DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, CO 80203	DATE FILED: October 23, 2023 1:41 PM
Petitioners: NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN, v. **Respondents:** JENA GRISWOLD, in her official capacity as Colorado Secretary of State, and DONALD J. TRUMP, and **Intervenor:** COLORADO REPUBLICAN STATE CENTRAL COMMITTEE, and DONALD J. TRUMP	▲ COURT USE ONLY ▲
Attorneys for Petitioners: Mario Nicolais, Atty. Reg. # 38589 KBN Law, LLC 7830 W. Alameda Ave., Suite 103-301 Lakewood, CO 80226 Phone: 720-773-1526 Email: mario@kbnlaw.com Martha M. Tierney, Atty. Reg. # 27521 Tierney Lawrence Stiles LLC 225 E. 16th Ave., Suite 350 Denver, CO 80203 Phone: 303-356-4870 Email: mtierney@tls.legal Eric Olson, Atty. Reg. # 36414 Sean Grimsley, Atty. Reg. # 36422 Jason Murray, Atty. Reg. # 43652 Olson Grimsley Kawanabe Hinchcliff & Murray LLC 700 17th Street, Suite 1600 Denver, CO 80202 Phone: 303-535-9151	Case Number: 2023CV032577 Division/Courtroom: 209

Email: eolson@olsongrimsley.com Email: sgrimsley@olsongrimsley.com Email: jmurray@olsongrimsley.com Donald Sherman* Nikhel Sus* Jonathan Maier* Citizens for Responsibility and Ethics in Washington 1331 F Street NW, Suite 900 Washington, DC 20004 Phone: 202-408-5565 Email: dsherman@citizensforethics.org Email: nsus@citizensforethics.org Email: jmaier@citizensforethics.org **Pro hac vice* admission pending	
PETITIONERS' REPLY TO TRUMP'S MOTION IN LIMINE TO EXCLUDE PETITIONERS' EXHIBITS	

Trump devotes the bulk of his (bulky) motion *in limine* to citing a handful of Republican politicians criticizing the January 6 Select Committee. It is not surprising that many of Trump's Congressional allies have attacked the Committee since its findings are damning to Trump. But the question of admissibility is whether the Committee's *investigative process* was trustworthy. It was. The committee interviewed over 1,000 witnesses (most of whom were Republicans and many of whom were former Trump staffers), collected over a million documents, and produced a detailed report through a transparent process that made available to the public substantially all the evidence it relied on. And Trump's motion makes no effort to show that the ultimate *conclusions* of the January 6 Report are questionable. Trump's challenges to the Report go to its weight rather than its admissibility.

Trump's motion also launches a barrage of other undeveloped evidentiary challenges.[1] Indeed, he has objected to over 90% of Petitioners' exhibits—even those one would think he could not object to with a straight face, like Trump's own videotaped public statements. He summarily invokes Rules 402, 403, 404, hearsay, authenticity, and even the best evidence rule to most of Petitioners' exhibits, rarely with any articulated rationale for why these objections would apply to any specific exhibit. The objections are cursory and meritless—especially in a bench trial where the Court may assign the evidence whatever weight it is due.

I. The Findings of the January 6 Committee Are Admissible

Trump does not appear to dispute that the findings of the January 6 Report are "factual findings resulting from an investigation made pursuant to authority granted by law." CRE

[1] Although the Court instructed Trump to respond to the exhibits to Petitioners' opposition to his anti-SLAPP motion, *see* Order Re: Anti-SLAPP Evidentiary Issues (Oct. 10, 2023), Trump filed a motion *in limine* to Petitioners' entire preliminary exhibit list without filing those exhibits with the Court. Petitioners' final exhibit list is not due until October 23rd. To aid this Court's decision, Petitioners attach as Appendix A the list of exhibits referred to in Trump's motion, and will file the finalized exhibits with the Court by October 23rd.

803(8)(C). And he has failed to meet his burden of proving that the January 6 Report "lack[s] trustworthiness." *Id.* For that reason, the Report's findings are admissible.

As explained in detail in Petitioners' Appendix to the anti-SLAPP opposition, the January 6 Select Committee produced its findings through a detailed, deliberative, transparent, and bipartisan process. *See* Anti-SLAPP Opp. Ex. 1, [redacted] ¶¶ 11-22. The investigation was timely, was led by a former U.S. Attorney and a bipartisan team of experienced investigators, involved extensive public hearings and over 1,000 witness interviews (mostly Republicans and many former Trump officials),[2] and the bipartisan Committee's findings were unanimous. *See* Anti-SLAPP Opp. App'x 1 at ii-iv. Rather than rebut this showing, Trump's motion relies on a misleading narrative spun by certain Republican politicians seeking to protect Trump from the damning findings of the January 6 Report. Trump's criticisms are meritless, and in any event go to the weight rather than admissibility of the Report's findings.

A. The Bipartisan Committee Was Not Biased

Trump's primary complaint is about the political composition of the Select Committee. That committee was bipartisan, with seven Democrats and two Republicans. Anti-SLAPP Opp. Ex. 1, [redacted] ¶ 12.[3] And Trump's brief omits that the composition of the Select Committee stemmed from a deliberate choice by Trump's Congressional allies to boycott participation in *any* investigation. Trump cites no cases suggesting that one party's voluntary non-participation in a congressional committee somehow renders an otherwise reliable investigative report inadmissible under Rule 803(8)(C).

[2] It is also worth noting that Trump had the opportunity to testify before the January 6 Committee and tell his side of the story, but he refused to comply with the subpoena. Anti-SLAPP Opp. Ex. 1, [redacted] ¶ 17.

[3] Trump also claims that the Republicans on the Committee were "biased" because they had voted to impeach Trump. Mot. 5-6. That is not a sign of pre-judgment or bias—they voted for impeachment (ultimately at great political cost to themselves) after hearing the evidence of Trump's incitement of insurrection.

Congressional Democrats originally sought to appoint an independent and bipartisan commission to investigate the insurrection of January 6. Trump Mot. Ex. C, Pelosi statement 7/21/2021; Ex. 1, New York Times, *Democrats failed to get enough votes for an independent inquiry into the Jan. 6 riot* (5/28/2021); *see also* Anti-Slapp Op. Ex. 3, Report of the January 6 Select Committee ("J6 Report"), at 128-129. But that legislation failed in the Senate despite bipartisan support when it could not obtain enough Republican votes to survive a filibuster. Ex. 1; J6 Report at 128-129.

Still committed to proceeding on a bipartisan basis, Speaker Nancy Pelosi announced the formation of a House Select Committee that would have eight members appointed by the Speaker and five members appointed by Republican minority leader Kevin McCarthy. Ex. 2, Forbes, *Pelosi To Pick 8 Of 13 Members For Capitol Riot Select Committee – One May Be A Republican* (6/28/2021). One of Speaker Pelosi's nominees was a Republican (Rep. Liz Cheney), meaning that the proposed composition of the Committee would be seven Democrats and six Republicans.

Ultimately, Republicans chose to boycott. Two of Mr. McCarthy's five selections (Rep. Jim Jordan and Rep. Jim Banks) were not serious choices for a genuine investigation. Rep. Jordan was a material witness in the January 6 Committee's investigation. *See* Ex. 3, CNBC, *Trump allies Jordan and Banks were 'ridiculous' choices for Jan. 6 commission, Pelosi says* (7/22/2021); J6 Report at 130; *see also* Ex. 4, J6 Committee 12/22/2022 Letter to Rep. Jim Jordan. Representative Banks not only voted to decertify the 2020 election, but also made statements suggesting that the Committee needed to investigate the "Biden administration's" response to January 6, even though (of course) President Biden had not yet taken office. Ex. 3; *see also* J6 Report at 130. Because these two representatives appeared bent on delegitimizing the Committee's investigation before it even began, Speaker Pelosi determined they should not be seated on the Committee. Ex. 5, The Hill, *McCarthy yanks all GOP picks from Jan. 6 committee* (7/21/21). Still, she made clear she

would seat the remaining three Republican nominees and invited Rep. McCarthy to nominate two additional Republican names. *Id.*; *see also* J6 Report at 130-131. Rather than do so, Rep. McCarthy made a tactical decision to withdraw *all* of his nominees from the January 6 Committee. *Id.;* J6 Report at 130-131.

That certain Trump allies who may have had a political motive to sabotage the investigation into the insurrection on January 6 did not participate in the investigation does not mean its findings were biased or otherwise unreliable.[4] To the contrary, the Committee's findings derived from a careful and deliberative process by a bipartisan investigative staff, and reflected the unanimous findings of a committee composed of both Republicans and Democrats. Anti-SLAPP Opp. Ex. 1, [redacted] ¶¶ 2, 12-21. In any event, the Court can readily evaluate Trump's critiques in determining the weight to assign to particular findings from the January 6 Report. There is no basis for exclusion.

B. Trump's Other Critiques of the Committee are Baseless

Trump's laundry list of other grievances about the January 6 Committee are similarly baseless. First, Trump cites several statements by Republican politicians levying various critiques of the January 6 Committee, without attempting to prove that any particular grievance is either true or relevant to the Report's findings. *See, e.g.,* Mot. 14-15 (citing Rep. McCarthy complaining about, for instance, the Committee's subpoenas and requests for testimony); *id.* at 15-16 (citing testimony from Rep. Bice calling the January 6 Committee a "witch hunt" with little evidence other than the fact of Republicans' non-participation); *id.* at 16-17 (Rep. McCarthy airing general grievances including Democrats allegedly not investigating "the Hunter Biden Laptop" and "left-

[4] Trump's own exhibits make clear the fact he attempts to gloss over in his brief—the absence of more Republicans on the January 6 Select Committee—was the doing of Trump's own allies. *See, e.g.,* Trump Mot. Ex. G. Fact-checking Republican complaints that Speaker Pelosi 'cherry-picked' January 6 committee assignments, Reuters deemed the claim "misleading."

wing mob violence"). These political gripes do not undercut the reliability of the Committee's ultimate findings.[5]

Trump repeats grievances that have been rejected in prior litigation related to the January 6 Committee. He argues that the Committee was not properly constituted because it had no "ranking member." But a "ranking member" is simply "the most senior . . . member of the minority party on a committee." *Republican Nat. Committee v. Pelosi*, 602 F. Supp. 3d 1, 29 (D.D.C. 2022). Republican Rep. Liz Cheney was thus the "ranking member" of the January 6 Committee. *Id.*; *see also Eastman v. Thompson*, No. 822CV00099DOCDFM, 2022 WL 1407965, at *6 (C.D. Cal. Jan. 25, 2022) (rejecting the same argument and holding that "the Select Committee is properly constituted"). And while Trump also complains about subpoenas issued by the January 6 Committee, those subpoenas were appropriate given Congress's "'uniquely weighty' and 'vital interest in studying the January 6th attack.'" *Republican Nat. Committee*, 602 F. Supp. 3d at 29 (quoting *Trump v. Thompson*, 20 F.4th 10, 35 (D.C. Cir. 2021)).

Trump also complains that the hearings of the January 6 Committee raised "policy disagreements with President Trump's orders" that did not have "anything to do with the events of January 6." Mot. 12-13. That is false. Trump cites statements by the Committee concerning Trump's orders for speedy troop withdrawals from Afghanistan and Somalia. But this was directly related to the January 6 investigation. The Committee cited these rushed orders after the 2020 election as evidence that Trump knew he would be leaving office in January 2021, despite peddling

[5] Trump also cites an opinion poll about the January 6 committee from August 2021. Trump Ex. M. The admissibility criterion of Rule 803(8)(C) do not turn on public opinion. But in any event, that poll pre-dated the bulk of the Committee's twelve hearings. A poll nearly a year later showed that almost 50% of Americans thought the committee's investigation was fair, while only a third thought it was politically motivated and the rest did not know one way or the other. See Ex. 6, CNN Poll (July 26, 2022).

false claims of election fraud at the same time. *See* Ex. 7, Transcript from Jan. 6 hearing, Oct. 13, 2022, at 14-16.

Next, Trump cites to the conspiratorial website The Epoch Times for the claim that "the Select Committee failed to properly archive information related to President Trump." Mot. at 21. This, too, is false. Ex. 8, [redacted] ¶ 6. The Committee made nearly all the sources it relied on available to the public. *Id.* To the extent material was not made public or sent to the National Archives, that is because the material involved sensitive national security information that the Committee was obligated to return to the relevant government agency. *Id.* None of this information was pertinent to the Report's findings. Anti-SLAPP Opp. Ex. 1, [redacted] ¶ 19.

Finally, Trump makes the baseless allegation that the January 6 Committee "doctored evidence." Mot. 18. Trump cites only to a declaration of [redacted], who was not a member of the Committee and who knows nothing about these issues other than what he read in two right-wing news sources. Trump Mot. Ex. A ¶¶ 22-23. The allegations of nefarious intent are simply false. Ex. 8, [redacted] ¶¶ 4-5. In one of Trump's examples, the January 6 Committee played a video at a hearing from Capitol security cameras that had no audio, alongside audio from the same scene but from a different source. *Id.* ¶ 5. This is not "doctored"—it accurately depicted the events shown in the video. *Id.* Nor does it change the meaning or import of the video, which showed insurrectionists breaking into the Capitol by shattering exterior windows. In Trump's other example, the January 6 Committee used a demonstrative exhibit with an excerpt from a text message Rep. Jim Jordan sent to Trump's Chief of Staff Mark Meadows. *Id.* ¶ 4. The excerpted text message erroneously ended in a period, rather than an ellipses that would have made clear the cited passage was only an excerpt. *Id.* The Committee's staff acknowledged the inadvertent error and apologized for the incorrect punctuation. *Id.* A single typographical error that occurred during a presentation at one of many public hearings and had no impact on the Committee's findings in

the report hardly show that the entire investigative process was unreliable. If anything, the speedy response of the Committee to correct the error demonstrates the reliability of their overall work. In contrast, Trump's reliance on immaterial clerical errors simply underscores the absence of any legitimate critique of the Report.

In short, the findings of the January 6 Committee report fall within the hearsay exception of Rule 803(8)(C). And as explained below, Trump's other objections to specific findings of the January 6 Committee are equally unavailing.

II. Trump's Other Objections to Petitioners' Exhibit List Are Meritless

a. Trump's Ill-Formed Summary Objections Should Be Denied

Trump objects to the vast majority (144 out of 155) of the exhibits on Petitioners' list, almost always in bulk and without identifying how any particular rule of evidence ostensibly bars specific exhibits. The Court should reject this cursory approach to objections out of hand. Petitioners cannot properly respond to objections that merely list CRE rule numbers and assert without real explanation that they require excluding dozens of exhibits in one fell swoop.

In addition, most of the objections Trump so liberally dispenses are based on a fundamental misunderstanding of the rules of evidence, which Petitioners need to correct at the outset.

***Rule 402 and 403*:** Trump asserts Rule 402 and 403 objections indiscriminately, and seldom explains *why* he thinks particular evidence is irrelevant or unduly prejudicial. The few times he does attempt to offer explanation, he improperly assumes his own disputed version of the facts. *See* Mot. 24-26. For example, he falsely claims that certain findings of the January 6 Committee merely "show that he was concerned with the integrity of the General Election in 2020." *Id*. at 25 (citing Findings #50, 229). In fact, those findings show that Trump had been informed that his fake elector scheme and efforts to pressure Mike Pence to overturn the election were illegal. *See* Anti-SLAPP Ex. 4 Findings #50, 229. He also argues without explanation that

other findings of the January 6 Committee are irrelevant because they do not "tend to show that President Trump engaged in insurrection." Mot. at 26. But the cited findings show that several intelligence reports (which the Court could reasonably infer Trump knew of) made clear that there was a significant possibility of violence on January 6. *See* Anti-SLAPP Ex. 4, Findings #88. Whether such evidence ultimately suggests that Trump knew his words would incite insurrection is a question for trial. In a bench trial, there is no reason to sift through all the evidence beforehand and determine relevance out of context—particularly based on one side's disputed and improperly narrow conception of the issues to be tried.

Rule 404: Trump objects to much of Petitioners' evidence on Rule 404 grounds. He appears to argue that evidence of Trump's speech and conduct before January 6, 2021, is inadmissible "propensity" evidence. That is wrong. This evidence is crucial context for the events on January 6, and it also proves, among other things, Trump's "intent" and "absence of mistake." CRE 404(b)(2). Petitioners' case is that Trump taught his supporters over the span of his campaigns and his Presidency to interpret his words as a call to violence, that he knew from experience his supporters would interpret his words as such, that he summoned an angry mob to D.C. on January 6, 2021 through a stream of lies about election fraud in the months prior, and that his speech on January 6 used language that he intended as (and his supporters understood as) a command to engage in violence to overturn the election. None of this is inadmissible propensity evidence—Petitioners do not argue that he was more likely to incite violence on January 6 because he had done so before. Petitioners instead offer evidence of a pattern of past call-and-response behavior between Trump and his extremist supporters—a pattern which proves that Trump knew precisely how the mob would interpret his words on January 6.

Authenticity: Trump also objects to most of Petitioners' exhibit list on authenticity grounds. But he does not explain why any particular exhibit is inauthentic, and his generalized

objection appears to be merely for purposes of harassment. "The burden to authenticate is not high—only a *prima facie* showing is required." *Gonzales v. People*, 2020 CO 71, ¶¶ 1-48, 471 P.3d 1059, 1061–67 (quotation omitted). This requires only "sufficient evidence to support a finding that the proffered evidence is what the proponent claims[.]" *Id.* As shown in the chart at Appendix A, Petitioners have declarations or other evidence authenticating each of the documents on their exhibit list, aside from government records which are self-authenticating under CRE 902.

Best Evidence Rule: Finally, Trump almost universally asserts Rule 1002 objections to Petitioners' exhibit list. He claims that Petitioners need to introduce the original copy of all documents, photos, or videos. Trump fundamentally misunderstands Rule 1002. That rule applies only when a party seeks "[t]o prove the content of a writing, recording, or photograph." Rare cases where Rule 1002 would apply are a contract case requiring proof of the contract's terms, or a copyright case requiring proof of the supposedly infringing work's contents. *See* Fed. R. Evid. Advisory Committee Note Rule 1002. Here, Petitioners do not seek to admit the photographs or videos to prove the contents of a particular shot. Rather, Petitioners use them to show generally what happened at the Capitol. Rule 1002 does not apply when a party merely seeks to introduce a writing, recording, or photograph as evidence to prove *some other fact*. *Id.* The rule "has no application where the recorded events themselves, rather than the contents of the document recording them, are at issue." *People v. Saiz*, 32 P.3d 441, 448 (Colo. 2001). And in any event, Trump does not, and cannot, dispute that the pictures show the attack on the Capitol and has not raised "a genuine question" as to the proposed evidence's authenticity as Rule 1003 requires.[6]

[6] To the extent Trump complains that certain videos are only clips rather than the full original, this was an issue the parties discussed with the Court at the last hearing, and Petitioners' understanding was that Trump's counsel wanted us to provide clips rather than the full, lengthy videos. Of course, Petitioners are happy to provide the full videos to Trump's counsel as well, should they desire.

B. Objection No. 2: There Are No Other Evidentiary Issues with Petitioners' Excerpted Findings from the Jan. 6 Report (P78)

On top of his general argument against the entire January 6 Report, Trump also argues against admitting specific findings of the Report. He throws nearly the entire rulebook of evidence into his motion in a cursory effort to do so. None of the objections have merit:

- **Multiple Hearsay**: As Petitioners showed in their Appendix to the Anti-SLAPP briefing, the specific findings Petitioners have cited from the January 6 Report do not raise multiple-hearsay problems. To the extent out-of-court declarants are cited in certain findings, their statements are either not for the truth of the matter (*e.g., they* go to Trump's or the declarant's state of mind), or they fit some other hearsay exception. *See, e.g.,* Findings #88 and #103 (citing other government reports that are admissible under Rule 803(8)(A)); *Leiting v. Mutha*, 58 P.3d 1049, 1052 (Colo. App. 2002) ("Hearsay within hearsay is admissible only if each part of the combined statement confirms with an exception to the hearsay rule"). Trump purports to make an "omnibus" objection to the entire January 6 Report because some parts of the report may contain "hearsay," Mot. 23-24, but that is not how it works. Certain findings of a government report may be admissible even if other parts of the report contain inadmissible hearsay. *See, e.g., Bernache v. Brown*, 2020 COA 106, ¶¶ 16-17. Petitioners have excerpted 411 findings that are admissible evidence, and Trump does not meaningfully attempt to frame hearsay objections to any particular one.

- **Best Evidence, Rule 402, Rule 403, and Rule 404**: See above.

- **Authentication:** The specific findings excerpted from the January 6 Report are taken verbatim from the report and are properly authenticated. *See* Appx A. Trump seems to argue that out-of-court statements incorporated into a finding of a government report must be *separately* authenticated, but he cites no authority for this novel proposition. *Contra People v. Vasquez*, 155 P.3d 588, 594 (Colo. App. 2006) ("Evidence that a public record, report, or statement, in any form, is from the public office where such items are kept is sufficient authentication and identification under CRE 901"). In any event, the fact that such statements are quoted, with citation, as part of a presumptively reliable government report suffices to meet the low bar for authentication.

- **Completeness:** To the extent Trump complains that Petitioners only seek to introduce "cherry-picked findings," Trump is more than welcome to seek to introduce his own excerpts from the Report if they are otherwise admissible. Petitioners have marked the entire Report and identified the page from which each of Petitioners' Findings are taken, so this should be easily doable.

C. Objection No. 3: Jan. 6 Video Exhibits (Ex. P80-81, 88-96, 109-110, 119-122)[7]

Trump objects to the video exhibits published by the January 6 Committee for the same reasons he objects to the Report itself, and those objections should be denied for the same reasons. The videos are authenticated. They also constitute findings of the Committee, which the Committee presented at its public hearings. But more fundamentally, these videos are not hearsay at all because they are not introduced for the truth of any matter asserted.

Exhibits P88-96, P110, P119, and portions of P122 show contemporaneous video of the events of January 6, taken from police body cameras, Capitol security cameras, and other video sources. These are not being introduced for the truth of any matter asserted by any declarant, but merely to show the events depicted in the videos and photos. And Exhibit 109 consists of a presentation by the January 6 Committee laying out certain of their factual findings about how extremist groups planned for, and carried out, the attack on the Capitol. That is admissible under 803(8)(C) for the same reason the report itself is admissible.

Most of the remaining video exhibits are admissible state of mind evidence. Exhibit P80 is a video of Trump's supporters reacting to his December 19, "will be wild" tweet. Exhibit P81 is a video of Trump's supporters speaking on January 5, 2021, supporting his false claims of election fraud and previewing the insurrection the next day with references to revolution such as chants of "1776." And Exhibit P120 is a video of white supremacist and Trump ally Nick Fuentes supposedly "joking" on January 4, 2021, about killing legislators.

Finally, P121 and the first ten seconds of P122 are not being introduced as substantive evidence—they are on Petitioners' exhibit list only because they are reliance materials for

[7] In an effort to streamline the issues in this case, Petitioners have dropped Exhibits P38-39, 79, 82-87, 108, 128, and 142 from their preliminary exhibit list and do not address them here.

Petitioners' expert, and he may refer to them in his testimony to explain the basis for his opinions. *See* CRE 703.

D. Objection No. 4: Transcribed Interviews Before the January 6 Committee (Exs. P75-76, 97, 116)

Petitioners have offered a handful of exhibits containing witness interviews and testimony before the January 6 Committee. This testimony is admissible under the residual hearsay exception in CRE 807. *See* Anti-SLAPP Opp. at 16 n.7.

A statement having "equivalent circumstantial guarantees of trustworthiness" to other hearsay exceptions is admissible if: "(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."[8] CRE 807. Each requirement is met here.

The statements Petitioners proffer are each probative of material facts. Petitioners' exhibits cover three subjects: (1) testimony by Cassidy Hutchinson, a former White House official, that she overheard Trump being told on January 6 that many of his supporters gathering at the Ellipse were armed; (2) testimony by Hutchinson that Trump's chief of staff said Trump did not want to do anything about the insurrection and that he thought Mike Pence "deserved" to be hung; and (3) statements by former Attorney General Bill Barr and former White House Counsel Pat Cipollone that they informed Trump his allegations of voter fraud were baseless. P75-76, 97, 116. Each of these directly bears on material facts.

[8] The rule also requires that the opposing party be informed "sufficiently in advance of the trial" to have "a fair opportunity to prepare to meet" the statement. Trump's team has known of Petitioners' intention to introduce these statements since at least September 29, 2023. *See* Anti-SLAPP Opp. at 16 n.7 & Exs. 23-26.

The evidence is more probative than other evidence. While some of these facts are also contained in other evidence, including the findings of the January 6 Report, statements from witnesses who were directly involved have an extra layer of persuasiveness and weight.

Finally, the statements have guarantees of trustworthiness and their admission would promote the interest of justice. In making this determination, Courts look to the nature and character of the statement, the relationship of the parties, the probable motivation of the declarant in making the statement, and the circumstances under which the statement was made. *People v. Fuller*, 788 P.2d 741, 745 (Colo. 1990). Those factors warrant admission:

- Each of these witnesses made the statements while testifying before Congress, and each were informed that they could be subject to criminal penalties if they provided false testimony. Anti-SLAPP Opp. Ex. 1, [redacted]. ¶ 18. Thus, although this was not technically sworn testimony, and it was not subject to cross-examination, the applicable criminal penalties render the testimony similarly reliable to the exception for sworn statements in CRE 804(b)(1).

- Each of the witnesses were working within Trump's own administration at the time of the events. These were not political foes of President Trump—they were some of his closest advisors. They had little discernible motive to falsely implicate Trump.

- Given the well-known political blowback against those in Republican circles who publicly criticize Trump, these statements by his former advisors would seem to have reliability akin to a statement against interest. *See* CRE 804(b)(3).

- Each of the witnesses were testifying about conversations they either had or overheard.

Under these circumstances, the Court should admit these limited portions of prior testimony. *See. e.g., Harris v. City of Chicago*, 327 F.R.D. 199, 201 (N.D. Ill. 2018) (admitting statements to government investigator under residual exception even though statement was not subject to cross examination, noting that giving sworn statements "to someone whose job it was to investigate" the subject matter showed trustworthiness); *United States v. Clarke*, 2 F.3d 81, 83–85 (4th Cir. 1993) (admitting prior testimony from defendant's brother that was not subject to cross-examination by

the defendant, because lying would have incurred criminal penalties and there was "no reason for [defendant's brother] to have falsely implicated him");

E. Objection No. 5: Charts Compiling Defendant Statements by Select Committee (Ex. P25)

This chart compiled by the January 6 Committee contain statements reflecting the violent intent and motivations of various extremists criminally charged for participating in the January 6 attack. These are not hearsay. Petitioners are of course not trying to prove the truth of declarants' statements that "[a]ny Democrat found guilty of treason should be executed," or that "[i]f Trump don't get in we better get to war or we will lose our country." *See* P25. This is purely state of mind evidence. Also, Rule 803(8) expressly covers not only the January 6 Report itself, but "data compilations in any form" which set out the Committee's findings. That covers these charts. Otherwise, Petitioners incorporate their response to Trump's other challenges to the January 6 Committee findings.

F. Objection No. 6: Declarations and Prior Trial Testimony (Ex. P118)

Petitioners do not intend to introduce declarations as substantive evidence at trial, and have marked Ex. P118 ([redacted] only because it contains facts that support the predicates for admissibility of the January 6 Committee Report which may need to be cited in post-trial findings for that purpose. *See* CRE 104(a).

G. Objection No. 7: Videos, Pictures, and Other Evidence (Exs. P1-21, 37-40, 42-44, 47-72, 99-102, 111-114, 121-131, 133-141, 143, 147, and 150-155)

In this objection, Trump challenges over eighty exhibits (more than half of Petitioners' exhibit list) in less than a single page of argument. He does not make a specific objection to *any* of these exhibits individually, instead making broad and unsupported assertions that *all* of the exhibits are somehow inadmissible. This cursory approach should be rejected out of hand. In any event, nothing in this fusillade of objections withstands scrutiny:

- **Videos and photos from events at the Capitol on January 5 and 6, 2021** (P1-12, 101, 111-115, 132, 134, 135-137, 139, 140-141, 144, 153-155): These photos and videos from the Capitol attack and its leadup are clearly relevant and indeed central to the issue of whether January 6 was an "insurrection" against the Constitution.[9]

- **Trump's statements** (P47-70, 99-100, 101, 123-125, 127, 134, 141, 147, and 150): These are videos of speeches by Donald Trump, which are clearly admissible. The fact that Trump even objects to the video of himself taking the oath of office, Ex. 102, which is an indisputable matter of public record and directly relevant to this case, just shows Trump has made no effort to be judicious about objections. To the extent Trump is suggesting these exhibits are hearsay, these are admissions of a party opponent. They are also not introduced for the truth, but for their *falsity*, or because they show Trump's state of mind, or because they are the very statements by which Trump engaged in insurrection.

- **Statements by public officials refusing to overturn the election** (P37, 40, 42): Public statements by high-ranking state officials refusing Trump's demands to overturn state election results are evidence bearing on Trump's state of mind—that by January 6 he knew he had no ability to overturn the election without resorting to violence.

- **Public statements that January 6 was an insurrection** (P43, 44, 130): Statements by President Biden and by Republican Senate Majority Leader Mitch McConnell that January 6 was an "insurrection" are part of the long public record of every branch of government declaring January 6 to be an insurrection, of which this Court can take judicial notice. *United States v. Greathouse*, 26 F. Cas. 18, 23 (C.C.N.D. Cal. 1863) (Field, J.) (taking judicial notice based on "public documents" and "proclamations of the president" of the existence of the Confederate secession and that it constituted "rebellion").

- **Co-Conspirator Statements** (P130): This is a statement of Trump's former advisor and co-conspirator, Steve Bannon, who explained just days before the election that "our strategy" was that Trump would declare victory on election night even if he lost, and assert that the election was fraudulent. Given that this is precisely what Trump did on election night, this statement tends to prove that Bannon and Trump were part of a conspiracy to fraudulently overturn the election. *See* CRE 801(d)(2)(E).

- **Others** (P71, 72, 51-152): One is a video Trump retweeted calling for violence shortly before January 6 (71), one shows Trump flying over a rally of extremist groups in Marine One (72), and a few relate to the state of mind of Trump's supporters in the lead-up to the election and to January 6 (151-152). None of these are hearsay or otherwise inadmissible.

[9] A handful of these videos reflect Fox News coverage from the events of January 6, 2021. In light of evidence showing that Trump was watching Fox News during the insurrection on January 6, this coverage is probative of what Trump knew during the three-hour period when he refused to take action to stop the insurrection.

H. No. 8: Social Media Posts (Exs. P73-74, 103, 148)

These are Trump's own social media posts (or in one case a video he retweeted) and are obviously admissible. Trump's hearsay objection to his own statements is frivolous, not only because they are party admissions but also because they are mainly introduced for the *lies* asserted. To the extent Trump complains that Petitioners put a significant number of his tweets into a single compilation exhibit (P148), that was for ease of the parties and the Court to avoid 50+ separate exhibits containing a single tweet each. Petitioners are happy to separate them out should the Court wish Petitioners to do so, although it seems like needless hassle for all involved. Because Rule 1003 permits duplicates where there is no genuine doubt as to authenticity, and because nothing in the rules prohibit marking several documents collectively as a single exhibit, Trump's complaint lacks merit.[10]

I. No. 9: News Articles and Releases (Exs. P34, 36, 41, 77, 98, 104)

Trump's only argument, in a single sentence, is that these news articles are "hearsay for the same reasons" as Trump's own tweets, which is puzzling. These news articles are not admitted for the truth of any matter asserted—they are admitted for the fact that certain major events were widely and publicly reported, which is probative of what Trump likely knew. This includes, for example, the fact that major news outlets called the election for Biden on November 7, P34, or that it was publicly reported on January 5 that Pence had denied any authority to overturn the election, P37.[11]

[10] The same is true for Trump's other objections to compilations, such as the compilations of photographs from [redacted] Ex. P133.

[11] And P98 is not a news article at all—it's a transcript of Trump's call with Georgia Governor Brad Raffensperger. Trump does not try to argue that this transcript is somehow inauthentic.

J. No. 10: Government Agency and Staff Reports (Exs. P22, 24, 26-33, and 35)

Trump objects to eleven separate government reports by doing little more than incorporating "his arguments regarding the January 6th Report's inadmissibility." Mot. 30-31. That is not how Rule 803(8) works. These reports are public reports from *other* governmental bodies, such as the nonpartisan Government Accountability Office, the FBI, the Cybersecurity & Infrastructure Security Agency, and the Georgia State Election Board. Each of them is a report on "the activities of the office or agency" or the conclusions of "investigation made pursuant to authority granted by law." Rule 803(8)(A), (C). Trump must show that "circumstances indicate lack of trustworthiness" for *these reports*, *id.,* not for some other unrelated report touching on similar subject matter. He has not even attempted to meet his burden of proof.

Trump also references *Zenith Radio Corp. v. Matsushita Elec. Indus. Co*., 505 F. Supp. 1125, 1145 (E.D. Pa. 1980) in passing (though he erroneously identifies it as a Third Circuit opinion). Mot. at 26. That case stands for the unremarkable and irrelevant proposition that 803(8) permits introduction of the findings of government reports, but not necessarily the full administrative evidentiary record that justified those findings. *Id.* Petitioners seek to introduce the reports themselves, not the underlying data and administrative proceedings.

Date: October 20, 2023 Respectfully submitted,

/s/ Jason Murray
Eric Olson, Atty. Reg. # 36414
Sean Grimsley, Atty. Reg. # 36422
Jason Murray, Atty. Reg. # 43652
Olson Grimsley Kawanabe Hinchcliff & Murray LLC
700 17th Street, Suite 1600
Denver, CO 80202
Phone: 303-535-9151
Email: eolson@olsongrimsley.com
Email: sgrimsley@olsongrimsley.com
Email: jmurray@olsongrimsley.com

Mario Nicolais, Atty. Reg. # 38589

KBN Law, LLC
7830 W. Alameda Ave., Suite 103-301
Lakewood, CO 80226
Phone: 720-773-1526
Email: Mario@kbnlaw.com

Martha M. Tierney, Atty. Reg. # 27521
Tierney Lawrence Stiles LLC
225 E. 16th Ave., Suite 350
Denver, CO 80203
Phone: 303-356-4870
Email: mtierney@tls.legal

Donald Sherman*
Nikhel Sus*
Jonathan Maier*
Citizens for Responsibility and Ethics in Washington
1331 F Street NW, Suite 900
Washington, DC 20004
Phone: 202-408-5565
Email: dsherman@citizensforethics.org
Email: nsus@citizensforethics.org
Email: jmaier@citizensforethics.org
**Pro hac vice* admission pending

Counsel for Petitioners

CERTIFICATE OF SERVICE

I served this document on October 20, 2023, by Colorado Courts E-filing and/or via electronic mail upon all parties and their counsel:

Michael T. Kotlarczyk
Grant T. Sullivan
LeeAnn Morrill
Colorado Attorney General's Office
mike.kotlarczyk@coag.gov
grant.sullivan@coag.gov
leeann.morrill@coag.gov

Attorneys for Secretary of State Jena Griswold in her official capacity as Colorado Secretary of State

Scott E. Gessler
Geoffrey N. Blue
Justin T. North
Gessler Blue LLC
gblue@gesslerblue.com
jnorth@gesslerblue.com
sgessler@gesslerblue.com

Jonathan Shaw
Mark P. Meuser
Jacob Roth
Dhillon Law Group, Inc.
jshaw@dhillonlaw.com
mmeuser@dhillonlaw.com
jroth@dhillonlaw.com

Attorneys for Donald J. Trump

Michael William Melito
Melito Law LLC
melito@melitolaw.com

Robert Alan Kitsmiller
Podoll & Podoll, P.C.
bob@podoll.net

Benjamin Sisney
Nathan J. Moelker
Jordan A. Sekulow
Jay Alan Sekulow
Jane Raskin
Stuart J. Roth

American Center for Law and Justice
bsisney@aclj.org
nmoelker@aclj.org
jordansekulow@aclj.org
sekulow@aclj.org

Andrew J. Ekonomou
aekonomou@outlook.com

Attorneys for Intervenor Colorado Republican State Central Committee

/s/ Jason Murray

Counsel for Petitioners