DISTRICT COURT **CITY AND COUNTY OF DENVER, COLORADO** 1437 Bannock Street, Room 256 Denver, CO 80202 Phone: (303) 606-2300	DATE FILED: November 13, 2023 5:30 PM FILING ID: C8CA563FF3A88 CASE NUMBER: 2023CV32577
NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and **CHRISTOPHER CASTILIAN**, **Petitioners**, v. **JENA GRISWOLD,** in her official capacity as Colorado Secretary of State, and **DONALD J. TRUMP** **Respondents**. and **COLORADO REPUBLICAN STATE CENTRAL COMMITTEE,** an unincorporated association, and **DONALD J. TRUMP,** **Intervenors.**	▲ COURT USE ONLY ▲
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PRESIDENT DONALD J. TRUMP'S MOTION TO EXCLUDE THE PROFFERED EXPERT TESTIMONY OF [redacted]

Certificate of Conferral under C.R.C.P. 121 § 15-8

The undersigned counsel has conferred with Petitioners' counsel, counsel for the Secretary of State, and counsel for Intervenor Colorado GOP regarding this motion. Petitioners and the Secretary oppose the relief sought while the Colorado GOP supports the Motion.

Introduction

Petitioners seek to call [redacted] for the sole purpose of testifying about the law. His expert report is a legal brief on the scope of presidential authority to mobilize the National Guard. Nothing in his testimony is intended to assist this Court in determining a disputed fact. Accordingly, his testimony is inadmissible.

The central dispute in this case is whether the events of January 6, 2021, at the United States Capitol constituted an "insurrection," and if so, whether President Trump "engaged" in an insurrection. [redacted] is expected to testify about the scope of President Trump's authority as Commander in Chief. Petitioners' offer of [redacted] legal analysis, in the guise of expert opinion, merely serves to circumvent this Court's decision to disallow *amicus* briefs.

Petitioners may choose to brief the scope of President Trump's legal authority as Commander in Chief. But it is not an appropriate topic for expert testimony. Finally, allowing [redacted] to provide opinion testimony will be highly prejudicial to President Trump while it will provide little, if any, probative value to the Court.

Standard of Review

President Trump incorporates the standards for admissibility of expert opinion set forth his motion to exclude testimony of Professor [redacted], concurrently filed with this *Motion*.

Argument

A. [redacted]s submission is a legal brief not an expert report meant to help the Court determine an issue of fact.

[redacted] Report is essentially a legal opinion in the form of an expert report. As such, it does not contain any discussion of the "reliability of the scientific principles [or specialized knowledge] underling [his] opinions." This is because there is none—[redacted] was hired as an expert in the field of law, presenting legal analysis not an opinion about evidentiary issues or the facts in the case.

Experts are permitted to "assist the trier of fact to understand the evidence or to determine a *fact* at issue."[1] They may not express opinions regarding the law.[2] Indeed, the Tenth Circuit addressed this issue in 1988, when it considered "whether Fed. R. Evid. 702[3]

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[1] *See Colorado Republican State Central Committee's Rule 702 Motion to Exclude the Testimony of Professor* [redacted], October 16, 2023, pp. 2-5 (emphasis supplied).

[2] *Mason v. Adams*, 961 P.2d 540, 543 (Colo. Ct. App. 1997) (*citing Garcia v. State Farm Mut. Ins. Co.*, 920 P.2d 843 (Colo. App. 1995)) (stating "The proper construction of a statute is a question of law for the court to determine.").

[3] Colorado looks to the Federal Rules of Evidence and caselaw interpreting those rules when interpreting the Colorado Rules of Evidence. *See Warden v. Exempla, Inc.,* 2012 CO 74, 21 (using federal caselaw to inform its analysis "given the similarity between the federal and Colorado discovery rules governing expert disclosures….".).

will permit an attorney, called as an expert witness, to state his views on the law which governs the verdict and opine whether defendants conduct violated that law."[4] The *Specht* Court determined that the prior admission of the expert by the trial court was in error, holding that "when the purpose of [expert opinion] testimony is to direct the [fact finder's] understanding of the legal standards upon which their verdict must be based, the testimony cannot be allowed" because "[i]n no instance can a witness be permitted to define the law of the case."[5]

While *Specht* is a Federal case interpreting the Federal Rules of Evidence, Colorado courts look to the Federal Courts in interpreting the Colorado Rules of Evidence.[6] And Colorado courts agree that opinion testimony offered on legal issues is an usurpation of the role of the court and thus is simply not permitted for expert witnesses.[7] Other federal courts, in addition to the *Specht* court, likewise recognize that experts cannot usurp the role of the court and circumvent the fact finder's decision-making process."[8] Importantly, this rule

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[4] *Specht v. Jensen*, 853 F.2d 805, 806 (10th Cir. 1988).

[5] *Id.* at 810.

[6] *See Shreck*, 22 P.3d, at n. 10.

[7] *See Quintana v. City of Westminster*, 8 P.3d 527, 530 (Colo. App. 2000); *see also People v. Lessliee*, 939 P.2d 443, 449-50 (Colo. App. 1996); *Town of Breckenridge v. Golforce, Inc.*, 851 P.2d 214, 216 (Colo. App. 1992).

[8] *King v. McKillop*, 112 F. Supp. 2d. 1214, 1222 (D. Colo. 2000).

applies in equal force in bench trials as it does in jury trials.[9]

Here, the only reason that Petitioners seek to introduce [redacted] is to have him opine on one aspect of the law of this case. That [redacted] was hired to explain the law to this Court is made explicitly clear based upon his first seven sequentially numbered conclusions:

- "First, under the District of Columbia ("D.C.") Code, Trump, as President of the United States, was the Commander in Chief of the District of Columbia National Guard ("D.C. National Guard"). D.C. Code § 49-409…and could have ordered the National Guard to deploy to the Capitol on January 6."[10]

- "Second, President Trump could have authorized the D.C. National Guard to detain individuals and make arrests within the District of Columbia, … 10 U.S.C. §§ 12301, 12302, 12303, 12304, 12406."[11]

- "Third, because federal law authorizes the President to order D.C. National Guard units into federal service to respond to an emergency, 10 U.S.C. § 12406, President Trump could have exercised this power immediately by declaring a national emergency pursuant to the National Emergencies Act, 50 U.S.C. 1601 et seq."[12]
- "Fourth, President Trump could have authorized the deployment of out-of-state National Guard troops…10 U.S.C. §§ 12301, 12406."[13]

- "Fifth, President Trump could have directed the mobilization of federal law enforcement agencies…to defend the Capitol and enforce local and federal law…by declaring a national emergency under the National Emergencies Act, 50 U.S.C. 1601 et seq."[14]

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[9] *CIT Group/Business Credit, Inc. v. Graco Fishing & Rental Tools, Inc.*, 815 F. Supp. 2d 673, 678 (S.D.N.Y. 2011).

[10] [redacted] Report, at 5.

[11] *Id.* at 6.

[12] *Id.* at 7.

[13] *Id.*

[14] *Id.* at 8.

- "Sixth, President Trump could have federalized local law enforcement, including the Metropolitan Police Department, to defend the Capitol and enforce local and federal law. D.C. Code § 1-207.40."[15]

- "Seventh, President Trump could have coordinated with D.C. Mayor Muriel Bowser and Capitol Police Chief Steven A. Sund to ensure adequate law enforcement responses."[16]

Each of these points is based on analysis of President Trump's legal authority. [redacted] should not be allowed to testify on what the law does or does not allow.

B. [redacted] does not have expertise, nor is it a proper area of opinion testimony, to speculate what President Trump could or could not have done on January 6, 2023.

[redacted] eighth conclusion states: "Eighth, Trump could have told the violent mob to leave the Capitol at any point while the violent attack was ongoing."[17] First, this opinion is not within the expertise of a professor with whose knowledge, education and experience is centered on national security. Second, this is not an opinion subject to expert testimony. And third, it is pure speculation on [redacted] part.

The [redacted] Report explains that [redacted] teaches [redacted] law, [redacted] law, and [redacted] law, among other subjects" and that he has "written extensively about the role of the United States [redacted],

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[15] *Id.* at 12.

[16] *Id.*

[17] *Id.*

[redacted]."[18] Further, the [redacted] includes [redacted] *curriculum vitae*, which contains 18 pages describing [redacted] relevant experience. Despite [redacted]' substantial experience in many areas of law, he lacks the knowledge, education, and experience to opine on whether a President is able to effectively speak to a crowd and when the President could actually do so. Because [redacted] is unqualified to offer his proposed opinion, he should not be allowed to offer it.[19] While [redacted] lists dozens of instances of "legal & teaching experience," hundreds of "publications", eighteen "courses taught," several hundred lectures and presentations, and a plethora of other experiences, he utterly lacks the knowledge, education, and experience to opine on whether a President is able to effectively speak to a crowd and when the President could actually do so. Because [redacted] is unqualified to offer his proposed opinion, he should not be allowed to offer it.

Not only is [redacted] unqualified to offer this opinion, but this is not the type of opinion that can be presented to the court through expert testimony. Specifically, this is not appropriate for expert testimony because it falls within the ability of the Court to determine a fact without expert testimony. "Expert testimony is that which goes beyond the realm of common experience and requires experience, skills, or knowledge that the ordinary person

[18] *Id.* at 2.

[19] **Exhibit A**, *Curriculum Vitae* of [redacted] (Exhibit A to the [redacted] Report).

would not have."[20] Therefore, a trial court's first step before admitting expert testimony is to "decide if the expert testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue." Here, the court is capable of determining whether President Trump had the capability to communicate with people, and the Court is similarly capable of concluding that, if indeed President Trump could have made the statements demanded by Petitioners, he could have done so during the violence at the Capitol. Because the Court is capable of making these determinations on her own without the aid of expert testimony, [redacted] testimony is inadmissible and should be rejected.

Finally, this testimony is inadmissible because it is flatly speculative. "A court may reject expert testimony that is connected to existing [evidence] only by a bare assertion resting on the authority of the expert."[21] Here, [redacted] doesn't even go so far as to make a bare assertion that the evidence supports his conclusion. Instead, [redacted] simply concludes – disjointed from any evidence whatsoever – that President Trump could have taken certain steps. This speculation should be disregarded by the Court.

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[20] *Randle v. Contreras*-Fierro, 2020 Colo. Dist. LEXIS 679, *12-13 (*quoting* Venalonzo *v. People*, 388 P.3d 868 (Colo, 2017)); *see also* M. Graham, Handbook of Federal Evidence, § 702.1, at 604-05 (1986).

[21] *People v. Ramirez*, 155 P.3d 371, 379 (Colo. 2007) (*quoting Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

C. The [redacted] Report's prejudice far outweighs any probative value it can provide.

C.R.E. 702's approach to the admissibility of expert testimony "is tempered by CRE 403,"[22] which gives a court discretion to exclude expert testimony where its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[23] Probative value of evidence talks to facts not to the law – and it is *evidence*, not legal argument, that has a tendency to prove the fact it is offered to support.[24] [redacted] proposed opinion testimony has very little, if any, probative value. In this context, "probative value…signifies the marginal or incremental…value of evidence relative to other evidence in this case."[25] Here, [redacted]' testimony is not "evidence," it is merely an interpretation of the law which the Court is capable of performing itself. For this reason alone, [redacted] opinion testimony lacks probative value.

Further, allowing [redacted] to provide his legal analysis as expert testimony is prejudicial to President Trump. A recitation of the law may appear facially neutral, but in this case, [redacted]' opinion testimony – if allowed – would dramatically prejudice President Trump,

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[22] *Id.*

[23] C.R.E. § 403.

[24] *See Fletcher v. People , 179 P.3d 969, 974* (Colo. 2007).

[25] *People v. Saiz*, 32 P.3d 441, 446 (Colo. 2001) (*quoting Old Chief v. United States*, 519 U.S. 172, 185 (1997).

because introducing this legal analysis through expert testimony will not allow him to adequately respond with full legal briefings.

As explained by the Colorado GOP, [redacted]' presentation of his legal analysis would hamstring President Trump's ability to counter it at trial.[26] He would provide his testimony as direct examination, forcing President Trump's counsel to counter it through cross-examination. As the Colorado GOP said, this would render this case deeply confused.[27] It also would require President Trump to make his own legal arguments through Petitioners' witness. President Trump's ability to present his legal arguments in opposition to [redacted] would be severely limited.

Conclusion

Petitioner's proposed expert witness, Professor [redacted]' Expert Report impermissibly attempts to usurp the function of this Court by saying what the law is. Further, his testimony – if allowed – would be far more prejudicial than probative. Finally, the [redacted] is rightfully viewed as a legal brief, to which President Trump will not have an opportunity to respond. As such, [redacted]' opinion testimony and the [redacted] is inadmissible under C.R.E. 403 and C.R.E. 702.

[26] Colorado Republican State Central Committee's Rule 702 Motion to Exclude the Testimony of Professor [redacted], October 16, 2023, p. 6.

[27] *Id.*

FOR THESE REASONS, the court should refuse to certify Professor [redacted] as an expert, refuse to allow Professor [redacted] to offer opinion testimony in this matter, and also grant President Donald J. Trump all such further relief as is just, proper or appropriate.

Respectfully submitted this 18th day of October 2023,

GESSLER BLUE LLC

s/ *Geoffrey N. Blue*
Geoffrey N. Blue

Certificate of Service

I certify that on this 18th day of October 2023, the foregoing was electronically served via e-mail or CCES on all parties and their counsel of record:

By: *s/ Joanna Bila*
Joanna Bila, Paralegal