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| SUPREME COURT<br>STATE OF COLORADO<br>2 East 14th Avenue, Denver, CO 80202 | DATE FILED: December 4, 2023 3:53 PM<br>FILING ID: D409A61A213D4<br>CASE NUMBER: 2023SA300 |
| Original Proceeding<br>Trial court, City and County of Denver, Colorado,<br>Case No. 2023CV32577 | ▲**COURT USE ONLY**▲ |
| **Petitioner-Appellants/Cross-Appellees:**<br>**NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT,** and **CHRISTOPHER CASTILIAN**,<br><br>v.<br><br>**Respondent-Appellee:**<br>**JENA GRISWOLD,** in her official capacity as Colorado Secretary of State,<br><br>v.<br><br>**Intervenor-Appellee:**<br>**COLORADO REPUBLICAN STATE CENTRAL COMMITTEE,** an unincorporated association,<br><br>**Intervenor Appellee/Cross-Appellant:**<br>**DONALD J. TRUMP.** | Supreme Court Case Number:<br>2023SA00300 |
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**PRESIDENT TRUMP'S REPLY IN SUPPORT OF HIS OPENING BRIEF**

## Certificate of Compliance

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

**The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).**

**X** It contains 5,523 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

**The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).**

**X** **For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

*s/Scott E. Gessler*
Scott E. Gessler

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## INTRODUCTION

The district court properly ruled that President Trump should be placed on the primary ballot because Section Three does not apply to him. This Court should affirm = and can do so if it agrees that the presidency is not an "office . . . under the United States," or if it agrees that the President is not an "officer of the United States," or if it agrees that President Trump did not take an oath to "support" the Constitution. But it can (and should) also affirm on other grounds.

## ARGUMENT

### I. Colorado courts lack jurisdiction over the petitioners' Section Three claim.

#### A. The District Court lacked jurisdiction under Sections 113 and 1204.

Affirming the Court's exercise of jurisdiction under Section 113 would transform this procedure from a limited proceeding designed to enforce specific Election Code duties into an open-ended, binding procedure for any election-related litigation, including constitutional litigation.

At the outset, it should be obvious that this case is an adjudication of the Fourteenth Amendment, independent of the Election Code. The district court interpreted Section Three, took evidence and made factual findings on Section Three, and issued an order interpreting and applying Section Three. This is not a case that

merely "implicates" constitutional issues,[1] or that is 'infused" with constitutional issues.[2] The lower court squarely adjudicated constitutional issues.

This proceeding should never have gone forward under Section 113. The sole relief a court may grant is to order an election official to "perform [his or her] duty" (or "desist from the wrongful act") under the Code.[3] But here, the Secretary has no duty or authority under the Code to bar a candidate under Section Three. The district court ruled that the Election Code does not give the Secretary such authority.[4] The Secretary admitted that she has no explicit Section Three enforcement authority.[5] The Secretary's *Answer Brief* identified no authority.[6] And the Petitioners can cite no specific duty. But the district court nonetheless exercised authority to adjudicate constitutional issues, independent of any official's duty under the Election Code.

In keeping with Section 113's plain language, jurisdiction over this case violates *Frazier v. Williams* and *Kuhn v. Williams*. Neither ruling was limited to a constitutional

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[1] *Omnibus Ruling on Pending Dispositive Motions*, Oct. 20, 2023, p.10.

[2] Secretary of State's *Answer Brief,* p.9.

[3] C.R.S. § 1-1-113(1).

[4] *Final Order*, ¶224.

[5] *Secretary of State's Omnibus Response to Motions to Dismiss*, p.1.

[6] Secretary of State's *Answer Brief,* pp. 5-6.

challenge to the Election Code, and while the Secretary now argues that it is appropriate to litigate constitutional issues in a Section 113 proceeding, that office took a much different stance in *Frazier*, forcefully arguing that Section 113 "is not designed to allow for the full and final adjudication of parties' federal constitutional rights."[7] President Trump agrees and has argued from the beginning of this highly flawed proceeding:

> The lack of discovery or adequate opportunity to marshal evidence and develop legal defenses, together with quickly evolving legal claims and the absence of motions practice, all differentiate § 1-1-113 petitions from standard constitutional litigation in important procedural and substantive ways. Additionally, First Amendment litigation can result in precedent that has lasting, permanent effects on how the State may legislate in the elections arena. Section 1-1-113, which is only concerned with how existing state law should be applied in practice, is not designed for that kind of work.[8]

Section 1204 is especially incompatible, requiring a hearing within five days of the petition and a decision within 48 hours. The lower court could not meet these deadlines and it improperly incorporated the January 6th Report to compensate for the lack of a meaningful evidentiary record, due in part to no

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[7] *Frazier v. Williams*, *Petition for Rule to Show Cause Pursuant to C.A.R. 21*, p.16, Case No. 2016SA230 (Colo. S.Ct. Aug. 9, 2016).

[8] *Id* at 21.

discovery and inadequate time. That other rulings have sought to avoid constitutional infirmities when interpreting the Election Code[9] does not alter the fundamental problem with litigating constitutional claims in a Section 113 proceeding.

Limited language plucked from several election code subsections does not solve these problems or otherwise empower election officials to enforce the entirety of federal and Constitutional law. Section 1-4-1204(4) allows enforcement of Section 1204's other provisions, and the phrase "all alleged improprieties" is limited to Section 1204; it does not, through implication, incorporate "all improprieties" that could violate any section of state law, federal law, or the U.S. Constitution. And while Section 1-4-1201 requires Colorado's primary election procedures to conform with federal law, it is wrong to interpret "procedure" to include the substantive law from the U.S. Constitution — such as the meaning of "engage" and "insurrection" under Section Three. And "conform" means to act in a manner that does not violate federal law, not to enforce federal law on all candidates, voters, and election workers.

Under the Secretary's interpretation of Section 1-4-1203(3), officials receive a generalized power to screen presidential candidates, by incorporating *state* candidate

[9] *See, e.g., Williams v. Griswold,* Case No. 2022CV031802 (Den. Dist. Ct. April 27, 2022). SoS Ex. 1.

eligibility requirements in C.R.S. 1-4-501. Legislative drafters would be astonished to learn that authority to *conduct* presidential primaries the same way as other state primaries meant that state courts could adjudicate, on an expedited time frame using truncated procedures, whether a person engaged in insurrection against the United States.

**B. Section Three is not self-executing**.

Shortly post-ratification, Chief Justice Chase cogently explained why federal legislation was required to implement section Three's disqualification provision:

> For, in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate. To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable; *and these can only be provided for by congress*.
>
> Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that 'congress shall have power to enforce, by appropriate legislation, the provision of this article.'
>
> There are, indeed, other sections than the third, to the enforcement of which legislation is necessary; but *there is no one which more clearly requires legislation in order to give effect to it*. The fifth section qualifies the third to the same extent as it would if the whole amendment consisted of these two sections. *And the final clause of the third section itself is significant. It gives to congress absolute control of the whole operation of the amendment*. These are its words: 'But congress may, by a vote of two-thirds of each house, remove such disability.' Taking the third section then, in its completeness with this final clause, it seems to put beyond reasonable question the conclusion that the intention of the people of the United States, in

> adopting the fourteenth amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, and to be made operative in other cases by the legislation of congress in its ordinary course.[10]

That holding was unquestioned by Congress (which promptly enacted implementing legislation)[11] and the courts,[12] and has continuously remained good law for 154 years.

Appellants seek to counter this by relying on cases that have nothing to do with Section Three or its application.[13] *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249 (1933), merely holds that States cannot prevent Supreme Court review through procedural mechanisms; it says nothing about a state's authority to enforce Section Three absent congressional legislation.[14] *Howlett v. Rose* recognizes the supremacy of federal law and prohibits state courts from rejecting that supremacy, and clarifies that the admonition does not "*include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented.*"[15] There are many

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[10] *In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (emphasis added).

[11] Enforcement Act of 1870, ch. 114, 16 Stat. 140.

[12] *See, e.g., Cale v. City of Covington, Va.,* 586 F.2d 311, 316 (4th Cir. 1978) (recognizing Chief Justice Chase's holding "that the third section of the Fourteenth Amendment … was not self-executing absent congressional action.").

[13] e.g. *Boerne v. Flores*, 521 U.S. 507 (1997).

[14] *See id.* at 264.

[15] 496 U.S. 356, 371, 372 (1990) (emphasis added).

other federal claims which also do not require state-court jurisdiction, such as patent, federal antitrust, and bankruptcy claims. None of that violates the Supremacy Clause. "[T]he Supremacy Clause … instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so."[16]

Appellants' assertion that there is a history of state courts enforcing section Three *in connection with federal elections* is misleading. Their cases addressed state offices,[17] and no one disputes that states are free to create whatever qualifications they wish for positions in state government. To the extent that any such cases do not involve application of *state* laws determining qualifications for *state* office, there is no suggestion that whether a state court could adjudicate disqualification under section

[16] *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25 (2015) (internal citations omitted).

[17] *See* Blackman & Tillman, *Sweeping & Forcing*, at pp. 98-100 ("We are not aware of any such case, where absent federal authorizing legislation, a candidate for *federal* elective position was denied a position on the state ballot based on purported Section 3 disqualification.").

Three was even raised, much less adjudicated. They therefore provide no guidance on this issue and do not undercut *Griffin*.[18]

Furthermore, as when they claim a contradiction in the *Davis* opinion, Appellants disregard the critical distinction between defensive and offensive uses of the Fourteenth Amendment.[19]

Nor is there anything absurd, circular, or self-contradictory in a rule providing that only Congress may establish procedures through legislation for applying Section Three disqualification for presidents and presidential candidates, rather than allowing a patchwork of conflicting standards to spring up across the nation or in the Constitution's reserving to Congress the power to lift any disqualification. Certainly, Chief Justice Chase reached the opposite conclusion.

This lawsuit runs headlong into the requirement that there be federal implementing legislation. As it is undisputed that there is none, the Colorado courts should not entertain it.

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[18] *See Webster v. Fall*, 266 U.S. 507, 511 (1924) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

[19] *See, e.g., Cale*, 586 F.2d at 316 (holding "that the Congress and Supreme Court of the time were in agreement [with Chief Justice Chase] that *affirmative relief* under [section 3] of the amendment should come from Congress….[while]the Fourteenth Amendment provide[s] of its own force as a *shield*.…") (emphasis added).

### C. Disqualification of a presidential candidate is a non-justiciable political question.

The Opening Brief and the amicus brief from the state of Indiana *et al.* (the "Indiana Amicus Brief") explains why this case is non-justiciable and how Section Three's enforcement is committed to Congress. But Petitioners and the Free Speech for People Amicus try to distinguish the cited cases by arguing that "most" of Trump's cases are post-election.[20] "Most" is not all. And regardless, the cases support President Trump's position.

*Grinols* refused to issue a preliminary injunction preventing the counting of electoral votes and later held that the Constitution does not permit the judiciary to address whether a President is qualified and whether he should be removed from office—that responsibility is reserved to Congress.[21] *Keyes v. Bowen* held that the

[20] *Amicus Brief*, Free Speech for People ("FSP Amicus"), at 16; *Petitioners Answer-Reply Brief* at 21 ("nearly all [cases] involved ….").

[21] *Grinols v. Electoral Coll., No. 12-CV-02997-MCE-DAD, 2013 WL 211135, at *1-4 (E.D. Cal. Jan. 16, 2013). Accord Robinson v. Bowen,* 567 F. Supp. 2d 1147 (N.D. Cal. 2008), *Strunk v. N.Y. State Bd. of Elections,* 2012 WL 1205117 *12 (N.Y. Sup. Ct. 2012), *order aff'd, appeal dismissed sub nom Christopher-Earl: Strunk v. New York State Bd. of Elections*, 5 N.Y.S.3d 483 (N.Y. App. Div. 2015), *Taitz v. Democrat Party of Mississippi*, 3:12-CV-280-HTW-LRA, 2015 WL 11017373 *16 (S.D. Miss. Mar. 31, 2015).

California Secretary of State had no discretion to investigate candidates' credentials.[22]

Petitioners and the Free Speech for People Amicus also falsely equate regulation of electors with regulation of presidential candidates. They are separate groups of people, and these arguments fall flat, especially when considering that the structure of the Constitution assigns the question of Presidential qualifications to Congress and the electoral college.[23] This also disposes of Petitioners' arguments regarding the text of each constitutional provision.[24]

The *Hasan* cases and *Lindsay v. Bowen* involved candidates who did not dispute that they failed to meet explicit, *administrative* requirements to submit notarized statements affirming that they met the Article II qualifications. None of those cases purports to determine whether the candidate *actually met* the constitutionally mandated qualifications.[25] The only two cases that support petitioners' position are outliers and

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[22] *Keyes v. Bowen*, 117 Cal. Rptr. 3d 207, 215 (Cal. Ct. App. 2010) (quoting *Robinson v. Bowen*, 567 F.Supp.2d 1144, 1147 (N.D.Cal.2008)).

[23] Trump *Opening-Answer Brief* at 22-24.

[24] *Id.* at 23-24; *See Castro v. N.H. Sec'y of State*, Case No. 23-cv-416-JL at 10-11 (D.N.H. Oct. 27, 2023); *Grinols,* 2013 WL 2294885, at *6.

[25] *Hassan v. Colorado*, 495 Fed. Appx. 947 (10th Cir. 2012), *Hassan v. New Hampshire*, 11-CV-552-JD, 2012 WL 405620 (D.N.H. Feb. 8, 2012), *aff'd* (Aug. 30, 2012), and *Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014).

should be rejected.[26]

Even if it were otherwise allowed, Colorado's statute does not authorize the judiciary or Secretary to evaluate any qualifications.

Petitioners argue it would be "calamitous" to allow Congress to enforce Section Three by disqualifying Trump after "millions of voters chose" him.[27] Yet they are entirely unconcerned with how "calamitous" it would be for this Court to prevent millions of voters from casting their ballots for Trump's delegates and electors based on a dubious interpretation of section Three that many voters (and members of Congress) reject—not to mention the convention delegates and presidential electors who are likewise charged with determining whether President Trump's conduct disqualifies him from the presidency. A congressional vote to disqualify President Trump after the election would hardly be "calamitous," as the Constitution envisions and provides for this scenario in the Twentieth Amendment. If Trump were to be disqualified by Congress after "winning" in the Electoral College, then the vice-president-elect will become President under section three of the Twentieth

[26] *Elliott v. Cruz*, 137 A.3d 646. (Pa. Commw. Ct. 2016), *aff'd*, 134 A.3d 51 (Pa. 2016) and *Williams v. Cruz*, OAL Dkt. No. STE 5016-16 (N.J. Off. of Admin. Law Apr. 12, 2016).

[27] Petitioners *Answer-Reply Brief* at 22

Amendment, and he will select a vice-president subject to the approval of Congress, as required by section two of the Twenty-Fifth Amendment.[28] Allowing voters to cast ballots for President Trump and his vice-presidential candidate permits them to vote for the ticket knowing the risk that President Trump might be disqualified by Congress, thereby securing the democratic process by allowing them to support their preferred candidates.

Finally, Petitioners have no answer to the point made by the State Attorney Generals in their brief regarding the chaos that would ensue should every jurisdiction apply incompatible standards to an issue that affects voters across the country.

### D. Section 3 bars holding office, not running for office.

Trump's Opening-Answer Brief, like the RNC's, NRSC's, and NRCC's amici brief, makes clear that the prohibition in Section Three applies only to individuals holding various offices, not to those merely running for those offices.[29] The weight of the sources applying Section Three's prohibitions demonstrates the District Court erred in finding the Colorado Election Code gives it authority to "investigate and

[28] US Const. amends. 20, §3 and 25, §2.

[29] President Trump's *Opening Brief* at 25-28; *Brief of Amici Curiae* RNC, NRSC, and NRCC at 3-5.

adjudicate Trump's eligibility under Section Three . . . ."[30] Petitioners' Answer-Reply Brief fails to adequately address those arguments. Instead, Petitioners offer meaningless distinctions that do not move the needle and ultimately urge this Court to allow Colorado officials to set additional qualifications for candidates running for president or presidents-elect in violation of *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802, 805 (1995).

To support their misguided argument, Petitioners cite a case wherein the defendant represented himself *pro se* and the court removed him from office as then-serving County Commissioner in New Mexico.[31] But that case effectively proves President Trump's point. President Trump is not currently holding any office, unlike the defendant in *Griffin*. He is merely running for President of the United States. That case is therefore inapposite, as President Trump does not "hold" office by merely running for or being elected President.

Next, each state has an interest in running elections and "protecting the integrity of its ballots."[32] Colorado's interest is no more important than Texas's, which

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[30] *Final Order* at ¶224.

[31] Petitioners' *Answer-Reply Brief* at 28 (citing *New Mexico ex rel. White v. Griffin*, 2022 WL 4295619, at *25 (N.M. Dist. Ct. Sept. 6, 2022)).

[32] *See id.* at 29.

is no more important than New York's. The point, of course, is avoiding the outcome of states adding their own heavily political, extra-statutory, non-neutral, and difficult-to-manage requirements as qualifications to individuals running for President under Section Three. State-by-state additions will only lead to conflicting qualifications.

Finally, it is not "implausible speculation" to suggest that a *future* Congress could remove any putative disqualification.[33] The cases and practices concerning disqualification under Section Three cited by President Trump and amici show this Court *how* Section Three has been applied in the past, albeit never to the presidency. Those did not address states' constitutional authority to exclude from the ballot candidates disqualified under Section Three because they did not need to; it was clear such a disqualification only prevented an individual from holding office.[34] No precedent permits a state to do what Petitioners have asked this Court to do.

## II. Under any reasonable interpretation, President Trump did not engage in insurrection.

### A. President Trump did not engage in insurrection.

#### 1. Engage does not include incite.

[33] *See id.* at 30.

[34] *Sublett v. Bedwell*, 47 Miss. 266, 274 (1872) ("The practical interpretation put upon [Section Three] has been, that it is a personal disability to 'hold office,' and if that be removed before the term begins . . . the person may take the office.").

Petitioners seek to overcome Section Three's omission of "incite" by referring to three grand jury charges involving treason – an act improperly conflated with the issue here. The framers drafted Section Three with a specific purpose – to disqualify those who had directly supported the Confederacy during the Civil War. And in applying language similar to Section Three, Attorney General Stanbery unsurprisingly advised Union occupation authorities that lower-level officials exercising civil authority in confederate states would be deemed to have engaged in insurrection *only* if they had used their official authority to mobilize support for the ongoing rebellion. One sentence in a multipage opinion, directed to a very specific situation arising after the Civil War, does not transform Section Three into a general disqualification of those who merely engaged in incitement. Section Three applies only to concrete actions that constitute participation in insurrection, not mere public words. That is why Section Three is much different from the broader federal criminal statute that expressly uses the term "incite," in *addition* to "engage."[35] The two words have different meanings.

2. President Trump's speech was protected by the First Amendment.

Neither Appellants nor their Amici address the showing in Respondent's opening brief that the district court's treatment of the First Amendment—eschewing

[35] 18 U.S.C. § 2383.

focus on Trump's words on January 6 in favor of "context" consisting of years of prior speech to various audiences to conclude that what would be protected speech for other politicians was not protected speech for him—was a radical departure from *Brandenburg* and its progeny. They identify no case supporting such an approach. Nor is there one.

Instead, they cite inapposite cases like *United States v. Hale*, 448 F.3d 971 (7th Cir. 2006), which they misleadingly describe as standing for the proposition that a "gang leader's suggestion to member to do 'whatever you wanna do,' in context, supported a charge of solicitation to violence."[36] The actual facts of *Hale*—a case which did not involve any First Amendment issue—were rather different and considerably more damning and probative of the defendant's intent to solicit violence. The snippet of conversation between two gang members (not a political address to a crowd) that Appellants quote (italicized below) followed an email from the defendant to the other gang member asking him to locate the home address of a federal judge, which led to the following exchange: "'I'm workin' on it. I got a way of getting it. Ah, when we get it, we gonna exterminate the rat?' Hale: 'Well, *whatever you wanna do*…. Ah, my position's always been that I, you know, I'm going to fight within the law and

[36] Petitioners' *Answer-Reply Br.* at 50.

but ah, that information's been pro-, provided. If you wish to, ah, do anything yourself, you can, you know.?'…Evola: 'Consider it done.' Hale: 'Good.'"[37] That clandestine conversation between two gang members was a far cry from President Trump's political speech on January 6.

As the district court acknowledged, coming from another politician the same words would have been protected speech, but Trump's style of speaking—going back years and addressed to various audiences—somehow changed that in the district court's estimation and rendered his speech unprotected. In *Counterman v. Colorado,* the Supreme Court emphasized that the intent requirement is meant to protect against the potential for chilling speech.[38] This is particularly true when it comes to political speech such that at issue here.[39] To create, as the district court did, a category of political speakers who cannot use ordinary political discourse for fear that their past history of speeches may transform protected speech into unprotected speech

[37] 448 F.3d at 978-979.

[38] 600 U.S. 66, 75-78 (2023).

[39] *Id.* at 81 ("A strong intent requirement … was a way to ensure that efforts to prosecute incitement would not bleed over, either directly or through a chilling effect, to dissenting political speech at the First Amendment's core.").

produces precisely the sort of chilling effect that *Counterman* forbids and would open the floodgates to prosecuting protected speech under the guise of "incitement."

### B. There was no insurrection on January 6.

#### 1. The January 6 riots were not an insurrection.

Petitioners' arguments that Trump engaged in insurrection[40] were refuted in the *Opening-Answer Brief*, but two additional points deserve mention.

The finding that Officer Sicknick died because of the January 6th riots is clearly erroneous and unsupported by the evidence. The district court cited Officer Winston Pingeon's testimony,[41] but Pingeon said only that Sicknick died in the line of duty. And Pingeon was not qualified to make even this judgment because he admitted on cross-examination that he was just an officer and did not dispute the D.C. Medical Examiner's conclusion that "Officer Sicknick died on January 7 of natural causes."[42]

The District Court and Petitioners also advance a faulty definition of "insurrection," as insurrection is more serious than either of their proposed definitions supposes. *See* Brief of Amici Curiae States of Indiana et al. ("*Indiana Amicus*

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[40] Petitioners' *Answer-Reply Brief*, at 37 (*referencing* 11/17/2023 Order ¶ 298 ("Trump engaged in an insurrection on January 6, 2021")).

[41] *See* Order, Nov. 17, 2023, ¶ 158; *See also* 10/30/2023 TR., pp. 224:23-225:2.

[42] 10/30/2023 TR., p. 233:2-18.

*Brief*"), at 12. Three points in the *Indiana Amicus Brief* argument[43] warrant further discussion. *See id.* at 12–17.

First, the term "insurrection" appears alongside "invasion" and "rebellion" throughout the Constitution.[44] Article I authorizes using the militia to "suppress Insurrections and repel Invasions,"[45] and in Section 3 of the Fourteenth Amendment, "insurrection" and "rebellion" are used together.[46] This pairing indicates that an insurrection is an "effort to overthrow the government" and is "more serious" than "mere[] opposition to the enforcement of the laws."[47]

Second, early authorities interpreted "insurrection" in this manner.[48] Blackstone explained that "insurrection" is closer to a foreign invasion than a riot.[49] Colonial-era

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[43] *See Indiana Amicus Brief,* at 12-17.

[44] *Id.* at 12.

[45] *See* U.S. Const. art. I, § 8.

[46] *See* U.S. Const. amend. XIV, § 3.

[47] Jason Mazzone, *The Commandeerer in Chief*, 83 Notre Dame L. Rev. 265, 336 n.450 (2007); *see* Myles S. Lynch. *Disloyalty & Disqualification: Reconstruction Section 3 of the Fourteenth Amendment*, 30 Wm. & Mary Bill Rts. J. 153, 167 (2021).

[48] *Attorneys General Amicus Brief,* at 13.

[49] 4 William Blackstone, *Commentaries on the Laws of England* *82, *420 (1765); *cf. Kneedler v. Lane*, 45 Pa. 238, 291 (1863).

laws treated invasion, insurrection, and rebellion similarly.[50] During the Constitutional Convention debates, James Wilson stated that a goal of the Convention was to avoid "dangerous commotions, insurrections, and rebellions."[51] Further, the four pre–Civil War insurrections (Shay's Rebellion (1787–1787), the Whiskey Rebellion (1794), Fries's Rebellion (1799–1800), and Dorr's Rebellion (1841–1842)) were far more extensive and menacing than the riots on January 6. Each lasted for at least several months, involved violence that shut down government operations for extended periods, targeted officials, involved militarily arrayed insurrectionists, and saw either combat or the election of a rival government.[52]

Finally, legal authorities treated the terms "insurrection," "rebellion," and "invasion" as equally grave offenses.[53] The primary Reconstruction Era legal dictionary defined "insurrection" as a "rebellion" "against the government," while

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[50] *See* James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. Pitt. L. Rev. 99, 107 (1983) (*quoting* Laws of New Haven Colony 24 (1656) (Hartford ed. 1858); Joseph Story, *Commentaries on the Constitution of the United States* § 111 (4th ed. 1873).

[51] James Madison, *Notes of Debates in the Federal Convention of 1787* 321 (Adrienne Koch ed., Ohio Univ. Press, 1966 (1840); *accord* Story, *supra*, § 490.

[52] *See United States v. Mitchell*, 2 U.S. 348, 355 (C.C.D. Pa. 1795); *Case of Fries*, 9 F. Cas. 924, 933 (C.C.D. Pa. 1800); *Ex parte Milligan*, 71 U.S. 2, 129 (1866).

[53] *See Miller v. United States*, 78 U.S. 268, 308 (1870); *United States v. Hammond*, 26 F. Cas. 99, 101 (C.C.D. La. 1875).

"rebellion" primarily meant "taking up arms traitorously against the government."[54] The legislators debating the Fourteenth Amendment swapped the terms rebellion, invasion, and insurrection freely.[55] A contemporaneous Attorney General opinion interpreting Section Three saw no meaningful distinction, constantly equating them and even defining them interchangeably as a "domestic war."[56] Throughout our history (even predating the Constitution) the term "insurrection" referred to "rebellion" or "invasion."

The district court's definition is overly broad because it brands anyone who obstructs the enforcement of any federal law an insurrectionist. For example, the rioters in the summer of 2020 who forced a federal courthouse to shut down would be deemed insurrectionists and disqualified under Section Three if they had previously taken an oath to support the Constitution.[57] This cannot be the result, and this Court must correct the District Court's error.

2. The district court improperly relied on inadmissible evidence to find Trump engaged in an insurrection.

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[54] John Bouvier, *Bouvier's Law Dictionary* (6th ed. 1856), *available at* https://bit.ly/3uzlbAP.

[55] Cong. Globe, 39th Cong., 1st Sess. 2898, 2900 (1866).

[56] The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141, 160 (1867).

[57] U.S. Const. amend. XIV, § 3.

The District Court disregarded case law that the political motivation of a congressional committee is central to judging the admissibility of its report: "[I]t is questionable whether any [such report] … could be admitted … against a private party."[58] That analysis includes assessing "the possibility that partisan political considerations" and "elected officials' tendency to 'grandstand'"[59]

Petitioners defend the J6 Report by saying that "[m]ost of the alleged hearsay [was used] only to show Trump's knowledge and his impact on extremists,"[60] but this is incorrect. Petitioners are offering the statements for the truth of what was allegedly said to Trump; otherwise, the impact on Trump is irrelevant. Regardless, even if this argument were valid, these statements were hearsay within hearsay—while the substance of statements made to President Trump may not be hearsay (they are), the statements that such things were said to Trump are themselves hearsay without an exception as they are offered to prove the truth of the matter – that people said certain specific facts to President Trump.

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

[59] *Barry v. Tr. of Int'l Ass'n Full Time Salaried Officers & Emps. of Outside Local Unions & Dist. Counsel's (Iron Workers) Pension Plan*, 467 F. Supp. 2d 91, 98 (D.D.C. 2006) (collecting cases).

[60] Petitioners' *Answer-Reply Brief* at 53.

The following chart identifies portions of the Final Order which relied on the improper testimony of Professor Simi and the improperly admitted January 6th Report.

| Finding of Fact from Final Order | Citation to January 6th Report Findings or Simi Testimony | Evidentiary Issue |
|---|---|---|
| ¶95 | Ex.78, (Finding #162). | A news report about election results is hearsay. |
| ¶97 | Ex.78, (Findings ##30, 36, 77) | Advice given to President Trump, the claim that "President Trump was informed over and over again," and Attorney General Barr, Acting Attorney General Rosen, and his Deputy's comments to President Trump are hearsay. That Trump was told something is hearsay and what he was told is hearsay. |
| ¶103 | Ex.78. (Findings ##5, 185) | Legal conclusion not supported by evidence that statements were unlawful or not protected by First Amendment; the contents and number of "apparent acts of public or private outreach, pressure, or condemnation" are hearsay. |
| ¶¶106-07 | Ex.78, (Finding #263) | Allegation that "the same constellation of actors that appeared in Atlanta also incited Trump supporters in Washington" is unsupported by evidence presented. |
| ¶110 | Ex.78, (Finding ##267, 268) | Allegation that President Trump's claims of election fraud were "fictitious" was not supported by any evidence presented; comments made by Alex Jones, Owen Shroyer, or by Ali Alexander are hearsay. |
| ¶113 | Ex.78, (Finding #50) | That "President Trump was told directly that Vice President Pence could not do what Trump was |

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| | | asking" is hearsay. That he was told something is hearsay and what he was told is hearsay. |
| ¶117 | Ex.78, (Finding ##254, 275, 276, 280, 289) | President Trump's tweet on December 19th was never introduced into evidence; Petitioners offered no evidence about Enrique Tarrio or his "national rally planning committee," the formalization of the Proud Boys "operations to focus on January 6th," the Oath Keepers' use of "encrypted chats on Signal," or "Militias around the country" who were "similarly inspired to act." |
| ¶132 | Ex.78, (Finding ##107 and 323) | Petitioners failed to demonstrate a connection between those who attended the Ellipse speech and rioted at the Capitol; an unnamed source recounting President Trump's commentary "from a tent backstage at the Ellipse" is hearsay. That he was told something is hearsay and what he was told is hearsay. |
| ¶131 | Ex.78, (Finding ##107, 338) | It is impossible to know whether a crowd is "prepared for potential violence" without interviewing members of that crowd; Petitioners failed to demonstrate a connection between those who attended the Ellipse speech and those who rioted at the Capitol |
| ¶134 | Ex.78, (Finding #108). | Whether people possessed weapons in Washington is irrelevant to these proceedings. |
| ¶85 | 10/31/2023 Tr.126:11–19, 221:10–21. | Professor Simi was unqualified to opine on rallygoers and rioters thoughts. There was no evidence President Trump knew rioters would be violent. |
| ¶¶61-84, 85, 105, 109 | Professor Simi's testimony generally. | Same. |
| ¶147 | Ex.78, pp. 25-26, 104-105 | "Chants" the Proud Boys allegedly made is hearsay and the conclusion that the Proud Boys led the initial breach is unsupported by Petitioners' evidence. |

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| ¶151 | Ex.78,<br>(Finding #361) | Petitioners offered no evidence about White supremacists or Confederate-sympathizers at the Capitol. |
| ¶152 | Ex.78,<br>(Finding #374) | Petitioners offered no evidence about Dominic Prezzola. |
| ¶¶155, 157 | Ex.78,<br>(Finding ##342, 346, 382) | Petitioners offered no evidence supporting Finding 342, including whether the weapon actually exists; about this person's alleged weapons; about Officer Michael Fanone, Albuquerque Head, Lucas Deny, Daniel Rodriquez, Kyle Young, or Thomas Sibick. |
| ¶163 | Ex.78,<br>(Finding #347) | Petitioners offered no evidence about Dominick Pezzola or William Pepe or their alleged crimes. |
| ¶169 | Ex.78,<br>(Finding #316). | An unnamed source informing President Trump of anything is hearsay. That he was told something is hearsay and what he was told is hearsay. |
| ¶174, 180 | Ex.78,<br>(Finding #150) | What "Chief of Staff Mark Meadows told White House Counsel Pat<br>Cipollone" is hearsay and Petitioners offered no evidence this information was relayed to Trump. How Trump responded to former Leader McCarthy are hearsay. That he was told something is hearsay and what he was told is hearsay. |
| ¶188 | Ex.78,<br>(Finding #120) | A statement that "people at the Capitol, people inside President<br>Trump's Administration, elected officials of both parties, members of President Trump's family, and Fox News commentators sympathetic to President Trump" were trying to contact Trump "to do one singular thing" is hearsay. |
| ¶191 | 10/31/2023<br>Tr.123:12–15 | Professor Simi was unqualified to opine on rallygoers and rioters thinking, and Petitioners offered no evidence to support the conclusion that Trump knew rioters would be violent. |

Respectfully submitted 4th day of December 2023,

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## CERTIFICATE OF SERVICE

I certify that on this 4th day of December 2023, the foregoing was electronically served via e-mail or CCES on all counsel and parties of record.

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