by opponent of the Fourteenth Amendment); Ex. AE, Chicago Tribune, May 24, 1872 (amnesty would make rebels "eligible to the Presidency of the United States"); Ex. AJ, Terre-Haute-Weekly Express, Apr. 19, 1871, at 2 (similar); Ex. AH, Indiana Progress, Aug. 24, 1871 (similar).

Section 3's plain language excluded oathbreaking rebels from the Presidency. Both supporters and opponents of the Fourteenth Amendment understood that. Trump does not cite a single person at the time who argued against this common-sense conclusion, and no amount

of creative nay-saying by lawyers and academics 150 years later can refute it.

II. Section 3 Covers Former Presidents

Section 3 applies to insurrectionist former presidents. Opening Br. 28-50. Trump ignores the historical evidence proving that the President's oath to "preserve, protect, and defend" the Constitution is an oath to support it. *Id.* at 29-31. And Trump *admits* that "the President is an Officer." Trump Br. 11; *id.* at 8 n.8 ("federal officer[]"). That concession decides the case. If the "President of the United States," U.S. Const. art. II § 1, is an "officer," then *of course* he is an "officer of the United States." What else could he possibly be an officer of?

Trump claims that "officer of the United States" is somehow a technical term of art that excludes the President. That is wrong. Section 3's parallel structure shows that "officer of the United States" retains its ordinary meaning as anyone who holds "any office . . . under the United States." Opening Br. 32. That's also what Attorney General Stanbery declared in his authoritative interpretation of Section 3. *Id.* at

34-33. Historical evidence confirms Section 3 was designed to cover *all* oathbreaking insurrectionists. Amicus Br. of Constitutional Accountability Center at 15-17. None of Trump's "evidence" to the contrary addresses Section 3 at all.

Instead, Trump relies on provisions of the original Constitution, which do not support his position. *See* Opening Br. 45-50. He also cites a passage from Joseph Story, which addressed only whether *members of Congress* were "civil officers" who could be impeached. *See* Story, Commentaries on the Constitution of the United States, Volume I, § 791 (1833). Story acknowledged that Congress was "greatly divided" on this question, but he highlighted constitutional provisions distinguishing Congresspeople from "officers." *Id.* Notably, Story said elsewhere that the president is "an officer of the Union, deriving his powers and qualifications from the Constitution." *Id.* § 627.

The State Party's three stray pieces of "evidence" likewise cannot overcome the barrage of historical sources from the mid-1800s referring to the President as an officer of the United States. Opening Br. 34-45. It cites a passage from an election law treatise, which was about whether

members of Congress were "officers" under Article II. CRSCC Br. 9. And it cites two references in an impeachment trial, ignoring that many other members of Congress during that same debate declared the President *is* an officer of the United States. *E.g.,* Ex. AI, Trial of William W. Belknap (1876), at 40 ("the President or other high officer of the Government"); 86 ("the President, the chief executive officer of the United States"); 144 (the President, "like any other officer"); *see also id.* at 54, 99.

Nor does anyone offer any reason *why* Section 3's framers would have wanted to exempt insurrectionist former presidents. And because Trump is the only President who did not previously serve in some other federal or state position covered by Section 3, Trump's argument is that Section 3 exempts *him alone*. 11/17/2023 Order ¶ 313 n.20 (Ex. A). The Court should not assume the framers intended this bizarre result, nor that they made a mistake. It is "of little significance" that the specific fact pattern here is "one with which the framers were not familiar"; the Court must give effect to the Constitution's "great purposes" and reject interpretations that "defeat rather than effectuate" those purposes.

United States v. Classic, 313 U.S. 299, 316 (1941). Here, text, history, and purpose all show that those who adopted Section 3 intended it to cover *all* insurrectionist federal officers, including the President.

ANSWER TO TRUMP'S OPENING BRIEF

STATEMENT OF ADDITIONAL FACTS

Because Trump's brief fails to recite "the relevant facts," Petitioners do so here. Colo. R. App. P. 28(a)(5); Trump Br. 3-4 (providing one paragraph of supposed "facts" with no record citations).

Following a five-day trial, the district court issued a detailed 102-page opinion finding that the January 6 attack was an insurrection against the Constitution, 11/17/2023 Order ¶¶ 240-44, 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," *id*. ¶¶ 288-94, and hence that Trump engaged in the January 6 insurrection through incitement, *id*. ¶¶ 295-98.

"[P]rior to the January 6, 2021 rally, Trump knew that his supporters were angry and prepared to use violence" and "did everything in his power to fuel that anger." *Id*. ¶ 128. Beginning in

August 2020, Trump peddled unfounded accusations of election fraud despite being told repeatedly such accusations were false. *Id.* ¶¶ 87-112, 120-22. After his court challenges had been rejected, Trump peddled the unfounded claim that Vice President Pence could somehow reject certification of electoral votes despite knowing Pence could not. *Id.* ¶¶ 113-15, 127. Starting December 19, 2020, Trump repeatedly called his supporters to Washington, D.C., for January 6, focusing their attention on Pence while insinuating that Democrats' supposed attempts to steal the election were an "act of war." *Id.* ¶¶ 116-19, 121-22.

Many of Trump's supporters were armed and prepared for violence on January 6. Roughly 25,000 attendees would not go through metal detectors. *Id.* ¶ 132. Hundreds of weapons and prohibited items were confiscated from those that did. *Id.* ¶ 131. Many wore tactical gear, including ballistic helmets, goggles, gas masks, and body armor. *Id.* ¶¶ 133, 242. Knowing the risk of violence and that supporters were angry and armed, *id.* ¶¶ 134-35, Trump gave an incendiary speech calling out Pence by name 11 times, using "fight like hell" and other

variants of "fight" 20 times, instructing the crowd they could not let the certification happen, and exhorting them to march with him to the Capitol. *Id.* ¶¶ 135, 137-38. He called on them to go beyond mere political expression: "[w]hen you catch somebody in a fraud, *you're allowed to go by very different rules*." *Id.* ¶¶ 135, 144. Trump added the most inflammatory remarks himself; they were not part of the written teleprompter speech. *Id.* ¶¶ 136, 139. During the speech, listeners shouted, "storm the Capitol!" and "invade the Capitol Building." *Id.* ¶ 141. "Trump's Ellipse speech incited imminent lawless violence" and "was intended as, and was understood by a portion of the crowd as, a call to arms." *Id.* ¶¶ 144-45.

Trump knew that his extremist supporters understood his words as a call to violence. *Id.* ¶ 85. The court credited the testimony of Petitioners' political extremism expert Professor Peter Simi, who explained how Trump cultivated ties with far-right extremists and communicated support for their political violence in the years leading up to January 6, and how Trump's Ellipse speech mirrored those previous communications. *Id.* ¶¶ 61-84, 105, 109. The court "note[d]

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." *Id.* ¶ 86.

The court also relied on many prior examples of Trump praising or inciting violence by his supporters. *Id.* ¶¶ 64-78. One particularly chilling example responded to a Georgia election official, Gabriel Sterling, pleading with Trump to "stop inspiring people to commit potential acts of violence"; Trump retweeted the video plea, "repeating the very rhetoric Sterling warned would cause violence":

Id. ¶¶ 104-05; Ex. 148 at 27 (Trump tweet); Ex. 126 (video).

Trump's speech on January 6 had its intended effect. Large portions of the crowd moved from the Ellipse to the Capitol. 11/17/2023 Order ¶ 146. At 12:53 pm, shortly before the speech ended, Trump's supporters launched their attack. *Id.* ¶ 147. The mob breached the

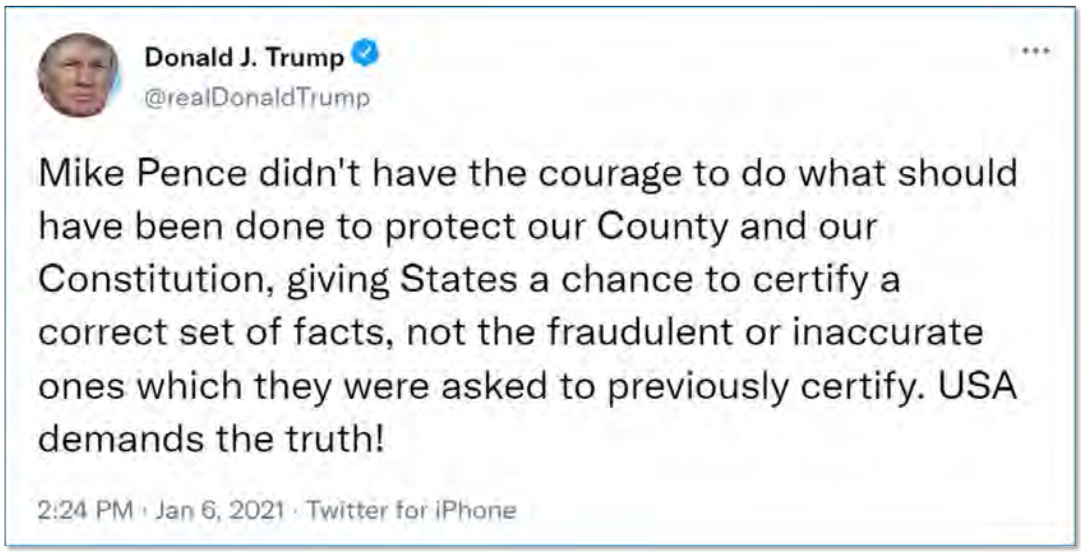
Capitol at 2:13 pm, causing the House and Senate to suspend certification and evacuate chambers. *Id.* ¶¶ 151-52, 177. The mob was armed and violent. *Id.* ¶ 155-57. Police officers "were tased, crushed in metal door frames, punched, kicked, tackled, shoved, sprayed with chemical irritants, struck with 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." *Id.* ¶ 157. Many were injured and hospitalized, and at least one died from the attack. *Id.* ¶ 158.

Members of the mob told officers they were there for Trump, referenced revolution and stopping the certification, and wore Trump paraphernalia while carrying Trump flags. *Id.* ¶¶ 162-63. The district court found, as Trump's own witness Representative Buck testified, that the attack was intended to and did obstruct the electoral vote count. *Id.* ¶¶ 168, 179.

Trump did nothing to stop the mob for nearly three hours, instead pouring fuel on the fire. *Id.* ¶¶ 169-93. He knew by 1:21 pm the Capitol

was under siege. *Id*. ¶ 169. He did not mobilize federal law enforcement or the National Guard. *Id*. ¶¶ 181-85. "Trump ignored pleas to intervene and instead called Senators urging them to help delay the electoral count," telling Kevin McCarthy, "I guess these people are more upset about the election than you are." *Id*. ¶ 180.

At 2:24 pm, Trump tweeted:



Id. ¶ 170; Ex. 148. This "paint[ed] a 'target' on the Capitol," encouraging and causing further violence. *Id*. ¶¶ 172-77. Trump sent two more tweets at 2:38 and 3:13 pm telling the mob to "remain peaceful" but did not condemn the attack or tell the mob to disband. *Id*. ¶¶ 178, 180. Trump finally told the mob to leave at 4:17 pm in a video statement

praising the attackers (which he echoed in a 6:01 pm tweet). *Id.* ¶¶ 186-90.

Having "heard no evidence that Trump did not support the mob's common purpose of disrupting the constitutional transfer of power," and noting his words celebrating the attack, the district court found that "Trump endorsed and intended the actions of the mob on January 6, 2021." *Id.* ¶¶ 191-93. Those familiar with Trump knew exactly what they saw. Trump's former campaign manager, Brad Parscale, texted Katrina Pierson the evening of January 6 that Trump's speech was "a sitting president asking for civil war." Ex. 263 at 76 (admitted without objection).

The court found credible and gave weight to all eight of Petitioners' witnesses. *Id.* ¶¶ 39-46. The court did not credit the testimony of Trump witness Kash Patel, including his assertion that Trump had authorized deployment of 10-20,000 National Guard troops on January 6. *Id.* ¶ 47. Nor did the court credit the testimony of another Trump witness who proffered the "conspiracy theory" that "Antifa was involved in the attack." *Id.* ¶ 51. The court found the remaining Trump

witnesses credible but noted much of their testimony was irrelevant or supported Petitioners' case. *Id.* ¶¶ 48-53.

SUMMARY OF THE ARGUMENT

Trump's scattershot brief advances nine poorly developed challenges to the district court's ruling. None have merit.

The Constitution gives state legislatures near plenary authority to decide how to select Presidential electors. U.S. Const. art. II, § 1. That broad power allows state legislatures to limit the presidential ballot to candidates who meet all the qualifications for that office (including Section 3), and to enforce those rules through state court actions.

The Colorado Election Code does just that. It mandates that the primary process conform to the requirements of Federal law (including the Constitution), and it limits participation in the primary to "qualified candidates." Because Trump is constitutionally disqualified, Colorado law requires his exclusion from the ballot.

Nor can Trump credibly challenge the district court's factual findings that the attack on the Capitol on January 6 was an "insurrection" and that Trump engaged in that insurrection through

intentional incitement to violence. On these issues, Trump's brief is a work of pure fiction. He ignores most of the facts the district court actually found, fails to mention the most incendiary portions of his own speeches and tweets, and presents dubious testimony discredited by the trial court as established fact. Trump cannot show clear error by pretending bad facts do not exist. And the First Amendment does not protect those who engage in insurrection through intentional incitement to violence.

Finally, Trump fails to show that the district court abused its discretion by admitting limited factual findings from the report of the January 6 Committee. Government reports are presumptively admissible, and Trump produced no evidence casting doubt on the reliability of the investigative process or the report's findings.

ARGUMENT

I. The Constitution Gives States Broad Power to Determine How to Select the President

The Constitution's Electors Clause empowers state legislatures to "direct" the "manner" of appointing presidential electors. U.S. Const. art. II, § 1, cl. 2. This clause gives the states "far-reaching authority" to

run presidential elections, "absent some other constitutional constraint." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020); *see* Amicus Br. of Free Speech for People at 7-8 ("FSFP"). Under this authority, "the States have evolved comprehensive . . . election codes regulating in most substantial ways . . . state and federal elections," including the "selection and qualification of candidates." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Here, the General Assembly has exercised its constitutional power by authorizing ballot access challenges to presidential primary candidates. *See* C.R.S. § 1-4-1204(4); *infra* § II.

Section 1-4-1204(4) advances Colorado's "legitimate interest in protecting the integrity and practical functioning of the political process" by permitting it "to exclude from the ballot [presidential] candidates who are constitutionally prohibited from assuming office." *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (upholding exclusion of a naturalized citizen from presidential primary ballot); *Lindsay v. Bowen*, 750 F.3d 1061, 1063-65 (9th Cir. 2014) (upholding exclusion of a 27-year-old from presidential primary ballot).

Counsel for Trump embraced this view when he was Colorado's Secretary of State. In 2012, then-Secretary Gessler insisted "any candidate who does not meet the minimum Constitutional requirements for the office of the Presidency may not be placed on the ballot for that office." Ex. AK, Answer ¶ 27, *Hassan v. Colorado*, No. 11-cv-3116, ECF No. 27 (D. Colo. Apr. 24, 2012); *accord* Ex. 107, Letter from Colorado Secretary of State to Abdul K. Hassan (Aug. 12, 2011). This remains the Secretary's position today. *See infra* § II.

The states' interest in policing their ballots is at its apex in presidential elections. A state must ensure its electoral votes are not wasted on an unqualified candidate. Yet under Trump's view, "every 'state would be powerless to prevent' 'fraudulent or unqualified candidates such as minors, out-of-state residents, or foreign nationals'" from running for President. *Cawthorn v. Amalfi*, 35 F.4th 245, 265 (4th Cir. 2022) (Wynn, J., concurring). "It is hard to believe the State legislatures that ratified the Constitution signed up for such a charade." *Id.*

A. The Petition Does Not Present a Nonjusticiable Political Question

Petitioners' claim does not present a nonjusticiable political question.[1] *See* 10/25/2023 Order at 3-18 (Trump Br. Attachment 4); 11/17/2023 Order ¶ 13 & n.2. "In general, the Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (quotation omitted). The political question doctrine is "a narrow exception to this rule." *Id.* at 195. It does not apply merely because a case has "political implications." *Id.* Rather, it applies when "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.* Trump does not make, and thus forfeits, any argument about judicially manageable standards—nor have courts had any difficulty adjudicating Section 3 cases, 10/25/2023 Order at 20 n.5 (citing cases). And if there is any "textually

[1] While state law governs "the powers of state government" under "the Colorado Constitution," *Colo. Common Cause v. Bledsoe*, 810 P.2d 201, 205 (Colo. 1991), the federal political question doctrine controls the separation of powers under the federal constitution.

demonstrable commitment" of presidential candidate qualifications, it is *to the states*, not to Congress. *See supra* § I.

The district court correctly determined that nothing in the Constitution explicitly vests in Congress or the Electoral College any power—let alone the *exclusive* power—to evaluate a presidential candidate's constitutional qualifications. *See* 10/25/2023 Order at 9-18; *accord Elliott v. Cruz*, 137 A.3d 646 (Pa. Commw. Ct. 2016) (challenge to presidential primary candidate Ted Cruz's eligibility did not raise a political question), *aff'd*, 635 Pa. 212 (2016); *Williams v. Cruz*, OAL Dkt. No. STE 5016-16 (N.J. Off. of Admin. Law Apr. 12, 2016), https://perma.cc/7G6F-AL3J (same).

For instance, the Twelfth Amendment "does not vest the Electoral College with power to determine the eligibility of a Presidential candidate"; it only charges the "Electoral College [with] select[ing] a candidate for President and then transmit[ting] their votes to the nation's 'seat of government.'" *Elliott*, 137 A.3d at 650-51 (quoting U.S. Const. amend. XII). Nor does the Twelfth Amendment give Congress any "control over the process by which the President and Vice President

are normally chosen," *id.* at 651; it merely tasks Congress with the duty to "count[]" the votes of the electors, U.S. Const. amend XII. While the Constitution says Congress shall be the "Judge of the . . . Qualifications of its own Members," art. I, § 5, cl. 1, it does not make Congress the "Judge" of presidential qualifications, reinforcing that such a function "has not been textually committed to Congress." *Elliott*, 137 A.3d at 651.

Nor does the Twentieth Amendment make such a textual commitment. By its terms, the Amendment only applies *post-election*, once there is a "President elect." U.S. Const. amend. XX, § 3. "[N]othing in the Twentieth Amendment states or implies that Congress has the *exclusive* authority to pass on the eligibility of candidates for president," nor does it "prohibit[] states from determining the qualifications of presidential candidates." *Lindsay*, 750 F.3d at 1065.

If anything, Section 3's text suggests Congress *lacks* the power to determine the President's disqualification under the Fourteenth Amendment. Section 3 requires a "vote of two-thirds of each House" to remove the disqualification. U.S. Const. amend. XIV, § 3. Allowing

Congress to decide by a simple majority that a candidate is qualified would render the supermajority requirement a nullity.

The Supreme Court requires a far clearer "textually demonstrable constitutional commitment" before declaring an issue non-justiciable. *See*, *e.g.*, *Nixon v. United States*, 506 U.S. 224, 228-29 (1993) (impeachment trial procedure was a political question because the Constitution provides that "'[t]he Senate shall have the sole Power to try all Impeachments'"); 10/25/2023 Order at 18 (citing cases).

Many courts and administrative bodies have decided challenges to presidential candidate qualifications under state ballot access rules. *See* FSFP Br. 10-13 (citing cases); *see also Elliott*, 137 A.3d 646; *Hassan*, 495 F. App'x 947; *Lindsay*, 750 F.3d 1061. And Trump's cases are readily distinguishable. *See* Trump Br. 21 n.41; 10/25/2023 Order at 4-18; FSFP Br. 14-20. Not one involved a ballot access challenge authorized by state law. And nearly all involved plaintiffs seeking to *annul the results* of an election or *remove* the sitting President—remedies that exceed state authority. Those cases are irrelevant before

an election, where Article II expressly commits elector selection to the states. *See supra* § I.

Trump's cases also offer "little analysis" of what constitutional provisions they rely on. 10/25/2023 Order at 10; 11/17/2023 Order ¶ 13 & n.2; *see, e.g.*, *Castro v. N.H. Sec'y of State*, 2023 WL 7110390, at *9 & n. 29 (D.N.H. Oct. 27, 2023) (relying on political question cases that admittedly lacked "searching analysis of the text and history of" pertinent constitutional provisions because *pro se* plaintiff waived counterarguments), *aff'd*, 2023 WL 8078010, at *5 (1st Cir. Nov. 21, 2023) (dismissing on standing and declining to reach political question doctrine "because of the limited nature of the arguments" by *pro se* plaintiff). This is hardly compelling authority.[2]

Trump's position would also have calamitous prospects: the only way to enforce Presidential qualifications would be by Congress during its January 6th Joint Session, *after millions of voters chose that candidate*. Common sense and the events of January 6, 2021, teach that

[2] It is irrelevant whether recent amendments to the Electoral Count Act altered Congress's power to consider a President-elect's qualifications. Trump Br. 24-25. Even if Congress has that power, it is not exclusive.

this is a recipe for disaster. It would lead to precisely "the sort of electoral 'chaos' that the Supreme Court has repeatedly held States are constitutionally empowered to mitigate" by policing their ballots of unqualified candidates *before* any votes are cast. *Cawthorn*, 35 F.4th at 266 n.4 (Wynn, J., concurring) (quoting *Storer*, 415 U.S. at 730); *see also* Common Cause Br. 17-18. And, because a federal question is involved here, the U.S. Supreme Court can resolve any conflicts between states.

B. Section 3 is Enforceable in State Courts under State Law

Trump's argument that Section 3 is not "self-executing and thus provides for no private right of action" is both irrelevant and wrong. Trump Br. 18. It is irrelevant because Petitioners do not assert a cause of action directly under the Fourteenth Amendment; they bring a cause of action under *Colorado law* to enforce a constitutional qualification for office. And it is wrong because Section 3 *is* "self-executing" in the sense that courts must enforce it where, as here, a proper cause of action calls for it. *See* 10/25/2023 Order at 19-20.

Most cases cited by Trump and amici stand for the irrelevant proposition that the Fourteenth Amendment confers no "implied cause

of action for damages." *Cale v. City of Covington*, 586 F.2d 311, 313 (4th Cir. 1978); *see, e.g.*, Trump Br. 19-20 nn. 36, 38. These cases say nothing about the states' settled authority to "execute" the Fourteenth Amendment *through their own laws*. *See Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 264 (1933) (states may prescribe "the form or method of procedure by which federal rights are brought to final adjudication in the state courts"); *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164 (1997) (discussing "federal constitutional claims … raised by way of a cause of action created by state law").

Indeed, the Supremacy Clause explicitly "charges state courts with a coordinate responsibility to enforce [federal] law according to their regular modes of procedure." *Howlett v. Rose*, 496 U.S. 356, 367 (1990). That means state courts *must* enforce Section 3 where state law procedures allow. And historically that's what state courts have done, even without federal enforcement legislation. *See* 10/25/2023 Order at 20 & n.5 (citing cases); Graber Br. 6-7. Trump's own expert admitted states could pass laws implementing other provisions of the Fourteenth Amendment. 11/03/2023 Tr. 234:3-21 (Ex. F).

Under Trump's reading, state enforcement of the Fourteenth Amendment without federal legislation is unconstitutional. That is absurd and no authority supports it. Trump cites cases saying that 42 U.S.C. § 1983 displaces any *implied federal* causes of action. Trump Br. 19 n.36; CRSCC Br. 41; *Foster v. Michigan*, 573 F. App'x 377, 391 (6th Cir. 2014). But the "§ 1983 remedy" does not displace *state* law; it is "*supplementary* to any remedy any State might have." *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 177 (2023). Because Congress has not legislated to preempt state enforcement of Section 3, states may pass laws giving it effect.

Nor does anything in the Fourteenth Amendment's text suggest that federal legislation is required to activate Section 3. To the contrary, Section 3's authorization of Congress to "remove such disabilit[ies]" by a two-thirds vote "connotes taking away something which has already come into being." *Cawthorn*, 35 F.4th at 248, 260. Section 3 itself creates the disability. *See* 11/01/2023 Tr. 25:1-26:11 (Ex. D); Graber Br. 7.

Section 5 of the Fourteenth Amendment, which says, "Congress shall have the power to enforce" the Amendment, does not displace the coordinate duty of the states to do so. Indeed, the Supreme Court has made clear that the Constitution's Reconstruction Amendments—each of which include materially identical enforcement provisions—impose "self-executing" limits that courts have the "power to interpret," even without congressional legislation. *City of Boerne v. Flores*, 521 U.S. 507, 522, 527 (1997) (Fourteenth Amendment); *Civil Rights Cases*, 109 U.S. 3, 20 (1883) (Thirteenth and Fourteenth Amendment); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009) (Fifteenth Amendment). It is the *courts'* interpretation of the Fourteenth Amendment that constrains *Congress's* Section 5 enforcement power, not the other way around. *Boerne*, 521 U.S. at 524-29.

Trump's reading of Section 5 also makes no sense: it would allow a simple majority in Congress to nullify *the entire Fourteenth Amendment* by repealing or failing to enact enforcement legislation, thereby making "Congress superior to the Constitution." Graber Br. 3-4, 9. "[S]o gross

an absurdity cannot be imputed to the framers of the constitution." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 355 (1819).

Chief Justice Chase's non-binding opinion as a circuit judge in *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869), is not to the contrary. That case arose in a unique historical context with no application here: in 1869, Virginia was an "unreconstructed" territory under federal military control, *id.* at 11, and it lacked any operative state law that could have enforced Section 3, *id.* at 14. And Chase only addressed whether Section 3 could be enforced collaterally through a federal habeas petition. He had no occasion to decide whether a functional state like Colorado could pass its own legislation enabling Section 3 enforcement.

Moreover, Chase later reversed his position in the treason prosecution of Jefferson Davis, where he agreed (again as a circuit judge) with Davis's counsel that Section 3 "executes itself" and "needs no legislation on the part of congress to give it effect." *In re Davis*, 7. F. Cas. 63, 90, 102 (C.C.D. Va. 1871). These "contradictory holdings . . . draw both cases into question and make it hard to trust Chase's

interpretation." *Cawthorn*, 35 F.4th at 278 n.16 (Richardson, J., concurring in the judgment); *see also* Graber Br. 8-10. And to the extent that *Griffin* could be read to apply outside of its limited historical context, it cannot be squared with *Boerne* and other binding precedents.[3]

C. Section 3 Can Be Enforced Pre-Election

Trump and amici wrongly claim that Section 3 cannot be enforced before an election because it only applies to *holding* office, not *running for* office. Trump Br. 25-28; RNC Br. 3-5. That argument disregards Section 3's text and history, as well as case law approving of pre-election enforcement of other presidential qualifications.

As discussed, Section 3 imposes a *present* disqualification from officeholding. *See supra* at 25; *New Mexico ex rel. White v. Griffin*, 2022 WL 4295619, at *25 (N.M. Dist. Ct. Sept. 6, 2022) (Section 3

[3] Amici wrongly claims that "all" of Chase's Supreme Court colleagues endorsed his reading of Section 3. Tillman Br. 12. The Justices "unanimously concur[red]" only with an alternative holding unrelated to Section 3—"that a person convicted by a judge de facto acting under color of office, though not de jure, … can not be properly discharged upon habeas corpus." *In re Griffin*, 11 F. Cas. at 27.

disqualification was effective upon officeholder's engagement in the January 6th insurrection). Thus, Trump is disqualified under Section 3 *right now*. The hypothetical possibility that Congress could "remove[]" Trump's disability does not negate that. Any constitutional qualification for the Presidency (including those based on age, citizenship, and residency) could be eliminated by amending the Constitution; that does not make it *unenforceable* before election day. *See Hassan*, 495 F. App'x at 948 (states may exclude candidates "constitutionally prohibited from *assuming* office") (emphasis added); *supra* § I. Besides, the notion that supermajorities of both Houses of Congress will grant Trump Section 3 amnesty is fanciful. Trump offers nothing to suggest it is even a remote possibility.

Enforcing Trump's existing disqualification would not "strip" Congress of its amnesty power. Trump Br. 21, 27. Far from it, "[i]f this Court were to disqualify . . . Trump, there would be nothing standing in the way of Congress immediately removing that disability." 10/25/2023 Order at 17 n.4. But Colorado has an election to run and a compelling interest in protecting the integrity of its ballots. Trump has no right to

override that interest based on implausible speculation that a supermajority of Congress *might* someday before January 20, 2025, grant him amnesty.

The cases cited by Trump and amici are inapt. Three of the cases addressed, under state law, whether to remove a *currently qualified* candidate *after* an election merely because they were disqualified during the election. Trump Br. 27 n. 60. Other cases involved Section 3 challenges to members-elect of Congress. RNC Br. 3-4. None of these cases addressed the states' constitutional authority to exclude from the ballot candidates disqualified under Section 3, let alone did they hold that states are *powerless* to do so. And the congressional cases are especially irrelevant because the Constitution makes Congress the "Judge of the . . . Qualifications of its own Members," U.S. Const. art. I, § 5, cl. 1, but designates no "Judge" of presidential qualifications.

Trump's comparison to the Constitution's residency qualifications for Congress is also unpersuasive. Trump Br. 28. Those qualifications include a controllable temporal trigger: they are tied to a person's residency status "when elected." Section 3, by contrast, imposes an

immediate disability once a covered officeholder engages in proscribed conduct. *Compare* U.S. Const. art. I, § 2, cl. 2; § 3, cl. 3, *with* amend. XIV, § 3. Thus, Colorado does not impose an extra-constitutional qualification on candidates by enforcing their *present* Section 3 disability. *Cf. Schaefer v. Townsend*, 215 F.3d 1031, 1036 (9th Cir. 2000).

Similarly, enforcing Section 3 at the ballot access stage does not run afoul *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). *Thornton* invalidated a state constitutional amendment that imposed an "additional qualification" (a term limit) for congressional candidates beyond those in the Constitution. *Id.* at 835-36. The Court made clear it was *not* opining on the states' ability to enforce qualifications *in* the Constitution, expressly including "§ 3 of the 14th Amendment." *Id.* at 787 n.2; *Cawthorn*, 35 F.4th at 264 (Wynn, J., concurring).

II. Colorado Law Empowers Courts to Review the Qualifications of Presidential Candidates

C.R.S. § 1-4-1204(4) permits "eligible electors" to sue the Secretary, using § 1-1-113's procedures, to prevent her from including a constitutionally ineligible Presidential candidate on the ballot. The

court evaluates the candidate's qualifications de novo. *See, e.g.*, *Kuhn v. Williams*, 2018 CO 30M, ¶¶ 39-46. The Secretary agrees with this reading of the Election Code, as did the district court. *See* 11/17/2023 Order ¶¶ 194-98, 213-24; 10/20/2023 Order at 14-20 (Ex. AL).

Trump argues that Colorado law only allows courts to order the Secretary "to comply with her duty under the election code" and, because the election code does not mention Section 3 of the Fourteenth Amendment, courts cannot enforce this qualification. Trump Br. 15. That is wrong.

Section 1-1-113 "permits the adjudication of controversies arising from *any wrongful act* that occurs prior to the day of an election, without further limitation." *Carson v. Reiner*, 2016 CO 38, ¶ 17 (emphasis added). Section 1-4-1204(4) reinforces the breadth of judicial review here: the statute permits "*any* challenge to the listing of any [presidential primary] candidate" based on an "alleged impropriety" and instructs that "the district court shall . . . assess the validity of *all alleged improprieties*." (emphasis added).

Several provisions of Part 12 of the Election Code (covering Presidential primaries) confirm this broad approach. Section 1-4-1201 makes clear that all of Part 12 is meant to "conform to the requirements of federal law," which includes Section 3 of the Fourteenth Amendment. Section 1-4-1203(2)(a) limits participation in primary elections to "qualified candidate[s]." And § 1-4-1203(3) states 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," which includes ensuring only qualified candidates can access the ballot. *See, e.g.*, C.R.S. § 1-4-501(1), (3); *Hanlen v. Gessler*, 2014 CO 24, ¶ 40; *Kuhn*, ¶¶ 36-46; 11/17/2023 Order ¶¶ 194-98. The Constitution's Supremacy Clause likewise requires state courts to enforce federal constitutional requirements through generally applicable state law procedures. *Supra* § I.B.

Under the Election Code, courts make the final eligibility determination. *See Hanlen*, ¶ 40 ("[T]he election code requires a court, not an election official, to determine the issue of [candidate] eligibility."); *Carson*, ¶ 8 ("[T]he statutory scheme evidences an intent

that challenges to qualifications of a candidate be resolved only by the courts."). If Trump is disqualified under Section 3, it "'would certainly '[be] a breach or neglect of duty or other wrongful act'" for the Secretary "to nonetheless certify [him] to the ballot." *Kuhn*, ¶ 38.

In arguing otherwise, the State Party cites recent decisions from Minnesota and Michigan rejecting Section 3 challenges to Trump's candidacy on state law grounds. *See* CRSCC Br. 22-23. But those cases held that no Minnesota or Michigan statute confers a private right of action to challenge ballot access in a presidential primary. *See id.* Because Colorado law *does* create such a private right of action, *see* C.R.S. § 1-4-1204(4), those cases are irrelevant here.

Nor is Petitioners' § 1-1-113 claim foreclosed by *Frazier v. Williams*, 2017 CO 85, or *Kuhn*. *See* 10/20/2023 Order at 8-13. In both cases, this Court held that a party may not inject into a § 1-1-113 proceeding a separate claim challenging the constitutionality of the Election Code itself. *Frazier*, ¶ 12; *Kuhn*, ¶ 55. Petitioners do not challenge the constitutionality of the code. Instead, they "alleg[e] a breach or neglect of duty or other wrongful act under the Colorado

Election Code," *Frazier*, ¶ 12, because the Code requires the Secretary to exclude constitutionally ineligible candidates from the ballot. Section 1-1-113 is the *exclusive* procedural vehicle for Petitioners' claim. *See* 10/20/2023 Order at 12; C.R.S. § 1-1-113(4).[4]

III. Enforcing Section 3 in a Presidential Primary Does Not Violate the CRSCC's Associational Rights

Enforcing constitutional qualifications for office does not violate anyone's First Amendment associational rights. A party does not have an absolute right to determine who appears on the ballot as that party's nominee. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997). For example, a party does not have a right to place candidates who are "ineligible for office" on the ballot. *Id.* at 359. That should end the argument.

Whether a ballot restriction violates First Amendment associational rights depends on weighing "the 'character and magnitude' of the burden the State's rule imposes on those rights

[4] Trump's claim that he was deprived of "due process" below is meritless and forfeited, given his failure to seek any specific relief in the district court. *See* 10/28/2023 Order at 3 n.2 (Ex. AM); 11/17/2023 Order ¶ 37 n.6.

against the interests the State contends justify the burden." *Id.* at 358. "That a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights." *Id.* at 359.

Colorado, by contrast, has weighty interests in ensuring ineligible candidates do not appear on the ballot. *Supra* § I; *Timmons*, 520 U.S. at 359, 364. That this challenge involves a primary ballot does not change the analysis, and the State Republican Party cites no case distinguishing *Timmons* on that ground. And while the State Party cites cases challenging state laws that regulated parties' "internal affairs and structures," it ignores that *Timmons* distinguished these very cases from those involving reasonable ballot access restrictions. *Id.*; CRSCC Br. 30-31.

There is no First Amendment right to place a candidate on the primary ballot who could not appear on the general election ballot. Accepting such an argument would mean that "anyone, regardless of age, citizenship or any other constitutional ineligibility would be entitled to clutter and confuse our electoral ballot. Nothing in the First

Amendment compels such an absurd result." *Lindsay*, 750 F.3d at 1064 (excluding a 27-year-old from presidential *primary* ballot).

IV. The District Court's Finding that Trump Engaged in Insurrection was Supported by the Evidence

The district court weighed the evidence and testimony and concluded that Trump engaged in insurrection. That finding is correct and this Court reviews it for abuse of discretion. *State ex rel. Weiser v. Ctr. for Excellence in Higher Educ., Inc.*, 2023 CO 23, ¶ 33.

A. The January 6 Attack Was An Insurrection

On January 6, a mob of thousands of Trump supporters attacked the Capitol. 11/17/2023 Order ¶¶ 147, 242. The mob breached the Capitol and disrupted the constitutionally mandated peaceful transfer of power. *Id.* ¶¶ 151-52, 177. The mob was armed and violently attacked police officers, injuring over 170 and killing one. *Id.* ¶¶ 155-58; Ex. 32 at 1 (GAO Report, Feb. 2023); Exs. 10-20 (videos of violent attacks on police officers). Members of the mob spoke of revolution and intended to and did obstruct the electoral vote count mandated by Article II and the Twelfth Amendment. 11/17/2023 Order ¶¶ 162-63, 168, 179, 244.

The violent attack to stop this core constitutional function "easily" qualifies as an "insurrection" "against the Constitution" for purposes of Section 3. 11/17/2023 Order ¶¶ 241-44; *id.* ¶¶ 146-68. Historically, "insurrection" meant "any public use of force or threat of force by a group of people to hinder or prevent the execution of law." *Id.* ¶ 233. This definition comports with historical examples of insurrection before the Civil War, with antebellum dictionary definitions and judicial opinions, and with other authoritative legal sources. *Id.* ¶¶ 234-40; 11/01/23 Tr. 26:19-35:22.

Trump's claim that "insurrection" means "levying war" for purposes of the Treason Clause only buttresses this conclusion. Trump Br. 40. Historically, "levying war" included any "insurrection" in which "a body of men" seek to "oppose and prevent by force and terror, the execution of a law." *United States v. Mitchell*, 2 U.S. (2 Dall.) 348, 349 (C.C.D. Pa. 1795) (Marshall, C.J.); *accord In re Charge to Grand Jury - Neutrality L. and Treason*, 30 F. Cas. 1024, 1025 (D. Mass. 1851); *Case of Fries*, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800) (Chase, J.); *United States v. Hanway*, 26 F. Cas. 105, 127-28 (C.C.E.D. Pa. 1851); Graber Br. 19-

21. Trump's own authority used the same definition. *See United States v. Greathouse*, 26 F. Cas. 18, 26 (C.C.N.D. Cal. 1863) (Field, J.).

Trump asserts January 6 was not "violent enough," Trump Br. 40, but it was more violent than historical insurrections referenced by Section 3's framers. 11/01/2023 Tr. 27:3-30:12. Nor does "insurrection" require officers to be "attacked with guns or knives" as opposed to other weapons. *Compare* Trump Br. 41-42 *with Case of Fries*, 9 F. Cas. at 930 ("[M]ilitary weapons" like "guns and swords" "are not necessary to make such insurrection or rising amount to a levying war, because numbers may supply the want of military weapons, and other instruments may effect the intended mischief."); *Charge to Grand Jury*, 30 F. Cas. at 1025-26 (similar). The district court also correctly found that the mob's overriding purpose was to obstruct certification of the election; that fact was obvious, including to Trump's own witnesses. 11/17/2023 Order ¶¶ 162-68, 243-44.

B. "Engaged in Insurrection" Includes Incitement

The district court correctly held that the phrase "engaged in" insurrection is not limited to taking up arms but includes "incitement to

insurrection." *Id.* ¶¶ 250-55. Binding Attorney General opinions directed that Section 3's "engaged in" language includes any "direct overt act," including "incit[ing] others," intended to further the insurrection or rebellion. 12 Op. Att'y Gen. 141, 164 (1867); 12 Op. Att'y Gen. 182, 205 (1867); Opening Br. 36-37 (explaining historical importance of Stanbery's opinions). Judicial decisions interpreting Section 3 similarly held that it covers any "voluntary effort to assist the Insurrection or Rebellion." *United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D. N.C. 1871); *accord Worthy v. Barrett*, 63 N.C. 199, 203 (1869); *Griffin*, 2022 WL 4295619, at *19. And antebellum treason cases that informed Section 3 held that "levying war" included "inciting and encouraging others" to commit treason. *In re Charge to Grand Jury*, 30 F. Cas. 1032, 1034 (C.C.S.D. N.Y. 1861); *accord In re Charge to Grand Jury-Treason*, 30 F. Cas. 1047, 1048-49 (C.C.E.D. Pa. 1851); *Ex parte Bollman*, 8 U.S. 75, 126 (1807) (Marshall, C.J.); Graber Br. 21-24.

Section 3 was focused on rebel *leaders*, who often engage through incitement rather than by taking up arms themselves. 11/17/2023 Order ¶ 255. Thus, excluding incitement would "defeat the purpose" of Section

3. *Id.* And given that criminal statutes are usually wordier than constitutional provisions, Trump is wrong to argue that the explicit inclusion of "incitement" in certain criminal insurrection statutes suggests an intent to exclude incitement from Section 3. *Id.* ¶¶ 252-53.

C. Trump Engaged in Insurrection

Trump's conduct and words "were the factual cause of . . . the January 6, 2021 attack on the United States Capitol." 11/17/2023 Order ¶ 145. Trump called his supporters to Washington on January 6, "incited" them with words that "explicitly" and "implicitly" commanded violence, and they then violently stormed the Capitol. *Id.* ¶¶ 144-45, 169-93, 288-98. Even though the standard of proof is a preponderance of evidence, the district court found by "clear and convincing evidence" that Trump's language was "likely to incite imminent violence" and was intended to do so. *Id.* ¶¶ 209, 288-98. Trump thereby engaged in insurrection.

"[P]rior to the January 6, 2021 rally, Trump knew that his supporters were angry and prepared to use violence" and "did everything in his power to fuel that anger" by repeatedly asserting false

accusations of election fraud. *Id.* ¶¶ 87-112, 120-22, 128. After the electors voted, Trump urged his supporters to come to Washington, D.C., on January 6, falsely claiming that Pence had the authority to overturn the election results and that the allegedly stolen election was an "act of war." *Id.* ¶¶ 113-19, 121-22, 127.

Knowing the risk of violence and that the crowd was angry and armed, *id.* ¶¶ 134-35, Trump incited violence both explicitly and implicitly. He repeatedly called out Pence, told the crowd to "fight like hell" and used other variations of "fight" 20 times, repeatedly insisted that "we" (including the agitated crowd) could not let the certification happen, and promised that he would march with them to the Capitol. *Id.* ¶¶ 135, 137-38. He said "[w]hen you catch somebody in a fraud, *you're allowed to go by very different rules*," commanding the crowd to use unlawful means rather than normal political advocacy. *Id.* ¶¶ 135, 144. The most inflammatory remarks of his speech were not in his prepared remarks; Trump added that language. *Id.* ¶¶ 136-39. During the speech, listeners shouted, "storm the Capitol!" and "invade the Capitol Building!" *Id.* ¶ 141. "Trump's Ellipse speech incited imminent

lawless violence" and "was intended as, and was understood by a portion of the crowd as, a call to arms." *Id.* ¶¶ 144-45.

Trump used this incendiary language knowing and intending that supporters would take his words not "symbolically" but as "literal calls to violence." *Id.* ¶¶ 84-85. Trump knew "the power that he had over his supporters," *id.* ¶ 143, and that "his supporters were willing to engage in political violence and that they would respond to his calls for them to do so," *id.* at ¶ 289; *see also id.* ¶¶ 130-35.

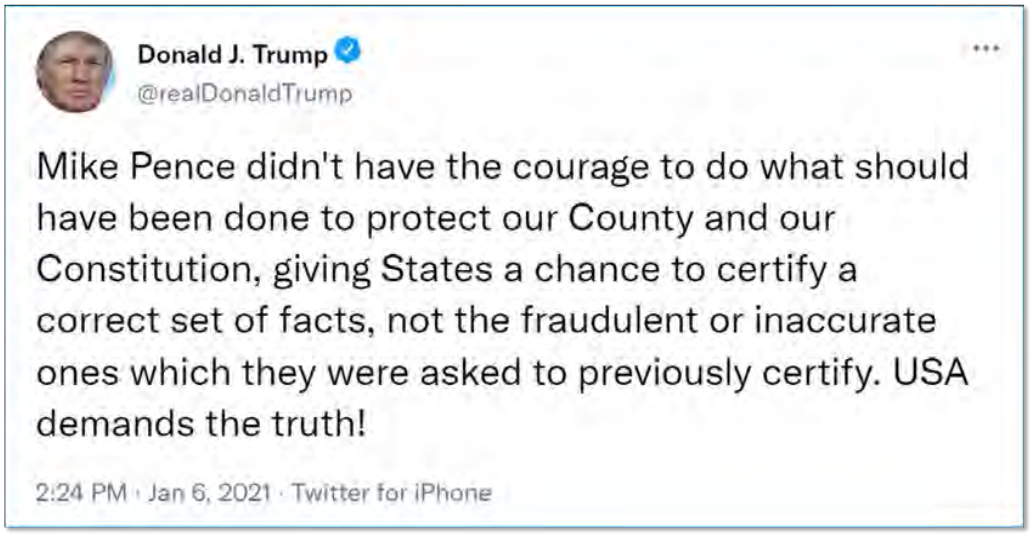
In reaching this finding, the trial court relied on an extensive record, including Trump's own words, testimony of his own witnesses, and the testimony of political extremism expert Professor Peter Simi. *Id.* ¶¶ 42, 61-86, 143. Professor Simi identified repeated episodes where Trump called for violence using similar language, his supporters then engaged in violence, and Trump then praised that violence. *Id.* ¶¶ 42, 61-86. By January 6, Trump knew how some of his supporters would respond to his rhetoric, and used that language deliberately to cause violence. *Id.* ¶¶ 85, 142-45. The court "note[d] 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." *Id.* ¶ 86. While Professor Simi is "not in President Trump's mind," Trump Br. 37, the pattern of behavior he identifies is powerful evidence of Trump's intent. The only person who *is* in Trump's mind refused to testify and defend his conduct.

Trump did nothing to stop the mob for nearly three hours, instead pouring fuel on the fire. *Id.* ¶¶ 169-86. He knew by 1:21 pm the Capitol was under siege, but made no effort to mobilize federal law enforcement or the National Guard. *Id.* ¶ 169, ¶¶ 181-85. Trump relies on testimony by Kash Patel claiming that, before January 6, Trump authorized activation of 10,000 National Guard troops. But the district court found that testimony not credible, "illogical," and "completely devoid of any evidence in the record." *Id.* ¶ 47; *see also* 11/01/2023 Tr. 254:20-255:18 (Patel) (Acting Secretary of Defense Chris Miller contradicting Patel's claims); 11/03/2023 Tr. 165:1-8 (Heaphy) (DOD produced no record documenting such authorization); 10/31/2023 Tr. 254:6-20 (Banks) (similar) (Ex. C). In any event, it is undisputed that the day of January 6, Trump refused to take action. "Trump ignored pleas to intervene and

instead called Senators urging them to help delay the electoral count," telling Rep. Kevin McCarthy, "I guess these people are more upset about the election than you are." 11/17/2023 Order ¶ 180.

Most damning, at 2:24 pm, while Trump knew the Capitol was under violent attack, he tweeted:



Ex. 148 at 83; 11/17/2023 Order ¶ 170. Incredibly, at no point at trial or in his appellate brief did Trump mention this tweet, let alone try to explain why, in context, it represents anything other than an intentional attempt to incite the mob and direct their anger at Pence as he carried out his constitutional duty.

This tweet "encouraged imminent lawless violence by singling out Vice President Pence and suggesting that the attacking mob was

'demand[ing] the truth'." *Id.* ¶ 172. It "paint[ed] a target on the Capitol," causing the mob to surge violently and forcing lawmakers and Pence to flee. *Id.* ¶¶ 172-77.

Trump finally told the mob to leave at 4:17 p.m., in a message that praised the attackers and justified their actions. *Id.* ¶¶ 186-90. By that time it was clear that reinforcements had arrived at the Capitol, that Pence and members of Congress had reached safety, and that the mob had delayed but would not stop the certification. Ex. 78 (January 6 Select Committee Finding #331, 392-95); Ex. 22 at 26 (January 6 Senate Report).

Hours later, Trump celebrated the violence again:

Ex. 148 at 84; 11/17/2023 Order ¶ 189. Even years later, Trump continued to insist that alleged 2020 election fraud justified "termination of all rules, regulations, and articles, *even those found in the Constitution*." Ex. 74 (emphasis added).

Considering the totality of the evidence, the district court found that "Trump endorsed and intended the actions of the mob on January 6, 2021." 11/17/2023 Order ¶¶ 61-145, 191-93. Trump cannot show that this finding was clearly erroneous.

V. The First Amendment Does Not Preclude Trump's Disqualification

Trump argues that the First Amendment's *Brandenburg* test protects him from disqualification even if he "engaged in insurrection" in violation of the Fourteenth Amendment. That is wrong on many levels. *See* Amicus Br. of Abrams *et al.* ("First Amendment Scholars"). The First Amendment does not somehow displace Section 3's narrowly targeted qualification for public office. *Id.* at 6-10. Additionally, Trump's encouragement and organization of insurrection falls within other First Amendment exceptions, including for speech integral to illegal conduct. *Id.* at 14-17.

But regardless, because the district court found that Trump's words were intended to, and did, incite an imminent insurrection, his speech is unprotected by the First Amendment under *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969); 11/17/2023 Order ¶¶ 294, 295; *see also Thompson v. Trump*, 590 F. Supp. 3d 46, 115 (D.D.C. 2022) (finding, without the benefit of this evidentiary record, that Trump's January 6th speech "plausibly [contains] words of incitement not protected by the First Amendment").

Rather than identifying clear error in the district court's factual findings, Trump argues that courts must examine only the "objective content of the speech," divorced from any context. Trump Br. 32. He notes that other speakers sometimes use phrases such as "fight like hell" metaphorically and in ways protected by the First Amendment. *Id.* at 34. But context is everything in *Brandenburg*. *See* 11/17/2023 Order ¶¶ 268-276, 283; *Nwanguma v. Trump*, 903 F.3d 604, 611 (6th Cir. 2018) ("[I]n addition to the content and form of the words, we are obliged to consider the context, based on the whole record."); *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (looking to "evidence or rational

inference from the import of the language" to see if "words were intended to produce, and likely to produce, imminent disorder"). The same words that would be protected if uttered in a sterile conference room can be unprotected if proclaimed in fiery terms to an agitated and armed crowd gathered near the target of the speech's ire.

It is true that "the subjective reaction of any particular listener cannot dictate whether the speaker's words enjoy constitutional protection." *Nwanguma*, 903 F.3d at 613. That is not what happened here. Trump riled up an already angry and armed crowd that he summoned, commanding them to imminent violence explicitly ("fight" and "fight like hell") and implicitly (urging the crowd to march to the Capitol and "go by a very different set of rules," and declaring "we are not going to let" the election results be certified). *Supra* at 6-13. He did so less than a mile from the Capitol, where Congress was certifying the election. And he knew, based on a long history of prior interaction, that extremist supporters would take these words as a literal call to arms. *Id.*

The First Amendment does not protect those who deliberately incite violence through barely veiled language they know their audience will understand. *See United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010); *see also United States v. Hale*, 448 F.3d 971, 983-84 (7th Cir. 2006) (gang leader's suggestion to member to do "whatever you wanna do," in context, supported charge of solicitation to violence).

Nor does one stray reference to "peacefully" in the Ellipse speech (or in two tepid tweets telling the already violent mob to "remain" peaceful without demanding they disperse) insulate the violent rhetoric under the First Amendment. Trump said "peaceful" robotically a single time and urged his supporters to fight 20 times in that speech. 11/17/2023 Order ¶¶ 135-37, 142. The district court credited Professor Simi's testimony that such statements negating his calls to violence "were insincere and existed to obfuscate and create plausible deniability" *Id.* ¶ 84. Indeed, Trump's effort to place so much emphasis on that one word in the speech–while ignoring the numerous calls to fight and the 2:24 tweet that day–confirms Professor Simi's conclusions. *Bongo Prods., LLC v. Lawrence*, 548 F. Supp. 3d 666, 682 (M.D. Tenn.

2021) (courts should "exercise ordinary common sense to evaluate the content of a message in context to consider its full meaning, rather than simply robotically reading the message's text for plausible deniability").

Trump incited insurrection on January 6, and the First Amendment does not protect that incitement.

VI. The District Court Did Not Abuse its Discretion by Admitting Findings from the January 6th Report

The district court did not abuse its discretion, much less commit reversible error, by relying on portions of 31 findings from the 814-page January 6 Select Committee's Final Report ("J6 Report").

First, Trump gets the burden of proof on reliability backwards. Once the party offering a government report shows that it "result[ed] from an investigation made pursuant to authority granted by law," C.R.E. 803(8)(C), the report is "presumptively admissible" unless the *opponent* of the evidence shows "circumstances indicate a lack of trustworthiness." *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143 (2d Cir. 2000); *see also Barry v. Trustees of Int'l Ass'n Full-Time Salaried*

Officers, 467 F. Supp. 2d 91, 96-97 (D.D.C. 2006) (same).[5] Petitioners satisfied their burden; Trump did not. There was thus nothing "absurd" or "unfair" about the district court pointing out Trump's complete failure to discredit any of the 31 findings the trial court relied on. 11/17/2023 Order ¶ 37; Trump Br. 46.

Trump is also wrong in suggesting that political motivation alone somehow renders a Congressional investigative report inadmissible. All such reports have some political motivation, yet C.R.E. 803(8)(C) presumes their admissibility and courts—including in the case Trump principally relies on—regularly admit them. *See, e.g., Barry*, 467 F. Supp. 2d at 98-99 (admitting Senate report); 11/17/2023 Order ¶ 28 (collecting cases). The district court here properly assessed the J6 Report's trustworthiness using the four-factor test first articulated in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 n.11 (1988). *See* 11/17/2023 Order ¶¶ 22-38. It concluded the J6 Report findings were reliable, having resulted from an extensive investigation by a team of

[5] *Barry* and *Bridgeway* addressed Fed. R. Evid. 803(8). Federal cases "are instructive" in interpreting the similar C.R.E. 803(8). *Leiting v. Mutha*, 58 P.3d 1049, 1052 (Colo. App. 2002).

seasoned investigators and a bipartisan committee that unanimously agreed to findings based overwhelmingly on the testimony of Republicans and members of the Trump administration. *Id*. ¶¶ 24, 26, 31-34. Trump did not—and does not—dispute any of these facts.

The district court did not, as Trump asserts, rely on inadmissible hearsay from the J6 Report. Most of the alleged hearsay to which he objects was offered and cited by the court only to show Trump's knowledge and his impact on extremists. *See id.* ¶¶ 95, 97, 103 (describing Associated Press call of election for Biden and Trump being told the falsity of his fraud claims); *id.* ¶ 110 (quoting extremists following incendiary statements by Trump). The rest of Trump's objections are to alleged hearsay on which the district court did not rely. *Compare id*. ¶¶ 132, 188 *with* Ex. 78. Trump also never explains how any of the 31 findings were, as he here baldly asserts, "legal conclusions . . . or facts unsupported or contradicted by the evidence in the record," Trump Br. 46, nor does he attempt to show that the court's ultimate finding of Trump's engagement in insurrection necessarily depended on those findings, *see Grace United Methodist Church v. City Of Cheyenne*,

451 F.3d 643, 644 (10th Cir. 2006) (stating that erroneous admission can only be prejudicial if "without such evidence, there would have been a contrary result"). There was no reversible error.

CONCLUSION

This Court should reverse the district court's legal conclusion that the Fourteenth Amendment does not apply to Trump, and affirm its rulings in all other respects.

Date: December 1, 2023 Respectfully submitted,

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I certify that on this 1st day of December 2023, a copy of this brief was electronically served via e-mail or via e-filing on all counsel and parties of record.

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