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<tr><td>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
1437 Bannock St.
Denver, CO 80203</td><td rowspan="2">DATE FILED: October 29, 2023 5:33 PM

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<tr><td>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.</td></tr>
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PETITIONERS' RESPONSE TO DONALD J. TRUMP'S MOTION TO EXCLUDE THE EXPERT TESTIMONY OF [redacted]

[redacted]. [redacted] has studied the topic for decades, conducted hundreds of interviews with extremists, including members of organizations that played pivotal roles in the January 6, 2021 insurrection, written books and articles on the subject, advised and trained law enforcement on political extremism, and served as an expert for both prosecutions and defense in extremism-related litigation. Reflecting that depth of expertise, [redacted] [redacted] testimony here will assist the Court with understanding the purposes of those who attacked the Capitol on January 6, the influence Donald Trump had over them, and the strategies they deployed to communicate while trying to evade accountability.

Intervenor Donald Trump nevertheless tries to exclude [redacted] testimony in this

bench trial because he claims [redacted] testimony relies on purportedly "highly biased" materials that could lead the Court to conclude that "Trump is responsible for the violence on January 6." Mot. 10. But Colorado law provides no basis to exclude an expert just because they offer testimony harmful to a party's case. Trump's objections ignore [redacted] methodology. His claims of bias are baseless. And his attacks on [redacted] helpfulness rest on his legally erroneous contention that his statements must be evaluated denuded of context. Trump's objections would not suffice to exclude [redacted] testimony in a jury trial, never mind this bench trial. Because [redacted] testimony will "assist" the Court "to understand the evidence or to determine a fact in issue," C.R.E. 702, Trump's motion should be denied.

Legal Standard

Colorado Rule of Evidence 702 governs the admissibility of testimony by expert witnesses. The rule requires courts make a "determination as to (1) the reliability of the scientific principles, (2) the qualifications of the witness, and (3) the usefulness of the testimony to the jury." *People v. Shreck*, 22 P.3d 68, 70 (Colo. 2001). In making that determination, a trial court focuses on "the reliability and relevance of the proffered evidence." *Id*. In determining whether the evidence is reliable, the court should "apply a liberal standard that only requires proof that the underlying scientific principles are *reasonably* reliable." *Kutzly v. People*, 2019 CO 55, ¶ 12 (citing *Shreck*, 22 P.3d at 77). This standard requires the court to consider the totality of the circumstances surrounding the proposed expert testimony. *Id.* The court may consider factors such as whether the technique has been subjected to peer review and publication and whether it is generally accepted, but the court is not confined to any specific list of factors. *Id.*; *Ruibal v. People*, 2018 CO 93, ¶ 12. In determining whether the evidence is relevant, the court should consider "whether the testimony would be useful to the [finder of fact]." *Shreck*, 22 P.3d at 77.

While Rule 702 applies in bench trials, "the usual concerns regarding unreliable expert testimony reaching a jury obviously do not arise when a district court is conducting a bench trial." *Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009). Rather, "[i]n a bench trial … 'there is a presumption that all incompetent evidence is disregarded by the court in reaching its conclusions.'" *People v. Hall*, 2021 CO 71M, ¶ 36 (quoting *Liggett v. People*, 135 P.3d 725, 733 (Colo. 2006)). "[A] judge conducting a bench trial" thus has "greater leeway in admitting questionable evidence, weighing its persuasive value upon presentation." *Tyson Foods*, 565 F.3d at 780.

Argument

A. Trump Does Not Dispute [REDACTED] is Qualified as an Expert in Political Extremism

Trump notably does not challenge "the qualifications of" [REDACTED] to testify as an expert in [REDACTED]. *See Shreck*, 22 P.3d at 70. Based on [REDACTED] considerable experience, *see* [REDACTED] Rep. § 2, [REDACTED]

B. Professor [REDACTED] Methods and the Materials On Which He Relies Are Reliable

Trump contends that, while qualified as an expert in political extremism, the methods [REDACTED] employs in reaching [REDACTED] opinions here are unreliable because [REDACTED]s expert report does not present an actual methodology." Mot. 5. Yet Trump ignores [REDACTED] report where [REDACTED] lays out the methodology [REDACTED] employs to opine on extremists. *See* [REDACTED] Rep. § 3. And Trump ignores that [REDACTED] teaches–and has taught–dedicated graduate and undergraduate classes on research methodology that closely track the work he has done here. That methodology involves

"observation of participants in political extremism and those around them; interviews with current and former members of groups; analysis of online and virtual dimensions of extremism; review of literature and communications produced by members, and open-source archival research of the history of political extremism" and "secondary sources of information." *Id.*

[REDACTED] report reflects that methodology, incorporating observations of January 6 and earlier events in recorded footage, reviewing interviews with extremist participants in January 6 and earlier events (and drawing on [REDACTED] own interviews with current and past members of political extremist groups, including the Proud Boys, Oath Keepers, and Three Percenter militias), and extensive review of archival and secondary sources of information, including scholarship in the field. *Id.* [REDACTED] noted the "January 6th Report, in particular, provides helpful information in this case because of the substantial interviews and documentation they collected and because they shared the original documents." *Id*. For example, [REDACTED] reviewed the Committee's interviews with political extremists involved in January 6. *See id*. at § 7.1e [REDACTED] further draws on his extensive history of interviews with political extremists to evaluate the representations of January 6 defendants. *See id*. at § 8.2g. [REDACTED] does not opine "in a vacuum" but, as in [REDACTED] *see also People v. Davis*, 2012 COA 56, ¶¶ 47, 49 (expert qualified to testify to jury where his method involved "extensive exposure to the gang" and could "testify as an expert concerning gang jargon, messages in code, rules of conduct, membership requirements, operations, and internal structure"); *United States v. Baptiste*, No. 06-20373-CR, 2007 WL 5303052, at *5 (S.D. Fla. Oct. 26, 2007) (radicalization expert's methodology reliant on past "interviews … with former members of Hamas …, members of Al-Qaeda, and members of and supporters of Hezbollah" was reliable); *cf. Masters v. People*, 58 P.3d 979, 989 (Colo. 2002) ("Because social science attempts to understand highly complex behavior

patterns, it is necessarily inexact" but still admissible if "reasonably reliable, and … helpful to the jury").

Trump's primary dispute, however, is not with [redacted] methodology, but with the materials on which [redacted] relies. *See* Mot. 7-11. He asserts some (though not all) of those materials are so "highly biased" that [redacted] should not be permitted to testify. But the fact that these materials–publicly available records and reports of the facts surrounding one of the most scrutinized days in American history–may support a finding against Trump here does not render them unreliable, nor does it render [redacted] opinion inadmissible.

"[A]s a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left to the jury's consideration.'" *Tuman v. Genesis Assoc.*, 935 F. Supp. 1375, 1385 (E.D. Pa. 1996) (quoting *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)). Thus, even in jury trials, "[a] court should only preclude expert testimony when the sources on which the expert relies are of 'such little weight' that the expert's opinion is insupportable." *Id.*[1] The bar to exclude testimony is even higher in a bench trial, where these concerns "are greatly reduced." *See Estate of Manu v. Webster Cnty., Miss.*, No. 1:11-CV-00149, 2014 WL 3866608, *3 (N.D. Miss. Aug. 6, 2014) (discussing *Viterbo*, 826 F.2d at 422).

Trump's claims of bias fall far short from this high bar. He repackages his objections to the January 6 Report raised in his Motion in Limine, *see* Mot. 8 (citing Respondent and Intervenor Donald J. Trump's Motion In Limine to Exclude Petitioners' Anticipated Exhibits, Oct. 17, 2023 and the attached Declaration [redacted]). But as explained in Petitioners' response to that motion, Trump's objections are baseless. The Select

[1] Additionally, "facts or data need not be admissible in evidence in order for [an expert's] opinion or inference to be admitted." C.R.E. 703. Further, inadmissible facts and data may be disclosed even "to [a] jury" after a balancing test. *Id.*

Committee that authored the January 6 Report was not "structured" to achieve a predetermined "political goal," Mot. 8, but was rather a bipartisan Committee structured to include six Republicans, even after Senate Republicans filibustered the plan for a bipartisan independent commission, *see* Pet'rs' Reply To Trump's Mot. In Limine To Exclude Pet'rs' Exhibits at 1-7. Republicans ultimately chose to boycott even the House Committee. Two of the purported Republican choices for the Committee, Representatives Jordan and Banks, were rejected because they were bent on their predetermined "political goal" of delegitimating the Committee. *Id.* Representative Jordan was also a material witness. *Id.* Even then, the Select Committee included Republican members. Trump's other claim that the Committee "doctored" evidence relies entirely on two purported but immaterial clerical errors—the substitution of a period for an ellipse in a demonstrative of a text message, and the pairing of an audio recording with a video of the same events—hardly establish the January 6 Report, the result of over 1,000 interviews and a review of over 1,000,000 documents, is biased. *Id.* at 6-7; *see also* [REDACTED]

[REDACTED] .

Trump next asserts that news articles cited by [REDACTED], including one from CNN, are "biased opinion." Mot. 9. Trump must do more than merely repeat his mantra that all factual reporting that he does not like is "fake news" without identifying actual errors, however, to render [REDACTED] testimony inadmissible. For example, Trump takes issue with [REDACTED] citation of a Vox media piece, but [REDACTED] cites it for its reporting that Trump defended his supporters' violence by claiming they were "very passionate," *see* [REDACTED]. § 6.1h n. 70, a fact Trump does not dispute and that is confirmed by other outlets. *See* Chris Boyette, *Alleged Trump supporters who beat homeless immigrant plead guilty*, CNN, May 16, 2016, https://www.cnn.com/2016/05/16/us/trump-supporters-immigrant-beating/index.html; Chris Cassidy, *Donald Trump: 'Shame' if illegal immigration crusade inspired beatdown by Southie*

brothers, Boston Herald, Aug. 20, 2015, https://www.bostonherald.com/2015/08/20/donald-trump-shame-if-illegal-immigration-crusade-inspired-beatdown-by-southie-brothers/. Nor does Trump dispute CNN's report, cited by that Trump directed his Secretary of State to study the treatment of white farmers in South Africa, Mot. 9, a request Trump confirmed publicly, Donald J. Trump (@realDonaldTrump), Twitter (Aug. 22, 2018), https://twitter.com/realDonaldTrump/status/1032454567152246785. That Trump believes this message from his own Twitter account portrays "Trump as a racist," Mot. 9, is his own opinion on which did not opine. Mot. 9. Trump further does not contest that he, in fact, "appeared on Infowars," as reported by the Southern Poverty Law Center, Mot. 9; *see also* Factbase Videos, InfoWars: Alex Jones Interviews Donald Trump - December 2, 2015, YouTube (Nov. 4, 2017), https://www.youtube.com/watch?v=4LeChPL0sLE, but it is expert opinion, based on years of scholarship and study of the far right and extremism, that Infowars is a forum of the "far right extremist media influencer Alex Jones," . § 6.1c. Trump identifies no error with these materials, and, in any event, an expert may "synthesz[e] various news articles and academic articles to inform his own opinion." *Colo. Mon. Wyo. State Area Conf. of NAACP v. U.S. Election Integrity Plan*, No. 122-cv-00581, 2023 WL 3865720, at *2 (D. Colo. June 7, 2023).

Despite Trump's baseless assertions about the type of materials that are reliable, eaches research methods and states that the materials on which relied in the report are consistent with the methodology employed in his field. § 3. "[E]xperts in a field can be presumed to know what evidence is sufficiently trustworthy and probative to merit reliance." *U.S. Election Integrity Plan*, 2023 WL 3865720, at *2. Any remaining concerns Trump has may be raised in cross-examination, or through his own expert. *See Masters*, 58 P.3d at 992-93 (defense's ability to cross-examine expert and "present opposing views" sufficient to

address concerns).

In the end, Trump falls far short of showing that sources are of such little weight to render testimony inadmissible. Trump's claim of "bias" is merely his recognition that the facts are detrimental to him.

C. Testimony is Useful to Interpreting Trump's Statements

Wrongly supposing that the only reliable materials in report are Trump's own words and tweets, Trump then asserts that testimony will not "assist the Court." Mot. 11, 13. opinion, however, is important to understanding Trump's words and tweets: opinion, based on deep knowledge of extremists groups and study of their relationship with Trump, is that "an understanding developed between Trump and his supporters that his encouragement, for example, to 'fight' was not metaphorical, referring to a political 'fight,' but rather meant as a literal command to commit violence against those identified as enemies." § 9. That goes directly to the issue of whether "Intervenor Trump's actions meet the standard set forth in Section 3 of the Fourteenth Amendment." Topics for the October 30, 2023 Hearing, at 2 (Oct. 18, 2023).

testimony is thus the sort of expert testimony on "jargon" and "messages in code" that Colorado courts permit. *Davis*, ¶ 49. It was testimony of just that sort by

Here, Petitioners' claims that an insurrection occurred rest, in part, on the purposes behind the attack on the Capitol on January 6. *See* Pet. ¶¶ 369, 378, 391. Further, Petitioners' claim that Trump engaged in that insurrection rests, in part, on the influence Trump enjoyed and

exerted over his violent supporters and the effect his statements had on them, causing them to gather in Washington D.C. on January 6 with the understanding force was anticipated, and giving them permission and encouragement to attack the Capitol. *See* Pet. ¶¶ 396, 398, 401-19, 425-29. testimony will assist the Court in understanding the commonly accepted meaning of messages among political extremists conveyed in the lead up to and on January 6 that reveal the political purposes behind the violence that day, and the effect of Trump's words on those attackers as a result of their relationship with Trump. *See* Pet. ¶¶ 48-97. The court must consider them in the "context" that reveals why they resulted in an unprecedented attack on the Capitol. *Thompson v. Trump*, 590 F. Supp. 3d 46, 112 (D.D.C. 2022).

D. Trump Conflates Prejudicial with Probative Testimony

Trump further claims testimony, even if reliable and relevant, is "unfairly prejudicial," Mot. 13. But Trump only repackages his baseless claims that all unsupportive evidence is "biased," *id.* at 14, and oddly claims testimony would permit Petitioners' claims to "avoid the violation of President Trump's [purported] First Amendment rights" because it "presents the argument that President Trump essentially groomed his supporters for years," *id.* at 15. Testimony, however, is not "unfairly prejudicial" simply because it is "legitimately damaging to defendant's case." *People v. James*, 117 P.3d 91, 93-94 (Colo. 2004); *see also United States v. Archuleta*, 737 F.3d 1287, 1293 (10th Cir. 2013). That testimony shows that Trump was not, in fact, a "speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning," *Thomas v. Collins*, 323 U.S. 516, 535 (1945), makes testimony probative, not prejudicial; *see also Thompson*, 590 F. Supp. 3d at 115 (First Amendment provides "no safe haven" for "strategic speaker who does not directly and

unequivocally advocate for imminent violence or lawlessness, but does so through unmistakable suggestion and persuasion").

For the same reason, discusses Trump's support of "birtherism," his appearance on Infowars, his retention of Steve Bannon and Roger Stone, and his endorsement of a candidate attacking a reporter because those actions cultivated support among violent political extremists in Trump's base. Those acts, among others the discusses, indicated that President Trump endorsed their causes and their actions, and supported the understanding that Trump was calling on them to use violence to support their shared political goals. *See* §§ 4.2, 4.3, 6.1a, 7.1e. neither opines "that President Trump's character is in line with" or that he "acted in accordance with" the multitude of "people who have been convicted of crimes, are negatively viewed by the public …, and have engaged in political violence," Mot. 16, 17. Rather, provides the context through which the Court must view Trump's calls to "be wild" or "fight like hell" to determine if Trump engaged in the January 6 insurrection. *See* C.R.E. 404(b)(2) (prior bad acts "may be admissible" to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident").

In any event, even if testimony were prejudicial, Trump cannot show that "its probative value is *substantially outweighed*" by this prejudice. C.R.E. 403 (emphasis added). And "it is improper to exclude evidence under Rule 403 on the grounds that it is unfairly prejudicial" in a bench trial. *U.S. Election Integrity Plan*, 2023 WL 3865720, at *4 (citing *United States v. Kienlen*, 349 F. App'x 349, 351 (10th Cir. 2009)). "In that context, 'the prejudicial effect of improperly admitted evidence is generally presumed innocuous.'" *People v. Caime*, 2021 COA 134, ¶ 29. Rather than exclude evidence, the Court is competent to weigh evidence as it sees fit. *See id.*

Conclusion

Though Trump clearly believes [redacted] testimony and the materials on which it relies are detrimental to his defense, Trump fails to identify any basis to exclude [redacted] testimony. Evidence isn't biased merely because it does not reflect the defendant's narratives, and testimony isn't unfairly prejudicial simply because it supports a petitioner's claims and disarms a defendant's constitutional defense [redacted] testimony is [redacted] [redacted] and the Court should permit it.

Date: October 27, 2023 Respectfully submitted,

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