IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
Letica, Anica, Riordan, Michael J., and Cameron, Thomas C.

ROBERT LaBRANT, ANDREW BRADWAY, NORAH MURPHY, and WILLIAM NOWLING,

Plaintiffs/Appellants,

v

JOCELYN BENSON, in her official capacity as Secretary of State,

Defendant/Appellee,

-and-

DONALD J. TRUMP,

Intervening Appellee.

SUPREME COURT DOCKET NO. 166470

COURT OF APPEALS DOCKET NO. 368628

COURT OF CLAIMS
CASE NO. 23-000137-MZ
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Intervening Appellee Donald J. Trump's Appendix to Answer to Plaintiffs/Appellants' Application for Leave to Appeal

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Respectfully submitted,

Date: December 22, 2023

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APPENDIX 1

STATE OF MICHIGAN
COURT OF CLAIMS

ROBERT LaBRANT, ANDREW BRADWAY, NORAH MURPHY and WILLIAM NOWLING,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State,

Defendant.
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DEFENDANT SECRETARY OF STATE'S MEMORANDUM OF LAW PURSUANT TO THE COURT'S OCTOBER 9, 2023, SCHEDULING ORDER ORDERING DEFENDANT TO ADDRESS SPECIFIC QUESTIONS

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Dated: October 16, 2023

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On September 29, 2023, Plaintiffs Robert LaBrant, Andrew Bradway, Noah Murphy, and William Nowling filed the instant Complaint against Defendant Secretary of State Jocelyn Benson. In Count I of their complaint, Plaintiffs request that the Court enter a declaratory judgment declaring that former President Donald Trump is ineligible to be placed on Michigan's presidential primary or general election ballot because he is disqualified under § 3 of the Fourteenth Amendment. (Comp, ¶¶ 316-319.) In Count II, Plaintiffs request that the Court enjoin the Secretary from placing Mr. Trump on Michigan's presidential or general election ballots. (*Id.*, ¶¶ 320-322.)

A similar case was filed by Robert Davis on September 15, 2023. See *Davis v Benson*, Court of Claims Case No. 23-000128.

On October 9, 2023, this Court entered an expedited scheduling order in both cases. The Court stated that it was expediting the instant case along with the *Davis* case, No. 23-00028-MZ. Defendant understands the Court's order to require responses in both cases by October 16, 2023.

In response to Plaintiffs' complaint, Defendant Benson has filed an answer. However, in the Court's scheduling order, it ordered Defendant to respond to six specific questions. Consistent with that order Secretary Benson submits the instant memorandum of law.

ARGUMENT

I. Secretary Benson's responses to the questions posed by the Court in its October 9, 2023, scheduling order.

The Court ordered Defendant Benson to address six specific questions relating to § 3 of the Fourteenth Amendment, including whether the Secretary is authorized to disqualify a candidate for President under that section. Because the Secretary has no authority to make such a determination, she has no official position as to the outcome of the related constitutional

questions. Her responses to the questions below, other than to the first question, therefore, do not advance an affirmative position.

A. Whether Defendant has an affirmative duty and the authority to decide whether a candidate may be placed on a ballot prior to a court's review of the issue.

Although the Court's question refers to a "candidate" generally, the Secretary will address this question as if directed to candidates for the Office of President.

The US Constitution delegates to state "Legislature[s]" the authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's ability to "make or alter such Regulations." US Const art I, § 4, cl 1. This provision is known as the "Elections Clause." The Clause "imposes" on state legislatures the "duty" to prescribe rules governing federal elections. *Arizona v Inter Tribal Council of Ariz, Inc*, 570 US 1, 8 (2013). It also guards "against the possibility that a State would refuse to provide for the election of representatives" by authorizing Congress to prescribe its own rules. *Id*.

Similar to the Elections Clause, the "Electors Clause" of the US Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors." US Const art II, § 1, cl 2. Congress can "determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." US Const art II, § 1, cl. 4. Congress has set the time for appointing electors as "the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." 3 USC 1.

Under the Michigan Constitution, the Legislature "shall enact laws to regulate the time, place and manner of all . . . elections[.]" Const 1963, art 2, § 4(2). The Legislature delegated the task of conducting proper elections to the Secretary of Secretary, an elected Executive-branch

officer, and the head of the Department of State. Const 1963, art 5, §§ 3, 9. See also, MCL 168.31(1), MCL 168.21.

The Legislature has prescribed the manner in which candidates for the Office of President obtain ballot access in Michigan. With respect to obtaining access to the presidential primary ballot, under MCL 168.614a(1), the Secretary creates a list of candidates from national news media sources:

> Not later than 4 p.m. of the second Friday in November of the year before the presidential election, *the secretary of state shall issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section 613a*. . . . [Emphasis added.]

And under subsection 614a(2), the chairpersons for the major political parties in Michigan file a list of candidates with the Secretary after she issues her list:

> Not later than 4 p.m. of the Tuesday following the second Friday in November of the year before the presidential election, the state chairperson of each political party for which a presidential primary election will be held under section 613a shall file with the secretary of state a list of individuals whom they consider to be potential presidential candidates for that political party. . . .

All names of the candidates identified under § 614a will then be placed on the presidential primary ballot unless a candidate withdraws.[1] MCL 168.615a ("Except as otherwise provided in this section, the secretary of state *shall* cause the name of a presidential candidate notified by the secretary of state under section 614a to be printed on the appropriate presidential primary ballot for that political party.") (emphasis added). The winning candidates for each party are then certified by the Board of State Canvassers. MCL 168.616a. However, the names

[1] A person who is not identified as a candidate under either method described in § 614a(1)-(2), may seek to access the ballot by timely filling a nominating petition containing sufficient valid signatures of registered voters. MCL 168.615a(2).

of which candidates for President will actually appear on the November general election ballot is ultimately a determination made by the major political parties through their respective fall state conventions. See, e.g., MCL 168.42, 168.591, 168.619. This process usually results in the winners of the Michigan presidential primary election being nominated by the parties as their candidates for November, but that is not a forgone result.

The US Constitution imposes qualifications for the Office of President. See, e.g., US Const, art II, § 1, cl 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.") But no language in §§ 614a, 615a, or any other section of the Michigan Election Law requires or authorizes the Secretary to determine whether a candidate for President meets the qualifications for office or is otherwise eligible to run for or hold that office if elected.

In contrast, the Legislature has incorporated eligibility requirements for various offices into the Michigan Election Law, including federal offices, see, e.g., 168.51, 168.71, 168.91, 168.131, 168.161, 168.281, and has required these candidates to file "affidavit[s] of identity," which include a statement that a candidate "meets the constitutional and statutory qualifications for the office sought," MCL 168.558(1)-(2).[2] Candidates who fail to complete a certificate identity or supply false information are prohibited from appearing on the ballot. *Moore v Genesee Cty*, 337 Mich App 723, 731 (2021). The Legislature chose, however, to expressly exclude candidates for President from compliance with the affidavit of identity requirement,

[2] There is an eligibility requirement for presidential electors. See MCL 168.41, Const 1963, art 2, § 3.

likely because the Legislature expects the parties to police the qualifications and eligibility of their candidates. MCL 168.558(1) ("The affidavit of identity filing requirement does not apply to a candidate nominated for the office of President of the United States or Vice President of the United States.").

There simply is no statute in the Michigan Election Law that imposes upon the Secretary a duty to determine whether a candidate for President meets the qualifications for office or is otherwise eligible to run for or hold that office if elected. Nor can such a duty be implied from any statute, particularly where the Legislature expressly relieved presidential candidates from making any affirmation that they meet the qualifications for that office. See MCL 168.558(1). The Legislature's drafting choice strongly suggests that the Secretary has neither the duty nor the authority to prohibit a presidential candidate who lacks the constitutional qualifications from appearing on a primary or general election ballot. See *People v Lewis*, 503 Mich 162, 165-66 (2018) ("[W]hen the Legislature includes language in one part of a statute that it omits in another, it is assumed that the omission was intentional."). And while the Secretary has the "inherent authority to take measures to ensure that voters [are] able to avail themselves of the constitutional rights established" in article 2, § 4 of the Michigan Constitution, *Davis v Sec'y of State*, 333 Mich App 588, 601 (2020), nothing in that article suggests she has the authority to modify the largely ministerial process of identifying and accepting a slate of presidential candidates to be voted upon at the presidential primary (or at the November election).

Further, whether the Fourteenth Amendment bars Mr. Trump from appearing as a presidential candidate on Michigan's ballots, is a federal constitutional question of enormous consequence. Michigan courts have held that administrative agencies generally do not have the power to determine constitutional questions. *Bauserman v Unemployment Ins Agency*, 509 Mich

673, 710 (2022), citing *Dickerson v Warden, Marquette Prison*, 99 Mich App 630, 641-642 (1980). See also *Dation v Ford Motor Co*, 314 Mich 152, 159 (1946). And here, where the Legislature has not authorized or required the Secretary to determine or confirm whether candidates for President are qualified and eligible to serve, she has no authority to determine this constitutional question.

It has been suggested that article 11, § 1 of the Michigan Constitution, which requires state officers to take an oath in which they "swear (or affirm) that [they] will support the Constitution of the United States," obligates the Secretary to resolve the Fourteenth Amendment question otherwise she is not supporting the US Constitution. But the text of § 3 does not speak directly to whether the Secretary or any other state official must prohibit a candidate for the Office of President from appearing on a state's ballot when state law confers no authority on that official to evaluate presidential candidates' qualifications for office. And article 11, § 1 does not somehow authorize the Secretary to determine a constitutional question she is otherwise not required or authorized to resolve. Moreover, the Secretary simply has no administrative process for making the legal—let alone factual—determinations that would need to be made concerning the application of § 3. There is no statutory vehicle that provides either a citizen with the right to initiate such an action or for the participation of the impacted candidate, who would presumably be entitled to some process. See, e.g., *Greene v Raffensberger*, 599 F Supp 3d 1283 (ND Ga 2022) (discussing plaintiff's due process concerns in case involving disqualification under § 3).

The Secretary will certainly comply with any order entered by this Court or another that declares Mr. Trump eligible or ineligible to appear as a candidate for President on Michigan's ballots by reason of the Fourteenth Amendment. And in doing so, the Secretary will uphold the oath she took to support both the US Constitution and the Michigan Constitution.

For these reasons, the Secretary does not have an affirmative, legal duty or the authority to decide whether the Fourteenth Amendment renders Mr. Trump eligible or ineligible to be placed on the ballot prior to a court's review of that constitutional question.

B. Whether § 3 of the Fourteenth Amendment applies to the offices of President and Vice President and to candidates for those offices?

Section 3 of the Fourteenth Amendment provides:

> No Person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold *any office*, civil or military, *under the United States*, or under any State, who, having previously taken an oath, as a member of Congress, or as an *officer of the United States*, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability. [US Const, Am XIV, § 3 (emphasis added).]

Again, the Secretary takes no position with respect to whether Mr. Trump should appear as a candidate in Michigan's presidential primary or general election, or whether he should be precluded from doing so under the Fourteenth Amendment.

The Court's question raises two, inter-related questions—does the office of President constitute "any office" "under the United States" from which a person may be disqualified from holding based on his engaging in insurrection. And was Mr. Trump "an officer of the United States" who previously took an oath to support the US Constitution for purposes of § 3 when he previously held the office of President. In a separate question, this Court also asked whether there were any state or federal cases interpreting or applying § 3 to candidates for office or persons serving in an office, including any cases currently involving Mr. Trump as potential presidential candidate.

Addressing this second question first, there are numerous cases pending throughout the United States in which the movants seek to disqualify Mr. Trump under § 3 of the Fourteenth

Amendment.[3] A list of known cases is attached as Exhibit 1. Upon information and belief, none of the cases have yet resulted in a substantive determination by a court regarding the application of § 3 to Mr. Trump.[4] And several have been dismissed for lack of standing. (Exhibit 1, Case list.) As far as cases applying § 3 to other candidates, there are a few cases of recent vintage in which several candidates were challenged on that basis.

In *Hansen v Finchem*, the court determined that the plaintiffs could not use a state statute allowing challenges to candidates based upon their qualifications for office to disqualify the candidates under § 3 because § 3 is a "legal proscription from holding office," not a law that "prescribe[s]" qualifications. No. CV-22-0099-AP/EL, 2022 WL 1468157 (Ariz May 9, 2022).

In *Rowan v Greene*, the Georgia Secretary of State affirmed an administrative hearing officer's determination that the plaintiffs failed to provide sufficient proof that Representative Marjorie Taylor Greene was not qualified to seek and hold public office. See No. 2222-582-OSAH-SECSTATE-CE-57-Beaudrot (Georgia Office of the Secretary of State, May 6, 2022). See also *Greene v Raffensperger*, 599 F Supp 3d 1283, 1320 (ND Ga 2022) (refusing to enjoin the state proceedings where Greene failed to demonstrate that states were prohibited from enforcing § 3), *Greene v Sec'y of State for Georgia*, 52 F 4th 907, 909-910 (CA 11, 2022) (remanding for dismissal of case as moot).

In *Griffin v New Mexico ex rel White*, a quo warranto proceeding, a state court judge determined that § 3 applied to a county commissioner convicted of a crime in relation to the

[3] Most of the cases have been filed by John Anthony Castro, a purported presidential candidate from Texas. Castro filed a complaint against Secretary Benson and Donald J. Trump in the Court of Claims on August 31, 2023. See *Castro v Benson, et al*, Case No. 23-000122, however, the complaint has not been served.

[4] Cases worth monitoring currently include *Growe v Simon*, Minnesota Supreme Court Case No. A23-1354, and *Anderson v Griswold*, District Court, City and County of Denver, 23-cv-32577. See Exhibit 1.

events on January 6, 2021, and the commissioner was removed from office. See No. D-101-CV-2022-00473, 2022 WL 4295619 (NM Dist Ct Sept 6, 2022). The commissioner's appeal to the New Mexico Supreme Court was denied. *Griffin v New Mexico, ex rel White*, No. S-1-SC-39571 (NM Feb 16, 2023).

And in *Cawthorn v Circosta*, voters filed a challenge with the North Carolina State Board of Elections seeking to disqualify Representative Madison Cawthorne from the 2022 primary ballot, and Cawthorne filed suit in federal court seeking to bar the state board from considering the issue. 590 F Supp 3d 873, 891 (ED NC 2022). The District Court held that the 1872 Amnesty Act supported enjoining the state proceedings. *Id*. at 890-892. The Fourth Circuit Court of Appeals reversed, and no further litigation occurred as Cawthorne lost in the primary. *Cawthorn v Amalfi*, 35 F4th 245 (CA 4, 2022).

Given the dearth of cases, reference to recent law review articles may assist the Court.

In a 2021 article, the authors opine that the President of the United States is not an "officer of the United States" whose prior taking of an oath will trigger the disqualification from holding a covered office under § 3. See Josh Blackman & Seth Barrett Tillman, Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?, 15 NYU J L & Liberty 1 (2021), attached as Exhibit 2. In summary of what is a complex argument, the authors argue that the terms "officer of the United States" and "[o]ffice . . . under the United States" should be presumed to have different meanings in § 3 since the Framers used different wording within the same section. *Id*. at 7-10. They argue that the history of the Framers use of this different terminology in different sections of the Constitution, supports a presumption that "these phrases refer to different positions." *Id*. at 9. And that "the better inference . . . is that the President and Vice President are not 'Officers of the United States.'" *Id.* at 10.

> All available evidence suggests that the Framers were deliberate. The ratifiers and their contemporaries would have understood how these alterations modified the meaning of these provisions. The different "office"- and "officer"-language presumptively had different meanings. And, we think, the Framers of 1868 also took reasonable care when using the coordinate phrases "officers of the United States" and "office ... under the United States" in Section 3 of the Fourteenth Amendment. [*Id*.]

The authors go on to expressly argue that the President is not an "officer of the United States" for purposes of the various provisions that use that language, including § 3, that there is no compelling evidence that the Framers intended something different in § 3, and that various cases and authorities support that conclusion. *Id*. at 21-33. The article then discounts various past authorities and arguments that suggest or reach different conclusions. *Id*. at 34-50. In their conclusion, the authors note that they chose not to resolve whether the President is an "office . . . under the United States," but that if the President is not an "officer of the United States," it "ends the case" for purposes of the application of § 3. *Id*. at 54.

Conversely, in a 2023 article, the authors reject the analysis in the Blackman and Tillman article that the President is not an "officer of the United States," and further conclude that the President is an "officer . . . under the United States" for purposes of both clauses in § 3. See William Baude & Michael Stokes Paulson, The Sweep and Force of Section Three, 172 U PA L REV ___ (forthcoming 2024), attached as Exhibit 3. These authors argue that the provisions of § 3 should be read:

> in as straightforward and common-sense a manner as possible. The text must be read precisely, of course, but also sensibly, naturally and in context, without artifice or ingenious invention unwarranted by that context. Some constitutional provisions embody precise terms of art that must be attended to. But a reading that renders the document a "secret code" loaded with hidden meanings discernible only by a select priesthood of illuminati is generally an unlikely one. . . . Where the simplest and most plausible explanation of minor textual differences is merely stylistic or accidental variation, that explanation should not lightly be cast aside. [*Id*. at p 105 (footnote omitted).]

The authors further argue that the list of disqualification triggering offices in § 3 ("officer . . . of the United States") closely tracks the listing of offices in the Constitution's oath provisions, see art VI, cl 3, art II, § 1, cl 8, and that the list of offices from which a person is disqualified from ("offices . . . under the United States") builds on that list. *Id*. at 105-106. "Thus, in general: If the original Constitution required an oath for a position, Section Three treats having held such a position as the trigger for Section Three's application." *Id*. at 106. And "if a person who once held any such position is disqualified under Section Three for engaging in or supporting insurrection, that person is barred (absent congressional relief) from holding any of those same positions[.]" *Id.* The argue that § 3's "project of office-listing" was to simply provide a comprehensive list of positions in both clauses. *Id.*

The authors reject the analysis of Blackman and Tillman as a technical and non-natural reading of the text that ultimately results in the implausible consequence that an insurrectionist President could hold the office of President, but that his prior holding of that office would not trigger disqualification. *Id*. at 108-109. They further note that a "variant" of that argument was refuted during congressional debates on § 3. (*Id*. at 110-111.)

There are certainly additional, relevant articles available, Defendant chose these as two recent competing viewpoints. It is also likely that the cases pending regarding Mr. Trump, see Exhibit 1, will result in additional discussions of whether § 3 applies to the Office pf President.

C. Whether § 3 precludes a person from serving in an office covered by § 3, seeking election to an office covered by § 3, or both.

Defendant Benson understands this question as asking whether § 3 is a qualification for seeking office, or whether it is a prohibition to holding office if elected, or whether it functions as both. Again, § 3 provides, in part, that "[n]o Person shall be a Senator or Representative in

Congress, or elector of President and Vice-President, or *hold* any office, civil or military, under the United States[.]" (Emphasis added.)

This issue does not appear to have been the subject of significant litigation yet or academic discussion. But in the Arizona case discussed above in I.B, the Arizona Supreme Court held in its brief opinion that the state statute allowing candidate challenges could not be used to advance a claim under § 3 because its "scope is limited to challenges based upon 'qualifications . . . as prescribed by law.'" *Hansen*, 2022 WL 1468157 at * 1. The statute did not apply, the court reasoned, because § 3 is a "legal proscription from holding office," not a law that "prescribe[s]" qualifications. *Id.*

But in the Fourth Circuit's opinion in *Cawthorn*, also noted above in I.B, the Court stated in a footnote that it was "assuming without deciding" that the "disability" imposed by § 3 is a "qualification" for purposes of article I, § 5 of the US Constitution, 35 F4th at 257 n7, which provides that "Each House shall be the judge of . . . the qualifications of its own members[.]" US Const, art I, § 5. In the text the Fourth Circuit cited *Powell v McCormack*, 395 US 486 (1969), in which the US Supreme Court made a passing reference to § 3 but stated in a footnote that it was *not* deciding whether § 3 and other constitutional provisions properly constituted "qualifications." *Id.* at 520 n 41. See also *US Term Limits, Inc v Thornton*, 514 US 779, 788 n 2 (1995) (citing *Powell* and likewise not deciding the issue).

Also, in *Greene*, the District Court discussed the state's important regulatory interests in ensuring that only qualified candidates appear on the ballot and appeared to treat the disqualification component of § 3 as a qualification. 599 F Supp 3d at 1311-1312, 1316 ("On the current record, it appears that the Challenge Statute imposes minimal burdens through its process of ensuring that only candidates who meet the Constitution's minimum threshold requirements

appear on the ballot — including candidates who are not disqualified by Section 3 of the Fourteenth Amendment.")

One author has discussed the possible timing of challenges to federal-office candidates under § 3, including the President, describing possible pre-election, post-election/pre-inauguration, and post-assumption of office challenges. See Myles S. Lynch, Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment, 30 Wm & Mary Bill Rts J 153, 189-194 (2021).[5]

It is possible that the cases pending regarding Mr. Trump will result in additional discussions of whether § 3 functions as a qualification for seeking office or a prohibition from ultimately holding office.

D. Whether § 3 is self-executing.

The question of whether § 3 is self-executing appears to have proponents on both sides. Authors Baude and Paulson in their article, discussed above in I.B., argue that § 3 functions as an automatic, legal disqualification whenever its' conditions for disqualification are met, and thus needs no implementing legislation by Congress. (Exhibit 3, p 17.) They note that the federal Constitution is the supreme law of the land, and states what the law is. (*Id.*) "Section Three's language is language of automatic legal effect: '*No person shall be*' directly enacts the officeholding bar it describes where its rule is satisfied. It lays down a rule by saying what shall be." (*Id.*, pp 17-18.) The authors observe that this language is consistent with other self-executing "disqualification" sections, such as those in article I and article II, § 1, cl 5's requirement that "[n]o person . . . shall be eligible" to be President who does not meet the age

[5] The Baude and Paulson article includes a discussion of the mode of enforcing § 3. See Exhibit 3, pp 22-35.

requirement. (*Id*., p 18.) As well as other provisions, like the Thirteenth Amendment (abolishing slavery) and other sections of the Fourteenth Amendment, such as the Equal Protection Clause. (*Id*., pp 18-19.)

The authors recognize that Congress *can* enact legislation to enforce § 3, as it has in the past, but Congress need not do so where § 3 "was effective all along." (*Id*., p 19-20.) They further contrast § 3's language with other provisions like the Constitution's impeachment provisions, which require implementation, whereas § 3 does not. (*Id*., pp 20-21.) For these reasons, they conclude that § 3 "has legal force already," meaning it is self-executing. (*Id*., p 22.)

Blackman and Tillman, in a new article, advance a contrary view. See Josh Blackman & Seth Barrett Tillman, Sweeping and Forcing the President into Section 3, 28 TEX REV L & POL (forthcoming 2024).[6] Again, in summary of what is a complex argument, they argue that whether § 3 is self-executing ultimately depends on the manner enforcement is sought. (*Id*., pp 18-20.) They note that many Article I qualification-type provisions have gone unenforced, whether at the federal or state level, which undermines Baude's and Paulson's argument that such provisions are self-executing without legislation intervention, and by extension their argument that § 3 is as well. (*Id*., pp 25-37.) Turning to the Fourteenth Amendment, Blackman and Tillman acknowledge that § 1, which includes the due process and equal protection clauses, is generally considered self-executing. (*Id*., pp 38-39.) But they say "the better question is in what fashion is Section 1 self-executing?" (*Id*. at p 39.) The authors argue, citing various precedents, that while a defensive ("shield") use of the constitutional constraints found in the

[6] An abstract of the lengthy article as well as a download is available online at Sweeping and Forcing the President into Section 3 by Josh Blackman, Seth Barrett Tillman :: SSRN.

Fourteenth Amendment is always permissible, the offensive ("sword") use of the Fourteenth Amendment's limitations, including those in § 3, is not. (*Id*. at pp 39-53.) Thus, in their view, § 3 would be not self-executing if used as a sword to disqualify a candidate.[7]

Secretary Benson is aware of only one recent case that has touched on whether § 3 is self-executing. In *Hansen*, the Arizona Supreme Court did not use the words self-executing, but it noted "that Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause ('The Congress shall have power to enforce, by appropriate legislation, the provisions of this article'), which suggests that ARS § 16-351(B) does not provide a private right of action to invoke the Disqualification Clause against the Candidates." 2022 WL 1468157, at *1. As above, it is possible that the cases pending regarding Mr. Trump will result in additional discussions of whether § 3 is self-executing.

E. Whether the 1872 Amnesty Act applies to the instant case.

In 1872, Congress enacted legislation related to § 3, which provides:

> [A]ll political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States. [Act of May 22, 1872, ch. 193, 17 Stat 142 (1872).]

And in 1898, Congress removed the disabilities from the previously excepted persons in the 1872 Act by enacting another law, providing that "the disability imposed by section three of

[7] Both Baude and Paulson and Blackman and Tillman spend time in their respective articles discussing the ramifications of US Supreme Court Justice Salmon Chase's decision as a circuit justice in *In re Griffin*, 11 F Cas 7 (CCD Va 1869), in which he determined § 3 required enabling legislation. For an additional viewpoint on this subject, the Court may wish to review Gerard N. Magliocca, Amnesty and Section Three of the Fourteenth Amendment, 36 Const Comment 87, 100-108 (Spring 2021).

the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed." Amnesty Act of 1898, ch. 389, 30 Stat. 432.

In *Cawthorn*, discussed previously, the District Court agreed with Representative Cawthorn that the 1872 Act permanently removed the disabilities stated in § 3. *Cawthorne*, 590 F Supp 3d at 890. "The 1872 Act, by its plain language, removed '*all political disabilities* imposed by the third section of the fourteenth article of amendments of the Constitution of the United States *from all persons whomsoever.*' " *Id*. at 891 (emphasis in original). The court observed that Congress could have used language that clarified the act only applied to persons currently subject to § 3 but did not do so. *Id*. The District Court therefore enjoined any further proceedings against Cawthorne.

But the Fourth Circuit reversed the District Court.

That Court concluded that the District Court erred "in construing the Act as a sweeping removal of all future Fourteenth Amendment disabilities." *Cawthorn*, 35 F.4th at 257. The Court determined that the lower court had read the Act incorrectly in that it did not prospectively relieve persons from disabilities in the future but was rather "'backward-looking'" because the language it employed ("imposed" and "removed") was in the "past tense." *Id*. at 258 (citations omitted). "Here, Congress employed the past-tense version, indicating its intent to lift only those disabilities that had by then been 'imposed.'" *Id*., citing *Costello v INS*, 376 US 120, 123–24 (1964) (referring to the past participle in "have been" as a "use of the past tense" (quotation marks omitted)). The Court went on to conclude that this construction was consistent with the Act's history and context in dealing with "the hordes of former Confederates seeking forgiveness." *Id*. at 259 (citation omitted). The Court thus reversed and vacated the injunction and remanded for further proceedings. *Id*. at 261.

The District Court in New Mexico in the *Griffin* case agreed with the Fourth Circuit's analysis concerning the 1872 Act. See *Griffin*, 2022 WL 2132042 at * 2. And in a decision preceding the Fourth Circuit's decision, the Georgia District Court in the *Greene* case rejected the District Court's analysis in *Cawthorn.* See *Greene*, 599 F Supp 3d at 1315 ("Suffice it to say, the Court is skeptical. It seems much more likely that Congress intended for the 1872 Amnesty Act to apply only to individuals whose disabilities under Section 3 had already been incurred, rather than to all insurrectionists who may incur disabilities under that provision in the future.")

Again, it is possible that the cases pending regarding Mr. Trump will result in additional discussions of the 1872 Act.

Respectfully submitted,

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PROOF OF SERVICE

Heather S. Meingast certifies that on October 16, 2023, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

/s/Heather S. Meingast
Heather S. Meingast

APPENDIX 2

STATE OF MICHIGAN
COURT OF CLAIMS

DONALD J. TRUMP,

Plaintiff,

v

No. 23-000151-MZ

HON. JAMES ROBERT REDFORD

JOCELYN BENSON, in her official capacity as Secretary of State,

Defendant.
_____/

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DEFENDANT SECRETARY OF STATE'S MEMORANDUM OF LAW PURSUANT TO THE COURT'S OCTOBER 9, 2023, SCHEDULING ORDER ORDERING DEFENDANT TO ADDRESS SPECIFIC QUESTIONS IN RELATED CASE NOS. 23-000128 AND 23-000137

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Dated: November 2, 2023

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STATEMENT OF FACTS

On September 15, 2023, Robert Davis filed a complaint against Secretary of State Jocelyn Benson and an emergency motion for declaratory relief requesting, among other things, that the Court declare that Secretary Benson has a legal duty to declare former President Donald Trump ineligible to run for president on Michigan's presidential primary or general election ballot under § 3 of the Fourteenth Amendment. (Compl, *Davis v Benson*, Case No. 23-000128.)

On September 29, 2023, Robert LaBrant and several other individuals filed a similar complaint against the Secretary, requesting that the Court declare Mr. Trump ineligible to be placed on Michigan's primary or general election ballot because he is disqualified under the Fourteenth Amendment, and enjoining the Secretary from placing him on any ballot. (Compl, *LaBrant, et al v Benson*, Case No. 23-000137.)

On October 9, 2023, the Court entered an expedited scheduling order in the *Davis* and *LaBrant* cases, ordering Defendant to respond by October 16, 2023, and to address six specific questions relating to the Secretary's duties and the application of the Fourteenth Amendment. (Exhibit 1, 10/9/23 order.) The Court ordered the plaintiffs in the cases to serve Mr. Trump with the filings, and invited Mr. Trump to participate as an amicus. (*Id*.)

On October 16, the Secretary filed answers and briefs in the *Davis* and *LaBrant* cases. The same day, Mr. Trump filed motions to intervene in both cases. On October 18, 2023, the Court entered a second scheduling order, specifying that responses to the motions to intervene were due October 23, 2023. (Exhibit 2, 10/18/23 order.) Secretary Benson opposed the motions to intervene because binding precedent precluded intervention by a private party but noted that in similar cases parties sometimes file parallel proceedings.

On October 25, 2023, the Court denied the motions to intervene without prejudice, granted Mr. Trump's motions to participate as amicus, noted the possibility of filing a parallel

proceeding, and ordered that any renewed motions to intervene or the filing of a parallel proceeding be done by October 30, 2023, and that any response to such filings be made by November 2, 2023. (Exhibit 3, 10/25/23 order.)

On October 30, 2023, Mr. Trump filed the instant complaint against Secretary Benson. In Count I, Mr. Trump seeks a declaration that the Secretary has no authority under Michigan law to refuse to include him as a candidate for President on Michigan's presidential primary ballot. (Compl, ¶¶ 38-40.) In Count II, he seeks a declaration that the Secretary has no authority to exclude him from the ballot under federal law. (*Id.*, ¶¶ 42-44.) And in Count III, Mr. Trump requests that the Secretary be enjoined from refusing to place Mr. Trump on the ballot. (*Id.*, ¶¶ 46-49.)

On October 31, 2023, the Court issued a scheduling order in all three cases. (10/31/23 order.) The Court confirmed that the three cases, while not consolidated, would be heard together. (*Id.*) The Court further confirmed that Defendant's answer or response to the instant complaint is due November 2. (*Id.*) And the Court ordered that a hearing in the three cases would take place on November 9, 2023, rather than the previously ordered date of November 6. (*Id.*)

In keeping with the Secretary's filings in the *Davis* and *LaBrant* cases, the Secretary submits the instant memorandum of law addressing the questions the Court raised in those cases in addition to a brief discussion of the political question doctrine, and a notation of upcoming election deadlines.

ARGUMENT

I. Secretary Benson's responses to the questions posed by the Court in its October 9, 2023, scheduling orders in related Case Nos. 23-000128 and 23-000137.

Previously, the Court ordered Defendant Benson to address six specific questions relating to § 3 of the Fourteenth Amendment, including whether the Secretary is authorized to disqualify a candidate for President under that section. (Exhibit 1, 10/9/23 order.) Because the Secretary has no authority to make such a determination, she has no official position as to the outcome of the related constitutional questions. Her responses to the questions below, other than to the first question, therefore, do not advance an affirmative position.

A. Whether the Secretary has an affirmative duty and the authority to decide whether a candidate may be placed on a ballot prior to a court's review of the issue.

Although the Court's question refers to a "candidate" generally, the Secretary will address this question as if directed to candidates for the Office of President.

The US Constitution delegates to state "Legislature[s]" the authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's ability to "make or alter such Regulations." US Const art I, § 4, cl 1. This provision is known as the "Elections Clause." The Clause "imposes" on state legislatures the "duty" to prescribe rules governing federal elections. *Arizona v Inter Tribal Council of Ariz, Inc*, 570 US 1, 8 (2013). It also guards "against the possibility that a State would refuse to provide for the election of representatives" by authorizing Congress to prescribe its own rules. *Id*.

Similar to the Elections Clause, the "Electors Clause" of the US Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors." US Const art II, § 1, cl 2. Congress can "determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the

same throughout the United States." US Const art II, § 1, cl. 4. Congress has set the time for appointing electors as "the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." 3 USC 1.

Under the Michigan Constitution, the Legislature "shall enact laws to regulate the time, place and manner of all . . . elections[.]" Const 1963, art 2, § 4(2). The Legislature delegated the task of conducting proper elections to the Secretary of Secretary, an elected Executive-branch officer, and the head of the Department of State. Const 1963, art 5, §§ 3, 9. See also, MCL 168.31(1), MCL 168.21.

The Legislature has prescribed the manner in which candidates for the Office of President obtain ballot access in Michigan. With respect to obtaining access to the presidential primary ballot, under MCL 168.614a(1), the Secretary creates a list of candidates from national news media sources:

> Not later than 4 p.m. of the second Friday in November of the year before the presidential election, *the secretary of state shall issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held under section 613a*. . . . [Emphasis added.]

And under subsection 614a(2), the chairpersons for the major political parties in Michigan file a list of candidates with the Secretary after she issues her list:

> Not later than 4 p.m. of the Tuesday following the second Friday in November of the year before the presidential election, the state chairperson of each political party for which a presidential primary election will be held under section 613a shall file with the secretary of state a list of individuals whom they consider to be potential presidential candidates for that political party. . . .

All names of the candidates identified under § 614a will then be placed on the presidential primary ballot unless a candidate withdraws.[1] MCL 168.615a ("Except as otherwise provided in this section, the secretary of state *shall* cause the name of a presidential candidate notified by the secretary of state under section 614a to be printed on the appropriate presidential primary ballot for that political party.") (emphasis added). The winning candidates for each party are then certified by the Board of State Canvassers. MCL 168.616a. However, the names of which candidates for President will actually appear on the November general election ballot is ultimately a determination made by the major political parties through their respective fall state conventions. See, e.g., MCL 168.42, 168.591, 168.619. This process usually results in the winners of the Michigan presidential primary election being nominated by the parties as their candidates for November, but that is not a forgone result.

The US Constitution imposes qualifications for the Office of President. See, e.g., US Const, art II, § 1, cl 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.") But no language in §§ 614a, 615a, or any other section of the Michigan Election Law requires or authorizes the Secretary to determine whether a candidate for President meets the qualifications for office or is otherwise eligible to run for or hold that office if elected.

In contrast, the Legislature has incorporated eligibility requirements for various offices into the Michigan Election Law, including federal offices, see, e.g., 168.51, 168.71, 168.91,

[1] A person who is not identified as a candidate under either method described in § 614a(1)-(2), may seek to access the ballot by timely filling a nominating petition containing sufficient valid signatures of registered voters. MCL 168.615a(2).

168.131, 168.161, 168.281, and has required these candidates to file "affidavit[s] of identity," which include a statement that a candidate "meets the constitutional and statutory qualifications for the office sought," MCL 168.558(1)-(2).[2] Candidates who fail to complete a certificate identity or supply false information are prohibited from appearing on the ballot. *Moore v Genesee Cty*, 337 Mich App 723, 731 (2021). The Legislature chose, however, to expressly exclude candidates for President from compliance with the affidavit of identity requirement, likely because the Legislature expects the parties to police the qualifications and eligibility of their candidates. MCL 168.558(1) ("The affidavit of identity filing requirement does not apply to a candidate nominated for the office of President of the United States or Vice President of the United States.").

There simply is no statute in the Michigan Election Law that imposes upon the Secretary a duty to determine whether a candidate for President meets the qualifications for office or is otherwise eligible to run for or hold that office if elected. Nor can such a duty be implied from any statute, particularly where the Legislature expressly relieved presidential candidates from making any affirmation that they meet the qualifications for that office. See MCL 168.558(1). The Legislature's drafting choice strongly suggests that the Secretary has neither the duty nor the authority to prohibit a presidential candidate who lacks the constitutional qualifications from appearing on a primary or general election ballot. See *People v Lewis*, 503 Mich 162, 165-66 (2018) ("[W]hen the Legislature includes language in one part of a statute that it omits in another, it is assumed that the omission was intentional."). And while the Secretary has the "inherent authority to take measures to ensure that voters [are] able to avail themselves of the

[2] There is an eligibility requirement for presidential electors. See MCL 168.41, Const 1963, art 2, § 3.

constitutional rights established" in article 2, § 4 of the Michigan Constitution, *Davis v Sec'y of State*, 333 Mich App 588, 601 (2020), nothing in that article suggests she has the authority to modify the largely ministerial process of identifying and accepting a slate of presidential candidates to be voted upon at the presidential primary (or at the November election).

Further, whether the Fourteenth Amendment bars Mr. Trump from appearing as a presidential candidate on Michigan's ballots, is a federal constitutional question of enormous consequence. Michigan courts have held that administrative agencies generally do not have the power to determine constitutional questions. *Bauserman v Unemployment Ins Agency*, 509 Mich 673, 710 (2022), citing *Dickerson v Warden, Marquette Prison*, 99 Mich App 630, 641-642 (1980). See also *Dation v Ford Motor Co*, 314 Mich 152, 159 (1946). And here, where the Legislature has not authorized or required the Secretary to determine or confirm whether candidates for President are qualified and eligible to serve, she has no authority to determine this constitutional question.

It has been suggested that article 11, § 1 of the Michigan Constitution, which requires state officers to take an oath in which they "swear (or affirm) that [they] will support the Constitution of the United States," obligates the Secretary to resolve the Fourteenth Amendment question otherwise she is not supporting the US Constitution. But the text of § 3 does not speak directly to whether the Secretary or any other state official must prohibit a candidate for the Office of President from appearing on a state's ballot when state law confers no authority on that official to evaluate presidential candidates' qualifications for office. And article 11, § 1 does not somehow authorize the Secretary to determine a constitutional question she is otherwise not required or authorized to resolve. Moreover, the Secretary simply has no administrative process for making the legal—let alone factual—determinations that would need to be made concerning

the application of § 3. There is no statutory vehicle that provides either a citizen with the right to initiate such an action or for the participation of the impacted candidate, who would presumably be entitled to some process. See, e.g., *Greene v Raffensberger*, 599 F Supp 3d 1283 (ND Ga 2022) (discussing plaintiff's due process concerns in case involving disqualification under § 3).

The Secretary will certainly comply with any order entered by this Court or another that declares Mr. Trump eligible or ineligible to appear as a candidate for President on Michigan's ballots by reason of the Fourteenth Amendment. And in doing so, the Secretary will uphold the oath she took to support both the US Constitution and the Michigan Constitution.

For these reasons, the Secretary does not have an affirmative, legal duty or the authority to decide whether the Fourteenth Amendment renders Mr. Trump eligible or ineligible to be placed on the ballot prior to a court's review of that constitutional question.

B. Whether § 3 of the Fourteenth Amendment applies to the offices of President and Vice President and to candidates for those offices?

Section 3 of the Fourteenth Amendment provides:

> No Person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold *any office*, civil or military, *under the United States*, or under any State, who, having previously taken an oath, as a member of Congress, or as an *officer of the United States*, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability. [US Const, Am XIV, § 3 (emphasis added).]

Again, the Secretary takes no position with respect to whether Mr. Trump should appear as a candidate in Michigan's presidential primary or general election, or whether he should be precluded from doing so under the Fourteenth Amendment.

The Court's question raises two, inter-related questions—does the office of President constitute "any office" "under the United States" from which a person may be disqualified from

holding based on his engaging in insurrection. And was Mr. Trump "an officer of the United States" who previously took an oath to support the US Constitution for purposes of § 3 when he previously held the office of President. In a separate question, this Court also asked whether there were any state or federal cases interpreting or applying § 3 to candidates for office or persons serving in an office, including any cases currently involving Mr. Trump as potential presidential candidate.

Addressing this second question first, there are numerous cases pending throughout the United States in which the movants seek to disqualify Mr. Trump under § 3 of the Fourteenth Amendment.[3] A list of known cases is attached as Exhibit 4. Upon information and belief, none of the cases have yet resulted in a substantive determination by a court regarding the application of § 3 to Mr. Trump. And several have been dismissed for lack of standing. (Exhibit 4, Case list.)[4] As far as cases applying § 3 to other candidates, there are a few cases of recent vintage in which several candidates were challenged on that basis.

In *Hansen v Finchem*, the court determined that the plaintiffs could not use a state statute allowing challenges to candidates based upon their qualifications for office to disqualify the candidates under § 3 because § 3 is a "legal proscription from holding office," not a law that "prescribe[s]" qualifications. No. CV-22-0099-AP/EL, 2022 WL 1468157 (Ariz May 9, 2022).

In *Rowan v Greene*, the Georgia Secretary of State affirmed an administrative hearing officer's determination that the plaintiffs failed to provide sufficient proof that Representative

[3] Many of the cases were filed by John Anthony Castro, a purported presidential candidate from Texas. Castro filed a complaint against Secretary Benson and Donald J. Trump in the Court of Claims on August 31, 2023. See *Castro v Benson, et al*, Case No. 23-000122, however, the complaint has not been served.

[4] This case list has been updated since the time it was filed in the *Davis* and *LaBrant* cases. Of note, the *Anderson v Griswold*, District Court, City and County of Denver, 23-cv-32577, matter is presently in the midst of a multi-day hearing. See Exhibit 7.

Marjorie Taylor Greene was not qualified to seek and hold public office. See No. 2222-582-OSAH-SECSTATE-CE-57-Beaudrot (Georgia Office of the Secretary of State, May 6, 2022). See also *Greene v Raffensperger*, 599 F Supp 3d 1283, 1320 (ND Ga 2022) (refusing to enjoin the state proceedings where Greene failed to demonstrate that states were prohibited from enforcing § 3), *Greene v Sec'y of State for Georgia*, 52 F 4th 907, 909-910 (CA 11, 2022) (remanding for dismissal of case as moot).

In *Griffin v New Mexico ex rel White*, a quo warranto proceeding, a state court judge determined that § 3 applied to a county commissioner convicted of a crime in relation to the events on January 6, 2021, and the commissioner was removed from office. See No. D-101-CV-2022-00473, 2022 WL 4295619 (NM Dist Ct Sept 6, 2022). The commissioner's appeal to the New Mexico Supreme Court was denied. *Griffin v New Mexico, ex rel White*, No. S-1-SC-39571 (NM Feb 16, 2023).

And in *Cawthorn v Circosta*, voters filed a challenge with the North Carolina State Board of Elections seeking to disqualify Representative Madison Cawthorne from the 2022 primary ballot, and Cawthorne filed suit in federal court seeking to bar the state board from considering the issue. 590 F Supp 3d 873, 891 (ED NC 2022). The District Court held that the 1872 Amnesty Act supported enjoining the state proceedings. *Id*. at 890-892. The Fourth Circuit Court of Appeals reversed, and no further litigation occurred as Cawthorne lost in the primary. *Cawthorn v Amalfi*, 35 F4th 245 (CA 4, 2022).

Given the dearth of cases, reference to recent law review articles may assist the Court.

In a 2021 article, the authors opine that the President of the United States is not an "officer of the United States" whose prior taking of an oath will trigger the disqualification from holding a covered office under § 3. See Josh Blackman & Seth Barrett Tillman, Is the President

an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?, 15 NYU J L & Liberty 1 (2021), attached as Exhibit 5. In summary of what is a complex argument, the authors argue that the terms "officer of the United States" and "[o]ffice . . . under the United States" should be presumed to have different meanings in § 3 since the Framers used different wording within the same section. *Id*. at 7-10. They argue that the history of the Framers use of this different terminology in different sections of the Constitution, supports a presumption that "these phrases refer to different positions." *Id*. at 9. And that "the better inference . . . is that the President and Vice President are not 'Officers of the United States.'" *Id.* at 10.

> All available evidence suggests that the Framers were deliberate. The ratifiers and their contemporaries would have understood how these alterations modified the meaning of these provisions. The different "office"- and "officer"-language presumptively had different meanings. And, we think, the Framers of 1868 also took reasonable care when using the coordinate phrases "officers of the United States" and "office ... under the United States" in Section 3 of the Fourteenth Amendment. [*Id*.]

The authors go on to expressly argue that the President is not an "officer of the United States" for purposes of the various provisions that use that language, including § 3, that there is no compelling evidence that the Framers intended something different in § 3, and that various cases and authorities support that conclusion. *Id*. at 21-33. The article then discounts various past authorities and arguments that suggest or reach different conclusions. *Id*. at 34-50. In their conclusion, the authors note that they chose not to resolve whether the President is an "office . . . under the United States," but that if the President is not an "officer of the United States," it "ends the case" for purposes of the application of § 3. *Id*. at 54.

Conversely, in a 2023 article, the authors reject the analysis in the Blackman and Tillman article that the President is not an "officer of the United States," and further conclude that the President is an "officer . . . under the United States" for purposes of both clauses in § 3. See William Baude & Michael Stokes Paulson, The Sweep and Force of Section Three, 172 U PA L

REV ___ (forthcoming 2024), attached as Exhibit 6. These authors argue that the provisions of § 3 should be read:

> in as straightforward and common-sense a manner as possible. The text must be read precisely, of course, but also sensibly, naturally and in context, without artifice or ingenious invention unwarranted by that context. Some constitutional provisions embody precise terms of art that must be attended to. But a reading that renders the document a "secret code" loaded with hidden meanings discernible only by a select priesthood of illuminati is generally an unlikely one. . . . Where the simplest and most plausible explanation of minor textual differences is merely stylistic or accidental variation, that explanation should not lightly be cast aside. [*Id*. at p 105 (footnote omitted).]

The authors further argue that the list of disqualification triggering offices in § 3 ("officer . . . of the United States") closely tracks the listing of offices in the Constitution's oath provisions, see art VI, cl 3, art II, § 1, cl 8, and that the list of offices from which a person is disqualified from ("offices . . . under the United States") builds on that list. *Id*. at 105-106. "Thus, in general: If the original Constitution required an oath for a position, Section Three treats having held such a position as the trigger for Section Three's application." *Id*. at 106. And "if a person who once held any such position is disqualified under Section Three for engaging in or supporting insurrection, that person is barred (absent congressional relief) from holding any of those same positions[.]" *Id.* The argue that § 3's "project of office-listing" was to simply provide a comprehensive list of positions in both clauses. *Id.*

The authors reject the analysis of Blackman and Tillman as a technical and non-natural reading of the text that ultimately results in the implausible consequence that an insurrectionist President could hold the office of President, but that his prior holding of that office would not trigger disqualification. *Id*. at 108-109. They further note that a "variant" of that argument was refuted during congressional debates on § 3. (*Id*. at 110-111.)

There are certainly additional, relevant articles available, Defendant chose these as two recent competing viewpoints. It is also likely that the cases pending regarding Mr. Trump, see

Exhibit 4, will result in additional discussions of whether § 3 applies to the Office of President.

C. Whether § 3 precludes a person from serving in an office covered by § 3, seeking election to an office covered by § 3, or both.

Defendant Benson understands this question as asking whether § 3 is a qualification for seeking office, or whether it is a prohibition to holding office if elected, or whether it functions as both. Again, § 3 provides, in part, that "[n]o Person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or *hold* any office, civil or military, under the United States[.]" (Emphasis added.)

This issue does not appear to have been the subject of significant litigation yet or academic discussion. But in the Arizona case discussed above in I.B, the Arizona Supreme Court held in its brief opinion that the state statute allowing candidate challenges could not be used to advance a claim under § 3 because its "scope is limited to challenges based upon 'qualifications . . . as prescribed by law.'" *Hansen*, 2022 WL 1468157 at * 1. The statute did not apply, the court reasoned, because § 3 is a "legal proscription from holding office," not a law that "prescribe[s]" qualifications. *Id.*

But in the Fourth Circuit's opinion in *Cawthorn*, also noted above in I.B, the Court stated in a footnote that it was "assuming without deciding" that the "disability" imposed by § 3 is a "qualification" for purposes of article I, § 5 of the US Constitution, 35 F4th at 257 n7, which provides that "Each House shall be the judge of . . . the qualifications of its own members[.]" US Const, art I, § 5. In the text the Fourth Circuit cited *Powell v McCormack*, 395 US 486 (1969), in which the US Supreme Court made a passing reference to § 3 but stated in a footnote that it was *not* deciding whether § 3 and other constitutional provisions properly constituted "qualifications." *Id.* at 520 n 41. See also *US Term Limits, Inc v Thornton*, 514 US 779, 788 n 2 (1995) (citing *Powell* and likewise not deciding the issue).

Also, in *Greene*, the District Court discussed the state's important regulatory interests in ensuring that only qualified candidates appear on the ballot and appeared to treat the disqualification component of § 3 as a qualification. 599 F Supp 3d at 1311-1312, 1316 ("On the current record, it appears that the Challenge Statute imposes minimal burdens through its process of ensuring that only candidates who meet the Constitution's minimum threshold requirements appear on the ballot — including candidates who are not disqualified by Section 3 of the Fourteenth Amendment.")

One author has discussed the possible timing of challenges to federal-office candidates under § 3, including the President, describing possible pre-election, post-election/pre-inauguration, and post-assumption of office challenges. See Myles S. Lynch, Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment, 30 Wm & Mary Bill Rts J 153, 189-194 (2021).[5]

It is possible that the cases pending regarding Mr. Trump will result in additional discussions of whether § 3 functions as a qualification for seeking office or a prohibition from ultimately holding office.

D. Whether § 3 is self-executing.

The question of whether § 3 is self-executing appears to have proponents on both sides. Authors Baude and Paulson in their article, discussed above in I.B., argue that § 3 functions as an automatic, legal disqualification whenever its' conditions for disqualification are met, and thus needs no implementing legislation by Congress. (Exhibit 6, p 17.) They note that the federal Constitution is the supreme law of the land, and states what the law is. (*Id.*) "Section Three's

[5] The Baude and Paulson article includes a discussion of the mode of enforcing § 3. See Exhibit 6, pp 22-35.

language is language of automatic legal effect: '*No person shall be*' directly enacts the officeholding bar it describes where its rule is satisfied. It lays down a rule by saying what shall be." (*Id*., pp 17-18.) The authors observe that this language is consistent with other self-executing "disqualification" sections, such as those in article I and article II, § 1, cl 5's requirement that "[n]o person . . . shall be eligible" to be President who does not meet the age requirement. (*Id*., p 18.) As well as other provisions, like the Thirteenth Amendment (abolishing slavery) and other sections of the Fourteenth Amendment, such as the Equal Protection Clause. (*Id*., pp 18-19.)

The authors recognize that Congress *can* enact legislation to enforce § 3, as it has in the past, but Congress need not do so where § 3 "was effective all along." (*Id*., p 19-20.) They further contrast § 3's language with other provisions like the Constitution's impeachment provisions, which require implementation, whereas § 3 does not. (*Id*., pp 20-21.) For these reasons, they conclude that § 3 "has legal force already," meaning it is self-executing. (*Id*., p 22.)

Blackman and Tillman, in a new article, advance a contrary view. See Josh Blackman & Seth Barrett Tillman, Sweeping and Forcing the President into Section 3, 28 TEX REV L & POL (forthcoming 2024).[6] Again, in summary of what is a complex argument, they argue that whether § 3 is self-executing ultimately depends on the manner enforcement is sought. (*Id*., pp 18-20.) They note that many Article I qualification-type provisions have gone unenforced, whether at the federal or state level, which undermines Baude's and Paulson's argument that such provisions are self-executing without legislation intervention, and by extension their

[6] An abstract of the lengthy article as well as a download is available online at Sweeping and Forcing the President into Section 3 by Josh Blackman, Seth Barrett Tillman :: SSRN.

argument that § 3 is as well. (*Id*., pp 25-37.) Turning to the Fourteenth Amendment, Blackman and Tillman acknowledge that § 1, which includes the due process and equal protection clauses, is generally considered self-executing. (*Id*., pp 38-39.) But they say "the better question is in what fashion is Section 1 self-executing?" (*Id*. at p 39.) The authors argue, citing various precedents, that while a defensive ("shield") use of the constitutional constraints found in the Fourteenth Amendment is always permissible, the offensive ("sword") use of the Fourteenth Amendment's limitations, including those in § 3, is not. (*Id*. at pp 39-53.) Thus, in their view, § 3 would be not self-executing if used as a sword to disqualify a candidate.[7]

Secretary Benson is aware of two recent cases that have touched on whether § 3 is self-executing. In *Hansen*, the Arizona Supreme Court did not use the words self-executing, but it noted "that Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause ('The Congress shall have power to enforce, by appropriate legislation, the provisions of this article'), which suggests that ARS § 16-351(B) does not provide a private right of action to invoke the Disqualification Clause against the Candidates." 2022 WL 1468157, at *1. But in *Anderson v Griswold*, District Court, City and County of Denver, 23-cv-32577, a Colorado court concluded that whether § 3 is self-executing was irrelevant to that case because Colorado law provided a cause of action. (Ex 7, 10/25/23 Order, 23-cv-32577, p 19.) The court further opined that if the court ultimately concludes that Colorado law allows the court to order the Colorado Secretary of State "to

[7] Both Baude and Paulson and Blackman and Tillman spend time in their respective articles discussing the ramifications of US Supreme Court Justice Salmon Chase's decision as a circuit justice in *In re Griffin*, 11 F Cas 7 (CCD Va 1869), in which he determined § 3 required enabling legislation. For an additional viewpoint on this subject, the Court may wish to review Gerard N. Magliocca, Amnesty and Section Three of the Fourteenth Amendment, 36 Const Comment 87, 100-108 (Spring 2021).

exclude a candidate under the Fourteenth Amendment, the Court holds that states can" apply § 3 "without federal enforcement legislation." (*Id*., pp 19-20.)

As above, it is possible that the cases pending regarding Mr. Trump will result in additional discussions of whether § 3 is self-executing.

E. Whether the 1872 Amnesty Act applies to the instant case.

In 1872, Congress enacted legislation related to § 3, which provides:

> [A]ll political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States. [Act of May 22, 1872, ch. 193, 17 Stat 142 (1872).]

And in 1898, Congress removed the disabilities from the previously excepted persons in the 1872 Act by enacting another law, providing that "the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed." Amnesty Act of 1898, ch. 389, 30 Stat. 432.

In *Cawthorn*, discussed previously, the District Court agreed with Representative Cawthorn that the 1872 Act permanently removed the disabilities stated in § 3. *Cawthorne,* 590 F Supp 3d at 890. "The 1872 Act, by its plain language, removed '*all political disabilities* imposed by the third section of the fourteenth article of amendments of the Constitution of the United States *from all persons whomsoever.*' " *Id*. at 891 (emphasis in original). The court observed that Congress could have used language that clarified the act only applied to persons currently subject to § 3 but did not do so. *Id*. The District Court therefore enjoined any further proceedings against Cawthorne.

But the Fourth Circuit reversed the District Court. That Court concluded that the District Court erred "in construing the Act as a sweeping removal of all future Fourteenth Amendment

disabilities." *Cawthorn*, 35 F.4th at 257. The Court determined that the lower court had read the Act incorrectly in that it did not prospectively relieve persons from disabilities in the future but was rather "'backward-looking'" because the language it employed ("imposed" and "removed") was in the "past tense." *Id*. at 258 (citations omitted). "Here, Congress employed the past-tense version, indicating its intent to lift only those disabilities that had by then been 'imposed.'" *Id*., citing *Costello v INS*, 376 US 120, 123–24 (1964) (referring to the past participle in "have been" as a "use of the past tense" (quotation marks omitted)). The Court went on to conclude that this construction was consistent with the Act's history and context in dealing with "the hordes of former Confederates seeking forgiveness." *Id*. at 259 (citation omitted). The Court thus reversed and vacated the injunction and remanded for further proceedings. *Id*. at 261.

The District Court in New Mexico in the *Griffin* case agreed with the Fourth Circuit's analysis concerning the 1872 Act. See *Griffin*, 2022 WL 2132042 at * 2. And in a decision preceding the Fourth Circuit's decision, the Georgia District Court in the *Greene* case rejected the District Court's analysis in *Cawthorn.* See *Greene*, 599 F Supp 3d at 1315 ("Suffice it to say, the Court is skeptical. It seems much more likely that Congress intended for the 1872 Amnesty Act to apply only to individuals whose disabilities under Section 3 had already been incurred, rather than to all insurrectionists who may incur disabilities under that provision in the future.")

Again, it is possible that the cases pending regarding Mr. Trump will result in additional discussions of the 1872 Act.

II. Whether the disqualification of a presidential candidate is a political question.

The Court did not identify this as a question to be addressed in its October 9, 2023, order; however, Plaintiff has argued in his complaint that "[q]uestions of constitutional qualifications are political questions reserved for Congress[.]" (Compl, ¶ 43.) The Secretary does not have an

affirmative position on this constitutional question. Suffice it to say, as with the other questions addressed above, there are differences of opinion as to this issue as well.

In an October 27, 2023, order, a federal judge in New Hampshire agreed that Mr. Trump's eligibility to run for and serve as president is a nonjusticiable political question. (Exhibit 8, 10/27/23 Order, *Castro v New Hampshire Secretary of State, et al*, Case No. 23-cv-416-JL.) Noting the test articulated in *Baker v Carr*, 369 US 186, 217 (1962), and discussing various decisions, including several that pertained to the Office of President, the Court concluded "the vast weight of authority has held that the Constitution commits to Congress and the electors the responsibility of determining matters of presential candidates' qualifications." (*Id*., pp 14-19.)

But in its October 25, 2023, the Colorado Court in the *Anderson* case reviewed many of the same decisions and found them distinguishable or unpersuasive because they concluded that the political question doctrine applied "with very little analysis" of the constitutional provisions at issue. (Exhibit 7, 10/25/23 Order, pp 9-10.) The court then reviewed the various sections in article II of the US Constitution, the Twelfth Amendment, 3 USC 15, and § 3 of the Fourteenth Amendment, and "decline[d] to dismiss [the] case under the political question doctrine." (*Id.*, pp 10-18.) The court determined that "there is no textually demonstrable constitutional commitment of the issue to a coordinate political department." (*Id*., p 18), citing *Baker*, 369 US at 217. However, the court stated that it would revisit its ruling when it makes a final ruling after a hearing. (*Id*.)

Other cases pending regarding Mr. Trump may result in additional discussions of the political question doctrine.

III. Upcoming election deadlines

Under the existing statute, MCL 168.613a, the date of the presidential primary continues to be March 12, 2024. But, because it is possible that Public Act 2 of 2023 may become effective and change the date to February 27, 2024, the Secretary has been preparing for the February date.[8] Using the February date, absent voter ballots for the primary must be available to send out to military and overseas voters by January 13, 2024. MCL 168.759a.[9] To meet that date, the ballot must be finalized early in January so that county clerks have time to print and distribute ballots. MCL 168.713 (requiring county boards to deliver absent voter ballots to the county clerk at least 47 days before the primary election; MCL 168.714 (requiring county clerks to deliver AV ballots to the township and city clerks at least 45 days before the primary election). This means that court proceedings and any appeals must conclude before that date to ensure the timely delivery of absent voter ballots for the presidential primary.

Respectfully submitted,

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Dated: November 2, 2023

PROOF OF SERVICE

Heather S. Meingast certifies that on November 2, 2023, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

/s/Heather S. Meingast
Heather S. Meingast

[8] See February 27, 2024, Presidential Primary Dates, available at Election Calendar of Dates (michigan.gov).

[9] *Id.*

APPENDIX 3

Court of Appeals, State of Michigan

ORDER

Robert LaBrant v Secretary of State

Docket No. 368628

LC No. 23-000137-MZ

Michael J. Kelly
Presiding Judge

Stephen L. Borrello

Michelle M. Rick
Judges

The motion for immediate consideration is GRANTED.

The motion to intervene is also GRANTED. The Clerk's Office shall docket Donald J. Trump as an intervening appellee in this appeal upon entry of this order.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

November 20, 2023
Date

Chief Clerk

APPENDIX 4

Order

Michigan Supreme Court
Lansing, Michigan

December 6, 2023

166373 & (7)(17)(18)

ROBERT LaBRANT, ANDREW BRADWAY, NORAH MURPHY, and WILLIAM NOWLING,
Plaintiffs-Appellants,

v

SECRETARY OF STATE,
Defendant-Appellee,

and

DONALD J. TRUMP,
Intervening Appellee.

SC: 166373
COA: 368628
Court of Claims: 23-000137-MZ

_____/

On order of the Court, the motions for immediate consideration are GRANTED. The application for leave to appeal prior to decision by the Court of Appeals is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court before consideration by the Court of Appeals. The motion to intervene is DENIED as moot.

WELCH, J. (*dissenting*).

Whether a potential presidential candidate is constitutionally ineligible to appear on the ballot pursuant to the Insurrection Clause of the Fourteenth Amendment, US Const, Am XIV, § 3, and whether the judiciary can decide that question before an election are questions of monumental importance for our system of democratic governance. Courts across the country are grappling with these very issues for the first time in our nation's history. The deadline for printing ballots for Michigan's 2024 primary election is fast approaching, and there is reasonable uncertainty about the ripeness, justiciability, and merits of the plaintiffs' claims. Under these circumstances, I would grant the bypass application for leave to appeal before a decision by the Court of Appeals, MCR 7.305(C)(1), and, while retaining jurisdiction, remand this case to the Court of Claims to promptly conduct an evidentiary hearing and develop the factual record that could be necessary to resolve the legal arguments presented by the plaintiffs.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 6, 2023

Clerk

APPENDIX 5

Candidate	Committee Name	Address	Party
Joseph R. Biden, Jr.	Biden for President	P.O. Box 58174 Philadelphia, PA 19102	Democratic
Dean Phillips	Dean Phillips for President	P.O. Box 741 Excelsior, MN 55331	Democratic
Marianne Williamson	Marianne Williamson for President	P.O. Box 33079 Washington, DC 20033	Democratic
Ryan Binkley	Binkley for President	6841 Virginia Parkway, Suite 103-190 McKinney, TX 75071	Republican
Chris Christie	Chris Christie for President, Inc.	613 Washington Blvd., #1381 Jersey City, NJ 07310	Republican
Ron DeSantis	Ron DeSantis for President	P.O. Box 3696 Tallahassee, FL 32315	Republican
Nikki Haley	Nikki Haley for President, Inc.	186 Seven Farms Dr., Ste. F-370 Daniel Island, SC 29492; 353 West Lancaster Avenue, Suite 300, Wayne PA 19087	Republican
Asa Hutchinson	Asa for America, Inc.	100 N. Dixieland Rd., Suite D2, Box 311 Rogers, AR 72756	Republican
Vivek Ramaswamy	Vivek 2024	P.O. Box 20209 Columbus, OH 43220	Republican
Donald J. Trump	Donald J. Trump for President 2024, Inc.	2121 Eisenhower Avenue, Suite 608 Alexandria, VA 22314; P.O. Box 13570 Arlington, VA 22219	Republican

APPENDIX 6

DATE FILED: December 19, 2023
CASE NUMBER: 2023SA300

ADVANCE SHEET HEADNOTE
December 19, 2023

2023 CO 63

No. 23SA300, *Anderson v. Griswold*—Election Law—Fourteenth Amendment—First Amendment—Political Questions—Hearsay.

In this appeal from a district court proceeding under the Colorado Election Code, the supreme court considers whether former President Donald J. Trump may appear on the Colorado Republican presidential primary ballot in 2024. A majority of the court holds that President Trump is disqualified from holding the office of President under Section Three of the Fourteenth Amendment to the United States Constitution. Because he is disqualified, it would be a wrongful act under the Election Code for the Colorado Secretary of State to list him as a candidate on the presidential primary ballot. The court stays its ruling until January 4, 2024, subject to any further appellate proceedings.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 63

Supreme Court Case No. 23SA300
Appeal Pursuant to § 1-1-113(3), C.R.S. (2023)
District Court, City and County of Denver, Case No. 23CV32577
Honorable Sarah B. Wallace, Judge

Petitioners-Appellants/Cross-Appellees:

Norma Anderson, Michelle Priola, Claudine Cmarada, Krista Kafer, Kathi Wright, and Christopher Castilian,

v.

Respondent-Appellee:

Jena Griswold, in her official capacity as Colorado Secretary of State,

and

Intervenor-Appellee:

Colorado Republican State Central Committee, an unincorporated association,

Intervenor-Appellee/Cross-Appellant:

Donald J. Trump.

Order Affirmed in Part and Reversed in Part
en banc
December 19, 2023

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PER CURIAM.
CHIEF JUSTICE BOATRIGHT dissented.
JUSTICE SAMOUR dissented.
JUSTICE BERKENKOTTER dissented.

PER CURIAM.[1]

¶1 More than three months ago, a group of Colorado electors eligible to vote in the Republican presidential primary—both registered Republican and unaffiliated voters ("the Electors")—filed a lengthy petition in the District Court for the City and County of Denver ("Denver District Court" or "the district court"), asking the court to rule that former President Donald J. Trump ("President Trump") may not appear on the Colorado Republican presidential primary ballot.

¶2 Invoking provisions of Colorado's Uniform Election Code of 1992, §§ 1-1-101 to 1-13-804, C.R.S. (2023) (the "Election Code"), the Electors requested that the district court prohibit Jena Griswold, in her official capacity as Colorado's Secretary of State ("the Secretary"), from placing President Trump's name on the presidential primary ballot. They claimed that Section Three of the Fourteenth Amendment to the U.S. Constitution ("Section Three") disqualified President Trump from seeking the presidency. More specifically, they asserted that he was ineligible under Section Three because he engaged in insurrection on January 6, 2021, after swearing an oath as President to support the U.S. Constitution.

[1] Consistent with past practice in election-related cases with accelerated timelines, we issue this opinion per curiam. *E.g.*, *Kuhn v. Williams*, 2018 CO 30M, 418 P.3d 478; *In re Colo. Gen. Assemb.*, 332 P.3d 108 (Colo. 2011); *In re Reapportionment of Colo. Gen. Assemb.*, 647 P.2d 191 (Colo. 1982).

¶3 After permitting President Trump and the Colorado Republican State Central Committee ("CRSCC"; collectively, "Intervenors") to intervene in the action below, the district court conducted a five-day trial. The court found by clear and convincing evidence that President Trump engaged in insurrection as those terms are used in Section Three. *Anderson v. Griswold*, No. 23CV32577, ¶¶ 241, 298 (Dist. Ct., City & Cnty. of Denver, Nov. 17, 2023). But, the district court concluded, Section Three does not apply to the President. *Id.* at ¶ 313. Therefore, the court denied the petition to keep President Trump off the presidential primary ballot. *Id.* at Part VI. Conclusion.

¶4 The Electors and President Trump sought this court's review of various rulings by the district court. We affirm in part and reverse in part. We hold as follows:

- The Election Code allows the Electors to challenge President Trump's status as a qualified candidate based on Section Three. Indeed, the Election Code provides the Electors their only viable means of litigating whether President Trump is disqualified from holding office under Section Three.
- Congress does not need to pass implementing legislation for Section Three's disqualification provision to attach, and Section Three is, in that sense, self-executing.
- Judicial review of President Trump's eligibility for office under Section Three is not precluded by the political question doctrine.

- Section Three encompasses the office of the Presidency and someone who has taken an oath as President. On this point, the district court committed reversible error.
- The district court did not abuse its discretion in admitting portions of Congress's January 6 Report into evidence at trial.
- The district court did not err in concluding that the events at the U.S. Capitol on January 6, 2021, constituted an "insurrection."
- The district court did not err in concluding that President Trump "engaged in" that insurrection through his personal actions.
- President Trump's speech inciting the crowd that breached the U.S. Capitol on January 6, 2021, was not protected by the First Amendment.

¶5 The sum of these parts is this: President Trump is disqualified from holding the office of President under Section Three; because he is disqualified, it would be a wrongful act under the Election Code for the Secretary to list him as a candidate on the presidential primary ballot.

¶6 We do not reach these conclusions lightly. We are mindful of the magnitude and weight of the questions now before us. We are likewise mindful of our solemn duty to apply the law, without fear or favor, and without being swayed by public reaction to the decisions that the law mandates we reach.

¶7 We are also cognizant that we travel in uncharted territory, and that this case presents several issues of first impression. But for our resolution of the Electors' challenge under the Election Code, the Secretary would be required to include President Trump's name on the 2024 presidential primary ballot.

Therefore, to maintain the status quo pending any review by the U.S. Supreme Court, we stay our ruling until January 4, 2024 (the day before the Secretary's deadline to certify the content of the presidential primary ballot). If review is sought in the Supreme Court before the stay expires on January 4, 2024, then the stay shall remain in place, and the Secretary will continue to be required to include President Trump's name on the 2024 presidential primary ballot, until the receipt of any order or mandate from the Supreme Court.

I. Background

¶8 On November 8, 2016, President Trump was elected as the forty-fifth President of the United States. He served in that role for four years.

¶9 On November 7, 2020, Joseph R. Biden, Jr., was elected as the forty-sixth President of the United States. President Trump refused to accept the results, but President Biden now occupies the office of the President.

¶10 On December 14, 2020, the Electoral College officially confirmed the results: 306 electoral votes for President Biden; 232 for President Trump. President Trump continued to challenge the outcome, both in the courts and in the media.

¶11 On January 6, 2021, pursuant to the Twelfth Amendment, U.S. Const. amend. XII, and the Electoral Count Act, 3 U.S.C. § 15, Congress convened a joint session to certify the Electoral College votes. President Trump held a rally that morning at the Ellipse in Washington, D.C. at which he, along with several others,

spoke to the attendees. In his speech, which began around noon, President Trump persisted in rejecting the election results, telling his supporters that "[w]e won in a landslide" and "we will never concede." He urged his supporters to "confront this egregious assault on our democracy"; "walk down to the Capitol . . . [and] show strength"; and that if they did not "fight like hell, [they would] not . . . have a country anymore." Before his speech ended, portions of the crowd began moving toward the Capitol. Below, we discuss additional facts regarding the events of January 6, as relevant to the legal issues before us.

¶12 Just before 4 a.m. the next morning, January 7, 2021, Vice President Michael R. Pence certified the electoral votes, officially confirming President Biden as President-elect of the United States.

¶13 President Trump now seeks the Colorado Republican Party's 2024 presidential nomination.

II. Procedural History

¶14 On September 6, 2023, the Electors initiated these proceedings against the Secretary in Denver District Court under sections 1-4-1204(4), 1-1-113(1), 13-51-105, C.R.S. (2023), and C.R.C.P. 57(a). In their Verified Petition, the Electors challenged the Secretary's authority to list President Trump "as a candidate on the 2024 Republican presidential primary election ballot and any future election ballot, based on his disqualification from public office under Section [Three]."

¶15 President Trump intervened and almost immediately filed a Notice of Removal to federal court, asserting federal question jurisdiction. *See* 28 U.S.C. §§ 1331, 1441(a), 1446. In light of the removal, the Denver District Court closed the case on September 8. On September 12, the federal district court remanded the case back to state court, concluding that it lacked jurisdiction because the Electors had no Article III standing and the Secretary had neither joined nor consented to the removal.

¶16 Once the Electors filed proof with the Denver District Court that all parties had been served, the court reopened the case on September 14. At a status conference four days later, on September 18, the Secretary emphasized that she must certify the candidates for the 2024 presidential primary ballot by January 5. *See* § 1-4-1204(1). The court set the matter for a five-day trial, beginning on October 30. On September 22, with the parties' input, the court issued expedited case management deadlines for a host of matters, including the disclosure of expert reports, witness lists and exhibits, as well as for briefing and argument on several motions. The court also granted CRSCC's motion to intervene on October 5.

¶17 On October 11, the Secretary's office received (1) President Trump's signed and notarized statement of intent to run as a candidate for a major political party in the presidential primary; (2) the approval form for him to do so, signed by the chair of the Colorado Republican Party, asserting that President Trump was "bona

fide and affiliated with the [Republican] party"; and (3) the requisite filing fee. *See* § 1-4-1204(1)(c).

¶18 On October 20, the district court issued an Omnibus Order addressing many outstanding motions. Regarding President Trump's motions, the court reached three conclusions that are relevant now: (1) the Electors' petition involved constitutional questions, but remained "a challenge against an election official based on her alleged duties under the Election Code," and "such a claim [was] proper under [section] 1-1-113 as a matter of procedure"; (2) "[section] 1-4-1204 expressly incorporates [section] 1-1-113, and [section] 1-1-113 does not limit challenges to acts that have already occurred, but rather provides for relief when the Secretary is 'about to' take an improper or wrongful act"—thus, because the Electors had alleged such an act, the matter was ripe for decision; and (3) it could not conclude, as a matter of law, that the Fourteenth Amendment excludes a candidate from the presidential primary ballot or that the Secretary has the authority to determine candidate qualifications, so those issues would be determined at the trial.

¶19 Regarding CRSCC's motions, the court, in relevant part, concluded that the state does not violate a political party's First Amendment associational rights by excluding constitutionally ineligible candidates from the presidential primary ballot, but also rejected CRSCC's argument to the extent it purported to raise an

independent constitutional claim beyond the proper scope of a section 1-1-113 proceeding.

¶20 On October 23, President Trump filed a petition for review in this court, asking us to exercise original jurisdiction to halt the scheduled trial. Four days later, we denied the petition without passing judgment on the merits of any of President Trump's contentions.

¶21 On October 25, the district court denied President Trump's Fourteenth-Amendment-based motion to dismiss. As relevant now, the court concluded that (1) it would not dismiss the case under the political question doctrine, but it reserved the right to revisit the doctrine "to the extent that there is any evidence or argument at trial that provides the Court with additional guidance on whether the issue of presidential eligibility has been delegated to the United States Congress"; (2) whether Section Three is self-executing is irrelevant because section 1-4-1204 allows the Secretary to exclude constitutionally disqualified candidates, and states "can, and have, applied Section [Three] pursuant to state statutes without federal enforcement legislation"; and (3) it would reserve for trial the issues of whether Section Three applies to a President and whether President Trump had engaged in insurrection.

¶22 The trial began, as scheduled, on October 30. The evidentiary portion lasted five days, with closing arguments almost two weeks later, on November 15.

During those two weeks, the Electors, the Secretary, President Trump, and CRSCC submitted proposed findings of fact and conclusions of law. The court issued its written final order on November 17, finding, by clear and convincing evidence, that the events of January 6 constituted an insurrection and President Trump engaged in that insurrection. The court further concluded, however, that Section Three does not apply to a President because, as the terms are used in Section Three, the Presidency is not an "office . . . under the United States" nor is the President "an officer of the United States" who had "previously taken an oath . . . to support the Constitution of the United States." U.S. Const. amend. XIV, § 3; *see Anderson*, ¶¶ 299–315. Accordingly, the Secretary could not exclude President Trump's name from the presidential primary ballot. *Anderson*, Part VI. Conclusion.

¶23 On November 20, both the Electors and President Trump sought this court's review of the district court's rulings under section 1-1-113(3). We accepted jurisdiction of the parties' cross-petitions. Following extensive briefing from the parties and over a dozen amici, we held oral argument on December 6 and now issue this ruling.

III. Analysis

¶24 We begin with an overview of Section Three. We then address threshold questions regarding (1) whether the Election Code provides a basis for review of the Electors' claim, (2) whether Section Three requires implementing legislation

before its disqualification provision attaches, and (3) whether Section Three poses a nonjusticiable political question. After concluding that these threshold issues do not prevent us from reaching the merits, we consider whether Section Three applies to a President. Concluding that it does, we address the admissibility of Congress's January 6 Report (the "Report") before reviewing, and ultimately upholding, the district court's findings of fact and conclusions of law in support of its determination that President Trump engaged in insurrection. Lastly, we consider and reject President Trump's argument that his speech on January 6 was protected by the First Amendment.[2]

A. Section Three of the Fourteenth Amendment and Principles of Constitutional Interpretation

¶25 The end of the Civil War brought what one author has termed a "second founding" of the United States of America. *See* Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (2019). Reconstruction ushered in the Fourteenth Amendment, which includes Section Three, a provision

[2] President Trump also listed a challenge to the traditional evidentiary standard of proof for issues arising under the Election Code as a potential question on appeal, claiming that "[w]hen particularly important individual interests such as a constitutional right [is] at issue, the proper standard of proof requires more than a preponderance of the evidence." As noted above, the district court held that the Electors proved their challenge by clear and convincing evidence. And because President Trump chose not to brief this issue, he has abandoned it. *See People v. Eckley*, 775 P.2d 566, 570 (Colo. 1989).

addressing what to do with those individuals who held positions of political power before the war, fought on the side of the Confederacy, and then sought to return to those positions. *See* National Archives, *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, https://www.archives.gov/milestone-documents/14th-amendment#:~:text=Passed%20by%20Congress%20June%2013,Rights%20to%20formerly%20enslaved%20people [https://perma.cc/5EZU-ABV3] (explaining that the Fourteenth Amendment was passed by Congress on June 13, 1866, and officially ratified on July 9, 1868); *see also* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 91–92 (2021).

¶26 Section Three provides:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. Const. amend. XIV, § 3.

¶27 In interpreting a constitutional provision, our goal is to prevent the evasion of the provision's legitimate operation and to effectuate the drafters' intent. *People v. Smith*, 2023 CO 40, ¶ 20, 531 P.3d 1051, 1055. To do so, we begin with

Section Three's plain language, giving its terms their ordinary and popular meanings. *Id.* "To discern such meanings, we may consult dictionary definitions." *Id.*

¶28 If the language is clear and unambiguous, then we enforce it as written, and we need not turn to other tools of construction. *Id.* at ¶ 21, 531 P.3d at 1055. However, if the provision's language is reasonably susceptible of multiple interpretations, then it is ambiguous, and we may consider "the textual, structural, and historical evidence put forward by the parties," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012), and we will construe the provision "in light of the objective sought to be achieved and the mischief to be avoided," *Smith*, ¶ 20, 531 P.3d at 1055 (quoting *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 20, 269 P.3d 1248, 1254).

¶29 These principles of constitutional interpretation apply to all sections of this opinion in which we address the meaning of any constitutional provision.

B. The State Court Has the Authority to Adjudicate a Challenge to Presidential Candidate Qualifications Under the Election Code

¶30 The Electors' claim is grounded in sections 1-4-1204 and 1-1-113 of the Election Code. They argue that it would be a breach of duty or other wrongful act under the Election Code for the Secretary to place President Trump on the presidential primary ballot because he is not a "qualified candidate" based on

Section Three's disqualification. § 1-4-1203(2)(a), C.R.S. (2023). The Electors therefore seek an order pursuant to section 1-1-113 directing the Secretary not to list President Trump on the presidential primary ballot for the election to be held on March 5, 2024 (or any future ballot).

¶31 President Trump and CRSCC contend that Colorado courts lack jurisdiction over the Electors' claim and that the Electors cannot state a proper section 1-1-113 claim, in part because the Electors' claim is a "constitutional claim" that cannot be raised in a section 1-1-113 action under this court's decisions in *Frazier v. Williams*, 2017 CO 85, 401 P.3d 541, and *Kuhn v. Williams*, 2018 CO 30M, 418 P.3d 478 (per curiam). CRSCC also argues that the Secretary lacks authority to interfere with a political party's decision-making process or to interfere with the party's First Amendment right of association to select its own candidates. Lastly, President Trump argues that the expedited procedures under section 1-1-113 are insufficient to evaluate the Electors' claim.

¶32 Before considering each of these arguments in turn, we first explain the standard of review for statutory interpretation and then provide an overview of the Election Code provisions at issue. Turning to Intervenors' contentions, we first conclude that the district court had jurisdiction to adjudicate the Electors' claim under section 1-1-113. But, recognizing that the ability to exercise *jurisdiction* here does not mean the Electors can state a *proper claim* under section 1-1-113, we

explore whether states have the constitutional power to assess presidential qualifications. We conclude that they do, provided their legislatures have established such authority by statute. Analyzing the relevant provisions of the Election Code, we then conclude that the General Assembly has given Colorado courts the authority to assess presidential qualifications and, therefore, that the Electors have stated a proper claim under sections 1-4-1204 and 1-1-113. We next address Intervenors' related arguments and conclude that limiting the presidential primary ballot to constitutionally qualified candidates does not interfere with CRSCC's associational rights under the First Amendment. Finally, we conclude that section 1-1-113 provides sufficient due process for evaluating whether a candidate satisfies the constitutional qualifications for the office he or she seeks.

1. Standard of Review

¶33 We review the district court's interpretation of the relevant statutes de novo. *Griswold v. Ferrigno Warren*, 2020 CO 34, ¶ 16, 462 P.3d 1081, 1084. In doing so, "[o]ur primary objective is to effectuate the intent of the General Assembly by looking to the plain meaning of the language used, considered within the context of the statute as a whole." *Mook v. Bd. of Cnty. Comm'rs*, 2020 CO 12, ¶ 24, 457 P.3d 568, 574 (alteration in original) (quoting *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010)). When a term is undefined, "we construe a statutory term in accordance with its ordinary or natural meaning." *Id.* (quoting *Cowen v. People*, 2018 CO 96, ¶ 14,

431 P.3d 215, 218). If the language is clear, we apply it as written. *Ferrigno Warren*, ¶ 16, 462 P.3d at 1084.

¶34 If, however, the language is reasonably susceptible of multiple interpretations, we may turn to other tools of construction to guide our interpretation. *Cowen*, ¶ 12, 431 P.3d at 218. These may include consideration of the purpose of the statute, the circumstances under which the statute was enacted, the legislative history, and the consequences of a particular construction. § 2-4-203(1), C.R.S. (2023). We also avoid constructions that would yield illogical or absurd results. *Educhildren LLC v. Cnty. of Douglas Bd. of Equalization*, 2023 CO 29, ¶ 27, 531 P.3d 986, 993.

2. Presidential Primaries Under the Election Code

¶35 Before addressing the merits, we provide a brief overview of the Election Code's provisions relating to presidential primary elections. Article VII, Section 11 of the Colorado Constitution commands the General Assembly to "pass laws to secure the purity of elections, and guard against abuses of the elective franchise." Pursuant to this constitutional mandate, the Secretary's duties under the Election Code include supervising the conduct of primary and general elections in the state and enforcing the provisions of the Election Code. § 1-1-107(1)(a)–(b), (5), C.R.S. (2023).

¶36 Part 12 of article 4 of the Election Code governs presidential primary elections. *See generally* §§ 1-4-1201 to -1207, C.R.S. (2023).[3] Section 1-4-1201, C.R.S. (2023), explains that "it is the intent of the People of the State of Colorado that the provisions of this part 12 conform to the requirements of federal law and national political party rules governing presidential primary elections." This reference indicates that the legislature envisioned part 12 as operating in harmony with

[3] Before 1990, Colorado's political parties used caucuses to nominate their presidential candidates. That year, Colorado voters adopted a referred measure establishing presidential primary elections. *See generally* Ch. 42, sec. 1–2, §§ 1-4-1101 to -1104, 1990 Colo. Sess. Laws 311, 311–13. The legislature later amended these statutes as part of a 1992 repeal and reenactment of the Election Code. *See* Ch. 118, sec. 7, §§ 1-4-1201 to -1207, 1992 Colo. Sess. Laws 624, 696–99. These amendments added the precursor to current section 1-4-1204(4): they permitted "challenges concerning the right of any candidate's name to appear on the ballot of the presidential primary election" but directed the Secretary (not a court) to hear and assess the validity of such challenges. Ch. 118, sec. 7, § 1-4-1203(4), 1992 Colo. Sess. Laws at 697–98.

Colorado eliminated presidential primary elections in 2003. Ch. 24, sec. 6, 2003 Colo. Sess. Laws 495, 496. In 2016, however, voters restored such elections through Proposition 107, a citizen-initiated measure. Proposition 107, Ballot Initiative No. 140, https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2015-2016/140Final.pdf [https://perma.cc/7TX8-J59L]. Proposition 107 largely preserved the pre-2003 version of section 1-4-1204(4) that vested the Secretary with the power to hear challenges to the listing of presidential primary candidates. *Id.* at 61. In a 2017 clean-up bill, the General Assembly adopted several amendments to the citizen-initiated measure "to facilitate the effective implementation of the state's election laws." S.B. 17-305, 71st Gen. Assemb., Reg. Sess. (Colo. 2017). Relevant here, the legislature directed challenges under section 1-4-1204(4) away from the Secretary and instead to the district court through section 1-1-113 proceedings. *Id.* at 4–5. Section 1-4-1204(4) has remained otherwise unchanged since its reenactment.

federal law, including requirements governing presidential primary elections. As such, it is instructive when interpreting other provisions of part 12.

¶37 The Election Code limits participation in the presidential primary to "qualified" candidates. § 1-4-1203(2)(a) ("[E]ach political party that has a *qualified* candidate . . . is entitled to participate in the Colorado presidential primary election."[4] (emphasis added)); *see also* §§ 1-4-1101(1), -1205, C.R.S. (2023) (allowing a write-in candidate to participate in the presidential primary election if he or she submits an affidavit stating he or she is "qualified to assume" the duties of the office if elected). As a practical matter, the mechanism through which a presidential primary hopeful attests that he or she is a "qualified candidate" is the "statement of intent" (or "affidavit of intent") filed with the Secretary.[5] *See* § 1-4-1204(1)(c) (requiring candidates to submit to the Secretary a notarized "statement of intent"); § 1-4-1205 (requiring a write-in candidate to file a notarized

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[4] In full, the quoted language reads: "[E]ach political party that has a qualified candidate entitled to participate in the presidential primary election pursuant to this section is entitled to participate in the Colorado presidential primary election." § 1-4-1203(2)(a). The phrase "pursuant to this section" sheds no light on the meaning of "qualified candidate." Section 1-4-1203 simply establishes the mechanics of presidential primaries, such as the date of the primary, elector party affiliation rules, and the content of primary ballots. § 1-4-1203(1), (2)(a), (4). Thus, "pursuant to this section" modifies the "presidential primary election" in which qualified candidates are entitled to participate: an election conducted in accordance with section 1-4-1203.

[5] In this context, the legislature appears to have used "statement" and "affidavit" interchangeably.

"statement of intent" in order for votes to be counted for that candidate and stating that "such affidavit" must be accompanied by the requisite filing fee).

¶38 The Secretary's statement-of-intent form for a major party presidential primary candidate requires the candidate to affirm via checkboxes that he or she meets the qualifications set forth in Article II of the U.S. Constitution for the office of President; specifically, that the candidate is at least thirty-five years old, has been a resident of the United States for at least fourteen years, and is a natural-born U.S. citizen. Colo. Sec'y of State, *Major Party Candidate Statement of Intent for Presidential Primary*, https://www.sos.state.co.us/pubs/elections/Candidates/files/MajorPartyCandidateStatementOfIntentForPresidentialPrimary.pdf [https://perma.cc/YA3X-3K9T] ("Intent Form"); *see also* U.S. Const. art. II, § 1, cl. 5. The form further requires the candidate to sign an affirmation that states, "I intend to run for the office stated above and *solemnly affirm that I meet all qualifications for the office prescribed by law*."[6] Intent Form, *supra* (emphasis added). No party has challenged the Secretary's authority to require candidates to provide this information on the statement-of-intent form.

[6] The Affidavit of Intent for write-in candidates for the presidential primary has the same requirements. *Affidavit of Intent for Presidential Primary Write-In Designation*, Colo. Sec'y of State (last updated June 20, 2023), https://www.sos.state.co.us/pubs/elections/Candidates/files/PresidentialPrimaryWrite-In.pdf [https://perma.cc/V83P-HLAD].

¶39 Section 1-4-1204(1) requires the Secretary to "certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots" not later than sixty days before the presidential primary election. For the 2024 election cycle, that deadline is January 5, 2024.

¶40 Section 1-4-1204(1) further states:

> The only candidates whose names shall be placed on ballots for the election shall be those candidates who:
>
> . . . .
>
> (b) Are seeking the nomination for president of a political party as a bona fide candidate for president of the United States pursuant to political party rules and are affiliated with a major political party that received at least twenty percent of the votes cast by eligible electors in Colorado at the last presidential election; and
>
> (c) Have submitted to the secretary not later than eighty-five days before the date of the presidential primary election, a notarized candidate's statement of intent together with either a nonrefundable filing fee of five hundred dollars or a petition signed by at least five thousand eligible electors . . . .

For the 2024 election cycle, the deadline to submit these items was December 11, 2023.

¶41 Section 1-4-1204(4) allows for "challenge[s] to the listing of any candidate on the presidential primary election ballot." Any such challenge must be brought "no later than five days after the filing deadline for candidates" and "must provide notice . . . of the alleged impropriety that gives rise to the complaint." *Id.* The district court must hold a hearing no later than five days after the challenge is filed

to "assess the validity of all alleged improprieties." *Id.* The statute does not limit the length or content of the hearing; it does, however, require the district court to issue findings of fact and conclusions of law no later than forty-eight hours after the hearing concludes. *Id.* "The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence." *Id.*

¶42 Challenges under section 1-4-1204(4) must be brought through the special statutory procedure found in section 1-1-113 for adjudicating controversies that arise under the Election Code. § 1-4-1204(4) (providing that any challenge to the listing of a candidate on the presidential primary ballot "must be made in writing and filed with the district court in accordance with section 1-1-113(1)" and "any order entered by the district court may be reviewed [by the supreme court] in accordance with section 1-1-113(3)").

¶43 Section 1-1-113 has deep roots in Colorado election law. It originated in an 1894 amendment to Colorado's Australian Ballot Law, first adopted by the Eighth General Assembly in 1891. Ch. 7, sec. 5, § 26, 1894 Colo. Sess. Laws 59, 65. Much like its present-day counterpart, the original provision established procedures for adjudicating controversies between election officials and any candidate, political party officers or representatives, or persons making nominations.[7] *Id.*

[7] Over time, the legislature amended the law to strengthen the courts' power to resolve election disputes. For example, in 1910, the General Assembly passed

¶44 The current version of section 1-1-113 establishes (with exceptions not relevant here) "the *exclusive method* for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of an election." § 1-1-113(4) (emphasis added). It provides:

> When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code *has committed or is about to commit a breach or neglect of duty or other wrongful act*, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code. The order shall require the person charged to forthwith *perform the duty or to desist from the wrongful act*

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primary election legislation (not then applicable to presidential elections) authorizing district courts to accept verified petitions alleging, among other things, "that the name of any person has been or is about to be wrongfully placed upon" primary ballots and to order the Secretary (among other election officials) to correct such errors. Ch. 4, § 25, 1910 Colo. Sess. Laws. 15, 33. The 1910 law also gave this court the power to review the district court's decision. *Id.* at 34; *see also People v. Republican State Cent. Comm.*, 226 P. 656, 657 (Colo. 1924) (confirming that if a proper entity "has violated a duty with which it is charged under the act, the court has power to direct it to correct the wrong").

In 1963, the General Assembly repealed and reenacted Colorado's Election Code. *See generally* Ch. 118, 1963 Colo. Sess. Laws 360. The 1963 code allowed for "any elector" to show "by verified petition . . . that any neglect of duty or wrongful act by any person charged with a duty under this act has occurred or is about to occur," mirroring the language in today's section 1-1-113. Ch. 118, § 203, 1963 Colo. Sess. Laws at 457. The legislature's next reenactment of the code in 1992 codified this procedure at section 1-1-113. Ch. 118, sec. 1, § 1-1-113, 1992 Colo. Sess. Laws 624, 635.

> or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.

§ 1-1-113(1) (emphases added).

¶45 Section 1-1-113 proceedings also provide for expedited, albeit discretionary, appellate review in this court. § 1-1-113(3). Either party may seek review from this court within three days after the district court proceedings conclude. *Id.* If this court declines jurisdiction of the case, the district court's decision is final and is not subject to further appellate review. *Id.*

¶46 Although Colorado's expedited statutory procedure for litigating election disputes may be unfamiliar nationally, our courts, particularly the Denver District Court (the proper venue when the Secretary is the named respondent), are accustomed to section 1-1-113 litigation. Such cases arise during virtually every election cycle, and this court has exercised jurisdiction many times to review these disputes. *E.g.*, *Kuhn*, ¶ 1, 418 P.3d at 480; *Frazier*, ¶ 1, 401 P.3d at 542; *Carson v. Reiner*, 2016 CO 38, ¶ 1, 370 P.3d 1137, 1138; *Hanlen v. Gessler*, 2014 CO 24, ¶ 3, 333 P.3d 41, 42. Moreover, it is not uncommon for section 1-1-113 cases to require courts to take evidence and grapple with complex legal issues. *E.g.*, *Ferrigno Warren*, ¶¶ 9–13, 462 P.3d at 1083–84 (describing a district court hearing, held one month after the petitioner filed her verified petition and after the parties filed briefing, to determine whether "substantial compliance" was the appropriate standard for a minimum signature requirement, how to apply that standard, and

whether, based on a four-factor test, a prospective U.S. Senate candidate satisfied that standard); *Kuhn*, ¶¶ 4, 15–18, 418 P.3d at 480–82 (describing a district court hearing to assess evidence and testimony concerning the residency of seven circulators of a petition to reelect a congressional representative); *Meyer v. Lamm*, 846 P.2d 862, 867 (Colo. 1993) (requiring an evidentiary hearing in district court that involved, among other things, the content of ballots cast for a write-in candidate). Even early cases recognized that the original 1894 provision "contemplate[d] the taking of evidence where the issues require[d] it." *Leighton v. Bates*, 50 P. 856, 858 (Colo. 1897).

3. The District Court Had Jurisdiction to Adjudicate the Electors' Claim Under the Election Code

¶47 President Trump argues that the district court lacked jurisdiction over the Electors' section 1-1-113 action because the Secretary has no duty under the Election Code to investigate a candidate's qualifications. A district court has jurisdiction pursuant to section 1-1-113(1) when: (1) an eligible elector; (2) files a verified petition in a district court of competent jurisdiction; (3) alleging that a person charged with a duty under the Election Code; (4) has committed, or is about to commit, a breach of duty or other wrongful act.

¶48 The district court plainly had jurisdiction under section 1-1-113 to hear the Electors' claim. First, the Electors are "eligible elector[s]" within the meaning of the Election Code because, as Republican and unaffiliated voters, they are

"person[s] who meet[] the specific requirements for voting at a specific election"; namely, the Republican presidential primary election. § 1-1-104(16), C.R.S. (2023); *see also* § 1-4-1203(2)(b) (providing that unaffiliated voters may vote in presidential primary elections); § 1-7-201(1), C.R.S. (2023) (identifying eligible electors for the purpose of primary elections). Second, the Electors timely filed their verified petition under sections 1-1-113 and 1-4-1204(4) in the proper district court. Third, their petition was filed against the Secretary, an election official charged with duties under the Election Code. *See* § 1-1-107 (prescribing the powers and duties of the Secretary); § 1-4-1204(1) ("[T]he secretary of state shall certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots."). And fourth, the petition alleged that the Secretary was about to commit a breach of duty or other wrongful act under the Election Code by placing President Trump on the presidential primary ballot because he is not constitutionally qualified to hold office.

¶49 Though it does not affect the district court's *jurisdiction*, President Trump's assertion that the Secretary does not have a duty under the Election Code to determine a candidate's constitutional qualification raises the question of whether the Electors presented a *proper claim*. To answer that question, we must first determine whether, generally, states have the authority to determine presidential qualifications.

4. States Have the Authority to Assess Presidential Candidates' Qualifications

¶50 "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . . ." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The Constitution delegates to states the authority to prescribe the "Times, Places and Manner" of holding congressional elections, U.S. Const. art. I, § 4, cl. 1, and states retain the power to regulate their own elections, *Burdick*, 504 U.S. at 433. States exercise these powers through "comprehensive and sometimes complex election codes," regulating the registration and qualifications of voters, the selection and eligibility of candidates, and the voting process itself. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) ("*Celebrezze*"); *see also, e.g.*, § 1-4-501(1), C.R.S. (2023) (setting qualifications for state office candidates). These powers are uncontroversial and well-explored in U.S. Supreme Court case law.

¶51 But does the U.S. Constitution authorize states to assess the constitutional qualifications of presidential candidates? We conclude that it does.

¶52 Under Article II, Section 1, each state is authorized to appoint presidential electors "in such Manner as the Legislature thereof may direct." U.S. Const. art. II, § 1, cl. 2. So long as a state's exercise of its appointment power does not run afoul of another constitutional constraint, that power is plenary. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020); *McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

¶53 But voters no longer choose between slates of electors on Election Day. *Chiafalo*, 140 S. Ct. at 2321. Instead, they vote for presidential candidates who serve as proxies for their pledged electors. *Id.* Accordingly, states exercise their plenary appointment power not only to regulate the electors themselves, but also to regulate candidate access to presidential ballots. Absent a separate constitutional constraint, then, states may exercise their plenary appointment power to limit presidential ballot access to those candidates who are constitutionally qualified to hold the office of President. And nothing in the U.S. Constitution expressly *precludes* states from limiting access to the presidential ballot to such candidates. *See Lindsay v. Bowen*, 750 F.3d 1061, 1065 (9th Cir. 2014).

¶54 No party in this case has challenged the Secretary's authority to require a presidential primary candidate to confirm on the required statement-of-intent form that he or she meets the Article II requirements of age, residency, and citizenship, and to further attest that he or she "meet[s] all qualifications for the office prescribed by law." Moreover, several courts have expressly upheld states' ability to exclude constitutionally ineligible candidates from their presidential ballots. *See id.* (upholding California's refusal to place a twenty-seven-year-old candidate on the presidential ballot); *Hassan v. Colorado*, 495 F. App'x 947, 948–49 (10th Cir. 2012) (affirming the Secretary's decision to exclude a naturalized citizen from the presidential ballot); *Socialist Workers Party of Ill. v. Ogilvie*, 357 F. Supp.

109, 113 (N.D. Ill. 1972) (per curiam) (affirming Illinois's exclusion of a thirty-one-year-old candidate from the presidential ballot).

¶55 As then-Judge Gorsuch recognized in *Hassan*, it is "a state's legitimate interest in protecting the integrity and practical functioning of the political process" that "permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." 495 F. App'x at 948.

¶56 The question then becomes whether Colorado has exercised this power through the Election Code. We conclude that it has. Section 1-4-1204(4) is Colorado's vehicle for advancing these state interests. When eligible electors challenge the Secretary's listing on the presidential primary ballot of a candidate who is not constitutionally qualified to assume office, section 1-4-1204(4), as exercised through a proceeding under section 1-1-113, offers an exclusive remedy under the Election Code. *See* § 1-1-113(4).

5. The Electors Have Stated a Proper Claim That Is Not Precluded by *Frazier* and *Kuhn*

¶57 President Trump argues that the Electors' claim cannot be properly litigated in a section 1-1-113 action because the Secretary has no duty under the Election Code to investigate a candidate's qualifications and because this court's precedent bars the litigation of constitutional claims in a section 1-1-113 action. Although we agree that the Secretary has no duty to independently investigate the qualifications of a presidential primary candidate, we conclude that the Electors may

nevertheless challenge a candidate's qualifications under section 1-4-1204(4), and that the Electors' claim here is not a "constitutional claim" precluded by our decisions in *Frazier* and *Kuhn*.

¶58 In presidential primary elections, the Secretary's duty is to "certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots." § 1-4-1204(1). The conditions that must be satisfied before she can exercise this duty are limited to timely receiving (1) confirmation that the prospective candidate is a "bona fide candidate" under the party's rules, (2) a notarized statement of intent from the candidate, and (3) the requisite filing fee or a petition signed by at least 5,000 eligible electors affiliated with the candidate's political party who reside in Colorado. § 1-4-1204(1)(b)–(c).

¶59 Where a candidate does not submit (or cannot comply with) the required attestations on the statement of intent form, the Secretary cannot list the candidate on the ballot. *See Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1195 (D. Colo. 2012), *aff'd* 495 F. App'x at 948. But if the contents of a signed and notarized statement of intent appear facially complete (i.e., the candidate has filled out the Secretary's form confirming that he or she meets the Article II requirements of age, residency, and citizenship, and further attesting that he or she "meet[s] all qualifications for the office prescribed by law"), the Secretary has no duty to further investigate the

accuracy or validity of the information the prospective candidate has supplied.[8] To that extent, we agree with President Trump that the Secretary has no duty to determine, beyond what is apparent on the face of the required documents, whether a presidential candidate is qualified.

¶60 The fact that the Secretary has complied with her section 1-4-1204(1) duties does not, however, foreclose a challenge under section 1-4-1204(4). As discussed above, section 1-4-1204(4) permits "[a]ny challenge to the listing of any candidate on the presidential primary election ballot," using section 1-1-113(1) as a procedural vehicle. Section 1-1-113(1), in turn, creates a cause of action for electors alleging a breach of duty *or other wrongful act* under the code. *See Frazier*, ¶ 3, 401 P.3d at 542 (construing "wrongful act" in section 1-1-113 as limited to a wrongful act under the Election Code). Section 1-1-113 then requires the district court—not the election official—to adjudicate an eligible elector's challenge to a candidate's eligibility. *Carson*, ¶ 8, 370 P.3d at 1139 (observing that the Election Code reflects an intent for challenges to the qualifications of a candidate to be

[8] In contrast, with respect to elections for state office, section 1-4-501(1), C.R.S. (2023), provides that "[t]he designated election official shall not certify the name of any designee or candidate . . . *who the designated election official determines is not qualified* to hold the office that he or she seeks based on residency requirements." (Emphasis added.) This provision for state office expressly charges the Secretary with a duty to investigate whether a candidate "meets any requirements of the office relating to registration, residence, or property ownership," among others. *Id.*

resolved by the courts); *Hanlen*, ¶ 40, 333 P.3d at 50 ("[T]he election code requires a court, not an election official, to determine the issue of [candidate] eligibility.").

¶61 As we have explained, the Secretary has complied with her limited duty to accept President Trump's properly completed paperwork. But the Electors have alleged an impending "wrongful act," which is "more expansive than a 'breach' or 'neglect of duty.'" *Frazier*, ¶ 16, 401 P.3d at 545 (quoting § 1-1-113(1)). Indeed, section 1-1-113 "clearly comprehends challenges to a broad range of wrongful acts committed by officials charged with duties under the code," *Carson*, ¶ 17, 370 P.3d at 1141, including any act that is "inconsistent with the Election Code," *Frazier*, ¶ 16, 401 P.3d at 545.

¶62 We conclude that certifying an unqualified candidate to the presidential primary ballot constitutes a "wrongful act" that runs afoul of section 1-4-1203(2)(a) and undermines the purposes of the Election Code. Nothing in section 1-4-1204(4) limits challenges under that provision to those based on a breach of the Secretary's duties under section 1-4-1204. And section 1-4-1203(2)(a) clearly limits participation in the presidential primary to political parties fielding "qualified" candidates. Although section 1-4-1203(2)(a) does not define "qualified," nearby provisions regarding write-in candidates indicate that "qualified" refers to a candidate's qualifications for office. As with bona fide major party candidates under section 1-4-1204(1), write-in candidates for the presidential primary must

file a "notarized candidate statement of intent." § 1-4-1205. Under the Election Code, such statements for all write-in candidates (regardless of the type of election) must indicate that the candidate "desires the office and is *qualified* to assume its duties if elected." § 1-4-1101(1) (emphasis added). The Election Code's explicit requirement that a write-in candidate be "qualified" to assume the duties of their intended office logically implies that major party candidates under 1-4-1204(1)(b) must be "qualified" in the same manner.[9]

¶63 Reading the Election Code as a whole, then, we conclude that "qualified" in section 1-4-1203(2)(a) must mean, at minimum, that a candidate is qualified under the U.S. Constitution to assume the duties of the office of President. It has to, as section 1-4-1203(2)(a) supplies the only textual basis in the Election Code for the Secretary's authority to require a presidential primary candidate to attest to his or her qualifications for office in the candidate statement (or affidavit) of intent. Moreover, to read "qualified" *not* to encompass federal constitutional qualifications would undermine the purpose of the Election Code—"to secure the

[9] This interpretation is further supported by the Election Code's treatment of uncontested primaries. The Election Code allows the Secretary to cancel a primary when every political party has no more than one affiliated candidate, whether that candidate is certified to the presidential primary ballot pursuant to section 1-4-1204(1) or is a write-in candidate entering under section 1-4-1205. § 1-4-1203(5). Because the General Assembly plainly treats such candidates as equivalent for purposes of 1-4-1203(5), we conclude that the legislature also viewed the "qualified" requirement in both provisions as equivalent.

purity of elections"—while compromising the Secretary's ability to advance that purpose. Colo. Const. art. VII, § 11; § 1-1-107(1), (5).

¶64 We therefore reject such an interpretation as contrary to the purpose of the Election Code. Instead, we conclude that, under the Election Code, "qualified" candidates for the presidential primary are those who, at a minimum, are qualified to hold office under the provisions of the U.S. Constitution.

¶65 We recognize that the Supreme Court has twice declined to address whether Section Three—which *disqualifies* an oath-breaking insurrectionist from *holding* office—amounts to a qualification for office. *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969) (describing Section Three and similar disqualification provisions in the federal constitution but declining to address whether such provisions constitute "qualification[s]" for office because "both sides agree[d] that [the candidate] was not ineligible under" Section Three or any other, similar provision); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 n.2 (1995) (seeing "no need to resolve" the same question regarding Section Three in a case concerning the propriety of *additional* qualifications for office). But lower courts, when presented squarely with the question, have all but concluded that Section Three is the functional equivalent of a qualification for office. *See, e.g.*, *Greene v. Raffensperger*, 599 F. Supp. 3d 1283, 1316 (N.D. Ga. 2022) ("Section [Three] is an existing constitutional disqualification adopted in 1868—similar to but distinct

from the Article I, Section 2 requirements that congressional candidates be at least 25 years of age, have been citizens of the United States for 7 years, and reside in the states in which they seek to be elected."); *State v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at *24 (N.M. Dist. Ct. Sept. 6, 2022) ("Section Three imposes a qualification for public office, much like an age or residency requirement . . . .").

¶66 We perceive no logical distinction between a *disqualification* from office and a *qualification* to assume office, at least for the purposes of the section 1-1-113 claim here. Either way, it would be a wrongful act for the Secretary to list a candidate on the presidential primary ballot who is not "qualified" to assume the duties of the office. Moreover, because Section Three is a "part of the text of the Constitution," assessing a candidate's compliance with it for purposes of determining their eligibility for office does not improperly "add qualifications to those that appear in the Constitution." *U.S. Term Limits*, 514 U.S. at 787 n.2. Doing so merely renders the list of constitutional qualifications more complete.

¶67 Nor are we persuaded by President Trump's assertion that Section Three does not bar him from *running for* or *being elected to* office because Section Three bars individuals only from *holding* office. *Hassan* specifically rejected any such distinction. 495 Fed. App'x at 948. There, the candidate argued that even if Article II "properly holds him ineligible to *assume the office* of president," Colorado could

not "deny him *a place on the ballot*." *Id.* The *Hassan* panel concluded otherwise. *Id.* In any event, the provisions in the Election Code governing presidential primary elections do not recognize such a distinction. Rather, as discussed above, those provisions require all presidential primary candidates to be constitutionally "qualified" *before* their names are added to the presidential primary ballot pursuant to section 1-4-1204(1).

¶68 Were we to adopt President Trump's view, Colorado could not exclude from the ballot even candidates who plainly do not satisfy the age, residency, and citizenship requirements of the Presidential Qualifications Clause of Article II. *See* U.S. Const. art. II, § 1, cl. 5 (setting forth the qualifications to be "*eligible to the Office of President*" (emphasis added)). It would mean that the state would be powerless to exclude a twenty-eight-year-old, a non-resident of the United States, or even a foreign national from the presidential primary ballot in Colorado. Yet, as noted, several courts have upheld states' exclusion from ballots of presidential candidates who fail to meet the qualifications for office under Article II. *See Lindsay*, 750 F.3d at 1065; *Hassan*, 495 F. App'x at 948; *Ogilvie*, 357 F. Supp. at 113.

¶69 Lastly, we reject President Trump and CRSCC's argument that state courts may not hear the Electors' claim because this court's precedent bars the litigation of constitutional claims in a section 1-1-113 action. *See Frazier*, ¶ 3, 401 P.3d at 542;

Kuhn, ¶ 55, 418 P.3d at 489. The Electors have not asserted a constitutional claim, so *Frazier* and *Kuhn* do not control here.

¶70 Both *Frazier* and *Kuhn* addressed whether a petitioner could shoehorn a claim challenging the constitutionality of the Election Code into a section 1-1-113 proceeding. *Frazier*, ¶ 6, 401 P.3d at 543; *Kuhn*, ¶ 55, 418 P.3d at 489. In *Frazier*, we concluded that section 1-1-113 is not a proper vehicle to resolve claims under 42 U.S.C. § 1983 because they do not arise under the Election Code and because the sole remedy available under section 1-1-113 is a court order directing compliance with the Election Code. *Frazier*, ¶¶ 17–18, 401 P.3d at 545. Similarly, in *Kuhn*, we held that to the extent the candidate sought to challenge the constitutionality of the petition circulator residency requirement under the Election Code, the court lacked jurisdiction to address such arguments in a section 1-1-113 proceeding. ¶ 55, 418 P.3d at 489.

¶71 Here, however, the Electors do not challenge the constitutionality of the Election Code. Nor do they allege a violation of the Constitution. Instead, they allege a "wrongful act" under section 1-1-113. That the Electors' claim has constitutional implications or requires interpretation of a constitutional provision does not make it a separate "constitutional claim" of the sort prohibited by *Frazier* and *Kuhn*. And neither President Trump nor CRSCC suggests that a section 1-1-113 claim cannot have constitutional implications. Indeed, as the Secretary

notes in her brief, there is nothing "particularly unusual about a section 1-1-113 proceeding raising constitutional issues."

¶72 As discussed above, the Electors' claim is that the Secretary will commit a wrongful act under the Election Code if she lists a candidate on the presidential primary ballot who is not qualified for office. While this claim requires resolving constitutional questions, it remains a challenge brought by eligible electors against an election official regarding an alleged wrongful act under the Election Code. Section 1-1-113 is the "exclusive" vehicle for litigating such challenges prior to an election; the Electors have no other viable option. § 1-1-113(4).

6. Limiting Presidential Primary Ballot Access to Constitutionally Qualified Candidates Does Not Interfere with CRSCC's First Amendment Rights

¶73 CRSCC argues that section 1-4-1204(1)(b) vests it with the sole authority to determine who the Republican nominees will be on a ballot—a reflection, CRSCC contends, of its constitutional right to freely associate and exercise its political decisions. *See* U.S. Const. amend. I; *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) ("The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas."). Taken to its logical end, CRSCC's position is that it has a First Amendment right to deem any person to be a "bona fide candidate" pursuant to their party rules, § 1-4-1204(1)(b), and subsequently mandate that individual's

placement on the presidential ballot, without regard to that candidate's age, residency, citizenship, *see* U.S. Const. art. II, § 1, cl. 5, or even whether the candidate has already served two terms as President, *see id.* at amend. XXII ("No person shall be elected to the office of the President more than twice . . . ."). We disagree with this position.

¶74 As a threshold matter, we acknowledge that the district court dismissed CRSCC's argument on this issue, ruling that it raised a separate constitutional claim improperly litigated in a section 1-1-113 action. *Anderson*, ¶ 12. We agree that a claim challenging the constitutionality of the Election Code cannot be reviewed under section 1-1-113. *See Kuhn*, ¶ 55, 418 P.3d at 489; *Frazier*, ¶ 3, 401 P.3d at 542. But to the extent that CRSCC argues in its Answer Brief that the Secretary lacks authority to interfere with CRSCC's associational rights, we respond briefly to those concerns.

¶75 We distinguish between (1) CRSCC's right to decide the candidates with whom it affiliates and recognizes as bona fide, and (2) CRSCC's ability to place candidates on the presidential primary ballot. CRSCC's "claim that it has a right to select its own candidate is uncontroversial, so far as it goes." *Timmons*, 520 U.S. at 359. Partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986), and "[a]s a result, political parties' government, structure,

and activities enjoy constitutional protection," *Timmons*, 520 U.S. at 358. In other words, CRSCC is well within its rights to choose with whom it affiliates and to decide which candidates it recognizes as bona fide. "It does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate." *Id.* at 359 (noting that a "particular candidate might be ineligible for office," for example).

¶76 As a practical matter, any state election law governing the selection and eligibility of candidates affects, to some degree, the fundamental right to associate with others for political ends. *Celebrezze*, 460 U.S. at 788. Even so, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

¶77 Accordingly, to determine if a state election law impermissibly burdens a party's associational rights, courts must weigh the "'character and magnitude'" of the burden imposed by the rule "against the interests the State contends justify that burden," and then consider whether the state's interests make the burden necessary. *Timmons*, 520 U.S. at 358 (quoting *Burdick*, 504 U.S. at 434). Limiting ballot access "to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable." *Burdick*, 504 U.S. at 440 n.10.

¶78 Here, the Election Code limits presidential primary ballot access to only qualified candidates. Such a restriction is an "eminently reasonable" regulation that does not severely burden CRSCC's associational rights. To hold otherwise would permit political parties to disregard the requirements of the law and the Constitution whenever they decide, as a matter of "political expression" or "political choice," that those requirements do not apply. That cannot be. The Constitution—not any political party rule—is the supreme law of the land. U.S. Const. art. VI, cl. 2.

7. Section 1-1-113 Proceedings Provide Adequate Due Process for Litigants

¶79 Lastly, President Trump asserts that section 1-1-113 is not a valid way to litigate complex constitutional legal and factual issues. He complains of unfairness inherent in the expedited procedures that section 1-1-113 demands. But President Trump's argument disregards how the Electors' claim proceeded here.

¶80 Initially, we note that to the extent President Trump purports to challenge the constitutionality of section 1-1-113 under the Fourteenth Amendment's Due Process clause as a defense to the Electors' claim, he raises precisely the type of independent constitutional claim he recognizes is barred by *Kuhn*. *See Kuhn*, ¶ 55, 418 P.3d at 489. As discussed above, constitutional challenges to provisions of the Election Code fall outside the scope of a proper section 1-1-113 challenge because these expedited statutory proceedings entertain only one type of claim—election

officials' violations of the Election Code—and one type of injunctive relief—an order compelling substantial compliance with the Election Code. *See Kuhn*, ¶ 55, 418 P.3d at 489; § 1-1-113(1); *accord Frazier*, ¶¶ 17–18, 401 P.3d at 545.

¶81 Furthermore, because section 1-1-113 proceedings are designed to address election-related disputes, they move quickly out of necessity. *Frazier*, ¶ 11, 401 P.3d at 544 ("Given the tight deadlines for conducting elections, section 1-1-113 is a summary proceeding designed to quickly resolve challenges brought by electors, candidates, and other designated plaintiffs against state election officials prior to election day."). Lawyers who practice in this area are well-aware of this. Looming elections trigger a cascade of deadlines under both state and federal law that cannot accommodate protracted litigation schedules, particularly when the dispute concerns a candidate's access to the ballot. And a state's interest in "protecting the integrity of the election process and avoiding voter confusion," *Lindsay*, 750 F.3d at 1063 (citing *Timmons*, 520 U.S. at 364–65), allows a state to expedite the process by which a candidate's qualifications, once challenged, are subsequently determined. That the form of section 1-1-113 proceedings reflects their function—to expeditiously resolve pre-election disputes over an election official's wrongful act—does not mean these proceedings lack due process.

¶82 Nor does the need for expedited proceedings in election disputes preclude a district court from using traditional means of case management in a section

1-1-113 proceeding to construct a schedule that accommodates legally or factually complex issues. *See Ferrigno Warren*, ¶¶ 8–13, 462 P.3d at 1083 (explaining that the district court ordered briefing and held a hearing one month after the candidate filed a section 1-1-113 petition). President Trump contends that the expedited nature of section 1-1-113 proceedings do not provide time for the kinds of procedures he believes the complexities of this case require—for example, filing C.R.C.P. 12 motions testing the legal sufficiency of the Electors' claims before the litigation proceeds, allowing for extended discovery and disclosure procedures, and providing the opportunity to depose expert witnesses. But he has never specifically articulated how the district court's approach lacked due process. He certainly does not contend that he was prejudiced because the district court moved too *slowly* or failed to resolve the case in a week. He made no specific offer of proof regarding other discovery he would have conducted or other evidence he would have tendered. Moreover, his arguments throughout this case have focused predominantly on questions of law and not on disputed issues of material fact.

¶83 In addition, the district court took many steps to address the complexities of the case. For example, the first hearing in this case was a status conference on September 18—four days after the case was reopened after being remanded from federal court. In recognition of the complexity of the case, the district court—with the parties' input—adopted a civil-case-management approach to the litigation

that afforded the parties the opportunity to be heard on a wide range of substantive issues.

¶84 The district court's case-management approach worked. After permitting multiple intervenors to participate, the district court allowed sufficient time for extensive prehearing motions in which all parties vigorously engaged. It then issued three substantive rulings on these motions, including an omnibus ruling addressing four of Intervenors' motions, all in advance of the trial. The trial took place over five days and included opening and closing statements, the direct- and cross-examination of fifteen witnesses, and the presentation of ninety-six exhibits. Moreover, the legal and factual complexity of this case did not prevent the district court from issuing a comprehensive, 102-page order within the forty-eight-hour window section 1-4-1204(4) requires.

¶85 In short, the district court admirably—and swiftly—discharged its duty to adjudicate this complex section 1-1-113 action, substantially complying with statutory deadlines while demonstrating the flexibility inherent in such a proceeding to address the various issues raised by Intervenors. And nothing about the district court's process suggests that President Trump was deprived of notice or opportunity to fully respond to the claim against him or to mount a vigorous defense. If any case suggests that it is *not* impossible to "fully litigate a

complex constitutional issue within days or weeks," this is it. *Frazier*, ¶ 18 n.3, 401 P.3d at 545 n.3.

¶86 For these reasons, we conclude that the Election Code allows Colorado's courts, through challenges brought under sections 1-4-1204(4) and 1-1-113, to assess the constitutional qualifications of a candidate—and to order the Secretary to exclude from the ballot candidates who are not qualified. These provisions advance Colorado's "legitimate interest in protecting the integrity and practical functioning of the political process" by allowing the Secretary to "exclude from the ballot [presidential] candidates who are constitutionally prohibited from assuming office." *Hassan*, 495 F. App'x at 948. Moreover, these provisions neither infringe on a political party's associational rights nor compromise the validity of a court's rulings on complex factual and legal issues. Rather, they provide a robust vehicle through which to protect the purity of Colorado's elections.[10] *See* Colo. Const. art. VII, § 11.

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[10] We note that Colorado's Election Code differs from other states' election laws. Michigan's election law, for example, does not include the term "qualified candidate," does not establish a role for Michigan courts in assessing the qualifications of a presidential primary candidate, and strictly limits the Michigan Secretary of State's responsibilities in the context of presidential primary elections. *See* Mich. Comp. Laws §§ 168.613, 168.620a (governing presidential primary elections in Michigan). The Michigan code also excludes presidential and vice presidential candidates from the requirement to submit the "affidavit of identity" that other candidates must submit to indicate that they "meet[] the constitutional and statutory qualifications for the office sought." *See Davis v. Wayne Cnty. Election*

¶87 Because the Electors have properly invoked Colorado's section 1-1-113 process to challenge the listing of President Trump on the presidential primary ballot as a wrongful act, we proceed to the other threshold questions raised by Intervenors.

C. The Disqualification Provision of Section Three Attaches Without Congressional Action

¶88 The Electors' challenge to the Secretary's ability to certify President Trump as a qualified candidate presumes that Section Three is "self-executing" in the sense that it is enforceable as a constitutional disqualification without implementing legislation from Congress. Because Congress has not authorized state courts to enforce Section Three, Intervenors argue that this court may not consider President Trump's alleged disqualification under Section Three in this section 1-1-113 proceeding.[11] We disagree.

Comm'n, No. 368615, 2023 WL 8656163, at *14 (Mich. Ct. App. Dec. 14, 2023) (unpublished order) (quoting Mich. Comp. Laws § 168.558(1)–(2)). Given these statutory constraints, it is unsurprising that the Michigan Court of Appeals recently concluded that the Michigan Secretary of State had no discretion to refrain from placing President Trump on the presidential primary ballot once his party identified him as a candidate. *Id.* at *16.

[11] Intervenors and their supporting amici occasionally assert that the Electors' claim is brought pursuant to Section Three and that the Section is not self-executing in the sense that it does not create an independent private right of action. But as mentioned above, the Electors do not bring any claim directly under Section Three. Their claim is brought under Colorado's Election Code, and resolution of that claim requires an examination of President Trump's qualifications in light of

¶89 The only mention of congressional power in Section Three is that "Congress may by a vote of two-thirds of each House, remove" the disqualification of a former officer who had "engaged in insurrection." U.S. Const. amend. XIV, § 3. Section Three does not determine who decides whether the disqualification has attached in the first place.

¶90 Intervenors, however, look to Section Five of the Fourteenth Amendment, which provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article," to argue that congressional authorization is necessary for any enforcement of Section Three. *Id.* at § 5. This argument does not withstand scrutiny.

¶91 The Supreme Court has said that the Fourteenth Amendment "is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances." *The Civil Rights Cases*, 109 U.S. 3, 20 (1883). To be sure, in the *Civil Rights Cases*, the Court was directly focused on the Thirteenth Amendment, so this statement could be described as dicta. But an examination of the Thirteenth, Fourteenth, and Fifteenth Amendments

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Section Three. The question of "self-execution" that we confront here is not whether Section Three creates a cause of action or a remedy, but whether the disqualification from office defined in Section Three can be evaluated by a state court when presented with a proper vehicle (like section 1-1-113), without prior congressional authorization.

("Reconstruction Amendments") and interpretation of them supports the accuracy and broader significance of the statement.

¶92 Section Three is one of four substantive sections of the Fourteenth Amendment:

- Section One: "No State *shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor *shall* any State deprive any person of life, liberty, or property, without due process of law . . . ."
- Section Two: "Representatives *shall* be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . ."
- Section Three: "No person *shall* be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office . . . under the United States . . . who, having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same . . . ."
- Section Four: "The validity of the public debt of the United States . . . *shall* not be questioned."

U.S. Const. amend. XIV, §§ 1–4 (emphases added). Section Five is then an enforcement provision that applies to each of these substantive provisions. *Id.* at § 5. And yet, the Supreme Court has held that Section One is self-executing. *E.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) ("As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing."), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803, *on other grounds*

as recognized in Ramirez v. Collier, 595 U.S. 411, 424 (2022). Thus, while Congress *may* enact enforcement legislation pursuant to Section Five, congressional action is not *required* to give effect to the constitutional provision. *See Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (holding that Section Five gives Congress authority to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," but not disputing that the Fourteenth Amendment is self-executing).

¶93 Section Two, moreover, was enacted to eliminate the constitutional compromise by which an enslaved person was counted as only three-fifths of a person for purposes of legislative apportionment. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three,* 172 U. Pa. L. Rev. (forthcoming 2024) (manuscript at 51–52), https://ssrn.com/abstract=4532751. The self-executing nature of that section has never been called into question, and in the reapportionment following passage of the Fourteenth Amendment, Congress simply treated the change as having occurred. *See* The Apportionment Act of 1872, 17 Stat. 28 (42nd Congress) (apportioning Representatives to the various states based on Section Two's command without mentioning, or purporting to enforce, the Fourteenth Amendment). Similarly, Congress never passed enabling legislation to effectuate Section Four.

¶94 The same is true for the Thirteenth Amendment, which abolished slavery and involuntary servitude. Section One provides the substantive provision: "Neither slavery nor involuntary servitude . . . *shall* exist within the United States . . . ." U.S. Const. amend. XIII, § 1 (emphasis added). Section Two provides the enforcement provision: "Congress shall have power to enforce this article by appropriate legislation." *Id.* at § 2. Discussing this Amendment, the Supreme Court recognized that "legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it," but that "[b]y its own unaided force it abolished slavery" and was "undoubtedly self-executing without any ancillary legislation." *The Civil Rights Cases*, 109 U.S. at 20.

¶95 Like the other Reconstruction Amendments, the Fifteenth Amendment, which established universal male suffrage, contains a substantive provision—"[t]he right of citizens of the United States to vote *shall* not be denied or abridged . . . on account of race, color, or previous condition of servitude"—followed by an enforcement provision—"[t]he Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XV, §§ 1–2 (emphasis added). As with Section One of both the Thirteenth and Fourteenth Amendments, the Supreme Court has explicitly confirmed that the Fifteenth Amendment is self-executing. *E.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (holding that Section One of the Fifteenth Amendment "has always been

treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice").

¶96 There is no textual evidence that Congress intended Section Three to be any different.[12] Furthermore, we agree with the Electors that interpreting any of the Reconstruction Amendments, given their identical structure, as not self-executing would lead to absurd results. If these Amendments required legislation to make them operative, then Congress could nullify them by simply not passing enacting legislation. The result of such inaction would mean that slavery remains legal; Black citizens would be counted as less than full citizens for reapportionment; non-white male voters could be disenfranchised; and any individual who engaged in insurrection against the government would nonetheless be able to serve in the

[12] It would also be anomalous to say this disqualification for office-holding requires enabling legislation when the other qualifications for office-holding do not. *See* U.S. Const. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id.* at § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."); *id.* at art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.").

government, regardless of whether two-thirds of Congress had lifted the disqualification. Surely that was not the drafters' intent.

¶97 Intervenors argue that certain historical evidence requires a different conclusion as to Section Three. We generally turn to historical and other extrinsic evidence only when the text is ambiguous, which it is not here. Nonetheless, we will consider these historical claims in the interest of providing a thorough review.

¶98 Intervenors first highlight a statement Representative Thaddeus Stevens made during the Congressional framing debates: "[Section Three] will not execute itself, but as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have the right to do." Cong. Globe, 39th Cong., 1st Sess. 2544 (1866); *see also* Kurt T. Lash, The Meaning and Ambiguity of Section Three of the Fourteenth Amendment 42 (Oct. 3, 2023) (unpublished manuscript), https://ssrn.com/abstract=4591838. But as one of the amici points out, this statement referenced a deleted portion of Section Three that disenfranchised all former Confederates until 1870. In any event, given the complex patchwork of perspectives and intentions expressed when drafting these constitutional provisions, we refuse to cherry-pick individual statements from extensive debates to ground our analysis. *See generally* Baude & Paulsen, *supra* (manuscript at 39–53).

¶99 Intervenors next direct us to the non-binding opinion written by Chief Justice Salmon Chase while he was riding circuit: *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815) ("*Griffin's Case*").[13] There, Caesar Griffin challenged his criminal conviction as null and void because under Section Three, the judge who had entered his conviction was disqualified from holding judicial office, having formerly sworn a relevant oath as a state legislator and then engaged in insurrection by continuing to serve as a legislator in Virginia's Confederate government. *Id.* at 22–23. It was undisputed that the judge fell within Section Three's scope, but the question Chief Justice Chase sought to answer was whether Section Three "operat[ed] directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power." *Id.* at 23.

¶100 In interpreting the scope of the provision, Chief Justice Chase observed that, after the end of the Civil War but before the Fourteenth Amendment was ratified, many southern states had established, with the approval of the federal government, provisional governments to keep society functioning. *Id.* at 25; *see*

[13] Between 1789 and 1911, U.S. Supreme Court justices traveled across the country and, together with district court judges, sat on circuit courts to decide cases. *See generally* Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 Cardozo L. Rev. 1753 (2003). Decisions written by the justices while they were riding circuit were not decisions of the Supreme Court.

also Baude & Paulsen, *supra* (manuscript at 36). And, within these provisional governments, many offices were filled with citizens who would fall within Section Three's scope. *Griffin's Case*, 11 F. Cas. at 25. Chief Justice Chase observed that giving Section Three a literal construction, as Griffin advocated, would "annul all official acts performed by these officers. No sentence, no judgment, no decree, . . . no official act [would be] of the least validity." *Id.* He reasoned that it would be "impossible to measure the evils which such a construction would add to the calamities which have already fallen upon the people of these states." *Id.*

¶101 And so, Chief Justice Chase turned to what he termed the "argument from inconveniences" and the interpretive canon that, when faced with two or more reasonable interpretations, the interpretation "is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended." *Id.* He then explained that, while it was not "improbable that one of the objects of this section was to provide for the security of the nation and of individuals, by the exclusion of a class of citizens from office," it could also "hardly be doubted that the main purpose was to inflict upon the leading and most influential characters who had been engaged in the Rebellion, exclusion from office as a punishment for the offense." *Id.* at 25–26. To find the provision self-executing under the circumstances, he argued, would be contrary to due process because it would, "at

once without trial, deprive[] a whole class of persons of offices held by them." *Id.* at 26.

¶102 Chief Justice Chase therefore concluded that the object of the Amendment—"to exclude from certain offices a certain class of persons"—was impossible to do "by a simple declaration, whether in the constitution or in an act of congress . . . . 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." *Id.* To accomplish "this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions . . . are indispensable; and . . . can only be provided for by congress." *Id.* Thus, Chief Justice Chase concluded that Section Three was not self-executing. *Id.*

¶103 *Griffin's Case* concludes that congressional action is needed before Section Three disqualification attaches, but this one case does not persuade us of that point. Intervenors and amici assert that *Griffin's Case* "remains good law and has been repeatedly relied on." Because the case is not binding on us, the fact that it has not been reversed is of no particular significance. And the cases that cite it do so either with no analysis—*e.g.*, *State v. Buckley*, 54 Ala. 599 (1875), and *Rothermel v. Meyerle*, 136 Pa. 250 (1890)—or for the inapposite proposition that Section Three does not create a self-executing cause of action—*e.g.*, *Cale v. City of Covington*, 586 F.2d 311, 316 (4th Cir. 1978), and *Hansen v. Finchem*, CV 2022-004321 (Sup. Ct.

of Ariz., Maricopa Cnty. Apr. 22, 2022), *aff'd on other grounds,* 2022 WL 1468157 (May 9, 2022). Moreover, *Griffin's Case* has been the subject of persuasive criticism. *See, e.g.*, Magliocca, *Amnesty and Section Three*, *supra*, at 105–08 (critiquing the case because the other provisions of the Fourteenth Amendment were understood as self-executing and the notion that Section Three was not self-executing was inconsistent with congressional behavior at the time); Baude & Paulsen, *supra* (manuscript at 37–49) (criticizing Chief Justice Chase's interpretation as wrong and constituting a strained interpretation based on policy and circumstances rather than established canons of construction).

¶104 Although we do not find *Griffin's Case* compelling, we agree with Chief Justice Chase that "it must be ascertained what particular individuals are embraced by the definition." 11 F. Cas. at 26. While the disqualification of Section Three attaches automatically, the determination that such an attachment has occurred must be made before the disqualification holds meaning. And Congress has the power under Section Five to establish a process for making that determination. But the fact that Congress *may* establish such a process does not mean that disqualification pursuant to Section Three can be determined *only* through a process established by Congress. Here, the Colorado legislature has established a process—a court proceeding pursuant to section 1-1-113—to make the determination whether a candidate is qualified to be placed on the presidential

primary ballot. And, for the reasons we have already explained, that process is sufficient to permit a judicial determination of whether Section Three disqualification has attached to a particular individual.

¶105 We are similarly unpersuaded by Intervenors' assertions that Congress created the only currently available mechanism for determining whether a person is disqualified pursuant to Section Three with the 1994 passage of 18 U.S.C. § 2383. That statute makes it a crime to "assist[] or engage[] in any rebellion or insurrection against the authority of the United States." True, with that enactment, Congress criminalized the same conduct that is disqualifying under Section Three. All that means, however, is that a person charged and convicted under 18 U.S.C. § 2383 would *also* be disqualified under Section Three. It cannot be read to mean that *only* those charged and convicted of violating that law are constitutionally disqualified from holding future office without assuming a great deal of meaning not present in the text of the law.

¶106 In summary, based on Section Three's plain language; Supreme Court decisions declaring its neighboring, parallel Reconstruction Amendments self-executing; and the absurd results that would flow from Intervenors' reading, we conclude that Section Three is self-executing in the sense that its disqualification provision attaches without congressional action. Intervenors' contrary arguments do not persuade us otherwise.

¶107 That said, our conclusion that implementing legislation from Congress is unnecessary for us to proceed under section 1-1-113 does not resolve the question of whether doing so would violate the separation of powers among the three branches of government. We turn to this justiciability question next.

D. Section Three Is Justiciable

¶108 President Trump next asserts that presidential disqualification under Section Three presents a nonjusticiable political question. Again, we disagree.

¶109 "In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky*, 566 U.S. at 194 (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). The political question doctrine is a narrow exception to this rule, and a court may not avoid its responsibility to decide a case merely because it may have "political implications." *Id.* at 195–96 (quoting *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 943 (1983)).

¶110 A controversy involves a nonjusticiable political question when, as relevant here, "there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Id.* at 195 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)); *see also Baker v. Carr*, 369 U.S. 186, 210, 217 (1962) (noting that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers" and identifying the above-described instances, and four

others not relevant here, as examples of political questions). The requisite textual commitment must be "[p]rominent on the surface of any case." *Baker*, 369 U.S. at 217.

¶111 Here, President Trump argues that this case is nonjusticiable because, in his view, the Constitution and federal law commit the question of the qualifications of a presidential candidate to Congress. The Electors point out that President Trump did not argue before us that the questions presented in this appeal are also nonjusticiable based on a lack of judicially discoverable and manageable standards, and therefore, he arguably waived any such argument. We nevertheless address that issue, again in the interest of providing a thorough review.

1. No Textually Demonstrable Constitutional Commitment to Congress of Section Three Disqualification

¶112 Contrary to President Trump's assertions, we perceive no constitutional provision that reflects a textually demonstrable commitment to Congress of the authority to assess presidential candidate qualifications. Conversely, the Constitution commits certain authority concerning presidential elections to the states and in no way precludes the states from exercising authority to assess the qualifications of presidential candidates.

¶113 As discussed in Part B.4 above, Article II, Section 1, Clause 2 of the Constitution empowers state legislatures to direct how presidential electors are

appointed, and the Supreme Court has recognized that this provision affords the states "far-reaching authority over presidential electors, absent some other constitutional constraint." *Chiafalo*, 140 S. Ct. at 2324. In furtherance of this delegation of authority, "the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections," the "selection and qualification of candidates," among other things. *Storer*, 415 U.S. at 730. The Election Code is an example of such a "comprehensive" code to regulate state and federal elections. And the fact that Article II, Section 1, Clause 4 authorizes Congress to determine the time for choosing the electors and the date on which they vote does not undermine the substantial authority provided to the states to regulate state and federal elections.

¶114 In our view, Section Three's text is fully consistent with our conclusion that the Constitution has not committed the matter of presidential candidate qualifications to Congress. As we have noted, although Section Three requires a "vote of two-thirds of each House" to remove the disqualification set forth in Section Three, it says nothing about who or which branch should determine disqualification in the first place. *See* U.S. Const. amend. XIV, § 3. Moreover, if Congress were authorized to decide by a simple majority that a candidate is qualified under Section Three, as President Trump asserts, then this would nullify Section Three's supermajority requirement.

¶115 President Trump's reliance on Article II, Section 1, Clause 5 of the Constitution and on the Twelfth, Fourteenth, and Twentieth Amendments is misplaced. We address each of these provisions, in turn.

¶116 Article II, Section 1, Clause 5 provides that no person shall be eligible to serve as President unless that person is "a natural born Citizen" who is at least thirty-five years of age and who has resided in the United States for at least fourteen years. This provision, however, says nothing about who or which branch should determine whether a candidate satisfies the qualification criteria either in the first instance or when a candidate's qualifications are challenged. *See id.*

¶117 The Twelfth Amendment charges the Electoral College with the task of selecting a candidate for President and then transmitting the electors' votes to the "seat of the government of the United States," and it provides the procedure by which the electoral votes are to be counted. U.S. Const. amend. XII. Nothing in the Twelfth Amendment, however, vests the Electoral College with the power to determine the eligibility of a presidential candidate. *See Elliott v. Cruz*, 137 A.3d 646, 650–51 (Pa. Commw. Ct. 2016), *aff'd*, 134 A.3d 51 (Pa. 2016) (mem.). Nor does the Twelfth Amendment give Congress "control over the process by which the President and Vice President are normally chosen, other than the very limited one of determining the day on which the electors were to 'give their votes.'" *Id.* at 651 (citing U.S. Const. amend. XII). And although the Twelfth Amendment provides

for the scenario in which no President is selected by March 4 and specifies that no person constitutionally ineligible to serve as President shall be eligible to serve as Vice President, the Amendment does not assign to Congress (nor to any other branch) the task of determining whether a candidate is qualified in the first place.

¶118 Section Five of the Fourteenth Amendment authorizes Congress to pass legislation to enforce the provisions of the Fourteenth Amendment, but as discussed above, the Fourteenth Amendment is self-executing, and congressional action under Section Five is not required to animate Section Three's disqualification of insurrectionist oath-breakers. Nor does Section Five delegate to Congress the authority to determine the qualifications of presidential candidates to hold office. U.S. Const. amend. XIV, § 5.

¶119 Finally, the Twentieth Amendment, in relevant part, empowers Congress to enact procedures to address the scenario in which neither the President nor the Vice President qualifies for office before the time fixed for the beginning of their terms. U.S. Const. amend. XX, § 3. By its express language, however, this Amendment applies post-election. *Id.* (referring to the "President elect" and "Vice President elect"). Moreover, the Amendment says nothing about who determines in the first instance whether the President and Vice President are qualified to hold office.

¶120 For these reasons, we perceive no textually demonstrable constitutional commitment to Congress of the authority to assess presidential candidate qualifications, and neither President Trump nor his amici identify any constitutional provision making such a commitment. In reaching this conclusion, we are unpersuaded by the cases on which President Trump and his amici rely, which are predicated on inferences they assert can be drawn from one or more of the foregoing constitutional provisions or on the fact that the cases had political implications. *See, e.g.*, *Taitz v. Democrat Party of Miss.*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *12–16 (S.D. Miss. Mar. 31, 2015); *Grinols v. Electoral Coll.*, No. 2:12-cv-02997-MCE-DAD, 2013 WL 2294885, at *5–7 (E.D. Cal. May 23, 2013), *aff'd*, 622 F. App'x 624 (9th Cir. 2015); *Kerchner v. Obama*, 669 F. Supp. 2d 477, 483 n.5 (D.N.J. 2009), *aff'd*, 612 F.3d 204 (3d Cir. 2010); *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1146–47 (N.D. Cal. 2008); *Keyes v. Bowen*, 117 Cal. Rptr. 3d 207, 216 (Cal. Ct. App. 2010); *Strunk v. N.Y. State Bd. of Elections*, No. 6500/11, 2012 WL 1205117, at *11–12 (N.Y. Sup. Ct. Apr. 11, 2012), *aff'd in part, dismissed in part*, 5 N.Y.S.3d 483 (N.Y. App. Div. 2015). As noted above, such inferences are insufficient to establish the requisite clear textual commitment to a coordinate branch of government, *see Baker*, 369 U.S. at 217, and we may not avoid our duty to decide a case merely because it may have political implications, *Zivotofsky*, 566 U.S. at 195–96.

¶121 Moreover, we may not conflate "actions that are textually *committed*" to a coordinate political branch with "actions that are textually *authorized*." *Stillman v. Dep't of Defense*, 209 F. Supp. 2d 185, 202 (D.D.C. 2002), *rev'd on other grounds sub nom.*, *Stillman v. C.I.A.*, 319 F.3d 546 (D.C. Cir. 2003). The Supreme Court has prohibited courts from adjudicating only the former. *Zivotofsky*, 566 U.S. at 195. Absent an affirmative constitutional *commitment*, we cannot abdicate our responsibility to decide a case that is properly before us. *Id.* at 194.

2. Section Three Involves Judicially Discoverable and Manageable Standards

¶122 The question of whether there are judicially discoverable and manageable standards for determining a case is not wholly separate from the question of whether the matter has been textually committed to a coordinate political department. *Nixon*, 506 U.S. at 228. "[T]he lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Id.* at 228–29.

¶123 As we have said, President Trump has not argued before us that Section Three lacks judicially discoverable and manageable standards, and we believe for good reason. Section Three disqualifies from certain delineated offices persons who have "taken an oath . . . to support the Constitution of the United States" as an "officer of the United States" and who have thereafter "engaged in insurrection or rebellion." U.S. Const. amend. XIV, § 3. Although, as we discuss below, the

meanings of some of these terms may not necessarily be precise, we can discern their meanings using "familiar principles of constitutional interpretation" such as "careful examination of the textual, structural, and historical evidence put forward by the parties." *Zivotofsky*, 566 U.S. at 201.

¶124 Indeed, in this and other contexts, courts have readily interpreted the terms that we are being asked to construe and have reached the substantive merits of the cases before them. *See, e.g.*, *United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D.N.C. 1871) (No. 16,079) (defining "engage" as that term is used in Section Three); *United States v. Rhine*, No. 210687 (RC), 2023 WL 2072450, at *8 (D.D.C. Feb. 17, 2023) (defining "insurrection" in the context of ruling on a motion in limine in a criminal prosecution arising out of the events of January 6); *Holiday Inns Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460, 1487 (S.D.N.Y. 1983) (defining "insurrection" in the context of an insurance policy exclusion); *Gitlow v. Kiely*, 44 F.2d 227, 233 (S.D.N.Y. 1930) (defining "insurrection" as that term is used in a section of the U.S. Code), *aff'd*, 49 F.2d 1077 (2d Cir. 1931); *Hearon v. Calus*, 183 S.E. 13, 20 (S.C. 1935) (defining "insurrection" as that term is used in a provision of the South Carolina constitution).

¶125 Accordingly, we conclude that interpreting Section Three does not "turn on standards that defy judicial application." *Zivotofsky*, 566 U.S. at 201 (quoting *Baker*, 369 U.S. at 211). In so concluding, we respectfully disagree with the Michigan

Court of Claims' finding that the interpretation of the terms now before us constitutes a nonjusticiable political question merely because "there are . . . many answers and gradations of answers." *Trump v. Benson*, No. 23000151-MZ, slip op. at 24 (Mich. Ct. Cl. Nov. 14, 2023), *aff'd sub nom. Davis v. Wayne Cnty. Election Comm'n*, No. 368615, 2023 WL 8656163 (Mich. Ct. App. Dec. 14, 2023). In our view, declining to decide an issue simply because it requires us to address difficult and weighty questions of constitutional interpretation would create a slippery slope that could lead to a prohibited dereliction of our constitutional duty to adjudicate cases that are properly before us.

¶126 For these reasons, we conclude that the issues presented here do not, either alone or together, constitute a nonjusticiable political question. We thus proceed to the question of whether Section Three applies to the President.

E. Section Three Applies to the President

¶127 The parties debate the scope of Section Three. The Electors claim that this potential source of disqualification encompasses the President. President Trump argues that it does not, and the district court agreed. On this issue, we reverse the district court.

¶128 Section Three prohibits a person from holding any "office, civil or military, under the United States" if that person, as "an officer of the United States," took an oath "to support the Constitution of the United States" and subsequently

engaged in insurrection. U.S. Const. amend. XIV, § 3. Accordingly, Section Three applies to President Trump only if (1) the Presidency is an "office, civil or military, under the United States"; (2) the President is an "officer of the United States"; and (3) the presidential oath set forth in Article II constitutes an oath "to support the Constitution of the United States." *Id*. We address each point in turn.

1. The Presidency Is an Office Under the United States

¶129 The district court concluded that the Presidency is not an "office, civil or military, under the United States" for two reasons. *Anderson*, ¶¶ 303–04; *see* U.S. Const. amend. XIV, § 3. First, the court noted that the Presidency is not specifically mentioned in Section Three, though senators, representatives, and presidential electors are. The court found it unlikely that the Presidency would be included in a catch-all of "any office, civil or military." *Anderson*, ¶ 304; *see* U.S. Const. amend. XIV, § 3. Second, the court found it compelling that an earlier draft of the Section specifically included the Presidency, suggesting that the drafters intended to omit the Presidency in the version that passed. *See Anderson*, ¶ 303. We disagree with the district court's conclusion, as our reading of both the constitutional text and the historical record counsel that the Presidency is an "office . . . under the United States" within the meaning of Section Three.

¶130 When interpreting the Constitution, we prefer a phrase's normal and ordinary usage over "secret or technical meanings that would not have been

known to ordinary citizens in the founding generation." *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008). Dictionaries from the time of the Fourteenth Amendment's ratification define "office" as a "particular duty, charge or trust conferred by public authority, and for a public purpose," that is "undertaken by . . . authority from government or those who administer it." Noah Webster, An American Dictionary of the English Language 689 (Chauncey A. Goodrich ed., 1853); *see also* 5 Johnson's English Dictionary 646 (J.E. Worcester ed., 1859) (defining "office" as "a publick charge or employment; magistracy"); *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) ("An office is defined to be 'a public charge or employment,' . . . ."). The Presidency falls comfortably within these definitions.

¶131 We do not place the same weight the district court did on the fact that the Presidency is not specifically mentioned in Section Three. It seems most likely that the Presidency is not specifically included because it is so evidently an "office." In fact, no specific *office* is listed in Section Three; instead, the Section refers to "any office, civil or military." U.S. Const. amend. XIV, § 3. True, senators, representatives, and presidential electors are listed, but none of these positions is considered an "office" in the Constitution. Instead, senators and representatives are referred to as "members" of their respective bodies. *See* U.S. Const. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications

of its own Members . . . ."); *id.* at § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."); *id.* at art. II, § 1, cl. 2 ("[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.").

¶132 Indeed, even Intervenors do not deny that the Presidency is an office. Instead, they assert that it is not an office "under the United States." Their claim is that the President and elected members of Congress *are* the government of the United States, and cannot, therefore, be serving "under the United States." *Id.* at amend. XIV, § 3. We cannot accept this interpretation. A conclusion that the Presidency is something other than an office "under" the United States is fundamentally at odds with the idea that all government officials, including the President, serve "we the people." *Id.* at pmbl. A more plausible reading of the phrase "under the United States" is that the drafters meant simply to distinguish those holding federal office from those held "under any State." *Id.* at amend. XIV, § 3.

¶133 This reading of the language of Section Three is, moreover, most consistent with the Constitution as a whole. The Constitution refers to the Presidency as an "Office" twenty-five times. *E.g.*, *id.* at art. I, § 3, cl. 5 ("The Senate shall chuse [sic] their other Officers, and also a President pro tempore, in the Absence of the Vice

President, or when he shall exercise *the Office of President of the United States*." (emphasis added)); *id.* at art. II, § 1, cl. 5 (providing that "[n]o Person except a natural born Citizen . . . shall be eligible to the *Office of President*" and "[t]he executive Power shall be vested in a President of the United States of America [who] shall hold *his Office* during the Term of four Years" (emphases added)). And it refers to an office "under the United States" in several contexts that clearly support the conclusion that the Presidency is such an office.

¶134 Consider, for example, the Impeachment Clause, which reads that Congress can impose, as a consequence of impeachment, a "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States." *Id.* at art. I, § 3, cl. 7. If the Presidency is not an "office . . . under the United States," then anyone impeached—including a President—could nonetheless go on to serve as President. *See id.* This reading is nonsensical, as recent impeachments demonstrate. The Articles of Impeachment brought against both President Clinton and President Trump asked for each man's "removal from office[,] and disqualification to hold and enjoy any office of honor, trust, or profit under the United States." Articles of Impeachment Against William Jefferson Clinton, H. Res. 611, 105th Cong. (Dec. 19, 1998); *see also* Articles of Impeachment Against Donald J. Trump, H. Res. 755, 116th Cong. (Dec. 8, 2019); Articles of Impeachment Against Donald J. Trump, H. Res. 24, 117th Cong. (Jan 13, 2021). Surely the impeaching members of Congress

correctly understood that either man, if convicted and subsequently disqualified from future federal office by the Senate, would be unable to hold the Presidency in the future.

¶135 Similarly, the Incompatibility Clause states that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const. art. I, § 6, cl. 2. To read "office under the United States" to exclude the Presidency would mean that a sitting President could also constitutionally occupy a seat in Congress, a result foreclosed by basic principles of the separation of powers. *See Buckley v. Valeo*, 424 U.S. 1, 124 (1976) ("The principle of separation of powers . . . was woven into the [Constitution] . . . . The further concern of the Framers of the Constitution with maintenance of the separation of powers is found in the so-called 'Ineligibility' and 'Incompatibility' Clauses contained in Art. I, s 6 . . . ."), *superseded by statute on other grounds*, Bipartisan Campaign Reform Act of 2002, 116 Stat. 81, *as recognized in McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

¶136 Finally, the Emoluments Clause provides that "no Person holding any Office of Profit or Trust under [the United States] shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. To read the

Presidency as something other than an office under the United States would exempt the nation's chief diplomat from these protections against foreign influence. But Presidents have long sought dispensation from Congress to retain gifts from foreign leaders, understanding that the Emoluments Clause required them to do so.[14]

¶137 The district court found it compelling that an earlier draft of the proposed Section listed the Presidency, but the version ultimately passed did not. *Anderson*, ¶ 303. As a starting point, however, we are mindful that "it is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process." *Heller*, 554 U.S. at 590. And the specifics of the change from the

[14] *See, e.g.*, H. Rep. No. 23-302, at 1–2 (Mar. 4, 1834) (discussing the receipt of gifts from the Emperor of Morocco and noting that the President's "surrender of the articles to the Government" satisfied the "constitutional provision in relation to their acceptance"); 14 Abridgement of the Debates of Congress from 1789 to 1856, 140–41 (Thomas Hart Benton ed., 6 1860) (displaying (1) a letter from the Secretary of State to the Imaum of Muscat indicating that the President "directed" the Secretary to refuse the Imaum's gifts "under existing constitutional provisions" and (2) a letter from the President requesting that Congress allow him to accept the gifts); An Act to authorize the sale of two Arabian horses, received as a present by the Consul of the United States at Zanzibar, from the Imaum of Muscat, Mar. 1, 1845, 5 Stat. 730 (providing that the President is "authorized" to sell some of the Imaum's gifts and place the proceeds in the U.S. Treasury); Joint Resolution No. 20, A Resolution providing for the Custody of the Letter and Gifts from the King of Siam, Mar. 15, 1862, 12 Stat. 616 (directing the King of Siam's gifts and letters to be placed in "the collection of curiosities at the Department of the Interior").

earlier draft to what was ultimately passed do not demonstrate an intent to exclude the Presidency from the covered offices.

¶138 The draft proposal provided that insurrectionist oath-breakers could not hold "the office of President or Vice President of the United States, Senator or Representative in the national Congress, or any office now held *under appointment from the President of the United States, and requiring the confirmation of the Senate*." Cong. Globe., 39th Cong., 1st Sess. 919 (1866) (emphasis added). Later versions of the Section—including the enacted draft—removed specific reference to the President and Vice President and expanded the category of office-holder to include "any office, civil or military" rather than only those offices requiring presidential appointment and Senate confirmation. *See* U.S. Const. amend. XIV, § 3.

¶139 It is hard to glean from the limited available evidence what the changes across proposals meant. But we find persuasive amici's suggestion that Representative McKee, who drafted these proposals, most likely took for granted that his second proposal included the President. While nothing in Representative McKee's speeches mentions why his express reference to the Presidency was removed, his public pronouncements leave no doubt that his subsequent draft proposal still sought to ensure that rebels had absolutely no access to political power. Representative McKee explained that, under the proposed amendment,

"the loyal alone shall rule the country" and that traitors would be "cut[] off . . . from all political power in the nation." Cong. Globe, 39th Cong., 1st Sess. 2505 (1866); *see also* Mark Graber, *Section Three of the Fourteenth Amendment: Our Questions, Their Answers*, 22–23 (Univ. of Md. Legal Stud. Rsch. Paper No. 2023-16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591133 ("*Our Questions, Their Answers*"); Mark A. Graber, *Punish Treason, Reward Loyalty: The Forgotten Goals of Constitutional Reform After the Civil War* 106, 114 (2023) (indicating that Representative McKee desired to exclude all oath-breaking insurrectionists from all federal offices, including the Presidency). When considered in light of these pronouncements, the shift from specifically naming the President and Vice President in addition to officers appointed and confirmed to the broadly inclusive "any officer, civil or military" cannot be read to mean that the two highest offices in the government are excluded from the mandate of Section Three.

¶140 The importance of the inclusive language—"any officer, civil or military"—was the subject of a colloquy in the debates around adopting the Fourteenth Amendment. Senator Reverdy Johnson worried that the final version of Section Three did not include the office of the Presidency. He stated, "[T]his amendment does not go far enough" because past rebels "may be elected President or Vice President of the United States." Cong. Globe, 39th Cong., 1st Sess. 2899 (1866). So, he asked, "why did you omit to exclude them? I do not understand them to be

excluded from the privilege of holding the two highest offices in the gift of the nation." *Id.* Senator Lot Morrill fielded this objection. He replied, "Let me call the Senator's attention to the words 'or hold any office, civil or military, under the United States.'" *Id.* This answer satisfied Senator Johnson, who stated, "Perhaps I am wrong as to the exclusion from the Presidency; no doubt I am; but I was misled by noticing the specific exclusion in the case of Senators and Representatives." *Id.* This colloquy further supports the view that the drafters of this Amendment intended the phrase "any office" to be broadly inclusive, and certainly to include the Presidency.

¶141 Moreover, Reconstruction-Era citizens—supporters and opponents of Section Three alike—understood that Section Three disqualified oath-breaking insurrectionists from holding the office of the President. *See* Montpelier Daily Journal, Oct. 19, 1868 (writing that Section Three "excludes leading rebels from holding offices . . . from the Presidency downward"). Many supporters of Section Three defended the Amendment on the ground that it would exclude Jefferson Davis from the Presidency. *See* John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. (forthcoming 2023) (manuscript at 7–10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4440157; *see also, e.g.*, *Rebels and Federal Officers*, Gallipolis J., Feb. 21, 1867, at 2 (arguing that foregoing

Section Three would "render Jefferson Davis eligible to the Presidency of the United States," and "[t]here is something revolting in the very thought").

¶142 Post-ratification history includes more of the same. For example, Congress floated the idea of blanket amnesty to shield rebels from Section Three. *See* Vlahoplus, *supra*, (manuscript at 7–9). In response, both supporters and dissenters acknowledged that doing so would allow the likes of Jefferson Davis access to the Presidency. *See id.*; *see also, e.g.*, The Pulaski Citizen, *The New Reconstruction Bill*, Apr. 13, 1871, at 4 (acknowledging as a supporter of amnesty that it would "make even Jeff. Davis eligible again to the Presidency"); The Chicago Tribune, May 24, 1872 (asserting that amnesty would make rebels "eligible to the Presidency of the United States"); Indiana Progress, Aug. 24, 1871 (similar).

¶143 We conclude, therefore, that the plain language of Section Three, which provides that no disqualified person shall "hold any office, civil or military, under the United States," includes the office of the Presidency. This textual interpretation is bolstered by constitutional context and by history surrounding the enactment of the Fourteenth Amendment.

2. The President Is an Officer of the United States

¶144 We next consider whether a President is an "officer of the United States." U.S. Const., amend. XIV, § 3. The district court found that the drafters of Section Three did not intend to include the President within the catch-all phrase "officer

of the United States," and, accordingly, that a current or former President can engage in insurrection and then run for and hold any office. *Anderson*, ¶ 312; *see* U.S. Const., amend. XIV, § 3. We disagree for four reasons.

¶145 First, the normal and ordinary usage of the term "officer of the United States" includes the President. As we have explained, the plain meaning of "office . . . under the United States" includes the Presidency; it follows then that the President is an "officer of the United States." *See Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1372 (Fed. Cir. 2006) (Gajarsa, J., concurring in part) ("An interpretation of the Constitution in which the holder of an 'office' is not an 'officer' seems, at best, strained."). Indeed, Americans have referred to the President as an "officer" from the days of the founding. *See, e.g.*, The Federalist No. 69 (Alexander Hamilton) ("The President of the United States would be an officer elected by the people . . . ."). And many nineteenth-century presidents were described as, or called themselves, "chief executive officer of the United States." *See* Vlahoplus, *supra* (manuscript at 17–18) (listing presidents).

¶146 Second, Section Three's drafters and their contemporaries understood the President as an officer of the United States. *See* Graber, *Our Questions, Their Answers*, *supra*, at 18–19 (listing instances); *see also* Cong. Globe, 39th Cong., 1st Sess. 915 (1866) (referring to the "chief executive officer of the country"); *The Floyd Acceptances*, 74 U.S. 666, 676–77 (1868) ("We have no *officers* in this government,

from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority." (emphases added)).

¶147 President Trump concedes as much on appeal, stating that "[t]o be sure, the President is an officer." He argues, however, that the President is an officer of the Constitution, not an "officer of the United States," which, he posits, is a constitutional term of art. Further, at least one amicus contends that the above-referenced historical uses referred to the President as an officer only in a "colloquial sense," and thus have no bearing on the term's use in Section Three. We disagree.

¶148 The informality of these uses is exactly the point: If members of the Thirty-Ninth Congress and their contemporaries all used the term "officer" according to its ordinary meaning to refer to the President, we presume this is the same meaning the drafters intended it to have in Section Three. We perceive no persuasive contemporary evidence demonstrating some other, technical term-of-art meaning. And in the absence of a clear intent to employ a technical definition for a common word, we will not do so. *See Heller*, 554 U.S. at 576 (explaining that the "normal and ordinary as distinguished from technical meaning" should be favored (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931))).

¶149 We also find Attorney General Stanbery's opinions on the meaning of Section Three significant. In one opinion on the subject, Stanbery explained that

the term "'officer of the United States,' within [Section Three] . . . is used in its most general sense, and without any qualification, as legislative, or executive, or judicial." The Reconstruction Acts, 12 Op. Att'y. Gen. 141, 158 (1867) ("*Stanbery I*"). And in a second opinion on the topic, he observed that the term "Officers of the United States" includes "without limitation" any "person who has at any time prior to the rebellion held any office, civil or military, under the United States, and has taken an official oath to support the Constitution of the United States." The Reconstruction Acts, 12 Op. Att'y. Gen. 182, 203 (1867) ("*Stanbery II*").

¶150 Third, the structure of Section Three persuades us that the President is an officer of the United States. The first half of Section Three describes the offices protected and the second half addresses the parties barred from holding those protected offices. There is a parallel structure between the two halves: "Senator or Representative in Congress" (protected office) corresponds to "member of Congress" (barred party); "any office . . . under the United States" (protected office) corresponds to "officer of the United States" (barred party); and "any office . . . under any State" (protected office) also has a corresponding barred party in "member of any State legislature, or as an executive or judicial officer of any State." U.S. Const. amend. XIV, § 3. The only term in the first half of Section Three that has no corresponding officer or party in the second half is "elector of President and Vice President," which makes sense because electors do not take

constitutionally mandated oaths so they have no corresponding barred party. *Id.*; *see also id.* at art. II, § 1 (discussing a presidential elector's duties without reference to an oath); *id.* at art. VI (excluding presidential electors from the list of positions constitutionally obligated to take an oath to support the Constitution). Save electors, there is a perfect parallel structure in Section Three. *See* Baude & Paulsen, *supra* (manuscript at 106).

¶151 Fourth, the clear purpose of Section Three—to ensure that disloyal officers could never again play a role in governing the country—leaves no room to conclude that "officer of the United States" was used as a term of art. *Id.* The drafters of Section Three were motivated by a sense of betrayal; that is, by the existence of a broken oath, not by the type of officer who broke it: "[A]ll of us understand the meaning of the third section," Senator John Sherman stated, "[it includes] those men who have once taken an oath of office to support the Constitution of the United States and have violated that oath in spirit by taking up arms against the Government of the United States are to be deprived for a time at least of holding office . . . ." Cong. Globe, 39th Cong., 1st Sess. 2899 (1866); *see also id.* at 2898 (Senator Thomas Hendricks of Indiana, who opposed the Fourteenth Amendment, agreeing that "the theory" of Section Three was "that persons who have violated the oath to support the Constitution of the United States ought not to be allowed to hold any office."); *id.* at 3035–36 (Senator John B. Henderson

explaining that "[t]he language of this section is so framed as to disfranchise from office . . . the leaders of any rebellion hereafter to come."); *Powell*, 27 F. Cas. at 607 (summarizing the purpose of Section Three: "[T]hose who had been once trusted to support the power of the United States, and proved false to the trust reposed, ought not, as a class, to be entrusted with power again until congress saw fit to relieve them from disability."). A construction of Section Three that would nevertheless *allow* a former President who broke his oath, not only to participate in the government again but to run for and hold the highest office in the land, is flatly unfaithful to the Section's purpose.

¶152 We therefore conclude that "officer of the United States," as used in Section Three, includes the President.

3. The Presidential Oath Is an Oath to Support the Constitution

¶153 Finally, we consider whether the oath taken by the President to "preserve, protect and defend the Constitution," U.S. Const. art. II, § 1, cl. 8, is an oath "to support the Constitution of the United States," *id.* at amend. XIV, § 3. The district court found that, because the presidential oath's language is more particular than the oath referenced in Section Three, the drafters did not intend to include former Presidents. *Anderson*, ¶ 313. We disagree.

¶154 Article VI of the Constitution provides that "all executive and judicial Officers . . . of the United States . . . shall be bound by Oath or Affirmation, to

support this Constitution."[15] U.S. Const. art. VI, cl. 3. Article II specifies that the President shall swear an oath to "preserve, protect and defend the Constitution." *Id.* at art. II, § 1, cl. 8. Intervenors contend that because the Article II oath does not include a pledge to "support" the Constitution, an insurrectionist President cannot be disqualified from holding future office under Section Three on the basis of that oath.

¶155 This argument fails because the President is an "executive . . . Officer[]" of the United States under Article VI, albeit one for whom a more specific oath is prescribed. *Id.* at art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ."). This conclusion follows logically from the accepted fact that the Vice President is also an executive officer. True, the Vice President takes the more general oath prescribed by federal law, *see* 5 U.S.C. § 3331 (noting that anyone "except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take" an oath including a pledge to "support and defend the Constitution"),

[15] Article VI, however, does not provide any specific form of oath or affirmation.

but it makes no sense to conclude that the Vice President is an executive officer under Article VI but the President is not.

¶156 The language of the presidential oath—a commitment to "preserve, protect, and defend the Constitution"—is consistent with the plain meaning of the word "support." U.S. Const. art. II, § 1, cl. 8. Modern dictionaries define "support" to include "defend" and vice versa. *See, e.g.*, *Support*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/*support* [https://perma.cc/WGH6-D8KU] (defining "support" as "to uphold or defend as valid or right"); *see also Defend,* at *id.*, https://www.merriam-webster.com/dictionary/*defend* [https://perma.cc/QXQ7-LRKX] (defining "defend" as "to maintain or support in the face of argument or hostile criticism"). So did dictionaries from the time of Section Three's drafting. *See, e.g.*, Samuel Johnson, A Dictionary of the English Language (5th ed. 1773) ("defend": "to stand in defense of; to protect; to support"); Noah Webster, An American Dictionary of the English Language 271 (Chauncey A. Goodrich, ed., 1857) ("defend": "to support or maintain").

¶157 The specific language of the presidential oath does not make it anything other than an oath to support the Constitution. Indeed, as one Senator explained just a few years before Section Three's ratification, "the language in [the presidential] oath of office, that he shall protect, support [sic], and defend the Constitution, makes his obligation more emphatic and more obligatory, if possible,

than ours, which is simply to support the Constitution." Cong. Globe, 37th Cong., 3d Sess. 89 (1862). And, in fact, several nineteenth-century Presidents referred to the presidential oath as an oath to "support" the Constitution. *See* James D. Richardson, A Compilation of the Messages and Papers of the Presidents, 1789–1897, Vol. 1 at 232, 467 (Adams, Madison), Vol. 2 at 625 (Jackson), Vol. 8 at 381 (Cleveland).

¶158 In sum, "[t]he simplest and most obvious interpretation of a Constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption." *Lake County v. Rollins*, 130 U.S. 662, 671 (1889). The most obvious and sensible reading of Section Three, supported by text and history, leads us to conclude that (1) the Presidency is an "office under the United States," (2) the President is an "officer . . . of the United States," and (3) the presidential oath under Article II is an oath to "support" the Constitution.

¶159 President Trump asks us to hold that Section Three disqualifies every oath-breaking insurrectionist *except the most powerful one* and that it bars oath-breakers from virtually every office, both state and federal, *except the highest one in the land*. Both results are inconsistent with the plain language and history of Section Three.

¶160 We therefore reverse the district court's finding that Section Three does not apply to a President and conclude that Section Three bars President Trump from

holding the office of the President if its other provisions are met; namely, if President Trump "engaged in insurrection." U.S. Const. amend. XIV, § 3.

¶161 Before addressing the district court's findings that President Trump engaged in insurrection, however, we consider President Trump's challenge to the admissibility of a congressional report on which the district court premised some of its findings.

F. The District Court Did Not Err in Admitting Portions of the January 6 Report

¶162 President Trump asserts that the district court wrongly admitted into evidence thirty-one findings from a congressional report drafted by the Select Committee to Investigate the January 6th Attack on the U.S. Capitol ("the Committee"), which recounted the Committee's investigation of the facts, circumstances, and causes of the attack on the Capitol. *See* H.R. Rep. No. 117-663 (Dec. 22, 2022) ("the Report"). In President Trump's view, the Report is an untrustworthy, partisan political document and therefore constituted inadmissible hearsay under Rule 803(8)(C) of the Colorado Rules of Evidence. We are unpersuaded. Under the deferential standard of review that governs, we perceive no error by the district court in admitting portions of the Report into evidence at trial.

¶163 We review a district court's evidentiary rulings for an abuse of discretion. *Zapata v. People*, 2018 CO 82, ¶ 25, 428 P.3d 517, 524. "A court abuses its discretion

only if its decision is 'manifestly arbitrary, unreasonable, or unfair.'" *Churchill v. Univ. of Colo. at Boulder*, 2012 CO 54, ¶ 74, 285 P.3d 986, 1008 (quoting *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 899 (Colo. 2008)). We may not consider "whether we would have reached a different result," but only "whether the trial court's decision fell within a range of reasonable options." *Id.* (quoting *E-470 Pub. Highway Auth. v. Revenig*, 140 P.3d 227, 230–31 (Colo. App. 2006)).

¶164 Hearsay statements are out-of-court statements offered in court for the truth of the matter asserted. CRE 801(c). Such statements are generally inadmissible, CRE 802, but CRE 803(8) creates an exception for "reports . . . of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law." This exception, however, applies only if the report is trustworthy. *Id.*

¶165 The Federal Rules of Evidence (on which our evidentiary rules were modeled) contain a near-identical exception to Colorado Rule 803(8), *see* Fed. R. Evid. 803(8), so we may look to federal case law interpreting the federal rule for guidance on how to assess trustworthiness, *see Garcia v. Schneider Energy Servs., Inc.*, 2012 CO 62, ¶ 10, 287 P.3d 112, 115 (noting that, although we are "not bound to interpret our rules . . . the same way the United States Supreme Court has interpreted its rules, we do look to the federal rules and federal decisions

interpreting those rules for guidance"); *Harding Glass Co. v. Jones*, 640 P.2d 1123, 1125 n.3 (Colo. 1982) ("[C]ase law interpreting the federal rule is persuasive in analysis of the Colorado rule."). Under federal law, courts are instructed to "assume[] admissibility in the first instance." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988). Thus, "the party challenging the admissibility of a public or agency report . . . bears the burden of demonstrating that the report is not trustworthy." *Barry v. Trs. of Int'l Ass'n*, 467 F. Supp. 2d 91, 96 (D.D.C. 2006). The federal courts have also identified four non-exclusive factors to help courts determine trustworthiness: "(1) the timeliness of the investigation; (2) the special skill or expertise of the investigating official; (3) whether a hearing was held and the level at which it was conducted; and (4) possible motivation problems." *Id.* at 97; *see Beech Aircraft*, 488 U.S. at 167 n.11.

¶166 The district court employed the foregoing presumption and four factors to analyze the Report.[16] The court determined that "the first three *Barry* factors weigh

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[16] We also review a district court's trustworthiness analysis for an abuse of discretion. *See United States v. Versaint*, 849 F.2d 827, 831–32 (3d Cir. 1988) ("Under [Fed. R. Evid. 803(8)], this Court must decide whether the district court abused its discretion by '[g]iving undue weight to trustworthiness factors of slight relevance while disregarding factors more significant.'"(quoting *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 266 (3d Cir. 1983))); *Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19, 22 (6th Cir. 1984) ("Rule 803(8)(C) also requires that the report not be subject to circumstances indicating a lack of trustworthiness. This determination is within the discretion of the trial court."); *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 821–22 (10th Cir. 1981) ("We believe that 'the trial court

strongly in favor of reliability." *Anderson*, ¶ 24. President Trump focuses his admissibility challenge on the fourth factor: "possible motivation problems." *Barry*, 467 F. Supp. 2d at 97.

¶167 First, President Trump claims the Report was biased against him because all nine Committee members voted in favor of impeaching him before their investigation began. Timothy Heaphy, Chief Investigative Counsel for the Committee, testified at trial, however, that although members "certainly had . . . hypotheses that were a starting point," such hypotheses did not impair the members' ability to be fair and impartial. *Anderson*, ¶ 26. The district court found "Mr. Heaphy's testimony on this subject to be credible and h[eld] that any perceived animus of the committee members towards [President] Trump did not taint the conclusions of the January 6th Report in such a way that would render them unreliable." *Id.* We see no abuse of discretion. *See People v. Pitts*, 13 P.3d 1218, 1221 (Colo. 2000) ("It is the function of the trial court, and not the reviewing court, to weigh evidence and determine the credibility of the witnesses.").

¶168 Second, President Trump believes that the political backdrop against which the Report was created makes it unreliable. This argument proves too much. All

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is the first and best judge of whether tendered evidence meets th[at] standard of trustworthiness and reliability . . .' and [w]e cannot say the trial court abused its discretion by refusing to admit the report." (quoting *Franklin v. Skelly Oil Co.*, 141 F.2d 568, 572 (10th Cir. 1944))).

congressional reports contain some level of political motivation, yet neither CRE 803(8) nor the corresponding federal rule declares such reports per se inadmissible; instead, as the district court explained, a court is at liberty to admit what it deems trustworthy. *See Anderson*, ¶ 28; *see, e.g.*, *Barry*, 467 F. Supp. 2d at 101 (admitting report from a Senate investigation); *Mariani v. United States*, 80 F. Supp. 2d 352, 361 (M.D. Pa. 1999) (admitting minority report from a Congressional investigation); *Hobson v. Wilson*, 556 F. Supp. 1157, 1183 (D.D.C. 1982) (admitting Congressional Committee report), *aff'd in part, rev'd in part*, 737 F.2d 1 (D.C. Cir. 1984).

¶169 Third, President Trump asserts that because Democrats outnumbered Republicans seven to two on the Committee, the Report's findings are necessarily biased. The district court determined that although the Report "would have further reliability had there been greater Republican participation," that deficit did not demonstrate "motivation problems." *Anderson*, ¶¶ 29–30. The district court observed that House Republicans opted to boycott the Committee after then-Speaker of the House Nancy Pelosi agreed to seat only three of the five Republicans recommended to her. *Id.* at ¶ 30. Despite then-Speaker Pelosi's "unprecedented" move, *id.*, the district court noted that "the two Republicans who did sit . . . were both duly elected Republicans," *id.* at ¶ 31; "[t]he investigative staff included . . . many Republican[]" lawyers, *id.* at ¶ 32; "the staffing decisions did

not include any inquiry into political affiliation," *id.*; and "[t]he overwhelming majority of witnesses . . . were [President] Trump administration officials and Republicans," *id.* at ¶ 33. The court reasoned that "[t]hese facts all cut against Intervenors' argument that lack of participation of the minority party resulted in . . . unreliable conclusions." *Id.* at ¶ 34.

¶170 Again, we perceive no abuse of discretion. CRE 803(8) assumes admissibility, *Barry*, 467 F. Supp. 2d at 96, and President Trump has not met his burden of demonstrating that, contrary to the evidence the district court highlighted, the Report suffered from motivation problems. *See id.* Moreover, we remain mindful that this is a four-factor inquiry. No single factor is dispositive. Instead, any perceived shortcomings as to one must be weighed against the strengths of the others. Whatever the "possible motivation problems," the weight of the other three factors remains. As the district court explained, (1) passage of time does not impugn the Report, as the investigation began six months after the attack and was completed in under two years; (2) the investigative staff consisted of highly skilled lawyers, including two former U.S. Attorneys; and (3) there was a formal ten-day hearing in which seventy witnesses testified under oath. *Anderson*, ¶ 24. So, not only was the court's analysis of the fourth factor reasonable, but it also did not abuse its discretion in reaching its broader conclusion that the Report was trustworthy.

¶171 President Trump nonetheless argues that, even if the Report is generally admissible under the CRE 803(8) exception, there were eleven admitted findings within the Report that remained independently inadmissible. Even if the general admissibility of the Report does not necessarily give a green light to multiple layers of hearsay, we conclude that only two of the eleven challenged findings constituted hearsay within hearsay.[17] And even if there was error in admitting those findings, neither is of sufficient consequence to warrant reversal. *See Liggett v. People*, 135 P.3d 725, 733 (Colo. 2006) (explaining that, under harmless error review, we will reverse only if, viewing the evidence as a whole, the error substantially influenced the outcome or impaired the fairness of the trial and that,

[17] The nine remaining statements fall into three categories: statements made (1) by President Trump, (2) to President Trump, and (3) by his supporters during chants. First, President Trump's own statements are not hearsay under the party-opponent rule. *See* CRE 801(d)(2)(A). Second, various statements made to President Trump on January 6 are not hearsay because they were offered to show the statements' effect on the listener (i.e., that President Trump had knowledge of certain issues). *See* CRE 801(c); *People v. Vanderpauye*, 2023 CO 42 ¶ 21 n.4, 530 P.3d 1214, 1221 n.4 (accepting that a "statement was not hearsay because it was offered for its effect on the listener . . . not for the truth of the matter asserted"). Third, chants by President Trump's supporters were not offered to prove the truth of the chants, but simply to establish that the statements were made. That is not hearsay. CRE 801(c); *see People v. Dominguez*, 2019 COA 78 ¶ 20, 454 P.3d 364, 369 (stating that "verbal acts aren't hearsay" because such a statement is "offered not for its truth, but to show that it was made"). Thus, none of the findings in these three classes constitutes hearsay within the Report.

"[i]n the context of a bench trial, the prejudicial effect of improperly admitted evidence is generally presumed innocuous").

¶172 First, the Report cited a newspaper article stating that the election was called for President Biden. Although this is hearsay, the district court did not rely on the statement in its analysis, so President Trump was not prejudiced by any error in admitting this statement. *See Raile v. People*, 148 P.3d 126, 136 (Colo. 2006) ("[T]here is no reasonable probability that Raile was prejudiced by the admission of the statements; thus, the trial court's error was harmless.").

¶173 Second, the Report explained that Chief of Staff Mark Meadows told White House Counsel Pat Cipollone that President Trump "doesn't want to do anything" to stop the violence. H.R. Rep. No. 117 663, at 110. The fact that this statement is hearsay is irrelevant: The district court expressly noted that "it has only considered those portions of the January 6th Report which are referenced in this Order and has considered no other portions in reaching its decision," *Anderson*, ¶ 38, and it did not mention this statement in its order, nor did it rely on it to reach any conclusions. Thus, President Trump's embedded hearsay argument is unavailing.

¶174 For these reasons, we conclude that the district court did not abuse its discretion by admitting portions of the Report into evidence.

¶175 We now consider the district court's findings that President Trump "engaged in" an "insurrection" within the meaning of Section Three.

G. President Trump Engaged in Insurrection

¶176 President Trump challenges the district court's findings that he "engaged in" an "insurrection." The Constitution leaves these terms undefined. Therefore, we must make a legal determination regarding what the drafters and ratifiers meant when they chose to deploy these words in Section Three. Mindful of the deferential standard of review afforded a district court's factual findings, we conclude that the district court did not clearly err in concluding that the events of January 6 constituted an insurrection and that President Trump engaged in that insurrection.

1. Standard of Review

¶177 As a general matter, we review findings of fact under either a clear error or abuse of discretion standard, and we review legal conclusions de novo. *E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 22 (Colo. 2000); *accord State ex rel. Weiser v. Ctr. for Excellence in Higher Educ., Inc.*, 2023 CO 23, ¶ 33, 529 P.3d 599, 607. When, however, the issue before an appellate court presents a mixed question of law and fact, Colorado courts have taken different approaches, depending on the circumstances. *455 Co.*, 3 P.3d at 22. For example, courts have sometimes treated the ultimate conclusion as one of fact and applied the clear error standard. *Id.* In other cases, courts have concluded that a mixed question of law and fact mandates de novo review. *Id.* And when a trial court made evidentiary findings of fact in

support of its application of a legal principle from another jurisdiction, we have found it appropriate to conduct an abuse of discretion review of the evidentiary factual findings supporting the legal conclusion and a de novo review of the legal conclusion itself. *Id.* at 23.

¶178 For our purposes here, where we are called on to review the district court's construction of certain terms used in Section Three to the facts established by the evidence, we will review the district court's factual findings for clear error and its legal conclusions de novo.

2. "Insurrection"

¶179 Dictionaries (both old and new), the district court's order, and the briefing by the parties and the amici curiae suggest several definitions of the word "insurrection."

¶180 For example, Noah Webster's dictionary from 1860 defined "insurrection" as:

> A rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state. It is equivalent to SEDITION, except that *sedition* expresses a less extensive rising of citizens. It differs from REBELLION, for the latter expresses a revolt, or an attempt to overthrow the government, to establish a different one, or to place the country under another jurisdiction.

Noah Webster, An American Dictionary of the English Language 613 (1860); *accord* John Bouvier, A Law Dictionary Adapted to the Constitution and Laws of

the United States of America and of the Several States to the American Union (6th ed. 1856), available at https://wzukusers.storage.googleapis.com/user-32960741/documents/5ad525c314331myoR8FY/1856_bouvier_6.pdf [https://perma.cc/PXK4-M75N] (defining "insurrection" as "[a] rebellion of citizens or subjects of a country against its government").

¶181 Webster's Third New International Dictionary defines "insurrection" as "an act or instance of revolting against civil or political authority or against an established government" or "an act or instance of rising up physically." *Insurrection*, Webster's Third New International Dictionary (2002).

¶182 In light of these and other proffered definitions, the district court concluded that "an insurrection as used in Section Three is (1) a public use of force or threat of force (2) by a group of people (3) to hinder or prevent execution of the Constitution of the United States." *Anderson*, ¶ 240.

¶183 Finally, we note that at oral argument, President Trump's counsel, while not providing a specific definition, argued that an insurrection is more than a riot but less than a rebellion. We agree that an insurrection falls along a spectrum of related conduct. *See The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 666 (1862) ("Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government."); *Case of Davis*, 7 F. Cas. 63, 96 (C.C.D. Va.

1871) (No. 3,621a) ("Although treason by levying war, in a case of civil war, may involve insurrection or rebellion, and they are usually its first stages, they do not necessarily reach to the actual levying of war."); 77 C.J.S. *Riot; Insurrection* § 36, Westlaw (database updated August 2023) ("Insurrection is distinguished from rout, riot, and offenses connected with mob violence by the fact that, in insurrection, there is an organized and armed uprising against authority or operations of government, while crimes growing out of mob violence, however serious they may be and however numerous the participants, are simply unlawful acts in disturbance of the peace which do not threaten the stability of the government or the existence of political society."). But we part company with him when he goes one step further. No authority supports the position taken by President Trump's counsel at oral argument that insurrectionary conduct must involve a particular length of time or geographic location.

¶184 Although we acknowledge that these definitions vary and some are arguably broader than others, for purposes of deciding this case, we need not adopt a single, all-encompassing definition of the word "insurrection." Rather, it suffices for us to conclude that any definition of "insurrection" for purposes of Section Three would encompass a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish a peaceful transfer of power in this country.

The required force or threat of force need not involve bloodshed, nor must the dimensions of the effort be so substantial as to ensure probable success. *In re Charge to Grand Jury*, 62 F. 828, 830 (N.D. Ill. 1894). Moreover, although those involved must act in a concerted way, they need not be highly organized at the insurrection's inception. *See Home Ins. Co. of N.Y. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954) ("[A]t its inception an insurrection may be a pretty loosely organized affair. . . . It may start as a sudden surprise attack upon the civil authorities of a community with incidental destruction of property by fire or pillage, even before the military forces of the constituted government have been alerted and mobilized into action to suppress the insurrection.").

¶185 The question thus becomes whether the evidence before the district court sufficiently established that the events of January 6 constituted a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish the peaceful transfer of power in this country. We have little difficulty concluding that substantial evidence in the record supported each of these elements and that, as the district court found, the events of January 6 constituted an insurrection.

¶186 It is undisputed that a large group of people forcibly entered the Capitol and that this action was so formidable that the law enforcement officers onsite could not control it. Moreover, contrary to President Trump's assertion that no evidence

in the record showed that the mob was armed with deadly weapons or that it attacked law enforcement officers in a manner consistent with a violent insurrection, the district court found—and millions of people saw on live television, recordings of which were introduced into evidence in this case—that the mob was armed with a wide array of weapons. *See Anderson*, ¶ 155. The court also found that many in the mob stole objects from the Capitol's premises or from law enforcement officers to use as weapons, including metal bars from the police barricades and officers' batons and riot shields and that throughout the day, the mob repeatedly and violently assaulted police officers who were trying to defend the Capitol. *Id.* at ¶¶ 156–57. The fact that actual and threatened force was used that day cannot reasonably be denied.

¶187 Substantial evidence in the record further established that this use of force was concerted and public. As the district court found, with ample record support, "The mob was coordinated and demonstrated a unity of purpose . . . . They marched through the [Capitol] building chanting in a manner that made clear they were seeking to inflict violence against members of Congress and Vice President Pence." *Id.* at ¶ 243. And upon breaching the Capitol, the mob immediately pursued its intended target—the certification of the presidential election—and reached the House and Senate chambers within minutes of entering the building. *Id.* at ¶ 153.

¶188 Finally, substantial evidence in the record showed that the mob's unified purpose was to hinder or prevent Congress from counting the electoral votes as required by the Twelfth Amendment and from certifying the 2020 presidential election; that is, to preclude Congress from taking the actions necessary to accomplish a peaceful transfer of power. As noted above, soon after breaching the Capitol, the mob reached the House and Senate chambers, where the certification process was ongoing. *Id.* This breach caused both the House and the Senate to adjourn, halting the electoral certification process. In addition, much of the mob's ire—which included threats of physical violence—was directed at Vice President Pence, who, in his role as President of the Senate, was constitutionally tasked with carrying out the electoral count. *Id.* at ¶¶ 163, 179–80; *see* U.S. Const. art. I, § 3, cl. 4; *id.* at art. II, § 1, cl. 3. As discussed more fully below, these actions were the product of President Trump's conduct in singling out Vice President Pence for refusing President Trump's demand that the Vice President decline to carry out his constitutional duties. *Anderson*, ¶¶ 148, 170, 172–73.

¶189 In short, the record amply established that the events of January 6 constituted a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish the peaceful transfer of power in this country. Under any viable

definition, this constituted an insurrection, and thus we will proceed to consider whether President Trump "engaged in" this insurrection.

3. "Engaged In"

¶190 Dictionaries, historical evidence, and case law all shed light on the meaning of "engaged in," as that phrase is used in Section Three.

¶191 Noah Webster's dictionary from 1860 defined "engage" as "to embark in an affair." Noah Webster, An American Dictionary of the English Language 696 (1860). Similarly, Webster's Third New International Dictionary defines "engage" as "to begin and carry on an enterprise" or "to take part" or "participate." *Engage*, Webster's Third New International Dictionary (2002). And Merriam-Webster defines "engage" as including both "to induce to participate" and "to do or take part in something." *Engage*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/engage [https://perma.cc/7JDM-4XSB].

¶192 Attorney General Stanbery's opinions on the meaning of "engage," which he issued at the time the Fourteenth Amendment was being debated, are in accord with these historical and modern definitions. Attorney General Stanbery opined that a person may "engage" in insurrection or rebellion "without having actually levied war or taken arms." *Stanbery I*, 12 Op. Att'y Gen. at 161. Thus, in Attorney General Stanbery's view, when individuals acting in their official capacities act "in

the furtherance of the common unlawful purpose" or do "any overt act for the purpose of promoting the rebellion," they have "engaged" in insurrection or rebellion for Section Three disqualification purposes. *Id.* at 161–62; *see also Stanbery II*, 12 Op. Att'y. Gen. at 204 (defining "engaging in rebellion" to require "an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose"). Accordingly, "[d]isloyal sentiments, opinions, or sympathies would not disqualify; but when a person has, by speech or by writing, incited others to engage in rebellion, [h]e must come under the disqualification." *Stanbery II*, 12 Op. Att'y. Gen. at 205; *accord Stanbery I*, 12 Op. Att'y Gen. at 164.

¶193 Turning to case law construing the meaning of "engaged in" for purposes of Section Three, although we have found little precedent directly on point, cases concerning treason that had been decided by the time the Fourteenth Amendment was ratified provide some insight into how the drafters of the Fourteenth Amendment would have understood the term "engaged in." For example, in *Ex parte Bollman*, 8 U.S. 75, 126 (1807), Chief Justice Marshall explained that "if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." In other words, an individual need not directly

participate in the overt act of levying war or insurrection for the law to hold him accountable as if he had:

> [I]t is not necessary to prove that the individual accused, was a direct, personal actor in the violence. If he was present, directing, aiding, abetting, counselling, or countenancing it, he is in law guilty of the forcible act. Nor is even his personal presence indispensable. Though he be absent at the time of its actual perpetration, yet if he directed the act, devised or knowingly furnished the means, for carrying it into effect, instigating others to perform it, he shares their guilt. In treason there are no accessories.

In re Charge to Grand Jury-Treason, 30 F. Cas. 1047, 1048 (C.C.E.D. Pa. 1851).

¶194 We find the foregoing definitions and authorities to be generally consistent, and we believe that the definition adopted and applied by the district court is supported by the plain meaning of the term "engaged in," as well as by the historical authorities discussed above. Accordingly, like the district court, we conclude that "engaged in" requires "an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose." *Anderson*, ¶ 254.

¶195 In so concluding, we hasten to add that we do not read "engaged in" so broadly as to subsume mere silence in the face of insurrection or mere acquiescence therein, at least absent an affirmative duty to act. Rather, as Attorney General Stanbery observed, "The force of the term to *engage* carries the idea of active rather than passive conduct, and of voluntary rather than compulsory action." *Stanbery I*, 12 Op. Att'y Gen. at 161; *see also* Baude & Paulsen, *supra* (manuscript at 67) (noting that "passive acquiescence, resigned acceptance,

silence, or inaction is not typically enough to have 'engaged in' insurrection or rebellion . . . [unless] a person possesses an affirmative duty to speak or act").

¶196 The question remains whether the record supported the district court's finding that President Trump engaged in the January 6 insurrection by acting overtly and voluntarily with the intent of aiding or furthering the insurrectionists' common unlawful purpose. Again, mindful of our applicable standard of review, we conclude that it did, and we proceed to a necessarily detailed discussion of the evidence to show why this is so.

¶197 Substantial evidence in the record showed that even before the November 2020 general election, President Trump was laying the groundwork for a claim that the election was rigged. For example, at an August 17, 2020 campaign rally, he said that "the only way we're going to lose this election is if the election is rigged." *Anderson*, ¶ 88. Moreover, when asked at a September 23, 2020 press briefing whether he would commit to a peaceful transfer of power after the election, President Trump refused to do so. *Id.* at ¶ 90.

¶198 President Trump then lost the election, and despite the facts that his advisors repeatedly advised him that there was no evidence of widespread voter fraud and that no evidence showed that he himself believed the election was wrought with fraud, President Trump ramped up his claims that the election was stolen from him and undertook efforts to prevent the certification of the election

results. For example, in a December 13, 2020 tweet, he stated, "Swing States that have found massive VOTER FRAUD, which is all of them, CANNOT LEGALLY CERTIFY these votes as complete & correct without committing a severely punishable crime." *Id.* at ¶ 101. And President Trump sought to overturn the election results by directly exerting pressure on Republican officeholders in various states. *Id.* at ¶ 103.

¶199 On this point, and relevant to President Trump's intent in this case, many of the state officials targeted by President Trump's efforts were subjected to a barrage of harassment and violent threats by his supporters. *Id.* at ¶ 104. President Trump was well aware of these threats, particularly after Georgia election official Gabriel Sterling issued a public warning to President Trump to "stop inspiring people to commit potential acts of violence" or "[s]omeone's going to get killed." *Id.* President Trump responded by retweeting a video of Sterling's press conference with a message repeating the very rhetoric that Sterling warned would result in violence. *Id.* at ¶ 105.

¶200 And President Trump continued to fan the flames of his supporters' ire, which he had ignited, with ongoing false assertions of election fraud, propelling the "Stop the Steal" movement and cross-country rallies leading up to January 6. *Id.* at ¶ 106. Specifically, between Election Day 2020 and January 6, Stop the Steal organizers held dozens of rallies around the country, proliferating President

Trump's election disinformation and recruiting attendees, including members of violent extremist groups like the Proud Boys, the Oath Keepers, and the Three Percenters, QAnon conspiracy theorists, and white nationalists, to travel to Washington, D.C. on January 6. *Id.* at ¶ 107.

¶201 Stop the Steal leaders also joined two "Million MAGA Marches" in Washington, D.C. on November 14, 2020, and December 12, 2020. *Id.* at ¶ 108. Again, as relevant to President Trump's intent here, after the November rally turned violent, President Trump acknowledged the violence but justified it as self-defense against "ANTIFA SCUM." *Id.* at ¶ 109.

¶202 With full knowledge of these sometimes-violent events, President Trump sent the following tweet on December 19, 2020, urging his supporters to travel to Washington, D.C. on January 6: "Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6. Be there, will be wild!" *Id.* at ¶ 112.

¶203 At this point, the record established that President Trump's "plan" was that when Congress met to certify the election results on January 6, Vice President Pence could reject the true electors who voted for President Biden and certify a slate of fake electors supporting President Trump or he could return the slates to the states for further proceedings. *Id.* at ¶ 113.

¶204 Far right extremists and militias such as the Proud Boys, the Oath Keepers, and the Three Percenters viewed President Trump's December 19, 2020 tweet as a

"call to arms," and they began to plot activities to disrupt the January 6 joint session of Congress. *Id.* at ¶ 117. In the meantime, President Trump repeated his invitation to come to Washington, D.C. on January 6 at least twelve times. *Id.* at ¶ 118.

¶205 On December 26, 2020, President Trump tweeted:

> If a Democrat Presidential Candidate had an Election Rigged & Stolen, with proof of such acts at a level never seen before, the Democrat Senators would consider it an act of war, and fight to the death. Mitch [McConnell] & the Republicans do NOTHING, just want to let it pass. NO FIGHT!

Id. at ¶ 121.

¶206 And on January 1, 2021, President Trump retweeted a post from Kylie Jane Kremer, an organizer of the scheduled January 6 March for Trump, that stated, "The calvary [sic] is coming, Mr. President! JANUARY 6 |Washington, D.C." President Trump added to his retweet, "A great honor!" *Id.* at ¶ 119.

¶207 The foregoing evidence established that President Trump's messages were a call to his supporters to fight and that his supporters responded to that call. Further supporting such a conclusion was the fact that multiple federal agencies, including the Secret Service, identified significant threats of violence in the days leading up to January 6. *Id.* at ¶ 123. These threats were made openly online, and they were widely reported in the press. *Id.* Agency threat assessments thus stated

that domestic violent extremists planned for violence on January 6, with weapons including firearms and enough ammunition to "win a small war." *Id.*

¶208 Along the same lines, the Federal Bureau of Investigation received many tips regarding the potential for violence on January 6. *Id.* at ¶ 124. One tip said:

> They think they will have a large enough group to march into DC armed and will outnumber the police so they can't be stopped . . . . They believe that since the election was "stolen" it's their constitutional right to overtake the government and during this coup no U.S. laws apply. Their plan is to literally kill. Please, please take this tip seriously and investigate further.

Id.

¶209 The record reflects that President Trump had reason to know of the potential for violence on January 6. As President, he oversaw the agencies reporting the foregoing threats. *Id.* at ¶ 123. In addition, Katrina Pierson, a senior advisor to both of President Trump's presidential campaigns, testified, on behalf of President Trump, that at a January 5, 2021 meeting, President Trump chose the speakers for the January 6 event at which he, too, would speak (avoiding at least some extremist speakers) and that he knew that radical political extremists were going to be in Washington, D.C. on January 6 and would likely attend his speech. *Id.* at ¶¶ 48, 126.

¶210 January 6 arrived, and in the early morning, President Trump tweeted, "If Vice President @Mike_Pence comes through for us, we will win the Presidency. Many States want to decertify the mistake they made in certifying incorrect & even

fraudulent numbers in a process NOT approved by their State Legislatures (which it must be). Mike can send it back!" *Id.* at ¶ 127. He followed this tweet later that morning with another that said, "All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!" *Id.*

¶211 These tweets had the obvious effect of putting a significant target on Vice President Pence's back, focusing President Trump's supporters on the Vice President's role in overseeing the counting of the electoral votes and certifying the 2020 presidential election to ensure the peaceful transfer of power. *Id.* at ¶¶ 128, 291.

¶212 At about this same time, tens of thousands of President Trump's supporters began gathering around the Ellipse for his speech. *Id.* at ¶ 129. To enter the Ellipse itself, attendees were required to pass through magnetometers. *Id.* at ¶ 130. Notably, from the approximately 28,000 attendees who passed through these security checkpoints, the Secret Service confiscated hundreds of weapons and other prohibited items, including knives or blades, pepper spray, brass knuckles, tasers, body armor, gas masks, and batons or blunt instruments. *Id.* at ¶¶ 130–31. Approximately 25,000 additional attendees remained outside the Secret Service perimeter, thus avoiding the magnetometers. *Id.* at ¶ 132.

¶213 President Trump then gave a speech in which he literally exhorted his supporters to fight at the Capitol. Among other things, he told the crowd:

- "We're gathered together in the heart of our nation's capital for one very, very basic reason: to save our democracy." *Id.* at ¶ 135.
- "Republicans are constantly fighting like a boxer with his hands tied behind his back. It's like a boxer. And we want to be so nice. We want to be so respectful of everybody, including bad people. And we're going to have to fight much harder." *Id.*
- "Now, it is up to Congress to confront this egregious assault on our democracy. And after this, we're going to walk down, and I'll be there with you . . . ." *Id.*
- "[W]e're going to walk down to the Capitol, and we're going to cheer on our brave senators and congressmen and women, and we're probably not going to be cheering so much for some of them. Because you'll never take back our country with weakness. You have to show strength and you have to be strong." *Id.*
- "When you catch somebody in a fraud, you're allowed to go by very different rules." *Id.*
- "This the most corrupt election in the history, maybe of the world. . . . This is not just a matter of domestic politics—this is a matter of national security." *Id.*
- "And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore." *Id.*

¶214 Unsurprisingly, the crowd at the Ellipse reacted to President Trump's words with calls for violence. Indeed, after President Trump instructed his supporters to march to the Capitol, members of the crowd shouted, "[S]torm the capitol!"; "[I]nvade the Capitol Building!"; and "[T]ake the Capitol!" *Id.* at ¶ 141. And before he had even concluded his speech, President Trump's supporters followed his instructions. *Id.* at ¶ 146. The crowd marched to the Capitol, many carrying

Revolutionary War flags and Confederate battle flags; quickly breached the building; and immediately advanced to the House and Senate chambers to carry out their mission of blocking the certification of the 2020 presidential election. *Id.* at ¶¶ 146–53.

¶215 By 1:21 p.m., President Trump was informed that the Capitol was under attack. *Id.* at ¶ 169. Rather than taking action to end the siege, however, approximately one hour later, at 2:24 p.m., he tweeted, "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!" *Id.* at ¶ 170.

¶216 This tweet was read over a bullhorn to the crowd at the Capitol, and produced further violence, necessitating the evacuation of Vice President Pence from his Senate office to a more secure location to ensure his physical safety. *Id.* at ¶¶ 171–75.

¶217 President Trump's next public communications were two tweets sent at 2:38 p.m. and 3:13 p.m., encouraging the mob to "remain peaceful" and to "[s]tay peaceful" (obviously, the mob was not at all peaceful), but neither tweet condemned the violence nor asked the mob to disperse. *Id.* at ¶ 178 (alteration in original).

¶218 Throughout these several hours, President Trump ignored pleas to intervene and instead called on Senators, urging them to help delay the electoral count, which is what the mob, upon President Trump's exhortations, was also trying to achieve. *Id.* at ¶ 180. And President Trump took no action to put an end to the violence. To the contrary, as mentioned above, when told that the mob was chanting, "Hang Mike Pence," President Trump responded that perhaps the Vice President deserved to be hanged. *Id.* President Trump also rejected pleas from House Republican Leader Kevin McCarthy, imploring him to tell his supporters to leave the Capitol, stating, "Well, Kevin, I guess these people are more upset about the election than you are." *Id.*

¶219 Finally, at 4:17 p.m., President Trump released a video urging the mob "to go home now." *Id.* at ¶ 186. Even then, he did not condemn the mob's actions. *Id.* at ¶ 187. Instead, he sympathized with those who had violently overtaken the Capitol, telling them that he knew their pain. *Id.* at ¶¶ 186–87. He told them that he loved them and that they were "very special." *Id.* at ¶ 186. And he repeated his false claim that the election had been stolen notwithstanding his "landslide" victory, thereby further endorsing the mob's effort to try to stop the peaceful transfer of power. *Id.* at ¶¶ 186–87.

¶220 A short while later, President Trump reiterated this supportive message to the mob by justifying its actions, tweeting at 6:01 p.m., "These are the things and

events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace." *Id.* at ¶ 189. President Trump concluded by encouraging the country to "[r]emember this day forever!" *Id.*

¶221 We conclude that the foregoing evidence, the great bulk of which was undisputed at trial, established that President Trump engaged in insurrection. President Trump's direct and express efforts, over several months, exhorting his supporters to march to the Capitol to prevent what he falsely characterized as an alleged fraud on the people of this country were indisputably overt and voluntary. Moreover, the evidence amply showed that President Trump undertook all these actions to aid and further a common unlawful purpose that he himself conceived and set in motion: prevent Congress from certifying the 2020 presidential election and stop the peaceful transfer of power.

¶222 We disagree with President Trump's contentions that the record does not support a finding that he engaged in an insurrection because (1) "engage" does not include "incite," and (2) he did not have the requisite intent to aid or further the insurrectionists' common unlawful purpose.

¶223 As our detailed recitation of the evidence shows, President Trump did not merely incite the insurrection. Even when the siege on the Capitol was fully

underway, he continued to support it by repeatedly demanding that Vice President Pence refuse to perform his constitutional duty and by calling Senators to persuade them to stop the counting of electoral votes. These actions constituted overt, voluntary, and direct participation in the insurrection.

¶224 Moreover, the record amply demonstrates that President Trump fully intended to—and did—aid or further the insurrectionists' common unlawful purpose of preventing the peaceful transfer of power in this country. He exhorted them to fight to prevent the certification of the 2020 presidential election. He personally took action to try to stop the certification. And for many hours, he and his supporters succeeded in halting that process.

¶225 For these reasons, we conclude that the record fully supports the district court's finding that President Trump engaged in insurrection within the meaning of Section Three.

H. President Trump's Speech on January 6 Was Not Protected by the First Amendment Right to Freedom of Speech

¶226 President Trump contends that his speech on January 6 was protected by the First Amendment and, therefore, cannot be used to justify his disqualification from office under Section Three. The district court concluded that this speech was unprotected by the First Amendment. *Anderson*, ¶ 298. We agree with the district court.

1. Standard of Review

¶227 In considering President Trump's First Amendment challenge, we undertake an "independent review of the record . . . to be sure that the speech in question actually falls within [an] unprotected category" of communication. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984). We have interpreted this independent review as being akin to de novo review. *See Air Wis. Airlines Corp. v. Hoeper*, 2012 CO 19, ¶ 46, 320 P.3d 830, 841, *rev'd on other grounds*, 571 U.S. 237 (2014); *Lewis v. Colo. Rockies Baseball Club, Ltd.*, 941 P.2d 266, 271 (Colo. 1997). *Bose* recognizes, however, that we may give some "presumption of correctness" to factual findings, 466 U.S. at 500, especially those that do not involve the application of standards of law, *id.* at 500 n.16, or those that arise from complex cases such as this one, where the district judge has "lived with the controversy," *id.* at 500. Focusing on the findings by the district court, we therefore "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." *Id.* at 508 (first alteration in original) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)).

2. First Amendment Protections and Incitement

¶228 The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. This

robust protection for speech functions to "invite dispute," *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), and "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484 (1957); *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

¶229 Even so, "the right of free speech is not absolute at all times and under all circumstances." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). The First Amendment does not protect, for example, true threats, *Watts v. United States*, 394 U.S. 705, 708 (1969); speech essential to criminal conduct, *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017); or speech that incites lawless action, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). It is this last strand of First Amendment jurisprudence that the parties debate here.

¶230 As the Supreme Court explained in *Brandenburg*, the First Amendment's "constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447. Under *Brandenburg* and its progeny, the modern test to determine whether speech is unprotected under the First Amendment because it incited lawless action is whether (1) the speech explicitly or implicitly encouraged the use of violence or lawless action; (2) the

speaker intended that the speech would result in the use of violence or lawless action; and (3) the imminent use of violence or lawless action was the likely result of the speech. *Nwanguma v. Trump*, 903 F.3d 604, 609 (6th Cir. 2018); *accord Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 246 (6th Cir. 2015).[18]

3. Applying the *Brandenburg* Test

a. Context

¶231 President Trump contends that the district court erred by examining the broader context in which President Trump's speech was made, thereby "expand[ing] the context relevant to a *Brandenburg* analysis beyond anything recognized in precedent." He asserts that we should examine his speech only in the narrow context in which it was made. We disagree.

¶232 In *Schenck v. United States*, 249 U.S. 47, 52 (1919), the Supreme Court addressed, for the first time, advocacy of illegal conduct, and it recognized the

[18] This tripartite formulation incorporates the holdings from *Brandenburg* and its progeny. *See Brandenburg*, 395 U.S. at 447 ("[T]he constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (holding there was "no evidence or *rational inference* from the *import* of the language" that the defendant's words were intended to produce imminent disorder and thereby indicating that although illegal action must be imminent, advocacy of lawless action could be implicit (emphases added)); *NAACP v. Claiborne Hardware*, 458 U.S. 886, 928 (1982) ("When such [emotional] appeals [for unity and action in a common cause] do not incite lawless action, they must be regarded as protected speech.").

importance of context in holding that "the character of every act depends upon the circumstances in which it is done." Although the Supreme Court has said little about how to analyze incitement since *Brandenburg*, it offered some guidance regarding a court's use of other statements for context in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

¶233 In *Claiborne Hardware*, the Court considered speeches given by Charles Evers, the field secretary of the Mississippi NAACP, in connection with the NAACP's boycott of white merchants in Claiborne County from 1966 to 1969. 458 U.S. at 890. Evers declared to Black residents of Claiborne County that "blacks who traded with white merchants would be *answerable to him*," and that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." *Id.* at 900 n.28. Evers's statements also included that "boycott violators would be 'disciplined' by their own people," and he "warned that the Sheriff could not sleep with boycott violators at night." *Id.* at 902. The Court held that Evers's speeches were protected by the First Amendment but said that "[i]f there [was] other evidence of [Evers's] authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence." *Id.* at 929. By considering and placing value in the *absence* of corroborating evidence of Evers's violent intentions, the Court implied that courts may look to circumstances beyond the speech itself to determine intent. *See United States v. White*, 610 F.3d

956, 961–62 (7th Cir. 2010) (relying on *Claiborne Hardware* in denying a motion to dismiss in a solicitation case based on the existence of "further evidence of . . . the relationship between [the defendant] and his followers which will show the posting was a specific request to [the defendant's] followers").

¶234 While incitement precedent is sparse, the case law on "true threats" is instructive regarding the importance of context. True threats and incitement are doctrinally distinct,[19] but true threats are the "closest cousin" to incitement under the First Amendment. *Counterman v. Colorado*, 600 U.S. 66, 97 (2023) (Sotomayor, J., concurring in part); *accord United States v. Howell*, 719 F.2d 1258, 1260 (5th Cir. 1983) ("The line between the two forms of speech [incitement and true threats] may be difficult to draw in some instances . . . ."); *see also* G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 B.Y.U. L. Rev. 829, 1069 (2002) (explaining that both exceptions involve exhortations regarding violence that derive from *Schenck*'s "clear and present danger" test).

[19] *Compare Brandenburg*, 395 U.S. at 447 (defining unprotected incitement as that "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action"), *with Virginia v. Black*, 538 U.S. 343, 359 (2003) (defining true threats as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals").

¶235 And multiple federal circuit courts conducting a true-threat analysis confirm what common sense suggests: When assessing whether someone means to threaten another with unlawful violence, we sometimes need to consider more than the behavior exhibited on one occasion. *See, e.g.*, *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1078 (9th Cir. 2002) (rejecting an argument that "'context' means the direct circumstances surrounding delivery of the threat," and instead concluding that "[w]e, and so far as we can tell, other circuits as well, consider the whole factual context and 'all of the circumstances' in order to determine whether a statement is a true threat" (internal citation omitted) (quoting *United States v. Merrill*, 746 F.2d 458, 462 (9th Cir. 1984), *overruled on other grounds by Planned Parenthood*, 290 F.3d at 1066–77, *and United States v. Hanna*, 293 F.3d 1080, 1088 n.5 (9th Cir. 2002))); *United States v. Hart*, 212 F.3d 1067, 1071 (8th Cir. 2000) (considering "whether the maker of the threat had made similar statements to the victim on other occasions" and "whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence" when determining whether a true threat exists). So too with incitement. Context matters.

¶236 This is not to say, as President Trump contends the district court found, that we "may consider *any speech ever uttered* by [President Trump]" in evaluating incitement. Of course, there are limits. But we need not define those outer limits

now. Instead, we simply conclude that it was appropriate for the district court to consider President Trump's "history of courting extremists and endorsing political violence as legitimate and proper, as well as his efforts to undermine the legitimacy of the 2020 election results and hinder the certification of the Electoral College results in Congress." *Anderson*, ¶ 289.

¶237 With this in mind, we review the district court's application of *Brandenburg*'s three-pronged test.

b. Encouraging the Use of Violence or Lawless Action

¶238 Again, the first prong of the test for incitement is that "the speech explicitly or implicitly encouraged the use of violence or lawless action." *Nwanguma*, 903 F.3d at 609.

¶239 The district court made dozens of findings regarding the general atmosphere of political violence that President Trump created before January 6, many of which we have already outlined in discussing why the district court concluded that President Trump "engaged in" insurrection. We incorporate those observations here by reference and supplement them with other illuminating evidence from the record below. For example, the district court found that "[a]t [a] February 2016 rally, [President] Trump told his supporters that in the 'old days,' a protester would be 'carried out on a stretcher' and that he would like to 'punch him in the face.'" *Anderson*, ¶ 68. In March 2016, President Trump

responded to questions about his supporters' violence by saying it was "very, very appropriate" and "we need a little bit more of" it. *Id.* at ¶ 69. And during the 2020 election cycle, "President Trump threatened to deploy 'the Military' to Minneapolis to shoot 'looters' amid protests over the police killing of George Floyd," *id.* at ¶ 76, and told the Proud Boys to "stand back and stand by" during a debate for the 2020 presidential election. *id.* at ¶ 77.

¶240 The district court also credited the testimony of Professor Peter Simi, a professor of sociology at Chapman University, whom it had "qualified . . . as an expert in political extremism, including how extremists communicate, and how the events leading up to and including the January 6 attack relate to longstanding patterns of behavior and communication by political extremists." *Id.* at ¶ 42. He testified, according to the court's summary, that (1) "violent far-right extremists understood that [President] Trump's calls to 'fight,' which most politicians would mean only symbolically, were, when spoken by [President] Trump, literal calls to violence by these groups, while [President] Trump's statements negating that sentiment were insincere and existed to obfuscate and create plausible deniability," *id.* at ¶ 84; and that (2) "[President] Trump's speech took place in the context of a pattern of [President] Trump's knowing 'encouragement and promotion of violence' to develop and deploy a shared coded language with his violent supporters," *id.* at ¶ 142.

¶241 As we described in the foregoing section, the district court further found that President Trump encouraged and supported violence before and after the 2020 election by telling his supporters that "the only way we're going to lose this election is if the election is rigged. Remember that," *id.* at ¶ 88; that the election was "a fraud on the American public," *id.* at ¶ 92; *see also id.* at ¶ 101 ("Swing States that have found massive VOTER FRAUD, which is all of them, CANNOT LEGALLY CERTIFY these votes as complete & correct without committing a severely punishable crime"); and that the Democrats had stolen an election that rightfully belonged to President Trump and his supporters, *id.* at ¶¶ 93, 96. The district court also found that "[m]any of the state officials targeted by [President] Trump's campaign of intimidation were subject to a barrage of harassment and violent threats by [his] supporters—prompting Georgia election official Gabriel Sterling to issue a public warning to [President] Trump to 'stop inspiring people to commit potential acts of violence' or '[s]omeone's going to get killed.'" *Id.* at ¶ 104 (last alteration in original); *see also id.* at ¶ 105 (finding that "[f]ar-right extremists understood [President] Trump's refusal to condemn the violence [Sterling condemned] . . . as an endorsement of the use of violence to prevent the transfer of presidential power").

¶242 The district court then identified specific incendiary language in President Trump's speech at the Ellipse on January 6, some of which we alluded to earlier in

this opinion. To reiterate: President Trump announced, "we're going to walk down, and I'll be with you, we're going to walk down . . . to the Capitol . . . ." *Id.* at ¶ 135. He "used the word 'fight' or variations of it [twenty] times during his Ellipse speech." *Id.* at ¶ 137; *see also, e.g.*, *id.* at ¶ 135 ("And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore."). He declared, "[w]hen you catch somebody in a fraud," a sentiment he had repeatedly said had occurred with the 2020 election, "you're allowed to go by very different rules." *Id.* at ¶ 135; *see also id.* at ¶ 138 ("You don't concede when there's theft involved."). And he claimed that "our election victory [was] stolen by emboldened radical-left Democrats . . . ." *Id.* at ¶ 135.

¶243 In short, the district court found that President Trump's speech at the Ellipse "was understood by a portion of the crowd as, a call to arms." *Id.* at ¶ 145. And the district court here is not the first or only court to reach this conclusion. In *Thompson v. Trump*, 590 F. Supp. 3d 46, 118 (D.D.C. 2022), the U.S. District Court for the District of Columbia found that President Trump

> invited his supporters to Washington, D.C., after telling them for months that corrupt and spineless politicians were to blame for stealing an election from them; retold that narrative when thousands of them assembled on the Ellipse; and directed them to march on the Capitol building . . . where those very politicians were at work to certify an election that he had lost.

The court concluded that President Trump's speech was, therefore "plausibly . . . a positive instigation of a mischievous act."[20] *Id.* (quoting John Stuart Mill, On Liberty 100 (London, John W. Parker & Son, 2d ed. 1859)). Our independent review of the record in this case brings us to the same conclusion: President Trump incited and encouraged the use of violence and lawless action to disrupt the peaceful transfer of power. The tenor of President Trump's messages to his supporters in exhorting them to travel to Washington, D.C. on January 6 was obvious and unmistakable: the allegedly rigged election was an act of war and those victimized by it had an obligation to fight back and to fight aggressively. And President Trump's supporters did not miss or misunderstand the message: the cavalry was coming to fight.

¶244 The fact that, at one point during his speech, President Trump said that "everyone here will soon be marching to the Capitol building to *peacefully and patriotically* make your voices heard" does not persuade us that the district court erred in finding that the first prong of the *Brandenberg* test was met. *See Thompson*, 590 F. Supp. 3d at 113–14. This isolated reference "cannot inoculate [President

[20] *Thompson* involved a motion to dismiss. As a result, the court determined only that President Trump's speech "plausibly [involved] words of incitement not protected by the First Amendment." *Thompson*, 590 F. Supp. 3d at 115; *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (requiring plaintiffs to show that their complaints are plausible to survive a motion to dismiss for failure to state a claim).

Trump] against the conclusion that his exhortation, made nearly an hour later, to 'fight like hell' immediately before sending rally-goers to the Capitol, within the context of the larger Speech and circumstances, was not protected expression." *Id.* at 117.

c. Intent to Produce Violent or Lawless Action

¶245 The second prong of the test for incitement is that "the speaker intends that his speech will result in the use of violence or lawless action." *Nwanguma*, 903 F.3d at 609. The Supreme Court has interpreted this second prong of the *Brandenburg* test to require specific intent.[21] *Counterman*, 600 U.S. at 79, 81 (establishing that "when incitement is at issue, we have spoken in terms of specific intent, presumably equivalent to purpose or knowledge," and defining acting purposely as "'consciously desir[ing]' a result"). So, we must consider whether President Trump's exhortations at the Ellipse on January 6 to "fight like hell," and his

[21] There is some uncertainty as to whether *specific intent* to incite imminent lawless action is needed in civil cases such as the one before us now because most of the modern incitement cases arose in a criminal context. *See Counterman*, 600 U.S. at 70; *Hess*, 414 U.S. at 105; *Brandenburg*, 395 U.S. at 444; *but see Claiborne Hardware*, 458 U.S. at 890 (adjudicating complainants' request for injunctive relief and damages). The *Counterman* Court's justification for the specific intent standard was therefore tied to criminal liability. *Counterman*, 600 U.S. at 81 ("A strong intent requirement . . . was a way to ensure that efforts to *prosecute* incitement would not bleed over . . . to dissenting political speech at the First Amendment's core." (emphasis added)). But we need not resolve the issue because, regardless of whether it is required, we agree with the district court that President Trump acted with specific intent.

urgings that his followers "go[] to the Capitol" and that they would get to "go by 'very different rules,'" were intended to produce imminent lawless action.

¶246 The district court concluded that President Trump exhibited the requisite intent here. It found that, before the January 6 rally, "[President] Trump knew that his supporters were angry and prepared to use violence to 'stop the steal' including physically preventing Vice President Pence from certifying the election," *Anderson*, ¶ 128, and that President Trump's response to the events following his speech "support . . . that [President] Trump endorsed and intended the actions of the mob on January 6," *id.* at ¶ 193 (second alteration in original). Based on these findings of fact, the court "conclude[d] that [President] Trump acted with the specific intent to incite political violence and direct it at the Capitol with the purpose of disrupting the electoral certification." *Id.* at ¶ 293.

¶247 The district court found that President Trump knew, before he gave his speech, that there was the potential for violence on January 6. It found that "[President] Trump himself agrees that his supporters 'listen to [him] like no one else,'" *id.* at ¶ 63 (second alteration in original), and that federal agencies that President Trump oversaw identified threats of violence ahead of January 6, including "threats to storm the U.S. Capitol and kill elected officials," *id.* at ¶¶ 123–24.

¶248 The court also found that President Trump's conduct and tweets, which we outlined above, from the time he was told of the attack on the Capitol at 1:21 p.m. until Congress reconvened later that night, indicated his intent to produce lawless or violent conduct. *See id.* at ¶¶ 169–73, 178, 183, 186, 189.

¶249 In conducting our independent review of the district court's factual findings, we agree that President Trump intended that his speech would result in the use of violence or lawless action on January 6 to prevent the peaceful transfer of power. Despite his knowledge of the anger that he had instigated, his calls to arms, his awareness of the threats of violence that had been made leading up to January 6, and the obvious fact that many in the crowd were angry and armed, President Trump told his riled-up supporters to walk down to the Capitol and fight. He then stood back and let the fighting happen, despite having the ability and authority to stop it (with his words or by calling in the military), thereby confirming that this violence was what he intended.

¶250 We therefore conclude that the second prong of the *Brandenburg* test has also been met.

d. Likely to Incite or Produce Imminent Lawless Action

¶251 Finally, for speech to be unprotected, we must conclude that "the imminent use of violence or lawless action is the likely result of the speech." *Nwanguma*, 903 F.3d at 609.

¶252 The district court found that:

> Professor Simi reviewed [President] Trump's relationship with his supporters over the years, identified a pattern of calls for violence that his supporters responded to, and explained how that long experience allowed [President] Trump to know how his supporters responded to his calls for violence using a shared language that allowed him to maintain plausible deniability with the wider public.

Id. at ¶ 62.

¶253 Professor Simi then "testified about . . . examples of [these] patterns of call-and-response that [President] Trump developed and used to incite violence by his supporters." *Id.* at ¶ 64. In one such instance, a November 2015 political rally, "[President] Trump . . . t[old] his supporters to 'get [a protester] the hell out of here' and the protester was then assaulted. When asked about the attack the next day, Trump said 'maybe [the protester] should have been roughed up.'" *Id.* at ¶ 66 (third and fourth alterations in original).

¶254 Further, the district court found that "on January 1, 2021, [President] Trump retweeted a post from Kylie Jane Kremer, an organizer of March for Trump on January 6, saying, 'The calvary [sic] is coming, Mr. President!'" *Id.* at ¶ 119. It found that, according to Professor Simi, "[President] Trump's December 19, 2020 ['will be wild'] tweet had an immediate effect on far-right extremists and militias . . . , who viewed the tweet as a 'call to arms' and began to plot activities to disrupt the January 6, 2021 joint session." *Id.* at ¶ 117.

¶255 These findings support the conclusion that President Trump's calls for imminent lawlessness and violence during his speech were likely to incite such imminent lawlessness and violence. When President Trump told his supporters that they were "allowed to go by very different rules" and that if they did not "fight like hell," they would not "have a country anymore," it was likely that his supporters would heed his encouragement and act violently. We therefore hold that this final prong of the *Brandenburg* test has been met.

¶256 In sum, we conclude that President Trump's speech on January 6 was not protected by the First Amendment.

IV. Conclusion

¶257 The district court erred by concluding that Section Three does not apply to the President. We therefore reverse the district court's judgment. As stated above, however, we affirm much of the district court's reasoning on other issues. Accordingly, we conclude that because President Trump is disqualified from holding the office of President under Section Three, it would be a wrongful act under the Election Code for the Secretary to list President Trump as a candidate on the presidential primary ballot. Therefore, the Secretary may not list President Trump's name on the 2024 presidential primary ballot, nor may she count any write-in votes cast for him. *See* § 1-7-114(2), C.R.S. (2023) ("A vote for a write-in candidate shall not be counted unless that candidate is qualified to hold the office

for which the elector's vote was cast."). But we stay our ruling until January 4, 2024 (the day before the Secretary's deadline to certify the content of the presidential primary ballot). If review is sought in the Supreme Court before the stay expires, it shall remain in place, and the Secretary will continue to be required to include President Trump's name on the 2024 presidential primary ballot until the receipt of any order or mandate from the Supreme Court.

CHIEF JUSTICE BOATRIGHT dissented.

JUSTICE SAMOUR dissented.

JUSTICE BERKENKOTTER dissented.

CHIEF JUSTICE BOATRIGHT dissenting.

¶258 I agree with the majority that an action brought under section 1-1-113, C.R.S. (2023) of Colorado's election code ("Election Code") may examine whether a candidate is qualified for office under the U.S. Constitution. But section 1-1-113 has a limited scope. *Kuhn v. Williams,* 2018 CO 30M, ¶ 1 n.1, 418 P.3d 478, 480 n.1 (per curiam, unanimous) (emphasizing "the narrow nature of our review under section 1-1-113"). In my view, the claim at issue in this case exceeds that scope. The voters' (the "Electors") action to disqualify former President Donald J. Trump under Section Three of the Fourteenth Amendment presents uniquely complex questions that exceed the adjudicative competence of section 1-1-113's expedited procedures. Simply put, section 1-1-113 was not enacted to decide whether a candidate engaged in insurrection. In my view, this cause of action should have been dismissed. Accordingly, I respectfully dissent.

I. The Electors' Challenge Is Incompatible with a Section 1-1-113 Proceeding

¶259 Section 1-1-113 provides for the resolution of potential election code violations in a timely manner. In many scenarios, Colorado voters can challenge the Secretary of State's (the "Secretary") certification of a candidate's qualifications. *Carson v. Reiner*, 2016 CO 38, ¶ 17, 370 P.3d 1137, 1141 (acknowledging that section 1-1-113 "clearly comprehends challenges to a broad range of wrongful acts committed by [Colorado's election] officials charged with

duties under the code [and] comprehends a specific challenge to a designated election official's certification of a candidate"). While section 1-1-113 only offers voters a "narrow opportunity," *Kuhn*, ¶ 28, 418 P.3d at 484, that opportunity has proven effective as voters have compelled the Secretary to omit from the ballot unqualified candidates whom they would have otherwise listed. *E.g.*, *id.* at ¶ 57, 418 P.3d at 489 (barring a candidate from the ballot because his petition circulator was not a Colorado resident). Section 1-1-113's grant of discretionary review to this court has also vindicated voters' rights by preventing a decision that would have compelled the Secretary to place an unqualified candidate on the ballot. *Griswold v. Ferrigno Warren*, 2020 CO 34, ¶ 26, 462 P.3d 1081, 1087 (barring a candidate from the ballot because she failed to gather sufficient signatures).

¶260 Further, our election code suggests that a petitioner may base a challenge to the Secretary's certification of an aspiring presidential primary candidate on federal law. *Compare* § 1-4-1203(2)(a), C.R.S. (2023) (stating that a candidate must be "qualified"), *with* §1-4-1201, C.R.S. (2023) (declaring that the code conforms to federal law); *see also Coats v. Dish Network, LLC*, 2015 CO 44, ¶ 20, 350 P.3d 849, 853 (relying on federal law to interpret "lawful activity" in a Colorado statute). We have previously held, however, that some federal law claims cannot be adjudicated under section 1-1-113. *E.g.*, *Frazier v. Williams*, 2017 CO 85, ¶ 19,

401 P.3d 541, 545 (concluding that a 42 U.S.C. § 1983 claim cannot be the basis of, or joined to, a section 1-1-113 action).

¶261 But not all federal questions exceed the scope of section 1-1-113. A qualification challenge under Article II, Section 1[1] or the Twenty-Second Amendment[2] lends itself to section 1-1-113's procedures. Although a claim that a candidate is not thirty-five years old may be easier to resolve than a claim that a candidate is not a natural born citizen, these presidential qualifications are characteristically objective, discernible facts. Age, time previously served as president, and place of birth all parallel core qualification issues under Colorado's election code.[3] Conversely, all these questions pale in comparison to the complexity of an action to disqualify a candidate for engaging in insurrection.

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[1] U.S. Const. art. II, § 1, cl. 5 provides the presidential qualifications:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[2] U.S. Const. amend. XXII, § 1 provides further presidential qualifications:

> No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.

[3] *See also* Colorado Secretary of State, *Presidential Primary 2024 Candidate Qualification Guide* 3, https://www.coloradosos.gov/pubs/elections/

¶262 Far from presenting a straightforward biographical question, Section Three of the Fourteenth Amendment proscribes insurrectionist U.S. officers from again holding office. U.S. Const. amend. XIV, § 3. Unlike qualifications such as age and place of birth, an application of Section Three requires courts to define complex terms, determine legislative intent from over 150 years ago, and make factual findings foreign to our election code. The Electors contend that there is nothing "particularly unusual about a section 1-1-113 proceeding raising constitutional issues." However, the framework that section 1-1-113 offers for identifying qualified candidates is not commensurate with the extraordinary determination to disqualify a candidate because they engaged in insurrection against the Constitution. *See* Dis. op. ¶ 352 (Berkenkotter, J., dissenting) (noting that "the historical application of section 1-1-113 . . . has been limited to challenges involving relatively straightforward issues, like whether a candidate meets a residency requirement for a school board election."). Recognizing this limitation of section 1-1-113 is not novel. *See Kuhn*, ¶ 1 n.1, 418 P.3d at 480 n.1 (emphasizing "the narrow nature of our review under section 1-1-113" and declining to address a First Amendment challenge to Colorado's residency requirement for petition

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Candidates/packets/2024PresidentialPrimaryGuide.pdf [https:// perma.cc/ KK3L-X8BM] (listing the "basic qualifications" for the presidency including the qualifications from Article II and the Twenty-Second Amendment but not mentioning the Fourteenth Amendment's disqualification for insurrectionists).

circulators "because such claims exceed this court's jurisdiction in a section 1-1-113 action").

¶263 Dismissal is particularly appropriate here because the Electors brought their challenge without a determination from a proceeding (e.g., a prosecution for an insurrection-related offense) with more rigorous procedures to ensure adequate due process. Instead, the Electors relied on section 1-1-113 and its "breakneck pace" to declare President Trump a disqualified insurrectionist. *See Frazier*, ¶ 11, 401 P.3d at 544.

II. As Demonstrated by the Proceeding Below, the Statutory Timeline for a Section 1-1-113 Proceeding Does Not Permit a Claim as Complex as the Electors'

¶264 In addition to qualitative incompatibilities, the complexity of the Electors' claims cannot be squared with section 1-1-113's truncated timeline for adjudication. Section 1-1-113 actions for presidential primary ballots fulfill a need for speed by requiring the district court to hold a hearing within *five days* and issue its decision within forty-eight hours of the hearing:

> Any such challenge must provide notice in a summary manner of an alleged impropriety that gives rise to the complaint. No later than five days after the challenge is filed, a hearing must be held at which time the district court shall hear the challenge and assess the validity of all alleged improprieties. The district court shall issue findings of fact and conclusions of law no later than forty-eight hours after the hearing. The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence.

§ 1-4-1204, C.R.S. (2023). This speed comes with consequences, namely, the absence of procedures that courts, litigants, and the public would expect for complex constitutional litigation. As President Trump, argues and the Electors do not contest, section 1-1-113's procedures do not provide common tools for complex fact-finding: preliminary evidentiary or pre-trial motions hearings, subpoena powers, basic discovery, depositions, and time for disclosure of witnesses and exhibits. This same concern was raised in *Frazier*; the then-Secretary argued that "it is impossible to fully litigate a complex constitutional issue within days or weeks, as is typical of a section 1-1-113 proceeding." ¶ 18 n.3, 401 P.3d at 545 n.3. While we avoided deciding if a claim could be too complex for a section 1-1-113 proceeding in *Frazier*, that question is unavoidable here, and it demands that we reconcile the complexity of this issue with the breakneck pace of a section 1-1-113 procedure. In my view, the answer to this question is dispositive.

¶265 This case's procedural history proves my point. Despite clear requirements, the district court did not follow section 1-4-1204's statutory timeline for section 1-1-113 claims. The proceeding below involved two delays that, respectively, violated (1) the requirement that the merits hearing be held within five days of the challenge being lodged, and (2) the requirement that the district court issue its order within forty-eight hours of the merits hearing.

¶266 The Electors filed their challenge on September 6, 2023. Although the question of whether this action should be removed to federal court was resolved by September 14, the district court did not hold an evidentiary hearing until October 30. The majority appears to imply that a "status conference" on September 18 fulfills the statutory requirement that the hearing be held within five days of the Electors' challenge. Maj. op. ¶ 83. However, a status conference plainly does not satisfy the requirement: "No later than five days after the challenge is filed, a hearing must be held *at which time the district court shall hear the challenge and assess the validity of all alleged improprieties*." § 1-4-1204 (emphasis added); *see Carson*, ¶ 21, 370 P.3d at 1142 (ruling that section 1-1-113 "does not permit a challenge to an election official's certification of a candidate to the ballot, solely on the basis of the certified candidate's qualification, once the period . . . for challenging the qualification of the candidate directly has expired . . . ."). It is no mystery why the statutory timeline could not be enforced: This claim was too complex.[4] The fact it took a week shy of two months to hold a hearing that "must" take place within five days proves that section 1-1-113 is an incompatible vehicle

[4] The intervals between the challenge and the hearing, and the hearing and the order, should not cast aspersions on the district court, which made valiant efforts to add some process above and beyond what the election code provides. However, the Colorado General Assembly, not the district court, decides when and how to change statutory requirements.

for this claim. The majority recognizes the five-day requirement, Maj. op. ¶ 38, but it does not acknowledge the violation of section 1-4-1204's timeline or give consequence to that violation.

¶267 Nonetheless, the majority touts the fact that a hearing was held and lauds the district court's timely issuance of its decision as evidence that this matter was not too complex for a section 1-1-113 proceeding. Maj. op. ¶¶ 84–85. But was the order timely issued? Substantially, I think not. *Compare* Maj. op. ¶ 22 ("The trial began, as scheduled, on October 30 [a Monday]. The evidentiary portion lasted five days [through Friday, November 3], with closing arguments almost two weeks later, on November 15. . . . The court issued its written final order on November 17 . . . ."), *with* § 1-4-1204 ("The district court shall issue findings of fact and conclusions of law no later than forty-eight hours after the hearing."). Section 1-4-1204 only mandates two deadlines, and neither were honored. After all the evidence had been presented at a week-long hearing, the court suspended proceedings for two weeks. I find nothing in the record offering a reason grounded in the election code for the interval between the five consecutive days of the hearing and the solitary closing arguments. However, I understand the necessity to postpone the closing arguments for one reason: The complexity of the case required more time than "no later than forty-eight hours after the hearing" for the court to draft its 102-page order. Thus, while the district court formally

issued its order within forty-eight hours of the closing arguments, the interval between the evidentiary hearings and the closing arguments was not in compliance with section 1-4-1204.

¶268 The majority condoned the district court's failure to observe the statutory timeline by concluding that it "substantially compl[ied]." *See* Maj. op. ¶ 85. This renders the statute's five-day and forty-eight-hour requirements meaningless. *Contra Ferrigno Warren*, ¶ 20, 462 P.3d at 1085 (holding that, under Colorado's election code, a "specific statutory command could not be ignored in the name of substantial compliance"); *Gallegos Fam. Props., LLC v. Colo. Groundwater Comm'n*, 2017 CO 73, ¶ 25, 398 P.3d 599, 608 ("Where the language is clear, we must apply the language as written."). If a court must contort a special proceeding's statutory timeline to process a claim, then that claim is not proper for the special proceeding.

¶269 From my perspective, just because a hearing was held and Intervenors participated, it doesn't mean that due process was observed. Nor should it be inferred that section 1-1-113's statutory procedures, which were not followed, were up to the task. I cannot agree with the majority that the district court's extra-statutory delays and select procedure augmentations indicate that the Electors' claim was fit for adjudication under sections 1-4-1204(4) and 1-1-113. *Contra*, Maj. op. ¶ 81 ("In short, the district court admirably—and swiftly—discharged its duty to adjudicate this complex section 1-1-113 action."). Dragging

someone through a "makeshift proceeding" is not an indication that it was an appropriate process. *See* Dis. op. ¶ 274 (Samour, J., dissenting). Importantly, the Electors were not rushed into the process; they didn't have to file their challenge until they were prepared. Only Intervenors arguably had inadequate time to prepare.

¶270 Finally, only a two-thirds majority of both houses of Congress can overturn a Section Three disqualification. U.S. Const. amend. XIV, § 3. This remedy is extraordinary and speaks volumes about the gravity of the disqualification. Such a high bar indicates that an expedited hearing absent any discovery procedures and with a preponderance of the evidence standard is not the appropriate means for adjudicating a matter of this magnitude.[5] *See Frazier*, ¶¶ 17–18, 401 P.3d at 545 (holding that "inconsistencies" between the procedures of section 1-1-113 and a claim under 42 U.S.C. § 1983 "reinforce" the conclusion that not all federal law claims can be raised in section 1-1-113 proceedings).

[5] Although the district court made its findings using the clear and convincing standard, the election code calls for a preponderance standard. § 1-4-1204 ("The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence.").

III. Conclusion

¶271 My opinion that this is an inadequate cause of action is dictated by the facts of this case, particularly the absence of a criminal conviction for an insurrection-related offense.

¶272 The questions presented here simply reach a magnitude of complexity not contemplated by the Colorado General Assembly for its election code enforcement statute. The proceedings below ran counter to the letter and spirit of the statutory timeframe because the Electors' claim overwhelmed the process. In the absence of an insurrection-related conviction, I would hold that a request to disqualify a candidate under Section Three of the Fourteenth Amendment is not a proper cause of action under Colorado's election code. Therefore, I would dismiss the claim at issue here. Accordingly, I respectfully dissent.

JUSTICE SAMOUR dissenting.

> Now it is undoubted that those provisions of the constitution which deny to the legislature power to deprive any person of life, liberty, or property, without due process of law, or to pass a bill of attainder or an ex post facto, are inconsistent in their spirit and general purpose with a provision which, at once without trial, deprives a whole class of persons of offices . . . for cause, however grave.

In re Griffin, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (No. 5,815) ("*Griffin's Case*").

¶273 These astute words, uttered by U.S. Supreme Court Chief Justice Salmon P. Chase a century and a half ago, eloquently describe one of the bedrock principles of American democracy: Our government cannot deprive someone of the right to hold public office without due process of law. Even if we are convinced that a candidate committed horrible acts in the past—dare I say, engaged in insurrection—there must be procedural due process before we can declare that individual disqualified from holding public office. Procedural due process is one of the aspects of America's democracy that sets this country apart.

¶274 The decision to bar former President Donald J. Trump ("President Trump")—by all accounts the current leading Republican presidential candidate (and reportedly the current leading overall presidential candidate)—from Colorado's presidential primary ballot flies in the face of the due process doctrine. By concluding that Section Three of the Fourteenth Amendment is self-executing, the majority approves the enforcement of that federal constitutional provision by our state courts through the truncated procedural mechanism that resides in our

state Election Code.[1] Thus, based on its interpretation of Section Three, our court sanctions these makeshift proceedings employed by the district court below—which lacked basic discovery, the ability to subpoena documents and compel witnesses, workable timeframes to adequately investigate and develop defenses, and the opportunity for a fair trial—to adjudicate a federal constitutional claim (a complicated one at that) masquerading as a run-of-the-mill state Election Code claim. And because most other states don't have the Election Code provisions we do, they won't be able to enforce Section Three. That, in turn, will inevitably lead to the disqualification of President Trump from the presidential primary ballot in less than all fifty states, thereby risking chaos in our country. This can't possibly be the outcome the framers intended.

¶275 I agree that Section Three bars from public office anyone who, having previously taken an oath as an officer of the United States to support the federal Constitution, engages in insurrection. But Section Three doesn't spell out the

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[1] As pertinent here, Section Three provides that:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office . . . under the United States, or under any State, who, having previously taken an oath . . . as an officer of the United States . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same . . . .

U.S. Const. amend. XIV, § 3.

procedures that must be followed to determine whether someone has engaged in insurrection after taking the prerequisite oath. That is, it sheds no light on whether a jury must be empaneled or a bench trial will suffice, the proper burdens of proof and standards of review, the application of discovery and evidentiary rules, or even whether civil or criminal proceedings are contemplated. This dearth of procedural guidance is not surprising: Section Five of the Fourteenth Amendment specifically gives Congress absolute power to enact legislation to enforce Section Three. My colleagues in the majority concede that there is currently no legislation enacted by Congress to enforce Section Three. This is of no moment to them, however, because they conclude that Section Three is self-executing, and that the states are free to apply their own procedures (including compressed ones in an election code) to enforce it.[2] That is hard for me to swallow.

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[2] The majority repeatedly uses "self-executing" to describe Section Three, but then reasons that this part of the Fourteenth Amendment is enforceable in Colorado only because of the procedures our legislature has enacted as part of the state's Election Code. This strikes me as an oxymoron. If a constitutional provision is truly *self-executing*, it needs no legislation to be enforced. *See Self-executing*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/self-executing [https://perma.cc/4X7W-Y8AR] (defining "self-executing" as "taking effect immediately without implementing legislation"); *see also Self-enforcing*, Black's Law Dictionary (11th ed. 2019) ("self-enforcing" means "effective and applicable without the need for any other action; self-executing"). Much like Inigo Montoya advised Vizzini, "I do not think [self-executing] means what [my colleagues in the majority] think it means." *The Princess Bride* (20th Century Fox 1987) ("You keep using that word [inconceivable]. I do not think it means what you think it means.").

¶276 Significantly, there is a federal statute that specifically criminalizes insurrection and requires that anyone convicted of engaging in such conduct be fined or imprisoned *and be disqualified from holding public office*. *See* 18 U.S.C. § 2383. If any federal legislation arguably enables the enforcement of Section Three, it's section 2383. True, President Trump has not been charged under that statute, so it is not before us. But the point is that this is the only federal legislation in existence at this time to potentially enforce Section Three. Had President Trump been charged under section 2383, he would have received the full panoply of constitutional rights that all defendants are afforded in criminal cases. More to the point for our purposes, had he been so charged, I wouldn't be writing separately to call attention to the substandard due process of law he received in these abbreviated Election Code proceedings.

¶277 I recognize the need to defend and protect our democracy against those who seek to undermine the peaceful transfer of power. And I embrace the judiciary's solemn role in upholding and applying the law. But that solemn role necessarily includes ensuring our courts afford everyone who comes before them (in criminal and civil proceedings alike) due process of law. Otherwise, as relevant here, how can we ever be confident that someone who is declared ineligible to hold public office pursuant to Section Three actually engaged in insurrection or rebellion after taking the prerequisite oath?

¶278 In my view, what transpired in this litigation fell woefully short of what due process demands. Because I perceive the majority's ruling that Section Three is self-executing to be the most concerning misstep in today's lengthy opinion, I focus on that aspect of the legal analysis.

¶279 Context is key here. The Fourteenth Amendment was designed to address a particular juncture in American history. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024) (manuscript at 3), https://ssrn.com/abstract=4532751. The postbellum framers were confronted with the unprecedented nexus of historical events that gave rise to and shaped secession, the Civil War, and Reconstruction. Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28(2) Tex. Rev. L. & Pol. (forthcoming 2024) (manuscript at 214–15), https://ssrn.com/abstract=4568771. And their response, in some measure, sounded the clarion call of "a constitutional revolution." *Id.* at 99.

¶280 Indeed, the Fourteenth Amendment ushered in an expansion of federal power that undercut traditional state power. *See United States v. Washington*, 20 F. 630, 631 (C.C.W.D. Tex. 1883) ("The fourteenth amendment is a limitation upon the powers of the state and an enlargement of the powers of congress."); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 255 (1995) (Stevens, J., dissenting) ("The Fourteenth Amendment directly empowers Congress at the same time it expressly

limits the States."). Forefront in the minds of the framers was the evident concern that the states would again seek to undermine the national government. In short, the states—state institutions, state officials, and state courts—were not to be trusted. *Ex parte Virginia*, 100 U.S. 339, 346 (1879) ("The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power.").

¶281 Thus, the indelible trespass of the former confederate states was met squarely by an overarching goal to render federal institutional authority paramount. Such is the contextual framework informing my view of the instant matter. To my mind, it compels the conclusion, soundly supported by the framers' intent and the weight of the relevant authorities, that Section Three of the Fourteenth Amendment is not self-executing, and that Congress alone is empowered to pass any enabling legislation.

¶282 My colleagues in the majority turn Section Three on its head and hold that it licenses states to supersede the federal government. Respectfully, they have it backwards. Because no federal legislation currently exists to power Section Three and propel it into action, because President Trump has not been charged under section 2383, and because there is absolutely no authority permitting Colorado state courts to use Colorado's Election Code as an engine to provide the necessary

thrust to effectuate Section Three, I respectfully dissent.[3] I would affirm the district court's judgment in favor of President Trump, but I would do so on other grounds.[4]

I. Analysis

A. Pertinent Procedural Posture

¶283 The district court gave short shrift to the question of whether Section Three is self-executing. In its Omnibus Order, which denied President Trump's September 29 motion to dismiss, the court found the issue "irrelevant." The court ruled, in conclusory fashion, that states are empowered to execute Section Three via their own enabling legislation and that Colorado's Election Code constitutes such an enactment. This analytical shortcut, though convenient, is inconsistent with both the text of the Fourteenth Amendment and persuasive authority interpreting it.

¶284 *Griffin's Case* is the jumping-off point for any Section Three analysis.

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[3] There is a colorable argument that the majority incorrectly holds that Section Three applies to the President of the United States. Other parts of the majority's analysis, including the determinations that President Trump engaged in insurrection and that his remarks deserve no shelter under the First Amendment's rather expansive protective canopy, are at least questionable. Because I conclude that Section Three is not self-executing, and because that conclusion is dispositive, I don't address any other issue.

[4] The district court decided that Section Three does not apply to the President of the United States.

B. *Griffin's Case*: The Fountainhead

¶285 In 1869, less than a year after the ratification of the Fourteenth Amendment, U.S. Supreme Court Chief Justice Chase presided over *Griffin's Case* in the federal circuit court for the district of Virginia.[5] *Griffin's Case* is the wellspring of Section Three jurisprudence. And, given the temporal proximity of Chief Justice Chase's pronouncements on the topic of self-execution to the passage and ratification of the Fourteenth Amendment, I consider the holding in *Griffin's Case* compelling.

¶286 Judge Hugh W. Sheffey presided over Caesar Griffin's criminal trial after the Fourteenth Amendment went into effect. *Griffin's Case*, 11 F. Cas. at 22. Before the Civil War, Sheffey held a Section Three-triggering position, and so, had taken an oath to support the Constitution of the United States. *Id.* Subsequently, Sheffey served in Virginia's confederate legislature. *Id.* It was not until after the war that Sheffey was appointed to a state court judgeship, the position he held at the time of Griffin's trial. *Id.* at 16. Following the jury's guilty verdict on the charge of assault with intent to kill, Judge Sheffey sentenced Griffin to two years' imprisonment. *Id.* at 22–23.

¶287 Griffin filed a collateral attack in federal district court. He argued that his sentence was null because Section Three had "instantly, on the day of its

[5] At the time, Supreme Court justices rode the circuit and sat in regional federal courts.

promulgation, vacated all offices held by persons within the category of prohibition," thereby rendering Judge Sheffey ineligible to be on the bench. *Id.* at 24. More specifically, Griffin claimed that Sheffey was disqualified from being a judge because he had engaged in conduct prohibited by Section Three. *Id.* The federal district court agreed and ordered Griffin's immediate discharge from custody. *Id.*

¶288 On appeal, Chief Justice Chase framed the issue in the following terms: "[W]hether upon a sound construction of the amendment, it must be regarded as operating directly, *without any intermediate proceeding whatever*, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power." *Id.* at 23 (emphasis added). Chief Justice Chase grounded his resolution of this self-execution inquiry in the "character of the third section of the amendment." *Id.* at 25. In other words, he focused on the context in which the disqualification clause of the Fourteenth Amendment was enacted. Of course, he recognized that the ultimate object of this part of the Fourteenth Amendment was "to exclude from certain offices a certain class of persons." *Id.* at 26. But his prefatory statements echo the bugle blow of constitutional revolution: "The amendment itself was the first of the series of measures proposed or adopted by congress with a view to the reorganization of state governments acknowledging the constitutional supremacy of the national

government, in those states which had attempted . . . to establish an independent Confederacy." *Id.* at 25.

¶289 Crucially, he observed that "it is obviously impossible to [disqualify certain officers] by a simple declaration, whether in the constitution or in an act of congress." *Id.* at 26. He added that to carry out Section Three's punitive mandate and enforce "any sentence of exclusion," it must first "be ascertained what particular individuals are embraced by the definition." *Id.* Chief Justice Chase explained that "[t]o accomplish this ascertainment and ensure effective results," considerable procedural and normative mechanisms would need to be introduced; certainly, "proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable." *Id.* And here's the kicker, the beating heart of *Griffin's Case*: Chief Justice Chase declared that these indispensable mechanisms "*can only be provided for by congress*." *Id.* (emphasis added).

¶290 It was the very language of the Fourteenth Amendment, Chief Justice Chase continued, that put this proposition beyond doubt: "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[s] of this article.'" *Id.* (emphasis added) (quoting U.S. Const. amend. XIV, § 3). Chief Justice Chase noted that Section Five "qualifies [Section Three] to the same extent as it would if the whole amendment consisted of these two

sections." *Id.* And pivoting back to Section Three, he pointed out that, consistent with Section Five, its final clause "gives to congress absolute control of the whole operation of the amendment." *Id.*; *see* U.S. Const. amend. XIV, § 3 ("But Congress may by a vote of two-thirds of each House, remove such disability.").

¶291 Chief Justice Chase, therefore, concluded:

> 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*.

Griffin's Case, 11 F. Cas. at 26 (emphases added).

¶292 I extract three seminal, and related, takeaways from this review of *Griffin's Case*. First, Section Three is not self-executing. Second, only Congress can pass the "appropriate legislation" needed to execute it. And third, this grant of power to Congress was not merely formalistic; it was also pragmatic. Indeed, it was indicative of the complex nature of the disqualification function. Chief Justice Chase perceived that Section Three would require an array of mechanisms—procedural, evidentiary, and definitional—to ascertain who was subject to disqualification and how they could be disqualified. More on this third notion later.

¶293 For now, though, it is worth stressing that, despite detractors in some quarters, the other premises have withstood the test of time: Section Three is not

self-executing, and Congress has the exclusive authority to enforce it. *See Cale v. City of Covington*, 586 F.2d 311, 316 (4th Cir. 1978) (citing *Griffin's Case* for the proposition that Section Three is "not self-executing absent congressional action"); *State v. Buckley*, 54 Ala. 599, 616–17 (1875) (same); *Hansen v. Finchem*, No. CV-22-0099-AP/EL, 2022 WL 1468157, *1 (Ariz. May 9, 2022) (affirming the lower court's ruling against disqualification on state law grounds but stating that "Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause"); *see also* Va. Op. Att'y Gen. No. 21-003, at 3 (Jan. 22, 2021) (citing *Griffin's Case* and stating that "the weight of authority appears to be that Section 3 of the Fourteenth Amendment is not 'self-executing'").

¶294 I now address the criticisms launched by the Electors against the enduring vintage of *Griffin's Case*. For the reasons I articulate, I am not persuaded by any of the contentions advanced.

C. Harmonizing *Griffin's Case* and *Case of Davis*

¶295 The Electors argue that Chief Justice Chase took the opposite tack on Section Three a couple of years before deciding *Griffin's Case*. *See Case of Davis*, 7 F. Cas. 63 (C.C.D. Va. 1871). But *Griffin's Case* was decided after *Case of Davis*, and unlike

Griffin's *Case*, *Case of Davis* is a two-judicial-officer, unwritten, split decision.[6] Hence, to put it mildly, *Case of Davis* is of questionable precedential value. Indeed, the majority doesn't rely on *Case of Davis* in its attempt to undermine *Griffin's Case*.

¶296 In *Case of Davis*, Chief Justice Chase, again sitting as a circuit court judge, presided over the treason prosecution of former confederate president, Jefferson Davis. *Id.* The question before the court was whether Section Three displaced the federal criminal treason charges levied against Davis. *Id.* at 102. Defense counsel asserted that Section Three provided the exclusive punishment for those within its reach, thus foreclosing prosecution under the federal treason statute. *Id.* at 90–91. Furthermore, defense counsel maintained that Section Three "executes itself" and "needs no legislation on the part of congress to give it effect." *Id.* at 90.

¶297 Due to the structure of the federal judiciary at the time, the case was heard by both a federal district court judge and Chief Justice Chase sitting together. *See* Judiciary Act of 1802, 2 Stat. 156, 159, § 6. The judicial officers, however, failed to reach consensus on the defense's motion to quash the indictment. *Case of Davis*,

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[6] Although the year in the citation for *Case of Davis* (1871) postdates the year in the citation for *Griffin's Case* (1869), it was in fact *Case of Davis* that came first. *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 100 n.66 (2021). Chief Justice Chase announced on December 5, 1868, that the court had failed to reach consensus in *Case of Davis*. *Case of Davis*, 7 F. Cas. at 102; Certificate of Division, *Case of Jefferson Davis*, 7 F. Cas. 63 (C.C.D. Va. 1867–1871) (No. 324), https://joshblackman.com/wp-content/uploads/2023/08/5220.pdf [https://perma.cc/K7QC-4YZJ].

7 F. Cas. at 102. Accordingly, a certificate of disagreement was submitted for review by the Supreme Court at its next session. *Id.* Notably, though, the case was never heard by the Supreme Court because President Johnson issued a proclamation of general amnesty in December 1868, effectively disposing of the treason charges. *Id.*

¶298 Although the certificate of disagreement did not indicate the judicial officers' votes, the final sentence in the 1894 report of the case in the *Federal Reports* states that Chief Justice Chase "instructed the reporter to record him as having been of opinion on the disagreement, that the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment to the constitution of the United States." *Id.* Over the years, some have clung to this hearsay to posit that Chief Justice Chase was inconsistent in his application of Section Three, waffling on the issue of self-execution.

¶299 Certain legal scholars have sought to explain this purported incongruence by surmising that Chief Justice Chase's application of Section Three in *Griffin's Case* was politically motivated. Consequently, they criticize *Griffin's Case* as wrongly decided and the result of flawed logic. *See* Baude & Paulsen, *supra* (manuscript at 35–49). Other legal scholars, however, question whether the statement quoted above from the *Federal Reports* accurately represented Chief Justice Chase's views. They point out that the case reporter, a former confederate

general, was the very attorney who represented Judge Sheffey in *Griffin's Case*.[7] *See* Blackman & Tillman, *supra* (manuscript at 15). Even assuming *Case of Davis* warrants any consideration at all, there is no need to join this affray because these cases can be reconciled in a principled manner by recognizing that there are two distinct senses of self-execution. *Id.* at 19. I find this distinction both helpful and borne out by the case law.

¶300 First, there is self-execution as a *shield*, allowing individuals to raise the Constitution defensively, in response to an action brought by a third party. Second, there is self-execution as a *sword*—such as when individuals invoke the Constitution in advancing a theory of liability or cause of action that supports affirmative relief. When acting as a *shield*, the Fourteenth Amendment is self-executing. *Cale*, 586 F.2d at 316. The Fourteenth Amendment, however, cannot act as a self-executing *sword*; rather, an individual seeking affirmative relief under the Amendment must rely on legislation from Congress. *Id.*

¶301 The Fourth Circuit aptly adopted this distinction in *Cale*, thereby reconciling any apparent inconsistencies in Fourteenth Amendment jurisprudence. That case

[7] *Griffin's Case* was decided in 1869 and the statement from the case reporter regarding *Case of Davis* appeared in the 1894 *Federal Reports*. Blackman & Tillman, *supra* (manuscript at 140).

implicated a wrongful discharge action in which the plaintiff asked the court to sanction an implied cause of action arising under the Fourteenth Amendment's due process clause. *Id.* at 313. In examining whether an implied cause of action exists under the due process clause of the Fourteenth Amendment, the court turned to cases that have construed Section Five. It began by discussing *Ex parte Virginia*, where the Supreme Court explained that the Fourteenth Amendment derives much of its force from Section Five, which envisions enabling legislation from Congress to effectuate the prohibitions of the amendment:

> It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged[.] *Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.*

Ex parte Virginia, 100 U.S. at 345–46 (first emphasis in original, second emphasis added).

¶302 But shortly after deciding *Ex parte Virginia*, the Supreme Court declared the Fourteenth Amendment to be "undoubtedly self-executing without any ancillary legislation," while simultaneously making the seemingly inconsistent statement that Section Five "invests Congress with power to enforce" the Fourteenth Amendment "in order that the national will, thus declared, may not be a mere brutum fulmen." *The Civil Rights Cases*, 109 U.S. 3, 11, 20 (1883). Although at first

blush the opinion in the *Civil Rights Cases* appears to be both internally inconsistent and inconsistent with *Ex parte Virginia*, the *Cale* court did not so hold. *Cale*, 586 F.2d at 316. Instead, the *Cale* court resolved any apparent inconsistencies by distinguishing between, on the one hand, "the protection the Fourteenth Amendment provide[s] of its own force as a shield under the doctrine of judicial review," and on the other, affirmative relief sought under the amendment as a sword, which is unavailable without legislation from Congress. *Id.*

¶303 In supporting this distinction, the *Cale* court found refuge in the *Slaughter-House Cases*. 83 U.S. 36 (1872). There, the defendants invoked the Fourteenth Amendment as a shield by arguing that a local law restricting where animals could be slaughtered deprived the city's butchers of their "right to exercise their trade." *Id.* at 60. The Supreme Court, however, held that given the history of the Reconstruction Amendments and their purpose of preventing discrimination against the newly liberated enslaved people, the butchers' "right to exercise their trade" was not a right that fell within the purview of the privileges-and-immunities provision of Section One of the Fourteenth Amendment. *Id.* at 81. Of particular interest for our purposes is the fact that the Court did not reject the use of the Fourteenth Amendment as a self-executing shield, but rather rejected the argument that the particular right in question fit within the Fourteenth Amendment's protection.

¶304 Importantly, based on its examination of *Ex parte Virginia*, the *Civil Rights Cases*, and the *Slaughter-House Cases*, the *Cale* court observed that "the Congress and Supreme Court of the time were in agreement that affirmative relief under the amendment should come from Congress." *Cale*, 586 F.2d at 316. The *Cale* court added that it's only when state laws or proceedings are asserted "in hostility to rights and privileges" that the Fourteenth Amendment, and specifically Section One, may be raised as a self-executing defense to those laws or proceedings. *Id.* (discussing the *Civil Rights Cases*, 109 U.S. at 46 (Harlan, J., dissenting)); *see also The Slaughter-House Cases*, 83 U.S. at 81 (explaining that when "it is a State that is to be dealt with, and not alone the validity of its laws," the matter should be left in the hands of Congress).

¶305 The defensive-offensive dynamic of the Fourteenth Amendment is best exemplified by the interplay between 42 U.S.C. § 1983 and *Ex parte Young*, 209 U.S. 123 (1908). *See Cale*, 586 F.2d at 316–17. In *Ex parte Young*, multiple railroad companies wielded the Fourteenth Amendment's due process clause as a shield to request enjoinment of the future enforcement of Minnesota's mandatory railroad rates. 209 U.S. at 130. The Court ruled in their favor, holding that they could prospectively bring suit against a state official to prevent the enforcement of an act that violated the federal constitution. *Id.* at 167. But an *Ex parte Young* claim is not so much an affirmative cause of action as it is a defense that may be asserted in

anticipation of the enforcement of state laws alleged to be unconstitutional. *See Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014). Hence, *Ex parte Young* provides a means of vindicating Fourteenth Amendment rights without violating the grant of exclusive enforcement power to Congress. When a party wishes to assert its Fourteenth Amendment rights offensively, however, it must bring a cause of action under legislation enacted by Congress, such as section 1983.

¶306 Between affirmative relief provided by Congress and defensive *Ex parte Young* claims, constitutional rights are "protected in all instances." *Cale*, 586 F.2d at 316–17. Not surprisingly, after declining to find an implied cause of action permitting affirmative relief within the Fourteenth Amendment, the Fourth Circuit in *Cale* remanded to the district court with instructions to determine whether the plaintiff's wrongful discharge claim could be brought under section 1983, the proper enforcement mechanism. *Id.* at 312.

¶307 The majority devotes all of one sentence to *Cale* and disregards most of the Supreme Court jurisprudence to which that thoughtful opinion is moored. Maj. op. at ¶ 103. It is true that *Cale* was a Section One, not a Section Three, case. But *Cale* cited to *Griffin's Case* (a Section Three case) in determining that the Fourteenth Amendment cannot be used as a self-executing sword, thus tethering the distinction to both Sections. *Cale*, 586 F.2d at 316. Accordingly, while courts have

seldom had occasion to interpret Section Three, the case law on Section One is instructive on the issue of self-execution.

¶308 Critically, the Supreme Court has affirmed that the Fourteenth Amendment, while offering protection under certain circumstances, does not provide a self-executing cause of action. *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921) ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, [n]ot affirmative, and it carries no mandate for particular measures of reform."). Moreover, as pertinent here, the Supreme Court has retreated from recognizing implied causes of action, instead holding that for a cause of action to exist, Congress must expressly authorize it. *Alexander v. Sandoval*, 532 U.S. 275, 276 (2001) (refusing to recognize a private right of action because, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress").

¶309 The majority nevertheless protests that interpreting any section of the Fourteenth Amendment as requiring legislation yields absurd results because the rest of the Reconstruction Amendments are self-executing. Maj. op. ¶ 96. I do not dispute that the Thirteenth and Fifteenth Amendments are self-executing. But I disagree that Section Three must therefore be deemed self-executing as well. The Thirteenth and Fifteenth Amendments, on the one hand, and the Fourteenth Amendment, on the other, are different.

¶310 The Thirteenth and Fifteenth Amendments speak in affirmative, universal terms to abolish slavery, create the right to vote, and restrain not only government actors, but also private individuals. *See* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 Va. L. Rev. 1367, 1367 (2008); *Guinn v. United States*, 238 U.S. 347, 363 (1915) (recognizing "the right of suffrage" created by the Fifteenth Amendment's "generic character"). The Fourteenth Amendment, however, was born out of a deep suspicion of the states and acts as a negative policing mechanism intended solely to curtail state power. *Adarand*, 515 U.S. at 255 (Stevens, J. dissenting) ("The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States."); *The Civil Rights Cases*, 109 U.S. at 11 (holding that the Fourteenth Amendment applies to state action, not private action). This curtailment applies both to state laws or actions abridging rights and to a state's selection of government officials. To give effect to this amendment while respecting our federalist system, courts have turned to the sword-shield paradigm of self-execution, thereby striking "a balance between delegated federal power and reserved state power" without forsaking the protection of constitutional rights "in all instances." *Michigan Corr. Org.*, 774 F.3d at 900; *Cale*, 586 F.2d at 317.

¶311 To draw a yet deeper line in the sand, unlike the Thirteenth and Fifteenth Amendments, Section Three does not indelibly ensure a right but instead allows

the federal government to act as a protective check against a state's selection of government officials so as to preclude elected insurrectionists and safeguard democracy. This shift in power between the authority of the states to choose their own government officials and the authority of the federal government as a last defense is all the more reason to require a congressionally created cause of action to direct the execution of this federal oversight.

¶312 In sum, Chief Justice Chase's holding in *Griffin's Case* appears consistent and in alignment with both his alleged vote in *Case of Davis* and our framework for Fourteenth Amendment litigation. Griffin wielded Section Three as a self-executing sword, invoking the provision as a cause of action to disqualify Judge Sheffey. Davis, on the other hand, took a defensive posture and invoked Section Three as a self-executing shield, arguing that it provided the exclusive punishment for insurrection, thus displacing the federal criminal treason charges brought against him.

¶313 Having said that, I do not rely solely on *Griffin's Case*. Congress's own actions corroborate my understanding of Section Three.

D. Erstwhile Enabling Legislation

¶314 The majority's ruling that Section Three self-executes without the need for any federal enforcement legislation is further undermined by Congress's promulgation of just such legislation. One year after *Griffin's Case* was decided,

and perhaps in response to it, Congress enacted the Enforcement Act of 1870. The Enforcement Act contained two provisions for the specific purpose of *enforcing Section Three*. Enforcement Act of 1870, ch. 114, 16 Stat. 140, 143–44. The first provided a quo warranto mechanism whereby a federal district attorney could bring a civil suit in federal court to remove from office a person who was disqualified by Section Three. *Id.* at 143. The second permitted a criminal prosecution for knowingly accepting or holding office in violation of Section Three, and included punishment by imprisonment of not more than a year, a fine of not more than $1,000, or both. *Id.* at 143–44.

¶315 The enforcement purpose behind the Act was evident in the congressional debates held on these very two provisions. Speaking in support of their adoption, Senator Lyman Trumbull, referring to Section Three, stated, "But notwithstanding that constitutional provision we know that hundreds of men are holding office who are disqualified by the Constitution. *The Constitution provides no means for enforcing itself, and this is merely a bill to give effect to the fundamental law embraced in the Constitution*." Cong. Globe, 41st Cong., 1st Sess. 626 (1869) (emphasis added). He later reiterated this point as he explained that "[s]ome statute is certainly necessary to enforce the constitutional provision." *Id.* The debate on the floor focused not on whether the provisions were necessary for enforcing Section Three—that seemed to be a foregone conclusion—but instead on whether the

second provision and its attendant punishments were necessary. The need for the first provision was so self-evident that it was not even debated. As Senator Garrett Davis put it, the first provision simply provided an "adequate remedy to prevent any of the criminals under the fourteenth amendment of the Constitution from holding office in defiance of its letter." *Id.* at 627.

¶316 While the quo warranto provision in the Enforcement Act would have provided a civil cause of action to challenge President Trump's eligibility to appear on Colorado's presidential primary ballot, Congress repealed it in 1948. *See* Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 Wm. & Mary Bill Rts. J. 153, 206 n.365 (2021) (citing Act of June 25, 1948, ch. 646, § 39, 62 Stat. 869, 993); *see also* Act of June 25, 1948, ch. 645, § 2383, 62 Stat. 683, 808. The Enforcement Act's criminal provision, however, appears to have survived: As best I can tell, 18 U.S.C. § 2383 is its descendant. *Id.*

¶317 Presumably recognizing the civil-action gap created by the 1948 repeal, just months after the January 6, 2021 incident, legislation was proposed to allow the Attorney General of the United States to bring a civil action "against any Officeholder who engages in insurrection or rebellion, including any Officeholder who, after becoming an Officeholder, engaged in insurrection or rebellion." H.R. 1405, 117th Cong. (2021). H.R. 1405 would have disqualified such an Officeholder from federal or state office. *Id.* Furthermore, it would have provided

what has been so apparently lacking from this state proceeding—clear designations of the appropriate procedures, forum, and standard of evidence, as well as the definition of "insurrection or rebellion." *Id.*

¶318 H.R. 1405 made it no further than introduction in the House. But the relevant point for our purposes remains: As recently as 2021, just months after the January 6 incident, Congress considered legislation to enforce Section Three through a civil proceeding. Why would Congress do so if, as the majority insists, Section Three is self-executing? Along the same lines, if the majority is correct that Section Three is self-executing, why did Congress pass the *Enforcement* Act to begin with (on the heels of *Griffin's Case*) and then allow it to remain in effect in its entirety until 1948? The majority offers no salient explanation.

¶319 If there is any enforcing legislation for Section Three currently on the books, it is arguably what remains from the Enforcement Act, 18 U.S.C. § 2383. Similar to its ancestor, that statute states that:

> Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.

While section 2383 might provide an enforcement mechanism for Section Three, it is not presently before us. That's because President Trump has never been charged

with, let alone convicted of, violating it. The instant litigation feels to me like an end run around section 2383.

¶320 To the extent there is interest in seeking to disqualify President Trump from holding public office (one of the mandatory punishments provided in section 2383) based on the allegation that he engaged in insurrection (one of the acts prohibited by section 2383), why wasn't he charged under section 2383? And, relatedly, why isn't he entitled to more due process than that which he received in this constricted Election Code proceeding? To be sure, unlike section 2383, Section Three prescribes neither a fine nor a term of imprisonment as a consequence for engaging in an insurrection after taking the prerequisite oath. So, I'm not suggesting that President Trump should have been afforded all the rights to which a defendant would be entitled in a criminal case. But here, the district court found that he engaged in insurrection after taking the prerequisite oath, despite affording him subpar due process (even under civil-procedure standards).

¶321 Compellingly, although H.R. 1405 wouldn't have called for a criminal proceeding, it would have provided more due process than that available in a civil action. For example, H.R. 1405 would have required any action brought to be "heard and determined by a district court of three judges." H.R. 1405, § 1(d)(1). Additionally, any allegation of insurrection would have demanded proof by clear and convincing evidence, and any final order or injunction would have been

reviewable by appeal directly to the U.S. Supreme Court. *Id.* at § (1)(d)(1)–(4). I infer from these provisions that at least some members of Congress acknowledged the need to provide ample due process (more than is available in typical civil cases) to anyone alleged to have violated Section Three.

¶322 My colleagues in the majority necessarily view as acceptable the diminished due process afforded President Trump as a result of enforcing Section Three through our Election Code. Instead, they prioritize their fear that a ruling disallowing the disqualification of President Trump from the primary ballot pursuant to Section Three would mean that "Colorado could not exclude from the ballot even candidates who plainly do not satisfy the age, residency, and citizenship requirements of the Presidential Qualifications Clause of Article II." Maj. op. ¶ 68. They see this as a more insidious evil. As I discuss in the following section, however, my colleagues are mistaken in their understanding of the law, and their worry is therefore unjustified.

E. Section Three of the Fourteenth Amendment Is Unlike Other Constitutional Qualification Clauses

¶323 The U.S. Supreme Court has acknowledged a non-exhaustive list of constitutional Qualification Clauses. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 n.2 (1995) (quoting *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969), which lists "qualifications" codified in the following provisions of the U.S. Constitution: (1) Art. I, § 2, cl. 2; (2) Art. I, § 3, cl. 7; (3) Art. I, § 6, cl. 2; (4) Art. IV,

§ 4; (5) Art. VI, cl. 3; and (6) Amend. XIV, § 3). This list can fairly be expanded to include Article II, Section One, Clause Five, and perhaps also Section One of the Twenty-Second Amendment. *See* U.S. Const. art. II, § 1, cl. 5 (laying out three presidential eligibility requirements related to birth ("natural born Citizen"), age ("thirty five Years"), and residency ("fourteen Years a Resident"), which are similar to those specified in Art. I, § 2, cl. 2); U.S. Const. amend. XXII, § 1 (using the same "No person shall" language found in Art. I, § 2, cl. 2 and specifying a two-term limit for the presidency).

¶324 Although Section Three was included in *Powell* among the so-called Qualification Clauses, closer scrutiny reveals that it is unique and deserving of different treatment. That's because Section Three is the only one that is "qualifie[d]" by the following language: "[C]ongress shall have power to enforce, *by appropriate legislation*, the provision[s] of this article." *Griffin's Case*, 11 F. Cas. at 26 (emphasis added) (quoting U.S. Const. amend. XIV, § 5 and stating that "[t]he fifth section qualifies the third"). None of the other Qualification Clauses—even when viewed in the context of the original Articles in toto—contains the "appropriate legislation" modifier. Indeed, that modifier only appears in certain other Amendments, none of which are objectively relevant to the instant matter. I need not contemplate what bearing, if any, this has on the self-executing nature of constitutional provisions more generally. While that might be an open question,

see Blackman & Tillman, *supra* (manuscript at 23) (noting that there appears to be "no deep well of consensus that constitutional provisions are automatically self-executing or even presumptively self-executing"), the demands of the instant matter counsel in favor of limiting my exposition to the Constitution's presidential qualifications, especially those found in Article II, Section One, Clause Five.

¶325 Here, once again, the interplay between Sections Three and Five of the Fourteenth Amendment is of great significance. *See Griffin's Case*, 11 F. Cas. at 26. As mentioned, Article II, Section One, Clause Five contains nothing akin to the "appropriate legislation" language in Section Five of the Fourteenth Amendment. Thus, unlike Section Three's disqualification clause, which is modified by Section Five's "appropriate legislation" language, the Article II presidential qualifications do not appear to have a constitutionally mandated reliance on congressional enabling legislation.

¶326 We are not at liberty to ignore this blistering lacuna in Article II's language. But that is exactly what my colleagues in the majority do. And in so doing, they err. Even if the presidential qualifications contained in Article II are self-executing or allow for state enabling legislation—thereby providing the Electors with a cause of action to enjoin the Secretary of State ("the Secretary") from certifying a candidate disqualified by birth, age, or residency, to the Colorado presidential primary ballot, *see, e.g.*, *Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1194–95 (D. Colo.

2012), *aff'd*, 495 F. App'x 947 (10th Cir. 2012); *see also* § 1-4-1203(2)(a), C.R.S. (2023)—the same does not hold true for Section Three's disqualification clause.

¶327 Moreover, I detect a principled reason underlying this discrepancy in the language of Article II and Section Three. It relates to what I previously identified as my third takeaway from *Griffin's Case*. Recall that the Fourteenth Amendment's grant of absolute power to Congress vis-à-vis Section Three's enforcement was pragmatic, not merely formalistic. It was motivated by the complex nature of the disqualification function. Chief Justice Chase presciently observed that to "ascertain what particular individuals are embraced" by Section Three's disqualifying function, and to "ensure effective results" in a disqualification case, considerable "proceedings, evidence, decisions, and enforcements of decisions . . . are indispensable." *Griffin's Case*, 11 F. Cas. at 26. In my view, the unwieldy experience of the instant litigation proves beyond any doubt the foresight of Chief Justice Chase's pronouncements. It doesn't require much process, procedure, or legal acumen to determine whether a candidate is barred by the binary and clerical requirements of birth, age, residency, and term limits. Typically, a notarized statement of intent will do the trick. *See* § 1-4-1204(1)(c), C.R.S. (2023). By contrast, Section Three disqualification necessarily requires substantial procedural and normative mechanisms to ensure a fair and constitutionally compliant outcome. These include, to name but a few, instruction on discovery and evidentiary rules;

guidance as to whether a jury must be empaneled or a bench trial will suffice; direction as to the proper standards of review and burdens of proof; and clarification about whether civil or criminal proceedings are contemplated. Additionally, there's a vital need for definitional counsel on such questions as who is an "officer of the United States"? What is an "insurrection"? What does it mean to "engage[] in" the same? Does "incitement" count?

¶328 By no means do I intend to undermine the sacred role of the judiciary in directing the course of similar issues through precedential pathways. Nor would I have the third branch hamstrung in its task of setting the metes and bounds of litigation practice. But when the enforcement power of a punitive constitutional mandate is delegated to Congress in such unequivocal terms, it would appear decidedly outside the judicial bailiwick to furnish the scaffolding that only "appropriate legislation" can supply. Because the Constitution gives this job to Congress, *and only Congress*, I consider it equally improper—indeed, constitutionally impossible—for state legislatures, in the absence of federal legislation, to create pseudo causes of action pursuant to Section Three's disqualification clause. This is precisely what the framers sought to prevent.

¶329 For this reason, the cases cited by the district court for the proposition that "states can, and have, applied Section [Three] pursuant to state statute without federal legislation" do not alter my analysis. *See Worthy v. Barrett*, 63 N.C. 199, 200

(1869), *appeal dismissed sub no. Worthy v. Comm'rs*, 76 U.S. 611 (1869); *In re Tate*, 63 N.C. 308, 309 (1869); *State ex rel. Sandlin v. Watkins*, 21 La. Ann. 631, 631–34 (La. 1869); *State v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619, at *15–22 (N.M. Dist. Sept. 6, 2022); *Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot, 1 (Ga. Off. Admin. Hearings May 6, 2022). To the extent other state courts have concluded that their own state statutes allow them to adjudicate Section Three claims, I respectfully submit that they are flat out wrong. Unfortunately, the majority joins company with these misguided decisions and holds that our General Assembly not only can, but has, empowered Colorado's state courts to adjudicate Section Three claims via our Election Code.[8] Maj. op. ¶ 88 n.11. I turn next to why Colorado's Election Code cannot rescue the majority.

F. Colorado's Election Code Cannot Supply What Congress Has Withheld

¶330 There is zero authority permitting state legislatures to do that which, though delegated to it, Congress has declined to do. The majority, however, holds that the Electors' Fourteenth Amendment claim can be brought under sections 1-1-113

[8] Interestingly, the majority does not explain what should happen moving forward if nobody challenges a candidate whom the Secretary believes previously engaged in insurrection after taking the prerequisite oath. Without the state courts' involvement, is the Secretary supposed to decide on her own whether the candidate is disqualified from public office by Section Three? And if so, how would the Secretary go about doing that? Would the majority expect her to act as investigator, prosecutor, and adjudicator in that type of situation?

and 1-4-1204(4), C.R.S. (2023), of the Colorado Election Code because the Secretary's listing of a constitutionally disqualified candidate on the presidential primary ballot would be a "wrongful act," as that term is used in section 1-1-113. *See* § 1-1-113(1). Maj. op. ¶¶ 4–5. But the truncated procedures and limited due process provided by sections 1-1-113 and 1-4-1204(4) are wholly insufficient to address the constitutional issues currently at play.

¶331 Section 1-1-113(1) provides that "when any eligible elector files a verified petition . . . alleging that a person charged with a duty *under this code* has committed or is about to commit a breach or neglect of duty or other *wrongful act*, . . . upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code." (Emphases added.) Section 1-4-1204(4) outlines the procedures to be followed when a section 1-1-113 challenge concerns the listing of a candidate on the presidential primary ballot. It provides that the challenge "must be made in writing and filed with the district court . . . no later than five days after the filing deadline for candidates." § 1-4-1204(4). The written challenge "must provide notice in a summary manner of an alleged impropriety that gives rise to the complaint." *Id.* Once the challenge is filed, the district court must hold a hearing within five days. *Id.* At that hearing, the district court must "hear the challenge and assess the validity of all alleged improprieties." *Id.* The filing party has the burden of sustaining the challenge by

a preponderance of the evidence. *Id.* After the hearing, the district court must issue its findings of fact and conclusions of law within forty-eight hours. *Id.* An appeal from the district court's ruling must be brought before this court within three days of the district court's order, and this court has discretion to accept or decline jurisdiction over the case. § 1-4-1204(4); § 1-1-113(3).

¶332 As these statutory provisions make clear, a section 1-1-113 challenge to the certification of a candidate to the presidential primary ballot is meant to be handled on an expedited basis. *See Frazier v. Williams*, 2017 CO 85, ¶ 11, 401 P.3d 541, 544 ("[S]ection 1-1-113 is a summary proceeding designed to quickly resolve challenges brought by electors, candidates, and other designated plaintiffs against state election officials prior to election day."). Indeed, "such proceedings generally move at a breakneck pace." *Id.* It's unsurprising, then, that this court has previously limited the types of claims that can be brought under section 1-1-113 to those "alleging a breach or neglect of duty or other wrongful act *under the Colorado Election Code*." *Id.* at ¶ 10, 401 P.3d at 543 (emphasis added).

¶333 Because section 1-1-113 constitutes a modest grant of power, until today, this court has expressly declined to use that section's reference to "other wrongful act[s]" to expand its scope to include constitutional claims and other claims that do not arise specifically under the Election Code. *Id.* at ¶ 14, 401 P.3d at 544. The "accelerated" nature of a section 1-1-113 proceeding and the limited remedy

available in such a proceeding (i.e., an order requiring "substantial compliance with the provisions of [the Election Code]") render the statute incompatible with complex constitutional claims such as the one involved here. *See id.* at ¶¶ 16–18, 401 P.3d at 544–45.

¶334 An examination of the proceedings below highlights why a section 1-1-113 proceeding is a mismatch for a constitutional claim rooted in Section Three. The Electors filed their verified petition on September 6, 2023. The verified petition, far from being a "summary" notice of the alleged impropriety, *see* § 1-4-1204(4), was 105 pages in length. The district court did not hold a hearing within five days as required by section 1-4-1204(4). In fact, the court didn't hold its first status conference until September 18, twelve days after the verified petition was filed.[9] During that status conference, the court set deadlines for initial briefing. The district court gave the parties just four days, or until September 22, to file initial motions to dismiss with briefing on those motions to be completed by October 6. *Cf.* C.R.C.P. 12(b) (allowing twenty-one days from service of the complaint in a civil case to file motions to dismiss). The court also scheduled a five-day hearing to begin on October 30, or roughly eight weeks after the verified petition was filed.

[9] I recognize that the case was removed to federal court on September 7, the day after it was filed. But the federal court returned the case to the state court on September 12, six days before the first status conference was held.

That's fifty-four days, which is nearly ten times the amount of time permitted by the Election Code. *See* § 1-4-1204(4) ("No later than five days after the challenge is filed, a hearing must be held . . . .").

¶335 At the next status conference, on September 22, the court set more deadlines, this time related to exhibit lists, expert disclosures, and proposed findings of fact and conclusions of law. With respect to expert disclosures, the court ordered the Electors to provide expert reports by October 6, or twenty-four days before the hearing. *Cf.* C.R.C.P. 26(a)(2)(C)(I) (providing that in a civil case the claiming party's expert disclosures are typically due "at least 126 days (18 weeks) before the trial date"). It ordered President Trump to provide his expert reports no later than October 27, three days before the hearing was to begin. *Cf.* C.R.C.P. 26(a)(2)(C)(II) (stating that a defending party in a civil case is generally not required to provide expert reports "until 98 days (14 weeks) before the trial date"). And even though it was apparent from very early on in these proceedings that the Electors would rely heavily on expert testimony regarding both legal and factual matters to attempt to prove their challenge, the district court did not allow experts to be deposed. *Cf.* C.R.C.P. 26(b)(4)(A) (setting forth the default rule on the deposition of experts in civil cases: "A party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2) of this Rule whose opinions may be presented at trial."). Instead, the court ordered that expert reports must

be "fulsome" and that experts would not be allowed to testify to anything outside their reports.

¶336 As planned, the hearing began on October 30 and concluded on November 3. The district court gave each side eighteen hours to present its case. The parties presented closing arguments on November 15, and the court issued its final order on November 17, two weeks after the hearing concluded and seventy-two days after the verified petition was filed.

¶337 This was a severe aberration from the deadlines set forth in the Election Code, *see* § 1-4-1204(4), which require a district court to issue its ruling no more than forty-eight hours after the hearing and roughly a week after the verified petition is filed. Despite this clear record, my colleagues in the majority curiously conclude that the district court "substantially compl[ied]" with all the statutory deadlines. Maj. op. ¶ 85. That's simply inaccurate (unless the majority views complete failure as substantial compliance). The majority's reading of the record, while creative, doesn't hold water.

¶338 Given the complexity of the legal and factual issues presented in this case, it's understandable why the district court may have felt that adhering to the deadlines in section 1-4-1204(4) wouldn't allow the parties to adequately litigate the issues. But the district court didn't have the discretion to ignore those statutory deadlines. Section 1-4-1204(4) states that "a hearing *must* be held" no later than

five days after a challenge is filed and that the district court "*shall* issue findings of fact and conclusions of law no later than forty-eight hours after the hearing." *See Waddell v. People*, 2020 CO 39, ¶ 16, 462 P.3d 1100, 1106 ("[T]he 'use of the word "shall" in a statute generally indicates [the legislature's] intent for the term to be mandatory.'" (alteration in original) (quoting *People v. Hyde*, 2017 CO 24, ¶ 28, 393 P.3d 962, 969)); *Ryan Ranch Cmty. Ass'n v. Kelley*, 2016 CO 65, ¶ 42, 380 P.3d 137, 146 (noting that "shall" and "must" both "connote[] a mandatory requirement").

¶339 Rather than recognize that the Section Three challenge brought by the Electors was a square constitutional peg that could not be jammed into our Election Code's round hole, the district court forged ahead and improvised as it went along, changing the statutory deadlines on the fly as if they were mere suggestions. If, as the majority liberally proclaims, sections 1-1-113 and 1-4-1204(4) provide such a "robust vehicle" for handling the constitutional claim brought here, Maj. op. ¶ 86, why didn't the district court just drive it? Why, instead, did the district court feel compelled to rebuild such a "robust vehicle" by modifying the procedural provisions of the Election Code? I submit that, in reality, while sections 1-1-113 and 1-4-1204(4) are plenty adequate to handle ordinary challenges arising under the Election Code, they did not measure up to the task of addressing the Electors' Section Three claim. The result was a proceeding that was neither the

"summary proceeding" envisioned by section 1-1-113 nor a full-blown trial; rather, it was a procedural Frankenstein created by stitching together fragments from sections 1-1-113 and 1-4-1204(4) and remnants of traditional civil trial practice.

¶340 Even with the unauthorized statutory alterations made by the district court, the aggressive deadlines and procedures used nevertheless stripped the proceedings of many basic protections that normally accompany a civil trial, never mind a criminal trial. There was no basic discovery, no ability to subpoena documents and compel witnesses, no workable timeframes to adequately investigate and develop defenses, and no final resolution of many legal issues affecting the court's power to decide the Electors' claim before the hearing on the merits.

¶341 There was no fair trial either: President Trump was not offered the opportunity to request a jury of his peers; experts opined about some of the facts surrounding the January 6 incident and theorized about the law, including as it relates to the interpretation and application of the Fourteenth Amendment generally and Section Three specifically; and the court received and considered a partial congressional report, the admissibility of which is not beyond reproach.

¶342 I have been involved in the justice system for thirty-three years now, and what took place here doesn't resemble anything I've seen in a courtroom. In my experience, in our adversarial system of justice, parties are always allowed to

conduct discovery, subpoena documents and compel witnesses, and adequately prepare for trial, and experts are never permitted to usurp the role of the judge by opining on how the law should be interpreted and applied.

¶343 The majority tries to excuse the due process shortcomings I have discussed by noting that section 1-1-113 proceedings "move quickly out of necessity" because "[l]ooming elections trigger a cascade of deadlines . . . that cannot accommodate protracted litigation schedules, particularly when the dispute concerns a candidate's access to the ballot." Maj. op. ¶ 81. But that's exactly my point. The necessarily expedited nature of section 1-1-113 proceedings is precisely why the Electors should not have been allowed to piggyback a Section Three claim—an admittedly complex constitutional claim—on their Election Code claim in the first place. In any event, the majority's acknowledgement that section 1-1-113 proceedings "cannot accommodate protracted litigation" seems to directly contradict its determination that the Election Code endowed the district court with the "flexibility" to adequately accommodate the needs of this complex litigation. *Id.* at ¶¶ 81, 85.[10] The majority can't have its cake and eat it too.

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[10] Even if the majority were correct about the district court's "flexibility" to accommodate a constitutional claim, the "limit[ed] appellate review" available under the letter of section 1-1-113 further demonstrates why the Election Code is not an appropriate avenue for the prosecution of a Section Three claim. *Frazier*, ¶ 18, 401 P.3d at 545. This court has the sole discretion to review section 1-1-113 proceedings, § 1-1-113(3); § 1-4-1204(4), so, whenever we decline such review, "the

¶344 The irregularity of these proceedings is particularly troubling given the stakes. The Electors ask us to hold that President Trump engaged in insurrection and is thus disqualified from being placed on the ballot for this upcoming presidential primary.[11]

¶345 Today's decision will have sweeping consequences beyond just this election. The majority's ruling that President Trump is disqualified under Section Three means that he can never again run for a Senate or House of Representatives position, or become an elector, or hold any office (civil or military) under the United States or under any state. In other words, he will be barred from holding any public office, state or federal, for the rest of time. His only possible out is if Congress at some point decides to remove the disqualification through a two-thirds vote by each House (which is no small feat). "A declaration that a person is permanently barred from any future public office raises constitutional issues that simple removal from office does not . . . . The serious nature of any such holding

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decision of the district court shall be final and not subject to further appellate review," *Frazier*, ¶ 18, 401 P.3d at 545 (quoting § 1-1-113(3)). Imagine, then, if we had declined to review the instant matter. Alarmingly, the adjudication of *federal* constitutional provisions, disqualifying President Trump from office, would have met its road's end in state district court. How can this court give its imprimatur to such an inverted conception of the supremacy doctrine? I, for one, cannot.

[11] This same ask has been made of other courts based on their state election codes. *See, e.g.*, *Trump v. Benson*, No. 23-00151-MZ (Mich. Ct. Cl. Nov. 14, 2023); *Growe v. Simon*, 997 N.W.2d 81 (Minn. 2023). Ours is the first to take the bait.

demands that the rules of procedural due process be complied with strictly." *Bohannan v. Arizona ex rel Smith*, 389 U.S. 1, 4 (1967) (Douglas, J., dissenting).

¶346 There was no strict compliance with procedural due process here. How is this result fair? And how can we expect Coloradans to embrace this outcome as fair?

¶347 I cannot agree with the majority that the chimeric proceedings below gave President Trump process commensurate to the interest of which he has been deprived. Nor did the proceedings below protect the interest Coloradans have in voting for a candidate of their choosing. Of course, if President Trump committed a heinous act worthy of disqualification, he should be disqualified for the sake of protecting our hallowed democratic system, regardless of whether citizens may wish to vote for him in Colorado. But such a determination must follow the appropriate procedural avenues. Absent adequate due process, it is improper for our state to bar him from holding public office.

¶348 More broadly, I am disturbed about the potential chaos wrought by an imprudent, unconstitutional, and standardless system in which each state gets to adjudicate Section Three disqualification cases on an ad hoc basis. Surely, this enlargement of state power is antithetical to the framers' intent.

II. Conclusion

¶349 In the first American Declaration of Rights in 1776, George Mason wrote that "no free government, nor the blessings of liberty, can be preserved to any people, but by . . . the recognition by all citizens that they have . . . rights, and that such rights cannot be enjoyed save in a society where law is respected and due process is observed." Va. Const. art. I, § 15. Some two and a half centuries later, those words still ring true. In 2023, just as in 1776, all, including those people who may have committed horrendous acts, are entitled to procedural due process.

¶350 Because I cannot in good conscience join my colleagues in the majority in ruling that Section Three is self-executing and that the expedited procedures in our Election Code afforded President Trump adequate due process of law, I respectfully dissent. Given the current absence of federal legislation to enforce Section Three, and given that President Trump has not been charged pursuant to section 2383, the district court should have granted his September 29 motion to dismiss. It erred in not doing so. I would therefore affirm its judgment on other grounds.

JUSTICE BERKENKOTTER dissenting.

¶351 Today, the majority holds that former President Donald J. Trump ("President Trump") cannot be certified to Colorado's presidential primary ballot. Maj. op. ¶ 5. He is, the majority concludes, disqualified from being President of the United States again because he, as an officer of the United States, took an oath to support the Constitution and thereafter engaged in insurrection. *See* U.S. Const. amend. XIV, § 3[1]; Maj. op. ¶¶ 4–5. In reaching this conclusion, the majority determines as an initial matter that a group of Colorado Republican and unaffiliated electors eligible to vote in the Republican presidential primary ("the Electors") asserted a proper claim for relief under Colorado's Election Code ("Election Code"). *See* §§ 1-1-101 to 1-13-804, C.R.S. (2023); Maj. op. ¶ 57.

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[1] Section Three of the Fourteenth Amendment is a Civil War era amendment to the United States Constitution that was ratified in 1868. Its aim was to prohibit loyalists to the confederacy who had taken an oath to support the Constitution from taking various state and federal offices. It provides:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

¶352 I write separately to dissent because I disagree with the majority's initial conclusion that the Election Code—as currently written—authorizes Colorado courts to decide whether a presidential primary candidate is disqualified under Section Three of the Fourteenth Amendment to the U.S. Constitution ("Section Three") from being listed on Colorado's presidential primary ballot. Maj. op. ¶¶ 62–63, 66. In my view, the majority construes the court's authority too broadly. Its approach overlooks some of part 12 of the Election Code's plain language and is at odds with the historical application of section 1-1-113, C.R.S. (2023), which up until now has been limited to challenges involving relatively straightforward issues, like whether a candidate meets a residency requirement for a school board election. Plus, the majority's approach seems to have no discernible limits.

¶353 To explain why the majority—to my mind—is wrong, first, I explain the process for challenging the listing of a candidate on the presidential primary ballot in Colorado and describe sections 1-1-113 and 1-4-1204(4), C.R.S. (2023), since those sections of the Election Code define the scope of the district court's authority to hear the case below. Then, I lay out the procedural history of this case. After that, I turn to the question of whether the district court erred in interpreting these two statutes and consider the majority's analysis with respect to each. In doing so, I conclude that the General Assembly has not granted courts the authority the

district court exercised in this case and that the court, accordingly, erred in denying President Trump's motion to dismiss.

I. The Process for Challenging the Listing of a Candidate on the Presidential Primary Ballot in Colorado

¶354 Part 12 of the Election Code charges Jena Griswold, in her official capacity as Colorado's Secretary of State ("the Secretary"), with certifying the names and party affiliations of the candidates to be placed on presidential primary ballots no later than sixty days before the presidential primary election. *See* § 1-4-1204(1). Section 1-4-1204(4) details the process through which an eligible petitioner can challenge a candidate's listing on the presidential primary ballot. It states:

> Any challenge to the listing of any candidate on the presidential primary election ballot must be made in writing and filed with the district court in accordance with section 1-1-113(1) no later than five days after the filing deadline for candidates. Any such challenge must provide notice in a summary manner of an alleged impropriety that gives rise to the complaint. No later than five days after the challenge is filed, a hearing must be held at which time the district court shall hear the challenge and assess the validity of all alleged improprieties. The district court shall issue findings of fact and conclusions of law no later than forty-eight hours after the hearing. The party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence. Any order entered by the district court may be reviewed in accordance with section 1-1-113(3).

§ 1-4-1204(4).

¶355 Section 1-1-113 is Colorado's fast-track procedural process under the Election Code that allows candidates; political parties; individuals who have made nominations; and, as pertinent here, eligible electors to file section 1-4-1204(4) and

other challenges in court, alleging that the Secretary or one of Colorado's sixty-four county clerks and recorders has committed or is about to commit a breach or neglect of duty or other wrongful act. It provides:

> When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or *when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act*, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code. The order shall require the person charged to forthwith perform the duty or to desist from the wrongful act or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.

§ 1-1-113(1) (emphasis added).

II. Procedural History

A. The Electors' Petition

¶356 On September 6, 2023, the Electors sued the Secretary under sections 1-1-113 and 1-4-1204(4) of the Election Code, alleging that the Secretary certifying President Trump to the primary ballot would constitute an "impropriety" under section 1-4-1204(4), and thus a "breach or neglect of duty or other wrongful act" under section 1-1-113(1) because Section Three—which disqualifies insurrectionists from holding office—prohibits him from being listed. The Secretary's "breach or neglect of duty or other wrongful act," the Electors argued,

authorized the district court to "issue an order requiring" the Secretary to "substantial[ly] compl[y]" with the Election Code by not certifying President Trump to the ballot. *See* § 1-1-113(1).

B. The Parties' Arguments in the District Court

¶357 Before trial, President Trump moved to dismiss the Electors' complaint. He argued that the court's authority to determine a claim under section 1-4-1204(4) is limited to the three criteria explicitly identified in section 1-4-1204(1)(b) and (c), which provide that the only candidates whose names shall be placed on the ballots for election are those who:

> (b) Are seeking the nomination for president of a political party as a bona fide candidate for president of the United States pursuant to political party rules and are affiliated with a major political party that received at least twenty percent of the votes cast by eligible electors in Colorado at the last presidential election; and
>
> (c) Have submitted to the secretary, not later than eighty-five days before the date of the presidential primary election, a notarized candidate's statement of intent together with either a nonrefundable filing fee of five hundred dollars or a petition signed by at least five thousand eligible electors affiliated with the candidate's political party who reside in the state. Candidate petitions must meet the requirements of parts 8 and 9 of this article 4, as applicable.

¶358 President Trump acknowledged that the Secretary's "Major Candidates Statement of Intent" form requires a candidate to affirm that they meet the three

qualifications set forth in Article II of the U.S. Constitution,[2] but emphasized that the form says nothing about Section Three. Thus, he urged the court to adopt a very narrow reading of section 1-4-1204(4): So long as a party candidate (1) is a bona fide presidential candidate; (2) timely submits a notarized statement of intent affirming that they meet the three Article II qualifications; and (3) pays the $500 fee, the Secretary must certify the candidate to the presidential primary ballot, thus fulfilling her duty under the Election Code.

¶359 Challenges based on anything other than those three criteria, including but not limited to a Section Three challenge, President Trump asserted in his motion, fall outside the court's authority to decide and fail to state a proper claim for relief under sections 1-4-1204(4) and 1-1-113. Any such claim, he posited, must be dismissed.

¶360 The Electors countered in their response to the motion to dismiss that section 1-4-1204(4) must be read in conjunction with the other provisions of the Election Code, including, specifically, section 1-4-1201, C.R.S. (2023), which states

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[2] Article II, Section 1, Clause 5 of the U.S. Constitution states:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

that "it is the intent of the People of the State of Colorado that the provisions of this part 12 conform to the requirements of *federal law* and national political party rules governing presidential primary elections . . . ." § 1-4-1201 (emphasis added).

¶361 The Electors also pointed to section 1-4-1203(2)(a), C.R.S. (2023), which states:

> Except as provided for in subsection (5) of this section, each political party that has a *qualified candidate* entitled to participate in the presidential primary election pursuant to this section is entitled to participate in the Colorado presidential primary election. At the presidential primary election, an elector that is affiliated with a political party may vote only for a candidate of that political party.

(Emphasis added.) And they leaned on section 1-4-1203(3), which provides, in part, that the Secretary and county clerk and recorders have "the same powers and shall perform the same duties for presidential primary elections as they provide by law for other primary elections and general elections." Based on this section, they argued that, in all "other primary elections and general elections," only candidates who meet all the qualifications to hold office may access the ballot. Finally, the Electors emphasized the text of section 1-4-1204(4), which allows for "*[a]ny challenge to the listing of any candidate*" and directs the district court to assess the validity of "*all alleged improprieties.*" (Emphases added.) In the Electors' view, part 12 of the Election Code, when read as a whole, necessarily encompasses challenges under Section Three.

C. The District Court's Final Order

¶362 In its final order, the district court rejected President Trump's argument in his motion to dismiss that the Electors failed to state a proper claim under sections 1-4-1204(4) and 1-1-113. *Anderson v. Griswold*, No. 23CV32577, ¶ 224 (Dist. Ct., City & Cnty. of Denver, Nov. 17, 2023). It concluded that the Secretary lacked the authority under the Election Code to *investigate and determine* presidential primary candidate qualifications. *Id.* at ¶ 216. It then turned to whether it had the authority to adjudicate the Electors' complaint. *Id.* at ¶ 217. The court considered three cases in which this court concluded that the Election Code requires courts—not election officials—to determine candidate eligibility. *Id.* at ¶¶ 219–21; *see Hanlen v. Gessler*, 2014 CO 24, ¶ 40, 333 P.3d 41, 50 (holding that the Secretary exceeded his authority by passing a rule that permitted election officials to determine whether a candidate appearing on the state ballot was not qualified for office because "the election code requires a court, not an election official, to determine the issue of eligibility"); *Carson v. Reiner*, 2016 CO 38, ¶ 8, 370 P.3d 1137, 1139 ("[W]hen read as a whole, the statutory scheme evidences an intent that challenges to the qualifications of a candidate be resolved only by the courts . . . ."); *Kuhn v. Williams*, 2018 CO 30M, ¶ 40, 418 P.3d 478, 485 (per curiam) (a court may review the validity of a challenged candidate-nomination petition and consider extrinsic evidence in doing so). The district court found particularly instructive

this court's conclusion in *Kuhn* that a challenger could "present evidence demonstrating that a petition actually fails to comply with the Election Code, even if it 'appear[ed] to be sufficient' in a paper review." ¶ 39, 418 P.3d at 485; *Anderson*, ¶ 219.

¶363 The court then interpreted two provisions of the Election Code to implicitly incorporate Section Three, which it concluded grants courts broad authority to review, through section 1-1-113's expedited procedures, whether a candidate is disqualified as an insurrectionist. *Anderson*, ¶¶ 222, 224. Specifically, the court interpreted the language in section 1-4-1201 stating that the provisions of part 12 of the Election Code are intended to "conform to the requirements of federal law" as incorporating the entire U.S. Constitution, including Section Three. *Anderson*, ¶ 222. And the court noted that section 1-4-1203(2)(a) provides that only political parties that have a "qualified candidate" are entitled to participate in the presidential primary process. *Anderson*, ¶ 222. Relying on these provisions, the court held that, while the Secretary is not empowered to investigate and adjudicate a candidate's potential disability under Section Three, courts are not so constrained. *Id.* at ¶ 224.

D. The Majority's Opinion

¶364 The majority also appears to construe part 12 very broadly. In sum, its view is that section 1-4-1201's reference to "federal law" speaks to the General

Assembly's intent, that section 1-4-1203(2)(a) limits participation in the presidential primary to "qualified" candidates, and that certification of a candidate who is not "qualified" thus constitutes a "wrongful act" within the scope of section 1-1-113. Maj. op. ¶¶ 36–37, 62–64. The majority draws on other provisions of the Election Code to inform the meaning of the term "qualified candidate." *Id.* at ¶¶ 37, 62 (citing § 1-4-1205, C.R.S. (2023) (requiring presidential primary write-in candidates to file a "notarized . . . statement of intent"); § 1-4-1101(1), C.R.S. (2023) (a write-in candidate's "affidavit of intent" must affirm that the candidate "desires the office and is qualified to assume its duties if elected"); § 1-4-1203(5) (when every party has no more than one certified candidate, whether party-nominated or write-in, the Secretary may cancel the presidential primary for all parties and declare the sole candidate the winner)). According to the majority, these provisions suggest that major party candidates—who are also required to submit a statement of intent—must also be "qualified to assume [the office's] duties if elected." *Id.* at ¶ 62; *see* § 1-4-1101(1).

¶365 Read as a whole, the majority thus interprets the Election Code to provide that a major party candidate in a presidential primary must, at a minimum, be qualified to hold the Office of President under the U.S. Constitution. Maj. op. ¶ 63. As such, it concludes that the General Assembly, through the Election Code, granted courts broad authority to determine presidential primary candidates'

constitutional eligibility, including eligibility under Section Three. *Id.* at ¶¶ 60–62, 65–66. In the majority's view, a reading of the Election Code that constrains courts from considering a candidate's constitutional qualifications would produce a result "contrary to the purpose of the Election Code." *Id.* at ¶ 64.

III. The Electors Failed to State a Cognizable Claim for Relief

¶366 Sections 1-4-1204(4) and 1-1-113 frame the threshold question this court must address before turning to the merits of the parties' appeal: Did the General Assembly intend to grant Colorado courts the authority to decide Section Three challenges? Based on my reading of sections 1-4-1204(4), 1-4-1201, and 1-4-1203(2)(a), I conclude that the answer to this question is no. As a result, I conclude that the Electors have not stated a cognizable claim for relief and their complaint should have been dismissed.

A. Section 1-4-1204(4) Allows for a Broad, but Not Unlimited, Range of Claims for Relief

¶367 As an initial matter, I acknowledge that the language in section 1-4-1204(4) is fairly broad insofar as it allows expedited challenges to the listing of any candidate on the presidential primary election ballot based on "alleged improprieties." And I agree with the majority that "section 1-1-113 'clearly comprehends challenges to a broad range of wrongful acts committed by officials charged with duties under the code,'" Maj. op. ¶ 61 (quoting *Carson*, ¶ 17, 370 P.3d at 1141), "including any act that is 'inconsistent with the Election Code,'" *id.*

(quoting *Frazier v. Williams*, 2017 CO 85, ¶ 16, 401 P.3d 541, 545). I also agree with the majority that a "wrongful act" is "more expansive than a 'breach' or 'neglect of duty.'" *Id.* (quoting *Frazier*, ¶ 16, 401 P.3d at 545).

¶368 But this language can only do so much. As we also held in *Frazier*, "other wrongful act" is limited to acts that are wrongful under the Election Code. ¶ 16, 401 P.3d at 545. We have also emphasized that section 1-1-113 is a *summary* proceeding designed to quickly resolve challenges brought by designated plaintiffs against state election officials prior to election day. *Id.* Indeed, past cases decided by this court reflect the generally straightforward nature of the cases filed under section 1-1-113, the lion's share of which involved disputes over state or local election residency or signature requirements. *See, e.g.*, *Griswold v. Ferrigno Warren*, 2020 CO 34, ¶ 15, 462 P.3d 1081, 1084 (deciding whether the Election Code's minimum signature requirement mandates substantial compliance and whether a U.S. Senate candidate satisfied that standard); *Kuhn*, ¶¶ 1–6, 418 P.3d at 480–81 (deciding whether a non-resident signature circulator could legally collect signatures for a candidate's petition); *Frazier*, ¶ 1, 401 P.3d at 542 (considering whether the Secretary improperly invalidated signatures included on a U.S. Senate candidate's petition to appear on the primary election ballot); *Carson*, ¶ 21, 370 P.3d at 1142 (considering whether a challenge to a candidate's qualifications

based on their residency was permitted after the Secretary certified the candidate to the ballot).

¶369 Don't get me wrong, the almost 450 entries in the district court register of actions in the two months and eleven days between September 6, 2023, the date on which the petition was filed, and November 17, 2023, the date on which the district court issued its 102-page final order, illustrate the extraordinary effort that the attorneys and the district court dedicated to this case. But that effort also proves too much. The deadlines under the statute were not met, nor could they have been. Setting aside the factual questions, an insurrection challenge is necessarily going to involve complex legal questions of the type that no district court—no matter how hard working—could resolve in a summary proceeding.

¶370 And that's to say nothing of the appellate deadline. Three days to appeal a district court's order regarding a challenge to a candidate's age? Sure. But a challenge to whether a former President engaged in insurrection by inciting a mob to breach the Capitol and prevent the peaceful transfer of power? I am not convinced this is what the General Assembly had in mind.

¶371 The various provisions of the Election Code on which the district court and the majority rely to suggest otherwise do not persuade me either.

B. The Term "Federal Law" Does Not Support a Broad Grant of Authority to Colorado Courts to Enforce Section Three

¶372 The district court relied on the declaration of intent in part 12. *Anderson*, ¶ 222. It explains the intent of the People of the State of Colorado in the context of presidential primary elections. It provides: "In recreating and reenacting this part 12, it is the intent of the People of the State of Colorado that the provisions of this part 12 conform to the requirements of *federal law* and national political party rules governing presidential primary elections . . . ." § 1-4-1201 (emphasis added).[3] In adopting a broad view of section 1-4-1204(4)'s reach, the court assumed that the term "federal law," as used in this section, refers to the entire U.S. Constitution, including Section Three. *Anderson*, ¶¶ 222–24.

¶373 The majority also leans on this reference to "federal law" in section 1-4-1201, though more obliquely, suggesting it means the General Assembly intended for part 12 to operate "in harmony" with federal law. Maj. op. ¶ 36. I am not persuaded.

[3] As Professor Muller notes in his amicus brief, "A postpositive modifier like ['governing presidential primary elections'] attaches to both 'federal law' and 'national political party rules.'" Brief for Professor Derek T. Muller as Amicus Curiae Supporting Neither Party. Hence, the term "federal law" is properly understood not as a standalone term but as only relating to presidential primary elections.

¶374 In my view, the term "federal law" is ambiguous at best. A brief dive into the history of part 12 explains why. *See McCoy v. People*, 2019 CO 44, ¶ 38, 442 P.3d 379, 389 ("If, however, the statute is ambiguous, then we may consider other aids to statutory construction, including the consequences of a given construction, the end to be achieved by the statute, and the statute's legislative history.").

¶375 Part 12 was enacted as part of the return to a primary system in Colorado. *See* § 1-4-1102, C.R.S. (1990) (governing Colorado's presidential primary system in the 1990s). From 2002 to 2016, presidential candidates were selected through a closed party caucus system. But in 2016, after "Colorado voters experienced disenfranchisement and profound disappointment with the state's [caucus] system," voters considered Proposition 107, which promised to restore presidential primary elections in Colorado, with one significant change—unlike prior iterations of its primary system, beginning in 2020, Colorado would host open presidential primaries, allowing unaffiliated voters to participate in these primary elections. *See* Proposition 107, § 1, https:// www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2015-2016/140Final.pdf [https://perma.cc/2GA9-ZY7U] (noting that "restor[ing] [Colorado's] presidential primary" to an open primary system would enable the "35% of Colorado voters who are independent of a party" to "participat[e] in the presidential nomination

process," and "encourage candidates who are responsive to the viewpoints of more Coloradans").

¶376 When Proposition 107 passed, the General Assembly amended the Election Code and adopted part 12 to formally re-introduce the presidential primary process. Nothing in this history indicates that one of the concerns animating either the proponents of Proposition 107 or the General Assembly was a need to challenge, through the courts, issues concerning candidates' constitutional disqualifications. In fact, the language in the current version of section 1-4-1201 mostly mirrors the 1990 version of part 12 (then, part 11): "It is the intent of the general assembly that the provisions of this part 11 *conform to the requirements of federal law and national political parties for presidential primary elections*." § 1-4-1104(3), C.R.S. (1990) (emphasis added).

¶377 There is some history surrounding Proposition 107 and part 12 which suggests that proponents of this new open presidential primary system were concerned about one specific constitutional issue: a potential First Amendment challenge to the new law based on political parties' private right of association. *See Independent Voters*, Denver Metro Chamber of Com., https://denverchamber.org/policy/policy-independent-voters-white-paper/ [https://perma.cc/T2TT-A2UD] (The Denver Chamber of Commerce, which launched Proposition 107, noted that a semi-open primary system, because it would permit

unaffiliated voters to affiliate with the Republican or Democratic parties in a presidential primary, could face legal challenges based on parties' First Amendment rights of association.); *see also* Christopher Jackson, *Colorado Election Law Update*, 46-SEP Colo. Law. 52, 53 (2017) (noting that the law was likely crafted in a manner designed to "stave off a First Amendment challenge" given the U.S. Supreme Court's 2000 decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), which struck down California's "blanket primary" law).

¶378 Curiously, the earlier version of the statute required the Secretary to provide a "written report" to the General Assembly "concerning whether the provisions of this part 11 conform to the requirements of federal law and national political party rules for presidential primary elections[,]" and provided that "the general assembly shall make such reasonable changes to this part 11 as are necessary to conform to federal law and national political parties' rules." § 1-4-1104(3), C.R.S. (1990). It is unclear if those reports were intended to speak to potential First Amendment concerns or some other issue, as any reports that may have been submitted to the General Assembly appear to have been lost to the sands of time (or, according to the State Archivist's Office, possibly a flood).

¶379 At bottom, this legislative history does little to illuminate what the 2016 General Assembly meant by this language in section 1-4-1201. What this history does show, however, is that the term "federal law" is most certainly not an

affirmative grant of authority to state courts to enforce Section Three in expedited proceedings under the Election Code.

C. The Term "Qualified Candidate" Does Not Support a Broad Grant of Authority to Colorado Courts

¶380 The other principal support for the district court's broad interpretation of section 1-4-1204(4) rests on the term "qualified candidate." The majority relies heavily on this language as well. Maj. op. ¶¶ 37, 62–64.

¶381 To understand the meaning of this term, it is critical to consider it in its full context. Recall, it states:

> Except as provided for in subsection (5) of this section, each political party that has a *qualified candidate* entitled to participate in the presidential primary election *pursuant to this section* is entitled to participate in the Colorado presidential primary election. At the presidential primary election, an elector that is affiliated with a political party may vote only for a candidate of that political party.

§ 1-4-1203(2)(a) (emphases added).

¶382 The district court construed this section expansively. It looked to the term "qualified candidate" as evidence of the General Assembly's intent to grant the court authority to determine if President Trump was disqualified under Section Three. The district court, like the Electors, appears to have read section 1-4-1203(2)(a) like a syllogism, such that if (1) participation in the presidential primary is limited to *qualified candidates*, and if (2) Section Three disqualifies insurrectionists, then (3) a court may appropriately consider a

Section Three challenge. But that is not what the statute says. Rather, it provides: "[E]ach political party that has a *qualified candidate* entitled to participate in the presidential primary election *pursuant to this section* is entitled to participate in the Colorado presidential primary election." *Id.* (emphases added).

¶383 Section 1-4-1203(2)(a) addresses when and how presidential primary elections are conducted. It does not prescribe additional qualifications through its use of the term "qualified candidate." *See People ex rel. Rein v. Meagher*, 2020 CO 56, ¶ 22, 465 P.3d 554, 560 ("[W]e do not add words to or subtract words from a statute."). Nor can it be read, given the fact that the term is explicitly tethered to subsection 1203, as expanding the criteria outlined in section 1-4-1204(1)(b) and (c): A candidate is eligible to be certified to the ballot by (1) being a bona fide candidate for president; (2) submitting a notarized candidate's statement of intent, and (3) paying the $500 filing fee or submitting a valid write-in petition. *See* § 1-4-1204(1)(b), (c).

¶384 It is significant, as well, that this part of the statute describes when a *political party* can participate in a presidential primary election. The consequence for a party that does not have a qualified candidate—that is, a candidate who does not meet the three-part criteria laid out in section 1-4-1204(1)(b) and (c)—is that the party cannot participate in the primary. Considered in context, then, the term

"qualified candidate" does not offer support for an expansive reading of the court's authority to determine a challenge under Section Three.

¶385 The majority takes a slightly different approach. It points to section 1-4-1201's "federal law" declaration and suggests it means that the General Assembly intended part 12 to operate "in harmony" with federal law. Maj. op. ¶ 36. Then, like the district court, it gives great weight to the language in section 1-4-1203(2)(a), which it construes to mean that participation in the presidential primary is limited to "qualified candidates." *Id.* at ¶¶ 37, 62–64. It effectively reads "pursuant to this section" out of the statute by concluding that the phrase "sheds no light on the meaning of 'qualified candidate.'" *Id.* at ¶ 37 n.3 (quoting § 1-4-1203(2)(a)). The majority then asserts that, "[a]s a practical matter, the mechanism through which a presidential primary hopeful attests that he or she is a 'qualified candidate' is the 'statement of intent' (or 'affidavit of intent') filed with the Secretary." *Id.* at ¶ 37 (quoting § 1-4-1204(1)(c)).

¶386 And, it explains, the Secretary's statement of intent for a major party presidential candidate requires the candidate to affirm via checkboxes that the candidate meets the qualifications set forth in Article II of the U.S. Constitution for the Office of President, i.e., that the candidate is at least thirty-five years old, has been a resident of the United States for at least fourteen years, and is a natural-born U.S. citizen. *Id.* at ¶ 38; U.S. Const. art. II, § 1, cl. 5; *Major Party Candidate*

Statement of Intent for Presidential Primary, Colo. Sec'y of State, https://www.sos.state.co.us/pubs/elections/Candidates/files/MajorPartyCandidateStatementOfIntentForPresidentialPrimary.pdf [https://perma.cc/RY72-ASSD]. As well, the form requires the candidate to sign an affirmation that states: "I intend to run for the office stated above and *solemnly affirm that I meet all qualifications for the office prescribed by law*." *Major Party Candidate Statement of Intent for Presidential Primary*, *supra.*

¶387 The majority stitches these various parts of the Election Code together to conclude the General Assembly intended to grant state courts the authority to decide Section Three challenges. Maj. op. ¶¶ 36–38, 62. This approach falls short for five reasons.

¶388 First, there is nothing in section 1-4-1201's "federal law" declaration that indicates the General Assembly meant to refer to Section Three. Perhaps the declaration refers to the General Assembly's concern regarding a potential First Amendment right of association challenge to the open primary system created by part 12, perhaps not. The declaration's history is muddy at best.

¶389 Second, the term "qualified candidate" cannot be fairly read to grant Colorado courts authority to adjudicate Section Three disqualification claims. The term is best understood as describing when a political party can participate in the

presidential primary process, not as the foundation for a wrongful act claim under section 1-4-1204(4) and section 1-1-113.

¶390 Third, even assuming the General Assembly intended to grant some authority to the courts through its reference to the candidate's statement of intent in the exceptionally roundabout manner suggested by the majority, there is no basis for concluding that authority extends beyond the fairly basic types of Article II challenges that have come before this court in the past, such as those involving a candidate's age, or other challenges like those alleging that petition circulators did not reside in Colorado.

¶391 Fourth, I am not persuaded by the majority's reliance on sections 1-4-1205 and 1-4-1101, which govern the requirements write-in candidates must satisfy before being certified to the ballot. *See* Maj. op. ¶¶ 37, 62. Like major party presidential primary candidates, write-in candidates for the presidential primary must file a "notarized . . . statement of intent" and submit to the Secretary "a nonrefundable fee of five hundred dollars . . . no later than the close of business on the sixty-seventh day before the presidential primary election." § 1-4-1205. Section 1-4-1101(1), which applies to all write-in candidates regardless of office, requires that the write-in candidate confirm "that he or she desires the office and *is qualified to assume its duties if elected*." (Emphasis added.) According to the majority, "[t]he Election Code's explicit requirement that a write-in candidate be

'qualified' to assume the duties of their intended office logically implies that major party candidates under 1-4-1204(1)(b) must be 'qualified' in the same manner." Maj. op. ¶ 62.

¶392 It is true that both major party candidates and write-in candidates must fill out statement of intent forms, and that the forms are similar in some respects. But, if anything, the General Assembly's decision to include a specific qualification provision for write-in candidates shows that when it wants to include an explicit qualifications requirement, like the one in section 1-4-1101(1), it knows how to do so. *See People v. Diaz*, 2015 CO 28, ¶ 15, 347 P.3d 621, 625 ("But, in interpreting a statute, we must accept the General Assembly's choice of language and not add or imply words that simply are not there." (quoting *People v. Benavidez*, 222 P.3d 391, 393–94 (Colo. App. 2009))).

¶393 Fifth and finally, there is the problem that Section Three is a disqualification for office, not a qualification to serve. As the majority acknowledges, the U.S. Supreme Court has twice declined to address whether Section Three—which is described in the text as a "disability" and is referred to as the Disqualification Clause—amounts to a qualification for office. *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969) (observing that an academic suggested in a law review article in 1968 that the three grounds for disqualification (impeachment, Section Three, and the Congressional incompatibility clause) and two other similar provisions were

each no less of a "qualification" than the Article II, Section 5 qualifications); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 n.2 (1995) (seeing "no need to resolve" the same question regarding Section Three in a case concerning the propriety of additional qualifications for office); Maj. op. ¶ 65.

¶394 Given the fact that the U.S. Supreme Court has not weighed in on whether Section Three is a qualification for office, it seems all the more important to look for some affirmative expression by the General Assembly of its intent to grant state courts the authority to consider Section Three challenges through Colorado's summary hearing and appeal process under the Election Code. I see no such expression.

IV. Conclusion

¶395 The Electors' arguments below and before this court are, to my mind, unavailing. Too much of their position rests on text like "federal law" and "qualified candidate" that—on closer examination—does not appear to mean what they say it means because it is taken out of context. In short, these sections do not show an affirmative grant by the General Assembly to state courts to decide Section Three cases through Colorado's summary election challenge process.

¶396 Because it too relied on the provisions of part 12 regarding "federal law" and "qualified candidate," the district court's reasoning suffers from the same shortcomings.

¶397 And, at the end of the day, while the majority's approach charts a new course—one not entirely presented by the parties—its approach has many of the same problems. It stitches together support from the Secretary's general authority to supervise the conduct of primary and other elections, § 1-1-107(1), C.R.S. (2023); the inference that section 1-4-1201's "federal law" declaration means something pertinent to Section Three; part, but not all, of the "qualified candidate" statute, § 1-4-1203(2)(a); inferences from the write-in candidate process statute, § 1-4-1101(1); and the novel suggestion that the General Assembly granted authority to state courts to adjudicate a Section Three challenge by virtue of its reference to the Secretary's statement of intent form in section 1-4-1204(1)(c). *See* Maj. op. ¶¶ 35–37, 62–63.

¶398 I agree with the majority that, if the General Assembly wants to grant state courts the authority to adjudicate Section Three challenges through the Election Code, it can do so. *See* U.S. Const. art. II, § 1, cl. 2 (authorizing states to appoint presidential electors "in such Manner as the Legislature thereof may direct"); *see also Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (recognizing that it is "a state's legitimate interest in protecting the integrity and practical functioning of the political process" that "permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office"). I just think it needs to say so.

APPENDIX 7

2013 WL 2294885
Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

James GRINOLS, et. al., Plaintiffs,
v.
ELECTORAL COLLEGE, et. al., Defendants.

No. 2:12–cv–02997–MCE–DAD.
|
May 23, 2013.

Attorneys and Law Firms

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Edward A. Olsen, Govt, United States Attorney's Office, George Michael Waters, Department of Justice, Office of the Attorney General, Sacramento, CA, for Defendants.

MEMORANDUM AND ORDER

MORRISON C. ENGLAND, JR., Chief Judge.

***1** The operative First Amended Complaint ("FAC") names the following plaintiffs: (1) James Grinols ("Grinols"), a 2012 California Republican party elector; (2) Edward Noonan ("Noonan"), allegedly the American Independent Party's 2012 presidential candidate; (3) Thomas MacLeran ("MacLeran"), a presidential candidate; (4) Robert Odden ("Odden"), a 2012 California Libertarian party elector; (5) Keith Judd ("Judd"), a 2012 Democratic primary candidate in West Virginia; and (6) Orly Taitz ("Taitz"), Plaintiffs' counsel and a California voter (collectively referred to as "Plaintiffs"). (ECF No. 69). The FAC lists the following Defendants: (1) California Governor Edmund G ., Jr. ("Governor Brown"); (2) California Secretary of State Debra Bowen ("Secretary Bowen"); (3) the Electoral College; (4) President of the Senate, Vice President Joseph Biden, Jr. ("Vice President Biden"); (5) the United States Congress ("Congress"); and (6) President Barack H. Obama ("President Obama"). [1] (ECF No. 69.)

In their FAC, Plaintiffs allege that President Obama is not eligible to be the President of the United States because he is not a "natural born" U.S. Citizen, as required by the United States Constitution. (*Id.*) Further, according to Plaintiffs, President Obama uses a stolen Connecticut social security number, a forged short-form birth certificate, a forged long-form birth certificate, and a forged selective service certificate as proof that he is a natural born American citizen. (*Id.*) Finally, Plaintiff s' FAC contains a claim alleging violations of California Elections Code § 2150 by California Defendants. Plaintiffs allege that over one-and-one-half million of California voter registration records contain falsified or missing data with respect to those voters' place of birth, which allegedly makes those voter registrations invalid under California law. (*Id.*) Accordingly, Plaintiffs ask the Court for "declarative and injunctive relief to clean up California voter roles [sic] and [have] a special election." (*Id*.)

On April 22, 2013, the Court heard oral arguments regarding California Defendants' and Federal Defendants' Motions to Dismiss Plaintiffs' Amended Complaint. After careful consideration of the parties' filings and exhibits prior to the hearing, as well as oral arguments made during the hearing, the Court orally dismissed Plaintiffs' Complaint without leave to amend. This Order provides further analysis regarding the Court's ruling from the bench. To the extent that there is any inconsistency between this Order and the Court's ruling from the bench, the terms of this Order control.

LITIGATION HISTORY

On December 13, 2012, Plaintiffs filed their original Complaint and "Petition for Extraordinary Emergency Writ of Mandamus/Stay of Certification of Votes for Presidential Candidate Obama due to elections fraud and his use of invalid/forged/fraudulently obtained IDs" ("Plaintiffs' Petition"). (ECF No. 2.) On December 14, 2012, the Court interpreted Plaintiffs' Petition to be an Application for a Temporary Restraining Order ("TRO"). (ECF No. 8 .) The Court denied Plaintiffs' Petition for failure to comply with the requirements of Local Rule 231(c), which governs the procedure for filing a TRO application. (*Id.*) In its ruling, the Court instructed Plaintiffs to file a corrected TRO application within a week. (ECF No. 12.)

***2** On December 20, 2012, Plaintiffs moved for a TRO to prevent the following events from occurring: (1) Secretary Bowen and Governor Brown certifying the Certificate of Ascertainment; (2) the Electoral College tallying the 2012 presidential election votes; (3) Governor Brown forwarding the Certificate of Electoral Vote to the United States Congress;

(4) Vice President Biden presenting the Certificate of Electoral Vote to Congress; (5) the United States Congress confirming the Presidential election results; and (6) President Obama taking the oath of office on January 20, 2013. (*Id.*) On January 3, 2013, the Court denied Plaintiffs' Motion for Temporary Restraining Order. (ECF Nos. 48 and 52.)

On February 11, 2013, Plaintiffs filed the operative FAC. (ECF No. 69.) Presently before the Court are a Motion to Dismiss Plaintiff's FAC filed by Federal Defendants on February 15, 2013 (ECF No. 71), and a Motion to Dismiss the FAC filed by California Defendants on February 28, 2013 (ECF No. 73).

THE 2012 PRESIDENTIAL ELECTION HISTORY

A brief overview of American presidential elections generally and the 2012 Presidential election in particular is necessary for better understanding Plaintiffs' allegations in this case.[2] The 2012 presidential election was held on November 6, 2012. Nationally, President Obama won the popular vote, earning 62,611,250 popular votes to Governor Mitt Romney's ("Governor Romney") 59,134,475 popular votes. (http://www.w ashingtonpost.com/wp-srv/spec ial/politics/election–map–2012/president/, *Washington Post,* 2012 Election Results.) In California, President Obama defeated Governor Romney by about 3 million votes and a margin of 60.2% to 37.1%. (Cal. Defs' Request for Judicial Notice ("RJN"),[3] ECF No. 75, Ex. D.)

The popular national vote does not determine the winner of American presidential races. Instead, the U.S. Constitution created the Electoral College to elect the President and Vice President of the United States. Under Article II, section 1, clause 2 of the U.S. Constitution, the voters of each state choose electors on Election Day to serve in the Electoral College. The number of electors in each state is equal to the number of members in Congress to which the state is entitled. U.S. Const. art. II, § 1, cl. 2. There are a total of 538 electors because there are 435 representatives and 100 senators, plus 3 electors allocated to Washington, D.C., under the Twenty–Third Amendment. U.S. Const. art. II, § 1, cl. 2. In most states, including California, the State appoints its electors on a "winner-takes-all" basis, based on the statewide popular vote on Election Day.

That is all electors pledged to the presidential candidate who wins the most votes become electors for that State. Two hundred and seventy electoral votes are necessary to win the American presidency.

As soon as the election results are final, the Governor of each State is required to prepare and send to the Archivist of the United States a Certificate of Ascertainment ("COA"), which is a formal list of the names of electors chosen in that State and the number of votes cast for each. *See* 3 U.S.C. § 6. Of particular relevance to this case, Governor Brown executed California's COA on December 15, 2012. (RJN Ex. A.)

***3** The electors chosen on Election Day meet in their respective state capitals on the Monday after the second Wednesday in December to cast their votes for President and Vice President of the Unites States. *See* U.S. Const. amend. XII; 3 U.S.C. §§ 7, 8. In the instant case, the Electoral College executed California's Certificates of Vote ("COV"), and Secretary Bowen witnessed them, on December 17, 2012. (RJN Ex. B.) On December 18, 2012, California forwarded both its COA and COV to Vice President Biden. (Decl. John Kim in Support of Cal. Defs' Mot. to Dismiss, ECF No. 59 ¶ 1.)

On January 4, 2013, the Senate and House of Representatives met in the House Chamber and counted the electoral votes. *See* 3 U.S .C § 15 (2012); H.J. Res. 122, 112th Cong. (2012). Vice President Biden, in his role as President of the Senate, was the presiding officer. Vice President Biden opened and presented the certificates of the electoral votes of the states and the District of Columbia in alphabetical order. *See* 3 U.S.C § 15 (2012).

Under 3 U.S.C. § 15, when the certificate from each state is read, "the President of the Senate shall call for objections, if any." An objection must be made in writing and must be signed by at least one Senator and one Representative. *Id.* The objection "shall state clearly and concisely, and without argument, the ground thereof." *Id.* If and when an objection is made, each house is to meet and debate it separately. *Id.* Both Houses must vote separately to agree to the objection to an electoral vote; otherwise, the electoral vote is counted. *Id.*

No Senators or Congressmen objected at the January 4, 2013, electoral vote count, and the tally confirmed that President Obama was the winner of the 2012 Presidential election with 332 electoral votes to Governor Romney's 206 votes. (RJN Ex. C.) Chief Justice Roberts inaugurated President Obama at noon on January 20, 2013. *See* U.S. Const. amend. XX, § 1.

STANDARDS

A. Federal Rule of Civil Procedure 12(b)(1) Standard

Federal courts are courts of limited jurisdiction, and are presumptively without jurisdiction over civil actions. *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). The burden of establishing the contrary rests upon the party asserting jurisdiction. *Id.* Because subject matter jurisdiction involves a court's power to hear a case, it can never be forfeited or waived. *United States v. Cotton,* 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). Accordingly, lack of subject matter jurisdiction may be raised by either party at any point during the litigation, through a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 506, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006); *see also Int'l Union of Operating Eng'rs v. Cnty. of Plumas,* 559 F.3d 1041, 1043–44 (9th Cir.2009). Lack of subject matter jurisdiction may also be raised by the district court sua sponte. *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 583, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999). Indeed, "courts have an independent obligation to determine whether subject matter jurisdiction exists, even in the absence of a challenge from any party." *Id.; see also* Fed.R.Civ.P. 12(h)(3) (requiring the court to dismiss the action if subject matter jurisdiction is lacking).

***4** There are two types of motions to dismiss for lack of subject matter jurisdiction: a facial attack and a factual attack. *Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp.,* 594 F.2d 730, 733 (9th Cir.1979). Thus, a party may either make an attack on the allegations of jurisdiction contained in the nonmoving party's complaint, or may challenge the existence of subject matter jurisdiction in fact, despite the formal sufficiency of the pleadings. *Id.*

In the case of a factual attack, "no presumptive truthfulness attaches to plaintiff's allegations." *Thornill,* 594 F.2d at 733 (internal citation omitted). The party opposing the motion has the burden of proving that subject matter jurisdiction does exist, and must present any necessary evidence to satisfy this burden. *St. Clair v. City of Chico,* 880 F.2d 199, 201 (9th Cir.1989). If the plaintiff's allegations of jurisdictional facts are challenged by the adversary in the appropriate manner, the plaintiff cannot rest on the mere assertion that factual issues may exist. *Trentacosta v. Frontier Pac. Aircraft Ind., Inc.,* 813 F.2d 1553, 1558 (9th Cir.1987) (quoting *Exch. Nat'l Bank of Chi. v. Touche Ross & Co.,* 544 F.2d 1126, 1131 (2d Cir.1976)). Furthermore, the district court may review any evidence necessary, including affidavits and testimony, in order to determine whether subject matter jurisdiction exists. *McCarthy v. United States,* 850 F.2d 558, 560 (9th Cir.1988); *Thornhill,* 594 F.2d at 733. If the nonmoving party fails to meet its burden and the court determines that it lacks subject matter jurisdiction, the court must dismiss the action. Fed.R.Civ.P. 12(h)(3).

When a party makes a facial attack on a complaint, the attack is unaccompanied by supporting evidence, and it challenges jurisdiction based solely on the pleadings. *Safe Air for Everyone v. Meyer,* 373 F.3d 1035, 1039 (9th Cir.2004). If the motion to dismiss constitutes a facial attack, the court must consider the factual allegations of the complaint to be true, and determine whether they establish subject matter jurisdiction. *Savage v. Glendale High Union Sch. Dist. No. 205,* 343 F.3d 1036, 1039 n. 1 (9th Cir.2003). In the case of a facial attack, the motion to dismiss is granted only if the nonmoving party fails to allege an element necessary for subject matter jurisdiction. *Id.* However, in the case of a facial attack, district courts "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Safe Air for Everyone,* 373 F.3d at 1039.

B. Federal Rule of Civil Procedure 12(b)(6) Standard

On a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.,* 80 F.3d 336, 337–38 (9th Cir.1996). Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (quoting *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require detailed factual allegations. However, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (internal citations and quotations omitted). A court is not required to accept as true a "legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal,* 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Twombly,* 550 U.S. at 555). "Factual

allegations must be enough to raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555 (citing 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1216 (3d ed.2004) (stating that the pleading must contain something more than "a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.")).

***5** Furthermore, "Rule 8(a)(2) ... requires a showing, rather than a blanket assertion, of entitlement to relief." *Twombly,* 550 U.S. at 556 n. 3 (internal citations and quotations omitted). Thus, "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirements of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Id.* (citing 5 Charles Alan Wright & Arthur R. Miller, *supra,* at § 1202). A pleading must contain "only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. If the "plaintiffs ... have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id* . However, "[a] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.' " *Id.* at 556 (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)).

ANALYSIS

Federal Defendants argue the Court should dismiss Plaintiffs' FAC under Federal Rule of Civil Procedure 12(b)(1) for the following reasons: (1) the case is moot; (2) Plaintiffs lack standing to bring their claims; (3) Plaintiffs' claims are barred by the political question doctrine; and (4) sovereign immunity protects Congress from this suit. (ECF No. 71.) California Defendants also argue that Plaintiffs' FAC should be dismissed under Rule 12(b)(1) because the case is moot as to California and it presents a nonjusticiable political question. (ECF No. 73.) Finally, both Federal Defendants and California Defendants argue that the Court should dismiss Plaintiffs' action under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

A. Political Question Doctrine [4]

All Defendants argue that the Court should dismiss this action for lack of subject matter jurisdiction because Plaintiffs' claims are barred by the political question doctrine. (ECF Nos. 71, 73)

The political question doctrine arises out of the Constitution's division of powers, and provides that certain questions are political as opposed to legal, and therefore off limits to the court. *See Corrie v. Caterpillar, Inc.,* 503 F.3d 974, 980 (9th Cir.2007) ("The Supreme Court has indicated that disputes involving political questions lie outside of the Article III jurisdiction of federal courts."). The doctrine exists because the Constitution prohibits "a court from interfering in a political matter that is principally within the dominion of another branch of government." *Banner v. U.S.,* 303 F.Supp.2d 1, 9 (D.D.C.2004) (citing *Spence v. Clinton,* 942 F.Supp. 32, 39 (D.D.C.1996)). The doctrine of separation of powers requires that political issues be resolved by the political branches rather than by the judiciary. *See Corrie,* 503 F.3d at 980. In other words, "[t]he political question doctrine serves to prevent the federal courts from intruding unduly on certain policy choices and value judgments that are constitutionally committed to Congress or the executive branch." *Koohi v. U.S.,* 976 F.2d 1328, 1331 (9th Cir.1992).

***6** To determine whether an issue is a "political question" that the court is barred from hearing, the court considers whether the matter has "in any measure been committed by the Constitution to another branch of government." *Baker v. Carr,* 369 U.S. 186, 210, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). The Supreme Court has set forth six factors indicating the existence of a political question. [5] *Id.* at 217. The first factor—whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department"—is the one most relevant to the present case. *Id.*

The "natural born citizen" clause of the U.S Constitution, on which Plaintiffs primarily rely, "is couched in absolute terms of qualification and does not designate which branch should evaluate whether the qualifications are fulfilled." *Barnett v. Obama,* No. SACV 09–0082 DOC (ANx), 2009 WL 3861788, at *12 (C.D.Cal. Oct. 29, 2009). Accordingly, the Court must look to the text of the Constitution to determine whether the Constitution "speaks to which branch of government has the power to evaluate the qualifications of a president." *Id.* As the Court explained in its January 16, 2013, Order, numerous articles and amendments of the U.S. Constitution, when viewed together, make clear that the issue of the President's qualifications and his removal from office are textually committed to the legislative branch and not the judicial branch.

First, Article II, Section 1 of the Constitution establishes the Electoral College as the means of electing the President, but the Constitution also empowers "Congress [to] determine the time of choosing the electors, and the day on which they shall give their votes ...." U.S. Const. art. II, § 1. The Twelfth Amendment empowers the President of the Senate to preside over a meeting between the House of Representatives and the Senate, in which the President of the Senate counts the electoral votes. [6] U.S. Const. amend. XII. If no candidate receives a majority of presidential votes, the Twelfth Amendment authorizes the House of Representatives to choose a President between the top three candidates. *Id.* The Twentieth Amendment empowers Congress to create a procedure in the event that neither the President-elect nor Vice President-elect qualifies to serve as President of the Unites States. U.S. Const. amend. XX, § 4.

Additionally, the Twenty–Fifth Amendment provides for removal of the President should he be unfit to serve. U.S. Const. amend. XXV. Finally, and perhaps most importantly, the Constitution gives Congress, and Congress alone, the power to remove the President from office. U.S. Const. art. I, § 2, cl. 5; U.S. Const. art. I, § 3, cl. 6; U.S. Const. art. I, § 3, cl. 7. Nowhere does the Constitution em power the Judiciary to remove the President from office or enjoin the President-elect from taking office.

These various articles and amendments of the Constitution make clear that the Constitution assigns to Congress, and not to federal courts, the responsibility of determining whether a person is qualified to serve as President of the United States. As such, the question presented by Plaintiffs in this case —whether President Obama may legitimately run for office and serve as President—is a political question that the Court may not answer. Accordingly, this Court, like numerous other district courts that have dealt with this issue to date, declines to reach the merits of Plaintiffs' allegations because doing so would ignore the Constitutional limits imposed on the federal courts. *See Do–Nguyen v. Clinton,* 100 F.Supp.2d 1241, 1247 (S.D.Cal.2000) (dismissing plaintiff's action seeking President Clinton's resignation as a non justiciable political question because removal of the President from office is an issue that has a "textually demonstrable constitutional commitment to Congress").

***7** In sum, were the Court to grant the declaratory relief requested by Plaintiffs, it would necessarily "[interfere] in a political matter that is principally within the dominion of another branch of government." *See Banner,* 303 F.Supp.2d at 9. Because federal courts are barred from intruding on a task constitutionally assigned to Congress, this action presents a non justiciable political question that this Court cannot consider, and, thus, the court lacks jurisdiction over this case. Accordingly, this action must be dismissed with prejudice. [7]

B. Additional Grounds for Dismissal

Although the political question doctrine bars Plaintiffs' declaratory relief action to the extent it challenges President Obama's eligibility to serve as President of the United States, the Court cannot avoid noting several other glaring jurisdictional problems associated with Plaintiffs' claim.

1. Standing

Article III of the United States Constitution limits the judicial power of federal courts to "adjudicating actual 'cases' and 'controversies.' " *Allen v. Wright,* 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). "As an incident to the elaboration of this bedrock requirement, [the Supreme Court] has always required that a litigant have 'standing' to challenge the action sought to be adjudicated in the lawsuit." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.,* 454 U.S. 464, 471, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Importantly for the present case, the Supreme Court has explained that the "standing inquiry" should be "especially rigorous" if reaching the merits of the lawsuit "would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd,* 521 U.S. 811, 819–20, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997).

A plaintiff bears the burden of demonstrating that he or she has standing. *Summers v. Earth Island Inst.,* 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). To establish standing, a plaintiff must show that:

> (1) [he] has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The requirement that the injury be "particularized" means that it "must affect the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 n. 1, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Accordingly, to demonstrate standing, a plaintiff must allege "such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction and to exercise the court's remedial powers on *his* behalf." *Warth v. Seldin,* 422 U.S. 490, 498–99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (emphasis added).

The Supreme Court has emphasized that "[s]tanding to sue may not be predicated upon an interest of the kind ... which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 220 (1974); *see also Warth,* 422 U.S. at 499 ("[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."); *Lujan,* 504 U.S. at 573–74 ("[A] plaintiff raising only a generally available grievance about government —claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and intangibly benefits him than it does the public at large—does not state an Article III case or controversy."). For this reason, the Supreme Court has consistently refused to recognize generalized claims of constitutional ineligibility for public office as sufficient to confer standing. *See, e.g., Ex Parte Levitt,* 302 U.S. 633, 633, 58 S.Ct. 1, 82 L.Ed. 493 (1937) (per curiam) (holding that "a citizen and a member of the Bar of this Court" did not have standing to challenge appointment of Hugo Black to the Supreme Court under the Constitution's Ineligibility Clause, art. I, § 6, cl. 2, because he "ha[d] merely a general interest common to all members of the public"); *Schlesinger,* 418 U.S. at 220–23 (holding that an anti-war group did not have standing to invoke the Incompatibility Clause, art. I, § 6, cl. 2, to have members of Congress stricken from the Armed Forces Reserve List).

***8** Several Circuits, including the Ninth Circuit, have recognized a "competitive standing" theory. *See, e.g., Owen v. Mulligan,* 640 F.2d 1130, 1132–33 (9th Cir.1981); *Tex. Dem. Party v. Benkiser,* 459 F.3d 582, 586–87 (5th Cir.2006); *Schulz v. Williams,* 44 F.3d 48, 53 (2d Cir.1994); *Fulani v. Hogsett,* 917 F.2d 1028, 1030 (7th Cir.1990). The Ninth Circuit has explained that "a candidate or his political party has standing to challenge the inclusion of an allegedly ineligible rival on the ballot, on the theory that doing so hurts the candidate's or party's own chances of prevailing in the election." *Drake v. Obama,* 664 F.3d 774, 782 (9th Cir.2011) (quoting *Hollander,* 566 F.Supp.2d 63, 68 (D.N.H.2008)). For the competitive standing theory to apply, however, a competitor must have a "chance of prevailing in the election." *Drake,* 664 F.3d at 782. A chance is "the possibility of a particular outcome in an uncertain situation." (Merriam–Webster's Dictionary, m-w.com.) Other courts have emphasized that a political candidate must be a "competitor" or "rival" to demonstrate the particularized injury element of competitive standing. Recently, the Western District of Tennessee concluded that competitive standing to challenge the results of the 2012 Presidential elections did not extend to "candidates" who would not appear on the state's general presidential election ballot:

> At most, the pleadings state that Plaintiffs were registered candidates for President of the United States. Neither Plaintiff has alleged that he is a Tennessee political party's nominee for the office, that his name will appear on the ballot for Tennessee's general election in November, that he is campaigning in the state of Tennessee, that any registered voter in Tennessee intends to cast a vote for him, or that President Obama's presence on the ballot will in any way injure either candidate's campaign. In short, *Plaintiffs have not alleged that he is truly in competition with President Obama for votes* in Tennessee's general election."

Liberty Legal Found. v. Nat'l Dem. Party of the USA, Inc., 875 F.Supp.2d 791, 800–01 (W.D.Tenn.2012) (emphasis added).

Similarly, the United States Court of Appeals for the District of Columbia recently held that "self-declaration as a write-in candidate is insufficient" to establish standing because "if it were sufficient any citizen could obtain standing (in violation of Article III of the U.S. Constitution) by merely self-declaring." *Sibley v. Obama,* No. 12–5198, 2012 WL

6603088 at *1 (D.C.Cir. Dec.6, 2012), *cert. denied,* —— U.S. ——, 133 S.Ct. 1263, 185 L.Ed.2d 183 (2013). Further, the doctrine of competitive standing does not stretch so far as to include individuals hoping to become electors pledged to vote for a presidential candidate. *Robinson v. Bowen,* 567 F.Supp.2d 1144, 1146 (N.D.Cal.2008). A would-be elector's injury is "not only speculative, but merely derivative of the prospects of his favored candidate." *Id.; Gottlieb v. Fed. Election Comm'n,* 143 F.3dd 618, 622 (D.C.Cir.1998).

***9** Federal Defendants correctly point out that the doctrine of competitive standing does not apply to Plaintiffs Noonan and MacLearan because neither Noonan's nor MacLearan's chances of prevailing in the 2012 Presidential election were affected by President Obama's participation. (ECF No. 71–1.)

As alleged, Noonan and MacLearan were presidential candidates in 2012, and Noonan won the American Independent Primary. (ECF No. 69.) However, as demonstrated by judicially noticed documents, an individual by the name of Thomas Hofeling was actually nominated as the American Independent party's candidate for President, not Noonan. (RJN, Ex. A). As to MacLearan, the FAC is devoid of any details about his alleged candidacy for President.

To gain competitive standing, Noonan and MacLearan needed to prove that their "own chances of prevailing in an election" were affected by President Obama's presence on the ballot. *See Drake,* 664 F.3d 774 at 784. However, they have failed to demonstrate that they were President Obama's competitors in the 2012 Presidential election or were otherwise personally injured by President Obama's participation in the election. There is no evidence that Noonan or MacLearan appeared on any state's 2012 general presidential election ballot, that they campaigned for the presidency anywhere in the country, or that a single registered voter intended to vote for them. Concluding that either Noonan or MacLearan has standing to bring this lawsuit would amount to declaring that any citizen who wished to be the President of the United States could self-declare himself or herself a presidential candidate and gain standing in federal court to challenge the results of the presidential election. Such a conclusion would clearly run afoul of Article III's "case or controversy" requirement. *See Sibley,* 2012 WL 6603088 at *1.

Further, Plaintiffs argue that Plaintiffs Grinols and Odden have competitive standing as would-be presidential electors. As alleged, Plaintiff Grinols was slated to be a Republican Party elector if a Republican candidate won California's popular vote, and Plaintiff Odden was expected to be a Libertarian party elector if the Libertarian Party's candidate won the election. (ECF No. 69.) However, the alleged harm Grinols and Odden faced as disappointed potential presidential electors is too far attenuated and vague to meet the particularized injury requirement imposed by the Supreme Court. Grinols and Odden's alleged harm is, at best, "speculative" and "derivative of their favored candidates." *See Robinson,* 567 F.Supp.2d at 1146. Plaintiff Taitz's status as a "voter" also does not provide her with standing to challenge the results of the 2012 Presidential election. Courts across the country have continually rejected arguments that "voters" have standing, explaining that "a voter ... has no greater stake in the lawsuit than any other United States citizen," and that "the harm [the voter] alleges is therefore too generalized to confer standing." *Drake,* 664 F.3d at 784.

***10** Because Noonan, MacLearan, Grinols, Odden, and Taitz are unable to demonstrate a "concrete and particularized ... injury ... traceable to the [defendants]," they are unable to show that they have standing to challenge the results of the 2012 Presidential election. *See Friends of the Earth, Inc.,* 528 U.S. at 180–81. Accordingly, the Court must dismiss those Plaintiffs from this action as lacking standing.

Finally, Plaintiffs contend that Keith Judd, a federal inmate currently serving his prison sentence, who received over 40,000 votes in West Virginia's 2012 Democratic Party Primary, has competitive standing to proceed with this action because he was President Obama's "competitor" in last year's Presidential election.

Cognizant of the fact that the history presents several examples of inmates running for the presidency from their jail cells, the Court declines to issue a categorical ruling that Plaintiff Judd has no standing to proceed with this action, even though the Court is quite skeptical of Judd's ability to demonstrate that President Obama's participation in the 2012 election hurt Judd's "chances of prevailing in the election." [8] *See Drake,* 664 F.3d at 782.

As analyzed above, even if the doctrine of competitive standing allows Plaintiff Judd to bring the instant lawsuit, his challenge to President ObamaÕs eligibility must be dismissed because it is barred by the political question doctrine. [9]

2. Mootness

Mootness is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) (citation omitted). "The mootness doctrine 'requires that an actual, ongoing controversy exist at all stages of federal court proceedings.' " *Leigh v. Salazar,* 677 F.3d 892, 896 (9th Cir.2012). A case becomes moot when it has "lost its character as a present, live controversy ..." *Oregon v. FERC,* 636 F.3d 1203, 1206 (9th Cir.2011).

As relevant for the purpose of instant litigation, the test for mootness of a claim for declaratory relief is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Biodiversity Legal Found. v. Badgley,* 309 F.3d 1166, 1174–75 (9th Cir.2002) (quoting *Super Tire Eng'g Co. v. McCorkle,* 416 U.S. 115, 122, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974)). Accordingly, the court must inquire "whether a judgment will clarify and settle the legal relations at issue and whether it will afford relief from the uncertainty and controversy giving rise to the proceedings." *Natural Res. Defense Council, Inc. v. U.S. EPA,* 966 F.2d 1292, 1299 (9th Cir.1992). In order to obtain declaratory relief, a plaintiff must show "a very significant possibility of future harm; it is insufficient ... to demonstrate only past injury." *San Diego Cnty. Gun Rights Comm. v. Reno,* 98 F.3d 1121, 1126 (9th Cir.1996). Thus, in order to satisfy the Article III "case or contr oversy" requirement, the dispute must be not only "definite and concrete" and "real and substantial," but also resolvable by *"specific relief* through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 127, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007) (citation omitted) (emphasis added).

***11** In this case, as fully explained above, Plaintiffs initially sought a preliminary injunction to prevent President Obama's inauguration and to enjoin a series of other events leading to President Obama's inauguration.

However, since Plaintiffs filed their original complaint in December of 2012, all of the events that Plaintiffs sought to enjoin have already taken place. In particular, as Defendants correctly point out: (1) Governor Brown already prepared and delivered the COA; (2) the Electoral College already convened and cast their votes for President; (3) the Electoral College already delivered their sealed votes to the President of the Senate; (4) Congress already counted the electoral votes at a joint session of Congress on January 4, 2013; (5) Congress already declared President Obama the winner earning 332 electoral votes to Governor Romney's 206 electoral votes; and (6) President Obama was inaugurated and began his second term as President of the United States on January 20, 2013. (ECF Nos. 71, 73.)

Realizing that every action they had sought to enjoin already occurred, Plaintiffs filed the operative amended complaint, in which they no longer seek a preliminary injunction, but merely request this Court's judicial declaration that President Obama is ineligible to be the President of the United States. However, Article III prohibits this Court to grant declaratory relief where "changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for *meaningful relief." West v. Sec'y of the Dep't of Transp.,* 206 F.3d 920, 925 n. 4 (9th Cir.2000) (emphasis added). During the hearing, Plaintiffs agreed that the Court cannot issue a ruling removing President Obama from office—the very remedy that Plaintiffs sought by filing the instant action and seeking an injunction preventing President Obama's inauguration. Thus, even were the Court to issue the declaratory judgment requested by Plaintiffs, that ruling would have no effect on the parties' legal relationship and would amount to nothing more than an advisory opinion, which the Court is constitutionally prohibited from issuing. *F.C.C. v. Pacifica Foundation,* 438 U.S. 726, 735, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978).

Accordingly, granting such declaratory judgment "without the possibility of prospective effect would be superfluous," would serve no useful purpose, and would not provide any legally cognizable benefit to Plaintiffs. *See McQuillion v. Schwarzenegger,* 369 F.3d 1091, 1095 (9th Cir.2004). Because this Court "has no jurisdiction to hear a case that cannot affect the litigants' rights," *see Allard v. DeLorean,* 884 F.2d 464, 466 (9th Cir.1989), Plaintiffs' challenge to President Obama's eligibility for office no longer presents a live "case or controversy" and is therefore dismissed as moot.

Plaintiffs, however, argue that the case is not moot because it is subject to the "capable of repetition yet evading review" exception to the mootness doctrine. (ECF No. 69 at 18–20.) This exception applies only in "exceptional situations," *City of Los Angeles v. Lyons,* 461 U.S. 95, 109, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), "where the following two circumstances

[are] simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again," *Lewis v. Cont. Bank Corp.,* 494 U.S. 472, 481, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) (internal citation and quotation marks omitted).

***12** The "capable of repetition, yet evading review" exception is inapplicable in this case because the actions challenged by Plaintiffs cannot be repeated. The TwentySecond Amendment prohibits a person from being elected to the office of President more than twice. U.S. Const. amend. XXII, § 1. Since President Obama is currently serving his second term as President of the United States, he is constitutionally precluded from serving as President again. Accordingly, even were the Court to declare that President Obama is ineligible to serve as the American President, such a declaration will have no practical effect on the parties' future relationship. *See Newdow v. Roberts,* 603 F.3d 1002, 1009 (D.C.Cir.2010) (explaining that the exception applies only where "an otherwise moot case [has] a reasonable chance of affecting the parties' future relations"). Therefore, the "capable of repetition, yet evading review" exception does not apply.

In sum, by granting Plaintiffs' requested declaratory relief would serve no useful purpose. All parties agree that the Court cannot enjoin the events that have already happened and that the Court is constitutionally barred from removing President Obama from office. Under these circumstances, Plaintiffs' request for declaratory relief is dismissed as moot and is dismissed for lack of subject matter jurisdiction.

3. The Speech or Debate Clause

Federal Defendants argue that the Court should dismiss Plaintiffs' action because Plaintiffs' claim against Congress is barred by the Speech or Debate Clause of the United States Constitution. (ECF No. 71.) At the hearing, Plaintiffs argued that the Speech or Debate Clause had "nothing to do with this case ... it only applies to cases where the government can prosecute or arrest members of Congress and prosecute them because of something they said."

Contrary to Plaintiffs' statement during oral argument, the Speech or Debate Clause provides:

> The Senators and Representatives shall ... in all Cases except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and *for any Speech or Debate in either House, they shall not be questioned in any other Place.*

U.S. Const. Art. I, § 6, cl. 1 (emphasis added). The Speech or Debate Clause "affords Member[s] of Congress [a] vital privilege—they may not be questioned in any other place for any speech or debate in either House." *Gravel v. U.S.,* 408 U.S. 606, 615, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972). The Speech or Debate Clause reinforces the Constitution's commitment to the separation of powers by assuring that Congress, a co-equal branch of government, "has the freedom of speech and deliberation" to perform its legislative function without intimidation, intervention, or oversight from the executive or judicial branches. *Gravel,* 408 U.S. at 616–18. "Without exception, [Supreme Court] cases have read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland v. U.S. Servicemen's Fund,* 421 U.S. 491, 501, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975) (holding that the activities of the Senate Subcommittee, the individual Senators, and the Chief Counsel are protected by the absolute prohibition of the Speech or Debate Clause of the Constitution being "questioned in any other Place" and are immune from judicial interference); *Kilbourn v. Thompson,* 103 U.S. 168, 204, 26 L.Ed. 377 (1881) (holding that an individual held in custody until he agreed to testify before committee could not sue Members of Congress for false imprisonment as they were exercising their official duties and protected by the Speech or Debate Clause). To determine whether the Speech or Debate Clause applies, a Court must ask "whether the claims presented fall within the sphere of legitimate legislative activity." *Gravel,* 408 U.S. 606 at 625, 92 S.Ct. 2614, 33 L.Ed.2d 583. "Matters which the Constitution places within the jurisdiction of either House" fall within the sphere of legitimate legislative activity and those activities shall not be questioned in any other place because the prohibitions of the Speech or Debate Clause are absolute. *Id.; Eastland,* 421 U.S. at 501.

***13** Accordingly, to determine whether the Speech and Debate Clause applies to Plaintiffs' lawsuit against Congress, the Court must assess "whether the claims presented fall within the sphere of legislative activity." *Gravel,* 408 U.S. 606 at 625, 92 S.Ct. 2614, 33 L.Ed.2d 583. Various articles and amendments of the U.S. Constitution place determining a person's qualifications to serve as President of the United States and counting electoral votes within Congress's jurisdiction. *See supra.* Because the Constitution assigns those tasks to Congress, the Speech or Debate Clause applies in this case, and the Court must not question Congress' performance of its duties. Thus, Plaintiffs' action against Congress is barred by the Speech or Debate Clause, and is therefore dismissed.

C. Plaintiffs' Claims under California Law

Plaintiffs' FAC contains a claim for violations of California Penal Code § 2150 against California Defendants. (ECF No. 69 at 15–18.) Although framed as a constitutional claim for violation of Plaintiffs' "equal protection" rights, this cause of action is based entirely on state law and, to the extent the Court can discern from Plaintiffs' convoluted allegations, does not "arise under" federal law as requir ed by 28 U.S.C. § 1331 for the Court to have original jurisdiction.[10] In their opposition to Defendants' motions to dismiss, Plaintiffs concede that their "equal protection" claim is a camouflaged state-law claim as they assert that the Court can exercise "supplemental and ancillary jurisdiction" over their second claim for relief. (ECF No. 115 at 5.)

Having dismissed Plaintiffs' only federal claim for declaratory relief, the Court determines that the FAC presents no basis for federal question or diversity jurisdiction. The Court declines to exercise supplemental jurisdiction over Plaintiffs' state-law claim for violations of California Penal Code pursuant to 28 U.S.C. § 1367(c)[11] and dismisses this claim without prejudice.[12]

CONCLUSION

Courts across the country have uniformly rejected claims that President Obama is ineligible to serve as President because his Hawaiian birth certificate is a fake or is forged. *See, e.g., Kerchner v. Obama,* 612 F.3d 204 (3d Cir.), *cert. denied,* —— U.S. ——, 131 S.Ct. 663, 178 L.Ed.2d 513 (2010); *Hollister v. Soetoro,* 601 F.Supp.2d 179, 180 (D.D.C.2009), *aff'd,* 368 F. App'x 154 (D.C.Cir.2010); *Berg v. Obama,* 574 F.Supp.2d 509 (E.D.Pa.2008), *aff'd,* 586 F.3d 234 (3d Cir.2009); *Wrotnowski v. Bysiewicz,* 289 Conn. 522, 958 A.2d 709 (Conn.), *stay denied,* —— U.S. ——, 129 S.Ct. 775, 172 L.Ed.2d 753 (2008); *Ankeny v. Governor of State of Indiana,* 916 N.E.2d 678 (Ind.Ct.App.2009). Plaintiff Taitz has single-handedly filed at least seven similar challenges to President Obama's eligibility for office, each and every one of these suits has failed. *See Taitz v. Astrue,* 806 F.Supp.2d 214 (D.D.C.2011) (denying plaintiffs' motion for reconsideration), *aff'd,* 2012 WL 1930959 (D.C.Cir. May 25, 2012); *Taitz v. Ruemmler,* No. 11–1421(RCL), 2011 WL 4916936 (D.D.C. Oct.17, 2011) (granting defendant's motion to dismiss and dismissing plaintiff's suit with prejudice), *aff'd,* No. 11–5306, 2012 WL 1922284 (D.C.Cir. May 25, 2012); *Taitz v. Obama,* 707 F.Supp.2d 1 (D.D.C.2010) (granting government's motion to dismiss, denying plaintiff's motion for preliminary injunction as moot, and dismissing case), *recons. denied,* 754 F.Supp.2d 57 (D.D.C.2010); *Cook v. Good,* No. 4:09–cv–82 (CDL), 2009 WL 2163535 (M.D.Ga. July 16, 2009) (dismissing case for lack of subject matter jurisdiction); *Rhodes v. MacDonald,* No. 4:09–CV–106 (CDL), 2009 WL 2997605 (M.D.Ga. Sept.16, 2009) (denying plaintiff's motion for temporary restraining order and dismissing plaintiff's complaint in its entirety), *cert. denied,* —— U.S. ——, 131 S.Ct. 918, 178 L.Ed.2d 751 (2011); *Barnett,* 2009 WL 3861788 (granting defendants' motion to dismiss), *aff'd sub nom. Drake v. Obama,* 664 F.3d 774 (9th Cir.2011), *and order clarified,* No. SA CV 09–0082 DOC (ANx), 2009 WL 8557250 (C.D.Cal. Dec. 16, 2009); *Keyes v. Bowen,* 189 Cal.App.4th 647, 661, 117 Cal.Rptr.3d 207 (Cal.Ct.App.2010), *cert. denied,* —— U.S. ——, 132 S.Ct. 99, 181 L.Ed.2d 27 (2011) (upholding on appeal a state Superior Court's ruling sustaining demurrers without leave to amend).

***14** Despite failing in courts across the country, Plaintiffs have continued to file lawsuits alleging that President Obama is ineligible to serve as the American President because he is not a natural born U.S. citizen. However, as set forth above, federal courts cannot grant Plaintiffs the relief sought because the issues which Plaintiffs raise in their pleadings are constitutionally committed to the jurisdiction of another branch of the federal government. If Plaintiffs believe that President Obama has violated the law, their remedy is to alert Congress to the alleged wrongdoing. Congress could then initiate impeachment proceedings with the aid of an independent and special prosecutor. *See* U.S. Const. art. I, § 2, cl. 5; U.S. Const. art. I, § 3, cl. 6; U.S. Const. art. I, § 3, cl. 7. Plaintiffs could also lobby Congress or the states to pass a Constitutional amendment defining the phrase "natural born

citizen" as used in Article II of the Constitution or pass laws requiring presidential candidates to prove their citizenship before taking office. U.S. Const. art. V.

In sum, as fully analyzed above, Plaintiffs' declaratory relief action is barred by the political question doctrine, is moot, and Plaintiffs lack standing to bring this action. Additionally, the Speech or Debate Clause of the U.S. Constitution bars Plaintiffs' lawsuit against Congress. Accordingly, the Court grants the motions to dismiss filed by Federal Defendants and California Defendants and dismisses Plaintiffs' first cause of action without leave to amend. [13]

For the reasons set forth above:

1. Defendants' Motions to Dismiss (ECF Nos. 71, 73) are GRANTED without leave to amend.

2. The Court DISMISSES without leave to amend Plaintiffs' claim for declaratory relief arising out of President Obama's alleged ineligibility for office.

3. Having dismissed the only federal claim asserted by Plaintiffs in their FAC, the Court declines to exercise supplemental jurisdiction over the remaining state-law claim and DISMISSES that claim without prejudice.

4. All other pending motions, including Plaintiffs' Motion to Recuse Counsel for Defendants (ECF No. 102), are DENIED as MOOT.

5. The Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 2294885

Footnotes

1 For the purposes of this Order, Governor Brown and Secretary Bowen are collectively referred to as "California Defendants." The Electoral College, Vice President Biden, Congress, and President Obama are collectively referred to as "Federal Defendants ."

2 Unless stated otherwise, this overview is derived, at times verbatim, from Federal Defendants' Motion to Dismiss and California Defendants' Motion to Dismiss. (ECF Nos. 71 and 73.)

3 On February 28, 2013, California Defendants requested that the Court take judicial notice of the following documents: (1) Executive Department, State of California, *Certificate of Ascertainment for Electors of President and Vice President of the United States of America 2012;* (2) Executive Department, State of California, *Certificate of Vote for President and Vice President of the United States of America 2012;* (3) 159 Congressional Record 1–149–1–150; (4) Secretary Bowen's *Statement of Vote, November 6, 2012, General Election;* (5) and United States Election Assistance Commission; *National Mail Voter Registration Form.* (ECF No. 75.) The Court granted California Defendants' RJN at the April 22, 2013 hearing because the content of the documents attached to the RJN "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See* Fed.R.Civ.P. 201.

4 This section's analysis is substantially similar to the discussion set forth in the Court's January 16, 2013, Order denying Plaintiff's TRO application. (ECF No. 52.)

5 "In *Baker v. Carr,* the Supreme Court announced a series of facts, at least one of which must be present in order to make a non-justiciable political question. Each factor relates to the separation of powers and are: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department" (i.e., to Congress or the President); (2) "a lack of judicially discoverable and manageable standards for resolving the issue"; (3) "the impossibility of deciding the issue without an initial policy determination of a kind

clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) "the potential for embarrassment from multifarious pronouncements by various departments on one question." *Do–Nguyen v. Clinton,* 100 F.Supp.2d 1241 (S.D.Cal.2000) (quoting *Baker,* 369 U.S. 186 at 217, 82 S.Ct. 691, 7 L.Ed.2d 663).

6 The President of the Senate is the Vice President of the United States.

7 At the hearing, Plaintiffs relied heavily on a recently decided Eastern District of California case, *Peace and Freedom Party v. Bowen* to support their argument. No. 12–00853, 2012 WL 6161031 *1 (E.D.Cal. Dec.11, 2012). Although Plaintiffs discussed the case at the MTD hearing, Plaintiffs failed to include it in any of their filings. Neither California Defendants nor Federal Defendants could discuss the case as they learned about it on-the-spot at the hearing. Moreover, even though *Peace and Freedom Party* has no precedential weight on this Court, the Court finds it distinguishable from the present action.

8 Lyndon H. LaRouche, Jr. ran for the U.S. Presidency in 1992 while serving a federal sentence he received in 1988 for several counts of mail fraud. *See LaRouche v. Fed. Election Comm'n,* 996 F.2d 1263, 1264 (D.C.Cir.1993) *cert. denied* 510 U.S. 992, 114 S.Ct. 550, 126 L.Ed.2d 451 (1993). Similarly, Eugene Debs ran as the Socialist Party's candidate for the presidency in 1900, 1904, 1908, 1912 and 1920. In 1920, Debs ran for president while serving time in federal prison for sedition. (http:// www.br itannica.com/EBchecked/ topic/154766/Eugene-V-Debs)

9 The Bureau of Prison's ("BOP") does not have a specific regulation which prevents inmates from running for political office; however, Prohibited Act 334 "Conducting a business; conducting or directing an investment transaction without staff authorization" in the Inmate Admission and Orientation Handbook likely prohibits a federal inmate from running for a compensated elected office.

10 A case 'arises under' federal law either where federal law creates the cause of action or 'where the vindication of a right under state law necessarily turn[s] on some construction of federal law.' " *Republican Party of Guam v. Gutierrez,* 277 F.3d 1086, 1088–89 (9th Cir.2002) (citation omitted). The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," pursuant to which "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987).

11 If Plaintiffs are concerned about California voting procedures, they should bring their grievances to a state court. Cal. Elec.Code §§ 16100(d), (b). Section 16100(d) provides that "any elector of a county, city, or of any political subdivision of either may contest any election held therein, for any of the following causes ... including ... [t]hat the person who has been declared elected to an office was not, at the time of the election, eligible to that office." Section 16100(b) enables any elector to contest an election because illegal votes were cast. Neither Plaintiffs nor any other California elector lodged a Complaint in state court alleging that President Obama was ineligible for office or that illegal votes were cast in 2012. (ECF No. 75.)

12 To the extent Plaintiffs attempted to state a federal "equal protection" claim, the Court determines that Plaintiffs' FAC does not meet the federal pleading requirements under Rule 8(a)(2) because it does not contain "a short and plain statement" of the claim showing that the pleader is entitled to relief. Since Plaintiffs' pleading does not provide Defendants with the requisite "fair notice of what the ... claim is and the grounds upon which it rests," *see Twombly,* 550 U.S. at 555, it is subject to dismissal for failure to state a claim under Rule 12(b)(6). Because the Court concludes that any amendment would be futile, the dismissal is with out leave to amend.

13 As demonstrated by the analysis above and by the rulings of numerous other courts throughout the nation, Plaintiffs' challenge to President Obama's eligibility for office is frivolous, and has been a tremendous drain on the Court's time and resources. Although the Court does not impose any sanctions on Plaintiffs or their counsel at this time, the Court will not hesitate to impose such sanctions if Plaintiffs or their counsel continue filing unsupported and groundless lawsuits. *See* Fed. R. Civ. Proc. 11(c).

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APPENDIX 8

2015 WL 11017373
Only the Westlaw citation is currently available.
United States District Court, S.D. Mississippi, Northern Division.

Dr. Orly TAITZ, Esq.; Brian Fedorka; Laurie Roth; Leah Lax; Tom MacLeran, Plaintiffs
v.
DEMOCRAT PARTY OF MISSISSIPPI; Secretary of State of Mississippi; Barack Hussein Obama; Obama for America; Nancy Pelosi; Dr. Alvin Onaka; Loretta Fuddy; Michael Astrue; Jane Does, John Does 1-100, Defendants.

Civil Case No. 3:12-CV-280-HTW-LRA
|
Signed 03/31/2015

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MEMORANDUM OPINION AND ORDER DISMISSING PLAINTIFFS' COMPLAINT

HENRY T. WINGATE, UNITED STATES DISTRICT JUDGE

***1** Before this court are several dispositive motions. Defendant Secretary of State of Mississippi has filed a motion for judgment on the pleadings [docket no. 8]. The Mississippi Democratic Party, represented by the Democratic Party Executive Committee ("MDEC") and named by the plaintiffs as the Democratic Party of Mississippi, has filed a motion for judgment on the pleadings [docket no. 15]. Defendants Loretta Fuddy ("Fuddy") [1], the former Director of the Department of Health for the State of Hawaii, and Dr. Alvin Onaka ("Onaka"), the Hawaii State Registrar, have filed a motion to dismiss for lack of jurisdiction, or for failure to state a claim [docket no. 57].

Having determined that this court has federal question subject-matter jurisdiction on a prior date, this court held a hearing on these motions on November 16, 2012. At that time, the court requested additional briefing from each of the parties, which has been submitted.

Also, on January 21, 2014, Orly Taitz filed a Notice of New Material Facts [docket no. 96]. This notice purported to contain additional evidence in support of this lawsuit. This court has determined to disregard this additional evidence because it is immaterial to her ballot challenges and, as later discussed, the alleged evidence does not alter her lack of standing on her racketeering claims.

Having read the parties' submissions and the applicable law, this court is persuaded to grant the two (2) motions for judgment on the pleadings [docket nos. 8 and 15] filed by defendants Secretary of State and MDEC. This court further dismisses Onaka and Fuddy's motion [docket no. 57] as moot. Because this court is persuaded to dismiss this case, this court also dismisses as moot plaintiffs' motion to bifurcate [docket no. 46], plaintiffs motion for an evidentiary hearing [docket no. 64], and James R. Grinol's motion to intervene [docket no. 83].

I. Background

A. Facts

Plaintiffs here accuse President Barack Obama ("President Obama"), Nancy Pelosi ("Pelosi"), and the other defendants of a conspiracy violating the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), Title 18 U.S.C. §§ 1961, *et seq.* Plaintiffs also have sued the Secretary of State of Mississippi ("the Secretary of State") to prevent him from placing President Obama's name on state presidential ballots and from certifying the final Mississippi election results. [2] The gravamen of the first amended complaint is that President Obama is not eligible to be a candidate, or to serve as President of the United States of America because he is not a "natural born citizen," as required by the United States Constitution. [3] To the contrary, say plaintiffs, President

Obama, aided by the other defendants, has perpetrated a fraud on the United States electorate by using forged documents and an illegally-obtained social security number as evidence of his eligibility to serve as President of the United States.

***2** The Secretary of State, as directed by Mississippi law, determined that President Obama was one of the "generally recognized" candidates "for the nomination of President of the United States," and placed his name on the ballot for the presidential preference primary. Miss. Code. Ann. § 23-15-1089.

Plaintiff Orly Taitz ("Taitz") says that, in January of 2012, she filed a challenge with MDEC, claiming that President Obama is ineligible for the political office he sought and demanding that he be removed from the Mississippi primary election ballot. *See* Ballot Challenge dated January 8, 2012, docket no. 6 at 16. According to Taitz, MDEC never responded.

On February 14, 2012, Taitz filed her original petition for declaratory and injunctive relief against MDEC and the Secretary of State in the Circuit Court for the First Judicial District of Hinds County. Original complaint, docket no. 6 at 8. Taitz paid a $300 bond into the court registry as required to challenge the qualifications of a political party nominee in a primary election under Mississippi Code § 23-15-961 [4] .

The Mississippi Democratic primary, which President Obama won, was held on March 13, 2012, before the Circuit Court held a hearing in Taitz's lawsuit. Plaintiff Taitz emailed Samuel Begley ("Begley"), an attorney for MDEC, on April 1, 2012, stating that "since the hearing on my challenge to candidate Obama in the primary election will be held after the election, I am requesting your client, the Democratic Party of Mississippi, to consider the aforementioned challenge as a general election challenge as well under [Mississippi] Code 23-15-963 [5] ." Exhibit B to the Secretary of State's memo in support of motion to dismiss, docket no. 9-2. This email is the sole record evidence of a "petition" to MDEC to challenge President Obama's qualifications for the general election.

***3** Hinds County Circuit Judge R. Kenneth Coleman ("Judge Coleman") scheduled a hearing for all outstanding issues in this lawsuit on April 16, 2012, but continued that hearing. Order, docket no. 6-10 at 5; Order continuing hearing, docket no. 6-9 at 13. On April 19, 2012, Taitz filed a motion with the Mississippi Supreme Court accusing Judge Coleman of bias and asking that the case be reassigned to a different judge. Motion, docket no. 7 at 10.

Also on April 19, 2012, Taitz amended her complaint, attempting to challenge President Obama's qualifications as a candidate for the general presidential election under Mississippi Code § 23-15-963. The amended complaint raised new claims under the federal RICO statutes and added new plaintiffs and defendants.

The additional plaintiffs are: Brian Fedorka ("Fedorka"), a citizen of the State of Mississippi; Leah Lax ("Lax"), a purported Democratic presidential candidate; Laurie Roth ("Roth"), a purported presidential candidate from the American Independent Party; and Tom MacLeran ("MacLeran"), a purported Republican presidential candidate. First amended complaint at 3, docket no. 1-1.

Taitz's first amended complaint added the following new defendants: President Obama, the 2012 Democratic candidate for president; Obama for America, President Obama's official campaign organization; Fuddy, former Director of the Hawaiian Department of Health; Onaka, Registrar for the State of Hawaii; Michael Astrue ("Astrue"), Commissioner of the United States Social Security Administration; Pelosi, "chair of the 2008 Presidential nominating convention, signatory on the certificate of candidate Barack Obama;" and John and Jane Does 1-100 "who aided and abetted Obama in elections fraud, forgery." First amended complaint at 3-4, docket no 1-1.

Judge Coleman filed a letter with the Mississippi Supreme Court on April 24, 2012, voluntarily recusing himself and asking the Supreme Court to appoint another judge to hear the lawsuit. Letter, docket no. 7 at 1. The Secretary of State, joined by MDEC, removed this lawsuit to federal court on that same day, citing this court's federal question subject-matter jurisdiction over plaintiffs' new RICO claims. Notice of removal, docket no. 1.

The plaintiffs have alleged the following claims in their first amended complaint: (1) declaratory relief; (2) preliminary injunctive relief and permanent injunctive relief; and (3) RICO claims of fraud, mail and wire fraud, obstruction of justice, and retaliation against a witness, victim, or informant. [6]

To remedy the wrongs alleged, plaintiffs ask this court: (1) to declare President Obama ineligible to be on the ballot as a presidential candidate; (2) to enjoin the Secretary of State from placing President Obama's name on the ballot

in the general election and mandate that the Secretary of State decertify or annul the votes for President Obama in the primary election; (3) to award treble damages to the plaintiffs for the injuries they have suffered as a result of defendants' RICO violations; (4) to award plaintiffs their costs and fees for this lawsuit; and (5) to award plaintiffs punitive and exemplary damages.

B. Voting and Electing a President

***4** The process of electing a President of the United States, while critically important, is often misunderstood. United States Presidents are elected through an indirect, representative process, not by direct votes of each citizen. This process involves selection of electors who are tasked with casting their votes for a particular candidate. The number of electors in each state is determined by the number of state representatives in the United States Senate and United States House of Representatives. U.S. Const. art. II, § 1, cl. 2[7]. The Electoral College process springs from a compromise reached during the Constitutional Convention of 1787 between constitutional framers who wanted the Congress to select the president and those who wanted the president to be selected by popular vote of the citizenry.[8]

Individual citizens, however, have no constitutional right to vote for a presidential candidate, nor for the electors who represent them. *Bush v. Gore*, 531 U.S. 98, 104, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). The constitution grants each state legislature the right to decide how to select presidential electors. *Id.* (citing Article II, § 1 of the United States Constitution); *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76, 121 S. Ct. 471, 148 L.Ed. 2d 366 (2000).[9]

Each state legislature has chosen to vest in the citizenry the right to select electors by enacting voting procedures and laws, which grant individual citizens the right to vote in the presidential elections. *Bush v. Gore*, 531 U.S. at 104. While the state legislature may appoint electors itself, once it grants this right to individuals, it must extend that voting right fairly and equally to the citizens of the state, with "equal weight accorded to each vote and ... equal dignity owed to each voter." *Id.* Further, the state legislature may not discriminate against a class of voters. *Id.* at 104-105 ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").

Most cases challenging state election procedures have been brought under the Fourteenth Amendment[10] to the Constitution, attacking state action as violative of the Equal Protection Clause. These cases generally fall into two (2) categories: (1) ballot access cases—hopeful candidates' challenges to the state denying them placement on an election ballot, *see, e.g.*, *Moore v. Hosemann*, 591 F.3d 741 (5th Cir. 2009) (socialist party candidate challenged the Secretary of State's refusal to put his name on the ballot for President when the candidate had submitted his application after the close of business on the deadline day); and (2) apportionment cases—voters' challenges to apportionment of state or federal legislative representatives, *see, e.g., Baker v. Carr*, 369 U.S. 186, 245, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (Tennessee citizens challenged Tennessee's apportionment of representatives to the State General Assembly under the Equal Protection Clause).

***5** Both types of challenges involve a specific injury to an individual citizen, such as a prospective candidates' access to run as a candidate on the ballot in an election, or a voter's right to have his or her vote carry equal weight as those in other geographies. For example, in *Baker*, the plaintiff alleged that "a single vote in Moore County, Tennessee, is worth 19 votes in Hamilton County." *Id. at* 245 (Douglas, J., concurring). Likewise, in *Storer v. Brown*, the plaintiff argued that California election law interfered with his First Amendment right to free association[11] because the laws limited his ability to run as a candidate for more than one party. *See Storer v. Brown*, 415 U.S. 724, 728, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). Plaintiffs *sub judice*, however, do not claim such an individual or particularized injury. These plaintiffs argue that they have been injured by the candidacy and election of a president whom they believe is not qualified for the position.

II. Motion for Judgment on the Pleadings by the Secretary of State

Defendant Secretary of State has filed a motion for judgment on the pleadings [docket no. 8], asking this court to dismiss him from this lawsuit. Plaintiffs have sued the Secretary of State, asking this court to enjoin him from placing President Obama's name on the Democratic presidential preference primary ballot, under Mississippi Code § 23-15-961, and to enjoin the Secretary of State from placing President Obama's name on the general election ballot, under Mississippi Code § 23-15-963. The Secretary of State says that the plaintiffs'

general election challenge is untimely and fails to state a claim for which relief may be granted. With respect to the presidential preference primary, the Secretary of State also attacks the plaintiffs' challenge on the grounds that it is untimely and moot, and because it fails to state a claim.

Plaintiffs here have sued the Secretary of State solely in his official capacity. To the extent that plaintiffs accuse him of RICO violations, says the Secretary of State, these claims must be dismissed because Taitz's pleadings fail to meet the pleading standard required in Rule 9 [12] of the Federal Rules of Civil Procedure. Further, says the Secretary of State, the plaintiffs have failed to plead adequate RICO claims.

A. Mississippi Election Law and the Primary Election Challenge

Miss. Code Ann. § 23-15-961 provides the exclusive method in Mississippi for someone to challenge a party candidate's qualifications in the presidential preference primary. Miss. Code Ann. § 23-15-961(7) [13] ; *Gourlay v. Williams*, 874 So.2d 987, 988 (Miss. 2004). As the statute plainly states, "[t]he procedure set forth above shall be the sole and only manner in which the qualifications of a candidate seeking public office as a party nominee may be challenged prior to the time of his nomination or election." Miss. Code Ann. § 23-15-961(7).

***6** Pursuant to Miss. Code Ann. § 23-15-961, a challenger is required to file a petition with the executive committee of the candidate's party "within ten (10) days after the qualifying deadline for the office." Miss. Code Ann. § 23-15-961(1) [14] . The executive committee then has ten (10) days to rule on that petition. Miss. Code Ann. § 23-15-961(2) [15] . Failure of the executive committee to act constitutes a denial of the petition. Miss. Code Ann. § 23-15-961(3) [16] . A party may seek judicial review by filing a petition in the circuit court of the county where the executive committee is located within fifteen (15) days of the date of filing the original petition. Miss. Code Ann. § 23-15-961(4). [17] The party seeking judicial review must file a $300 bond "with two (2) or more sufficient sureties conditioned to pay all costs in case his petition be dismissed." *Id.* Failure to comply with these provisions will bar judicial review. *Gourlay*, 874 So.2d at 988 (referencing Miss. Code Ann. § 23-15-961(7)).

Computation of time for statutory deadlines is the same under both the Mississippi Code [18] and the Mississippi Rules of Civil Procedure [19] . For time periods of seven (7) or more days, "day" refers to a calendar day. Miss. Code Ann. § 1-3-67; M.R.C.P. Rule 6(a). For prescribed periods of less than seven (7) days "intermediate Saturdays, Sundays and legal holidays shall be excluded" from the computation of time, meaning only business days are counted. Miss. Code Ann. § 1-3-67; M.R.C.P. Rule 6(a).

1. Claims by Plaintiffs Fedorka, Roth, MacLeran, and Lax

***7** Plaintiffs Fedorka, Roth, MacLeran, and Lax joined this lawsuit after Taitz had filed suit in state court. These plaintiffs have neither alleged nor offered evidence that any of them ever filed a challenge with MDEC as required by Mississippi statutory law prior to petitioning for judicial review. Any claims which these plaintiffs seek to pursue under Miss. Code Ann. § 23-15-961 are barred from judicial review for their failure to comply with the state law prerequisites for filing suit. Accordingly, to the extent that these plaintiffs attempt to challenge placement of President Obama on the primary preference ballot under Miss. Code Ann. § 23-15-961, this court dismisses their claims. [20]

2. Claims by Plaintiff Taitz

Taitz's challenge to President Obama's candidacy in the primary election must be dismissed as untimely. Taitz's petition is dated January 8, 2012, but the record is not clear as to when it was filed with MDEC. The Secretary of State says that the qualifying deadline for the presidential primary election in Mississippi was January 14, 2012. [21] To object timely to President Obama's qualifications, Taitz would have had to file a petition with MDEC before January 24, 2012, ten (10) calendar days after the filing deadline. Assuming Taitz filed her petition with MDEC before the statutory deadline of January 24, 2012, the latest due date for her to petition for judicial review would have been February 8, 2012, fifteen (15) days after the deadline for filing her original petition.

Taitz filed her complaint in the Hinds County Circuit Court on February 14, 2012, which was six (6) days late. Original complaint, docket no. 6 at 8. Taitz's argument that she counted business days and not calendar days does not help her cause. Under Mississippi law, the method for calculating time periods of seven (7) days or more mandates counting of calendar days. Miss. Code Ann. § 1-3-67; M.R.C.P. Rule 6(a). This court, then, dismisses Taitz's claim brought under Miss. Code Ann. § 23-15-961 as untimely.

Taitz objects to the Secretary of State's interpretation of Mississippi law, saying that Miss. Code Ann. § 23-15-961 only applies to a "party nominee," and President Obama was not his party's nominee until he was nominated on September 6, 2012, at the Democratic National Convention. Taitz says that because she filed her complaint in state court in February of 2012, and her amended complaint in April of 2012, before President Obama was officially nominated by his party, the strictures of this Mississippi statute should not apply to her dispute. To support her cause, Taitz offers a theoretical "what if" scenario about voters challenging a candidate who does not qualify in a particular state's ballot, but wins the party nomination, saying application of these deadlines would "disenfranchise" voters in that state if they could not challenge the party nominee. She, however, provides no law to support her position that Mississippi election law should not apply to her ballot challenge in Mississippi.

***8** The Secretary of State has raised multiple reasons to dismiss this claim, including mootness. The court finds it sufficient for dismissal that plaintiffs' claims, brought under Miss. Code Ann. § 23-15-96, are barred by the plaintiffs' failure to comply with the state statutory prerequisites. This claim is dismissed as to all defendants.

B. Mississippi Election Law and General Election Challenge

After the primary election took place, Taitz attempted challenge President Obama's qualifications for the general election, under Miss. Code Ann. § 23-15-963. Plaintiffs have asked this court to declare President Obama ineligible to be on the ballot for the 2012 general election, to enjoin the Secretary of State from placing President Obama on the ballot, and to enjoin the Secretary of State from certifying the general election results.

The Secretary of State has challenged the validity of Taitz's email to attorney Begley as a proper "petition" to MDEC attacking President Obama's general election qualifications. Further, says the Secretary of State, all other plaintiffs claims must be dismissed because they have not alleged that they attempted to petition MDEC at all. The Secretary of State also says that dismissal is appropriate because Taitz's petition to the Circuit Court for judicial review was defective, and was not accompanied by a $300 bond as required by statute.

With respect to the Mississippi's general election, Miss. Code Ann. § 23-15-963 provides the exclusive mechanism to challenge the qualifications of a candidate to be placed on the ballot. Miss. Code Ann. § 23-15-963(7).[22] , [23]

The language of Miss. Code Ann. § 23-15-963 closely follows that of Miss. Code Ann. § 23-15-961, which governs the primary election. A person challenging a general election candidate's qualifications must file a petition with the appropriate political body or official, in this case MDEC, "not later than thirty-one (31) days after the date of the first primary election set forth in Section 23-15-191." Miss. Code Ann. § 23-15-963(1).[24] Inaction by the political body or official is deemed a denial. Miss. Code Ann. § 23-15-963(5).[25] To seek judicial review a plaintiff must file a petition to the circuit court "no later than fifteen (15) days after the date the petition was originally filed with the appropriate election officials." Miss. Code Ann. § 23-15-963(6).[26]

***9** This court agrees with the Secretary of State that no plaintiff, other than Taitz, claims to have filed a petition with MDEC challenging President Obama's general election bid. This court, therefore, finds that to the extent plaintiffs Fedorka, Roth, MacLeran, and Lax, purport to bring claims under Miss. Code Ann. § 23-15-963, those claims must be dismissed. Even if these plaintiffs could join Taitz's general election claims against the Secretary of State, their claims would have to be dismissed for failure to fulfill state statutory requirements as discussed below.

Assuming, *arguendo*, that Taitz's April 1, 2012, email to attorney Begley could be considered a petition to MDEC under Mississippi law, Taitz's petition for judicial review would have been due to the Circuit Court by April 16, 2012, fifteen (15) days after Taitz sent her email to Begley. Taitz and the other plaintiffs filed their first amended complaint, which included the general election challenge, in the Circuit Court of Hinds County on April 19, 2012, three (3) days late.

Further, as the Secretary of State points out, the plaintiffs failed to file an additional $300 bond with this petition. This court finds that Taitz's claim under Miss. Code Ann. § 23-15-963 is barred by Taitz's failure to comply with Mississippi election law.

C. Whether Plaintiffs Have Stated a Claim to Enjoin the Secretary of State

The Secretary of State argues that even if Taitz had followed the proper procedures under state law to challenge President

Obama's qualifications, she has asserted no cognizable claim against the Secretary of State. According to the Secretary of State, the statutes governing elections do not impose a legal duty on the Secretary of State to investigate a candidate's qualifications. The statutes in question, says the Secretary of State, legally required him to certify President Obama's and Vice President Biden's names to the circuit clerks for placement on the election ballots. The court has no power to enjoin him, says the Secretary of State, from carrying out these legally mandated duties which are not judicial nor quasi-judicial in nature.

Taitz has challenged neither the validity nor the constitutionality of Mississippi election law. To the contrary, she has attempted to contest President Obama's eligibility under the authority of those statutes. Taitz argues that the Secretary of State has a duty or responsibility to verify President Obama's eligibility to hold the office of President of the United States before placing him on the ballot for the primary or general election. Essentially, Taitz asks this court to order the Secretary of State to verify that Obama is a natural born citizen. Further, says Taitz, the Secretary of State should be enjoined from certifying votes for President Obama if the Secretary of State does not verify President Obama's qualifications. The Secretary of State compares Taitz's claim for declaratory and injunctive relief to the filing of a writ of mandamus. [27]

A writ of mandamus may be used to "direct an official or commission to perform its official duty or to perform a ministerial act ...." *In re Wilbourn*, 590 So.2d 1381, 1385 (Miss. 1991). For a court to issue a writ of mandamus, the petitioner must show that: (1) the petitioner is authorized to bring suit; (2) the petitioner has a clear right to the relief sought; (3) the defendant has a legal duty to do the thing which the petitioner seeks to compel; and (4) no other adequate remedy at law exists. *Bennett v. Bd. of Supervisors of Pearl River Cnty.*, 987 So.2d 984, 986 (Miss. 2008). Both federal and Mississippi state law require a petitioner for a writ of mandamus to show that the official in question has a clear legal duty to act. *See id.* at 986; *Giddings v. Chandler*, 979 F.2d 1104, 1108 (5th Cir. 1992). [28]

***10** A writ of prohibition, [29] similar to an injunction, may be used to restrain or prevent an official with judicial or quasi-judicial powers from conduct which exceeds that official's authority. *Barnes v. Ladner*, 131 So.2d 458, 463-64 (Miss. 1961). These tools of mandamus and prohibition, however, may not be used "to restrain or prohibit the Secretary of State from performing the acts mandatorily required of him" by state law. *Id.* at 464.

The court must look to the Mississippi election code to determine if the Secretary of State is required to vet presidential candidates' qualifications prior to placing them on the ballot, or if he is legally obligated to place on the ballot those candidates who comply with the procedures mandated by statute. When construing a statute, if the language is clear and unambiguous, the court's inquiry will begin and end with an examination of that statutory language. *Sebelius v. Cloer*, ___ U.S. ____, 133 S.Ct. 1886, 1893, 185 L.Ed.2d 1003 (2013). "Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Id.*

1. Primary Election

Courts consistently have upheld restrictions to ballot access as necessary for the state to manage the electoral process. *See, e.g., Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971) (finding that states have an interest in regulating ballot access to avoid confusion, deception, and frustration "of the democratic process at the general election"). Courts have found constitutional certain statutes that say a candidate must be generally recognized in the media or must have raised enough support to receive federal matching funds. *See, e.g. LaRouche v. Sheehan*, 591 F.Supp. 917 (D. Md. 1984).

Some courts have struck down state ballot access statutes under the "void for vagueness" doctrine, because they insufficiently instruct the candidate how to gain access to the ballot. *See, e.g., Duke v. Connell*, 790 F.Supp. 50 (D.R.I. 1992) (finding that the language "bona fide national candidates" unconstitutionally vague.); *see also Kay v. Mills*, 490 F.Supp. 844 (E.D. Ky. 1980) (finding a Kentucky statute void for vagueness when it permitted the Kentucky State Board of Elections to place candidates on the ballot if they are "generally advocated and nationally recognized as candidates of the political parties [and running] for the office of the President of the United States").

The plaintiffs here have not challenged Mississippi's primary election statute, and have not alleged that any of them were seeking ballot access. The court will not attack a constitutional issue if the claims may be resolved on another basis, and will not raise a constitutional challenge not raised by the parties. These cases addressing the constitutionality of the language of state primary election laws restricting ballot

access, then, do not apply under the circumstances presented here.

Miss. Code Ann. § 23-15-1089 defines the Secretary of State's responsibility with respect to the primary election. This statute states:

> The Secretary of State *shall place the name of a candidate upon the presidential preference primary ballot when the Secretary of State shall have determined that such a candidate is generally recognized throughout the United States or Mississippi as a candidate for the nomination of President of the United States.*
>
> ***11** On or before December 15 immediately preceding a presidential preference primary election the Secretary of State shall publicly announce and distribute to the news media for publication a list of the candidates he intends to place on the ballot at the following presidential preference primary election. Following this announcement he may add candidates to his selection, but he may not delete any candidate whose name appears on the announced list, unless the candidate dies or has withdrawn as a candidate as provided in this chapter. [30]

Before placing a candidate on the ballot for the presidential preference primary, the Secretary of State must decide whether that candidate is "generally recognized throughout the United States or Mississippi for the nomination of President of the United States." Miss. Code Ann. § 23-15-1089. The determination of whether a candidate is "generally recognized" as a nominee involves discretion on the part of the Secretary of State.

The statute, however, has no language that would create a legal duty for the Secretary of State to demand each candidate present credentials. Nor does the statute create a duty for the Secretary of State to complete a background check or other investigation into the constitutional qualifications of the candidates. This court is persuaded that once the Secretary of State determines that a candidate is "generally recognized" as a nominee, which President Obama unquestionably was in December of 2011, the Secretary of State is required to place that candidate on the primary ballot under Mississippi law.

Beyond the obligation Taitz claims is embedded in the Mississippi election statutes, Taitz has cited only one case in support of her claim that the Secretary of State has a duty to investigate the credentials of each presidential candidate: *Peace & Freedom Party v. Bowen*, 912 F.Supp.2d 905 (E.D. Cal. 2012). In that case, the California Secretary of State removed a candidate from the 2012 presidential primary ballot in California because the candidate was twenty-seven (27), under the eligible age for holding the office of President of the United States [31] . *Id.* at 908. The California court held that the California Secretary of State's decision to prohibit the underage candidate from appearing on the ballot was constitutional because the state " '[may] seek[ ] to prevent the clogging of its election machinery [and] avoid voter confusion' by restricting who is listed on the ballot to persons eligible to assume the presidential office" and "state election officials can and do prohibit certain candidates from appearing on the ballot, including those 'who d[o] not satisfy the age requirement for becoming a member of Congress' or for becoming president of the United States.' " *Id.* at 909, 911.

Peace & Freedom Party, though, being an opinion from California, is not binding precedent in this court. Further, the holding in that case does not impose an affirmative duty upon the Secretary of State to investigate each candidate's qualifications; rather, the case permits the Secretary of State to remove a candidate who clearly does not qualify for the position he or she seeks. In other words, the court did not impose a duty on the California Secretary of State to vet candidates; instead, the court recognized the California Secretary of State's authority to exclude a candidate who, admittedly, did not meet the minimum requirements.

***12** This court can find no clear legal duty, created by the Mississippi election statutes, for the Secretary of State to inquire into or investigate each presidential candidate's credentials. For that reason, Taitz has failed to state a claim against the Secretary of State for a declaratory judgment or injunction.

2. General Election

Miss. Code Ann. § 23-15-785(1) describes the Secretary of State's responsibilities with respect to the general election ballot. Section 23-15-785(1) states:

> When presidential electors are to be chosen, the Secretary of [the] State of Mississippi *shall certify to the circuit clerks of the several counties the names of all candidates for President and Vice President who are nominated by any national convention* or other

> like assembly of any political party or by written petition signed by at least one thousand (1,000) qualified voters of this state.

No Mississippi court, or federal court for that matter, has addressed this statute to determine whether it imposes some duty on the Secretary of State to ascertain the qualifications of the candidate prior to certifying the names of the candidates to the circuit clerks of the Mississippi counties. [32]

This statute states that the Secretary of State "shall" certify those candidates nominated by any national convention. The term "shall" imposes a mandatory duty on the Secretary of State to certify those candidates which meet the requirements of the statute. The statute includes no language creating a legal obligation or duty for the Secretary of State to investigate the qualifications of the candidates. The clear language of the statute requires the Secretary of State to accept those candidates nominated by "any national convention," and certify their names to the circuit clerks for placement on the ballot in the general election.

At the time the plaintiffs filed the first amended complaint, President Obama was the presumptive nominee for the Democratic Party, but the Democratic National Convention had not yet been held. No one here disputes, though, that President Obama was nominated at the Democratic National Convention as the Democratic Party's nominee for President of the United States. This court finds, then, that the Secretary of State was obligated by Mississippi law to place President Obama on the ballot for the general election when the Democratic Party certified his nomination as its candidate.

3. Federalism, Political Question, and Separation of Powers

A larger issue confronting the court here is, under our form of government, who should have the primary role to regulate and police our national political process? Should this court intervene? Or has the issue been delegated to another branch of government? And what is the role of state officers in these national elections?

"Political questions" are a category of nonjusticiable issues "committed by the Constitution to another branch of government." *Baker*, 369 U.S. at 211. Because an issue that is deemed a political question is delegated to either the executive or legislative branch, the courts are forbidden from intervening. *Id.* The political question doctrines springs from the doctrine of separation of powers, which is based on the idea that the executive, judicial, and legislative branches of government are equal and independent branches, each with its own role in the administration of government. Each branch must respect the power and authority the other branches wield in their respective realms. In *Baker*, the United States Supreme Court articulated circumstances in which a political question may arise to threaten this separation of powers:

> ***13** Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

"Federalism" is a separation of powers between a state government and the federal government. The concept of federalism recognizes that certain powers properly belong to a centralized federal government, and other powers properly belong to a localized state government. *See* Seigfried Weissner, *Federalism: An Architecture for Freedom,* 1 NEW EUR. L. REV. 129, 132-33 (1993).

Both state and federal courts have dismissed cases similar to the one *sub judice*, some lodged by plaintiff Taitz, concluding that granting plaintiffs' requested relief would impermissibly violate the concepts of federalism, the political question

doctrine, and separation of powers. This court finds this case on all fours with both *Keyes v. Bowen*, 117 Cal.Rptr.3d 207 (Cal. Ct. App. 2010), and *Grinols v. Electoral Coll.*, 2013 WL 211135 (E.D. Cal. 2013), cases where the courts ruled that federalism and the separation of powers doctrine barred judicial review of the plaintiffs' challenges to President Obama's qualifications.

In *Keyes*, plaintiffs sued to prevent the Secretary of State of California from placing then-candidate Obama's name on the ballot in the 2008 election. *Keyes*, 117 Cal.Rptr.3d. at 208. The plaintiffs argued that the California Secretary of State had to require documentary proof of each candidate's constitutional qualifications before allowing the candidate to be placed on the ballot. *Id.* at 210.

The California election code in question stated, "the Secretary of State shall cause the names of the candidates for President and Vice President of the several political parties to be placed upon the ballot for the ensuing general election." *Id.* at 214. Much like the Mississippi statute, the Secretary of State was required to certify the names of candidates nominated by their respective political parties.

The California Court of Appeals for the Third District of California denied plaintiffs' requested relief, finding that the California Secretary of State had no discretion to investigate the candidates' credentials, but was mandated by law "to place on the ballot the names of the several political parties' candidates." *Id.* at 215.

The *Keyes* court stated that the Constitution and laws of the United States delegate to Congress the authority to raise and decide objections to a presidential nominee's candidacy. *Id.* at 215-16 (citing the Twelfth Amendment [33] and Title 3 U.S.C. § 15 [34]). The court in *Keyes* supported its decision with the pragmatic view of the states' role, saying:

> the truly absurd result would be to require each state's election official to investigate and determine whether the proffered candidate met eligibility criteria of the United States Constitution, giving each the power to override a party's selection of a presidential candidate. *The presidential nominating process is not subject to each of the 50 states' election officials independently deciding whether a presidential nominee is qualified, as this could lead to chaotic results.* Were the courts of 50 states at liberty to issue injunctions restricting certification of duly-elected presidential electors, the result could be conflicting rulings and delayed transition of power in derogation of statutory and constitutional deadlines.

***14** *Id.* at 215. (emphasis added).

***15** In *Grinols*, 2013 WL 211135 *1, plaintiff Taitz acted as attorney for plaintiffs who challenged President Obama's constitutional qualifications to serve as President of the United States. [35] The plaintiffs in *Grinols* asked the court for a temporary restraining order to prevent, among other things:

> (1) California's Secretary of State and Governor from certifying the Certificate of Ascertainment [which lists the electors for each candidate and the number of votes received by each candidate's electors]; (2) the Electoral College from tallying the 2012 presidential election votes; and (3) the Governor of California from forwarding the Certificate of Electoral Vote to the United States Congress ....

Id. at *1.

The district court decided that the plaintiffs' claims were "legally untenable" and nonjusticiable because the relief requested violated the separation of powers and political question doctrines. *Id.* at *2. In particular, the district court noted that the United States Constitution had entrusted the issue of presidential qualifications and removal from office with the legislative branch. *Id.* at *6.

The Twelfth Amendment, said the district court, guides the electoral college process in Congress. Under the Twelfth Amendment, the President of the Senate [36] presides over a meeting of the two (2) houses of Congress to count the

electoral votes. *Id.* at *4. This amendment authorizes the House of Representatives to choose a president and the Senate to choose a vice president if no candidate receives a majority of the electoral votes. *Id.* Should neither the president-elect nor the vice-president-elect qualify to serve, the Twentieth Amendment [37] authorizes Congress to devise a method for selecting a president and vice-president. *Id.*

Further, the *Grinols* court noted that the Twenty-Fifth Amendment [38] permits only Congress to remove a president from office. *Id.* at *6. Under the Twenty-Fifth Amendment, the Vice President or some other executive body created by Congress must inform the Congress that the president is unfit to discharge his duties. Thereafter, Congress must determine whether to remove the president.

***16** The *Grinols* court could find no Constitutional provision that would empower the judiciary to remove a president from office or enjoin an elected president from taking office. *Id.* The *Grinols* court also concluded that if it were to grant the declaratory relief requested by the plaintiffs, it would necessarily interfere with the prerogative of Congress to determine if the president is fit to discharge his duties. *Id.* at *7.

Likewise, this court can find no authority in the Constitution which would permit it to determine that a sitting president is unqualified for office or a president-elect is unqualified to take office. These prerogatives are firmly committed to the legislative branch of our government. Plaintiffs want this court to declare President Obama ineligible to serve as President of the United States and bar the Secretary of State from placing President Obama on the ballot or nullify any votes cast by Mississippi voters for President Obama. This court agrees with the courts in both *Keyes* and *Grinols* that these matters are entrusted to the care of the United States Congress, not this court. For this reason, the court finds that the plaintiffs have failed to demonstrate a proper legal footing for this court to mandate or enjoin the Secretary of State in his duties with respect to the presidential election.

D. RICO Claim

Plaintiffs' first amended complaint disavowed any RICO claim against the Secretary of State:

> Secretary of State of Mississippi is sued only in his official capacity as the chief elections officer of the State of Mississippi and he is sued only as a respondent in relation to the declaratory relief and injunctive relief in seeking his action in his official capacity ... to remove candidate Obama from the ballot in the general 2012 Presidential election and in de-certifying any and all votes for Obama fraudulently received by Obama in the Primary 2012 Presidential election. Secretary of State is NOT being sued in RICO causes of action.

First amended complaint at 3-4, docket no. 1-1. Plaintiffs' RICO statement, however, alleges fraud on the part of the Secretary of State.

Rule 9 of the Federal Rules of Civil Procedure requires the plaintiff to allege with particularity the time, place, and manner of each act of fraud. Plaintiffs have claimed that the Secretary of State was "on notice" of fraud because of a prior lawsuit against the Secretary of State in Mississippi, *Thomas v. Hoseman*, civil action no. 2:08-cv-241-KS-MTP, which raised similar allegations against President Obama.

Because the plaintiff motioned for voluntary dismissal, that lawsuit was never prosecuted to resolution, and involved no adjudication of the facts surrounding President Obama's "natural born" status. That suit, therefore, merely notified the Secretary of State of allegations against President Obama.

Knowledge that someone has accused another person of committing a wrong does not necessarily mean that the accusation is true. At best, plaintiffs have shown that the Secretary of State was aware of the dispute over President Obama's identification documents or disregarded prior litigants' unproven accusations. Plaintiffs, however, have not alleged even minimal facts to accuse the Secretary of State of fraud, nor have they succeeded in their burden under Rule 9. Nor have plaintiffs alleged that the Secretary of State was somehow complicit in, or agreed to carry out, a purported RICO scheme

E. Conclusion

***17** For the reasons discussed above, this court finds that the Secretary of State's motion for judgment on the pleadings [docket no. 8] is well-taken and should be granted. This court, therefore, dismisses all claims against the Secretary of State.

III. Motion for Judgment on the Pleadings Filed by MDEC

MDEC has filed a motion for judgment on the pleadings [docket no. 15], asking this court to dismiss this lawsuit in its entirety. President Obama, Pelosi, and Obama for America have joined in and adopted this motion, the accompanying memorandum, and MDEC's reply brief. Docket no. 60. MDEC urges dismissal on the following grounds: (1) plaintiffs' state law claims are barred because the plaintiffs have failed to follow the jurisdictional requirements of state election laws or, in the alternative, these claims are moot now that the election has passed; (2) plaintiffs lack standing to seek declaratory or injunctive relief or, in the alternative, the plaintiffs' claims are moot now that the election has passed; and (3) plaintiffs lack standing to file their RICO claims or, in the alternative, plaintiffs have failed to allege a RICO "enterprise." This court already has dismissed all claims brought by Taitz and her co-plaintiffs under Mississippi election statutes in Section II above.

A. Injunctive and Declaratory Relief

This court, according to MDEC, lacks jurisdiction to issue the injunctive or declaratory relief plaintiffs seek, because these plaintiffs lack standing under Article III of the United States Constitution. MDEC also argues that these claims are moot because the primary and general election have taken place. Finally, says MDEC, the plaintiffs' claims are so lacking in merit as to be frivolous.

Federal courts have limited jurisdiction as defined by the United States Constitution and acts of Congress. Standing "is perhaps the most important of jurisdictional doctrines." *United States v. Hays*, 515 U.S. 737, 742, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) (internal citations omitted). The doctrine of standing derives its potency from Article III, Section 2, of the United States Constitution,[39] which limits the federal judicial power to the resolution of "cases" and "controversies." *Hollander v. McCain*, 566 F.Supp.2d 63, 67 (D.N.H. 2008). The purpose of the standing doctrine, "which is built on separation-of-powers principles, [is] to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, ___ U.S. ____, 133 S.Ct. 1138, 1146, 185 L.Ed.2d 264 (2013).

***18** To have Article III standing, a plaintiff must show: (1) "an injury in fact" that is "concrete and particularized" and "actual or imminent;" (2) a causal connection between the defendant's conduct and plaintiff's injury; and (3) a likelihood that a favorable decision by the court will be able to redress or remedy the injury. *Hays*, 515 U.S. at 743. The burden falls to the party asking the court to resolve the dispute to "clearly allege facts" that demonstrate standing. *Id.*

The United States Supreme Court has consistently rejected a plaintiff's standing to bring a lawsuit based on "generalized grievances" against governmental misconduct that does not impact the plaintiff in some unique way. *Id.* (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974); *Ex parte Levitt*, 302 U.S. 633, 58 S.Ct. 1, 82 L.Ed. 493 (1937)). Ultimately, these cases have reached the same conclusion: a generalized grievance does not rise to the level of an injury-in-fact for the purposes of standing.

In *Hays*, the United States Supreme Court found that plaintiffs, who did not live in the particular voting district that they contended was created by illegal, racially-motivated gerrymandering, did not have standing to challenge the boundaries of the state's voting districts in federal court. *Hays*, 515 U.S. at 747. The court stated that "anybody in the State" could not show a direct injury from improper redistricting. *Id.* at 744-45. To have standing to sue, plaintiffs who did not live in the district in question had to show "specific evidence that [they had] been personally subjected to racial classification." *Id.*

In *Hollander*, the United States District Court for the District of New Hampshire dismissed a lawsuit brought by a New Hampshire voter against presidential candidate John McCain and the Republican National Committee. *Hollander*, 566 F.Supp.2d at 64. Plaintiff Hollander alleged that McCain, who was born in the Panama Canal Zone, was not a "natural born citizen" and, thus, not eligible to be president of the United States. *Id.* at 66. Hollander said that he was injured because McCain's appearance on the primary ballot in New Hampshire diluted his and other Republicans' votes, such that their votes would "count less than the votes of those

who voted in other parties' primary elections." *Id.* at 67. The district court found that Hollander lacked standing because he failed to allege a concrete injury specific to him, as opposed to a harm that "would adversely affect only the generalized interest of all citizens in constitutional governance." *Id.* at 68 (citing *Schlesinger*, 418 U.S. at 217).

Numerous federal courts confronted with challenges to President Obama's qualifications have found that plaintiffs lacked standing because the plaintiffs' claims were either generalized grievances or could not be redressed through court action. *See Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011) (finding that active duty military personnel, former military personnel, state representatives, taxpayers, and an Obama relative had no injury-in-fact, other than generalized grievances, to satisfy standing; also finding that presidential candidates had no "competitive standing" after a president has been sworn in); *see Kerchner v. Obama*, 612 F.3d 204 (3d Cir. 2010) (finding that two service men did not have standing to sue to remove President Obama because their alleged injuries only amounted to a generalized grievance); *see Berg v. Obama*, 574 F.Supp.2d 509 (E.D. Pa. 2008), *aff'd* 586 F.3d 234 (3d Cir. 2009) (finding that voters lack standing when the harm alleged is abstract and widely held by the general public); *see Hollander*, 566 F.Supp.2d at 63 (finding that an allegation of failure to follow the requirements of the Constitution, without showing an actual injury-in-fact, is not sufficient to grant standing to a person challenging the qualifications of a person running for president); *see Robinson v. Bowen*, 567 F.Supp.2d 1144 (N.D. Cal. 2008) (stating that the Constitution committed to members of the Senate and the House of Representatives the right to adjudicate objections to allegedly unqualified candidates).

***19** Plaintiff Taitz has cited *Miss. State Democratic Party v. Barbour*, 491 F.Supp.2d 641 (N.D. Miss. 2007), to support her cause. In that case, the Mississippi Democratic Party challenged the constitutionality of Mississippi statutes governing state primary elections. *Id.* at 644. The district court reached the merits, finding that the Mississippi Democratic Party had standing to sue, and granted summary judgment in favor of the Mississippi Democratic Party. *Id.* at 661-62.

On appeal, the Fifth Circuit decided that the plaintiff's claims were not yet ripe for adjudication because plaintiff provided no evidence of concrete plans or "serious interest" in implementing a closed primary in violation of the challenged Mississippi law. *Miss. Democratic Party v. Barbour*, 529 F.3d 538, 546 (5th Cir. 2008). While the Fifth Circuit reversed on different grounds than the type of standing at issue here, [40] the facts of *Barbour* are not on all fours with plaintiffs' claims here.

In *Barbour*, the Mississippi Democratic Party and MDEC (jointly "MDEC") challenged Mississippi's statute governing primary elections saying that the statute allowed anyone, regardless of party affiliation, to vote in the Democratic Party primary. *Id.* at 541. This circumstance, said MDEC, violated the political party's First Amendment right of free association. *Id.* at 542-43. The plaintiffs here make very different claims, insisting that President Obama's bid for the office of President has "deprived [voters] of a lawful election." First amended complaint at 25, docket no. 1-1. These plaintiffs' claims are far from the specific allegations of harm involved in *Barbour*.

Some courts have recognized "competitive standing" of a candidate in a particular election to challenge his competitor's credentials. The court in *Drake*, 664 F.3d at 783 (citing *Owen v. Mulligan*, 640 F.2d 1130, 1132-33 (9th Cir. 1981)), referenced competitive standing saying that "the potential loss of an election [is] an injury-in-fact sufficient to give a local candidate and Republican party officials standing."

Taitz cites a case involving "competitive standing," *Fulani v. Hogsett*, 917 F.2d 1028, 1029 (7th Cir. 1990), in which the New Alliance party's presidential candidate, Lenora Fulani ("Fulani"), challenged placement of the Democratic and Republican nominees on the same ballot with her in the Indiana presidential election. Fulani challenged the competing candidates saying they had failed to follow the proper state election procedures. *Id.* at 1030. The United States Court of Appeals for the Seventh Circuit found that Fulani had standing to challenge the competing candidates because the presence of other candidates on the ballot resulted in increased competition which required additional campaigning and funds. *Id.*

This Circuit also has recognized "competitive standing" under certain circumstances. The United States Court of Appeals for the Fifth Circuit, in *Tex. Democratic Party v. Benkiser,* 459 F.3d 582, 586-88 (5th Cir. 2006), found that the Texas Democratic Party ("TDP") had Article III standing to obtain an injunction in federal court preventing the Republican Party of Texas ("RPT") from removing an ineligible candidate from the ballot for a United States Congressional seat and replacing him with a different candidate.

***20** The TDP challenged a ballot change late in the election cycle in federal court, alleging that the TDP would suffer immediate financial loss because it would have to "raise and expend additional funds and resources to prepare a new and different campaign in a short time frame." *Id.* at 586. The district court agreed with the TDP, finding it had standing to challenge the RPT's and defendant's actions, and enjoined the Texas Secretary of State from removing the Republican candidate's name from the ballot. *Id.* at 585.

The Fifth Circuit affirmed the district court's decision, finding that the TDP had standing based on its allegations of financial harm, and the negative impact a last minute change could have on its candidate on the ballot in that election. *Id.* at 586-87.

Fulani and *Benkiser*, however, are distinguishable from the case at hand. In this lawsuit, the plaintiffs have provided no evidence nor alleged any facts that show they have a particularized injury. The first amended complaint demands equitable relief because "no financial damages would suffice." First amended complaint at 25, docket no. 1-1. Plaintiffs demand a declaratory judgment and an injunction because, allegedly, "[v]oters are being deprived of a lawful election" and the plaintiffs are being deprived "of the basic civil right to have a lawful election." *Id.* at 26. These claims fall squarely into the category of harms common to the general public, which courts have repeatedly found do not suffice to confer standing on a plaintiff. *See Drake*, 664 F.3d at 774; *see Berg*, 574 F.Supp.2d at 509, *aff'd* 586 F.3d 234 (4th Cir. 2009); *see Hollander*, 566 F.Supp.2d at 63.

With respect to competitive standing, the first amended complaint alleges that three (3) plaintiffs—Lax, Roth, and MacLeran—were running for the office of President of the United States. First amended complaint at 3, docket no. 1-1. The complaint, however, does not allege that any of these plaintiffs sought to be placed on the Mississippi ballot, either in the primary or general election. While the first amended complaint alleges that Lax is a Democrat and was running for President and McLaren was a Republican presidential candidate, it does not allege that these plaintiffs sought the nomination of their respective parties. These candidates cannot establish competitive standing to challenge placement of President Obama's name on the Mississippi ballot without some showing that they, too, were competing on that ballot.

Plaintiff Fedorka is the only plaintiff who alleges residence in Mississippi. He is named in the first amended complaint as a "citizen of the state of Mississippi and a registered legal voter in Mississippi." Under the facts presented here, a voter lacks standing to sue in federal court because individual voters have "no greater stake in this lawsuit than any other United States citizen." *Drake*, 664 F.3d at 782.

Taitz complains of a unique harm to herself. She alleges that she has:

> received multiple death threats from Obama supporters who do not believe their 'messiah' is capable of committing elections fraud.... Unless the injunction is issued and the public is apprised of the evidence of the elections fraud and forgery by Obama, such threats will continue until one of Obama's supporters will succeed in making his threat a reality.

First amended complaint at 26, docket no. 1-1.

While threats of violence are quite serious, this court is persuaded that these alleged injuries are too attenuated from the wrongs alleged to confer standing on Taitz. A targeted physical attack against a third party is not generally the type of harm the court would expect to flow from election-related fraud.

***21** Further, Taitz does not allege that any of the defendants here have threatened her with physical harm. Taitz admits in the complaint that the "Obama supporters" who have threatened her are members of the public who do not even know that President Obama has, according to Taitz, committed elections fraud. *See* first amended complaint at 26, docket no. 1-1.

The court can provide no remedy for these alleged harms. These unnamed "Obama supporters" are not parties here, and this court is without authority to exert jurisdiction over them. Whether these "supporters" would be dissuaded from their threats if the court addressed the merits of plaintiffs' claims is at best speculative and tenuous. The court is persuaded that this is not the type of injury that could be addressed with the relief sought by plaintiffs.

Plaintiffs next point to other cases and court documents saying that other courts have exerted jurisdiction over similar

claims, and this court is bound to grant her standing based on principles of *res judicata* or collateral estoppel. For example, an administrative law judge in Georgia heard evidence and the merits of plaintiffs' challenge to President Obama's qualifications in the case of *Farrar v. Obama*, Case No. OSAH-SECSTATE-CE-1215136-60-Malihi. Judge Michael M. Malihi, Deputy Chief Administrative Law Judge in the Office of State Administrative Hearings in Georgia, held an evidentiary hearing on January 26, 2012, and allowed Taitz to present evidence of President Obama's fraud and foreign nationality. [41] Judge Malihi, after a full hearing, found Taitz's "proof" unconvincing. [42] , [43]

***22** Judge Malihi, as a state administrative law judge is not constrained by the Article III standing requirement, which limits this federal court's jurisdiction. State courts are courts of general jurisdiction. Only the federal courts are so bound by these constitutional strictures. *See Barrett Computer Servs., Inc. v. PDA, Inc.*, 884 F.2d 214, 218 (5th Cir. 1989) ("By definition, standing goes to "the 'case or controversy' limitation on federal court jurisdiction, and [an inquiry into a party's standing] focuses primarily 'on the party seeking to get his complaint before a federal court.' "). Judge Malihi's proceedings, therefore, do not bestow standing on plaintiffs to adjudicate these matters in this federal court.

Taitz also has submitted a subpoena *duces tecum* issued by the United States District Court for the District of Hawaii. The subpoena is addressed to defendant Fuddy, Director of Health, Hawaii Health Department, and demands that she produce President Obama's "original 1961 typewritten birth certificate." Docket no. 69-1 at 31.

Taitz, however, appears to have obtained a blank subpoena from the Clerk of Court for the United States District Court for the District of Hawaii, as is authorized by Rule 45 of the Federal Rules of Civil Procedure, and filled in the contents of the subpoena herself. Rule 45 directs the clerk to issue a blank subpoena to a party or attorney who requests one. Rule 45(a)(3) of the Federal Rules of Civil Procedure states:

> The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena as an officer of:
>
> (A) a court in which the attorney is authorized to practice; or
>
> (B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

Taitz seems to have obtained this subpoena in connection with a lawsuit she filed in the United States District Court for the District of Columbia. *Taitz v. Astrue*, 806 F.Supp.2d 214 (D.D.C. 2011) *aff'd* by 2012 WL 1930959 (D.C. Cir. May 25, 2012). Taitz sued Astrue, the Commissioner of the United States Social Security Administration, under the Freedom of Information Act, seeking release of documents related to President Obama's social security number. *Id.* at 216. During the pendency of that lawsuit, she had this subpoena issued in Hawaii, and attempted to use it to obtain a copy of President Obama's original birth certificate from that states' vital records department. *Taitz v. Astrue*, Civil case no. 1:11-cv-519-SOM-RLP. Taitz allegedly served this subpoena on defendant Fuddy, and then moved to compel Fuddy to attend a hearing and to produce President Obama's birth certificate. The United States District Court for the District of Hawaii denied Taitz motion to compel Fuddy to appear or to produce the requested documents because the underlying lawsuit in the District of Columbia had been dismissed.

The District Court in Hawaii never passed on whether the subpoena was valid, whether Taitz had standing in the underlying matter, or whether Fuddy could be compelled to produce President Obama's birth certificate. The District Court in the District of Columbia granted summary judgment in favor of defendant Astrue, finding that Taitz could not legally compel Astrue to release the documents she sought under the Freedom of Information Act. *See Astrue*, 806 F.Supp.2d at 220. This subpoena provides no support that Taitz and the other plaintiffs have standing to pursue this lawsuit in this federal court.

This court finds that the plaintiffs lack standing to pursue the declaratory and injunctive relief named in their complaint. The plaintiffs have alleged no particularized injury that would confer Article III standing on them to bring this lawsuit. Further, the authority and documents cited by plaintiff Taitz provide no support to her argument that this court is collaterally estopped from finding that plaintiffs lack standing.

B. RICO claims

***23** Before proceeding, this court makes clear that the plaintiffs' complaint and RICO statement are far from a

model of clarity. The plaintiffs' documents are disjointed and at times incomprehensible. Many sections appear to be lifted directly from other pleadings in other cases, without regard to whether those sections are relevant to the case *sub judice*. The complaint and RICO statement also cite pages of statutes without explanation of their specific applicability to the facts here, merely copied-and-pasted from the United States Code. Further, plaintiffs have deluged the court with documents brimming with accusations, conclusory statements, and general attacks. As the Fifth Circuit has previously stated, "[v]ital facts ... may not be established by piling inference upon inference. Some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence." *Davis-Lynch, Inc.*, 667 F.3d at 553 (internal quotations omitted).

Plaintiffs have essentially asked this court to make their arguments for them; in common parlance, plaintiffs have thrown a haystack at the court, expecting the court to find a needle therein. *See Old Tim Enters. v. Int'l Coffee Corp.*, 862 F.2d 1213, 1220 (5th Cir. 1989) (a RICO plaintiff cannot allege every possible avenue of recovery "while retaining a level of generality and indefiniteness that would mask any legal deficiencies and preclude effective challenge"). Although this court construes *pro se* pleadings liberally, this court is not the plaintiffs' attorney, and this court will not read the *pro se* pleadings so broadly as to include a cause of action not alleged. *Richards v. British Petroleum*, 869 F.Supp.2d 730, 737 (E.D. La 2012). Further, while Taitz is acting *pro se* as a plaintiff here, she is a licensed attorney and presumably should have the requisite skill and competence to prosecute a lawsuit.

Plaintiffs have filed RICO claims, a RICO case statement, and a supplemental RICO statement, saying that defendants are part of an expansive fraudulent scheme. Plaintiffs allege that President Obama has committed fraud by failing to provide valid documentary evidence of his natural born citizen status and by using forged identification documents. Plaintiffs accuse President Obama of mail and wire fraud for posting his allegedly fabricated long form birth certificate on the internet and sending his declaration of candidacy to all fifty (50) states in both the 2008 presidential election and the 2012 presidential election.

Plaintiffs say that Onaka, Fuddy, Astrue, Pelosi, the Secretary of State, MDEC, and Obama for America are guilty of misprision of felony, under Title 18 U.S.C. § 4, [44] for aiding and abetting President Obama in his fraud, social security fraud, elections fraud, and use of a forged postal stamp on his selective service certificate.

Plaintiffs also accuse Obama for America of being a RICO association-in-fact enterprise. [45]

The RICO statutes were enacted as part of the Organized Crime Control Act of 1970, "to prevent the infiltration of legitimate business operations affecting interstate commerce" by organized crime and the monies generated by criminal activity. *Iannelli v. United States*, 420 U.S. 770, 787 n.19, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975). In addition to criminal penalties, these statutes create a private civil cause of action for any individual who is "injured in his business or property" by a defendant's "racketeering" as described in Title 18 U.S.C. § 1962. Title 18 U.S.C. § 1964(c). [46] The statute allows the injured party to recover treble damages. *Id.*

***24** Subsections (a) through (c) of § 1962 describe three (3) types of RICO violations. To satisfy the common elements of these subsections, which make up a *prima facie* case of civil RICO, a plaintiff must allege that the defendant is "(1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise." *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007). Subsection (d) codifies conspiracy as a violation of RICO. The specific prohibited activities under § 1962 may be summarized as follows:

> (a) a person who has received income from a pattern of racketeering activity *cannot invest that income in an enterprise*;
>
> (b) a person *cannot acquire or maintain an interest in an enterprise* through a pattern of racketeering;
>
> (c) a person who is employed by or associated with an enterprise *cannot conduct the affairs of the enterprise* through a pattern of racketeering activity.

Abraham, 480 F.3d at 354-55 (emphasis added).

A RICO enterprise need not be a "business-like" entity, but it must have a structure that encompasses "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 945-56, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009). "An association-in-fact enterprise is a group of persons associated together for a common purpose of engaging in a course of

conduct." *Id.* at 946 (internal citation omitted). The RICO enterprise need not have a formal structure, or "chain of command." *Id.* at 948.

The enterprise must exist as a distinct and independent entity, apart from the pattern of racketeering activity itself. *Id.* at 947. "Proof of one does not necessarily establish the other." *Id.* The proof of a pattern or racketeering, though, may in some circumstances also prove the existence of a RICO enterprise. *Id.*

A "pattern of racketeering activity" requires a showing of "two or more predicate criminal acts that are (1) related and (2) amount to or pose a threat of continued criminal activity." *St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009).

Racketeering activities, also called predicate acts, are defined in Title 18 U.S.C. § 1961.[47] These acts are federal or state crimes that are punishable by more than one (1) year of imprisonment. *Id.* The statute lists specific federal crimes which constitute RICO predicate acts, including mail and wire fraud, offenses involving bankruptcy or securities fraud, and drug-related crimes. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 481-82, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) (citing Title 18 U.S.C. § 1961(1)).

C. RICO standing

Defendants challenge the plaintiffs standing to bring this lawsuit, saying that the plaintiffs have not alleged an injury cognizable under RICO. To have RICO standing, a plaintiff must show he has suffered an injury, and that the injury was caused by, or "by reason of," the defendants RICO activity. *See Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 606 (5th Cir. 1998). Plaintiffs may satisfy this standing requirement by showing they suffered an injury that was proximately caused by the defendants' predicate acts. *See Sedima, S.P.R.L.*, 473 U.S. at 497.

***25** Injury under civil RICO is defined as harm to "business or property;" thus, personal injuries such as medical expenses, emotional distress, or injuries related to defamation are not cognizable under RICO. *Gaines*, 965 F.Supp. at 890 (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979)).

When a plaintiff brings claims under § 1961(a) and (b), a RICO injury must stem from investing racketeering proceeds into an enterprise or gaining control of an enterprise through racketeering activities. *Abraham*, 480 F.3d at 354-55. A plaintiff may not maintain a cause of action under these two subsections when she claims injury solely caused by predicate criminal acts. *Id.* at 356-57. Taitz only has claimed injury allegedly caused by predicate acts of defendants and their associates. For this reason, she has failed to allege a cause of action under either § 1961(a) or (b).

In order to determine if the defendants' alleged racketeering activity has caused injury to the plaintiffs' "business or property," this court will review the alleged racketeering acts and injuries. In reviewing the plaintiffs' allegations and purported injuries, the court does not pass on whether the plaintiffs have sufficiently pled each of the numerous predicate acts cited.

Furthermore, this court will not address the "new evidence" that plaintiffs provided to the court on January 21, 2014. That purported evidence alleges that President Obama is responsible for the deaths of various individuals. Even if this court took those allegations as true, the plaintiffs' businesses and properties have not been harmed by those alleged crimes.

Lastly, this court already has dismissed the Secretary of State, and will not address allegations against the Secretary of State here.

1. Predicate acts

Plaintiffs do not appear to have made the effort to pinpoint specific crimes committed, but instead accuse the defendants of nearly all possible predicate crimes by copying the bulk of § 1961 of RICO into their pleadings.[48] Plaintiffs' allegations, however, focus primarily on mail and wire fraud[49], and misprision of felony[50].

a. President Obama

***26** Plaintiffs say that President Obama committed fraud by failing to provide valid documentary evidence of his natural born status and by using forged identification documents. President Obama, say plaintiffs, committed mail and wire fraud when he posted his allegedly fraudulent long form birth certificate on the internet, and sent his declaration of candidacy to each of the fifty (50) states in 2008 and in 2012. Taitz also accuses President Obama of fraud in his "release the mugs" campaign, in which he sold coffee mugs with his picture and the slogan "Made in the USA." Taitz

accuses President Obama of misprision of felony, under Title 18 U.S.C. § 4,[51] citing his alleged social security fraud, elections fraud, and use of a forged postal date stamp on his selective service certificate.

Under the heading of RICO claims, plaintiffs also accuse President Obama of obstruction of justice[52, 53] for attempting to quash a subpoena, and for failing to respond to the subpoena in the Georgia case of *Farrar v. Obama*, OSAH-SECSTATE-CE-1215136-60-MALIHI, heard by a state administrative court.[54] Also related to the *Farrar v. Obama* case, Taitz says that Obama attempted to intimidate her, in violation of federal witness tampering law, Title 18 U.S.C. 1512,[55] by having his attorney Michael Jablonski send letters to the Secretary of State of Georgia "personally attacking Taitz and demanding some action be taken against her." *Id.*

The complaint says that President Obama has retaliated against a witness, victim or informant (the plaintiffs), in violation of Title 18 U.S.C. 1513,[56] by holding a press conference on April 27, 2011, in which he presented what he alleged was his long form birth certificate and called Taitz and her followers a "side show" and "carnival barkers." Taitz says that after this press conference, she was "subjected to a wave of attacks, which included defamation, slander of her character, harassment, [and] persecutions." First amended complaint at 12, docket no. 1-1. Taitz does not name her attackers.

***27** Plaintiffs accuse President Obama's campaign manager, Julianna Smoot, of insulting and harassing Taitz in a statement that Smoot made on President Obama's campaign website on November 19, 2011, when the campaign re-released President Obama's "Made in the USA" coffee mugs for sale.[57] *See* first amended complaint at 40, docket no. 1-1.

b. Onaka, Fuddy, and Astrue

Taitz accuses Onaka, Fuddy, and Astrue[58] of misprision of felony under Title 18 U.S.C. § 4. Taitz says that Onaka, Fuddy, and Astrue, using their positions as Hawaii State Registrar, Director of the Hawaii Department of Health, and Commissioner of the United States Social Security Administration, respectively, have aided and abetted President Obama by covering-up President Obama's social security fraud, elections fraud, use of a forged birth certificate, and use of a forged postal date stamp on his selective service certificate.

According to plaintiffs, defendant Fuddy has obstructed justice because Fuddy failed to comply with an allegedly "valid federal subpoena" demanding that Fuddy allow Taitz to inspect President Obama's original long form birth certificate.[59] First amended complaint at 39, docket no. 1-1.

In a supplemental RICO statement, plaintiffs accuse Onaka and Fuddy of authorizing a computer forgery of President Obama's birth certificate in violation of Title 18 U.S.C. §§ 471,[60] 472,[61] 473[62, 63] (relating to counterfeiting), 1028[64] (relating to fraud and related activity in connection with identification documents), 1341[65] (relating to mail fraud), and 1343[66] (relating to wire fraud).

c. Pelosi

***28** Plaintiffs charge Pelosi with fraud and misprision of felony, under Title 18 U.S.C. § 4, for aiding and abetting President Obama's extensive alleged fraud. Plaintiffs also accuse Pelosi of "49 counts of fraud by signing altered certificates of candidacy." First amended complaint at 34, docket no. 1-1. According to plaintiffs, Pelosi also committed fraud when, "in her capacity [as] chairwoman of the Democratic National convention[, she] worked together with Obama and Jane and John Does and changed the certificate of candidacy sent to Hawaii on Obama's behalf." RICO statement at 2, docket no. 49.

d. MDEC

Plaintiffs say that, like Onaka, Fuddy, and Astrue, MDEC is guilty of misprision of felony for aiding and abetting President Obama in the various fraudulent activities he has allegedly conducted in association with forging documents and passing himself off as a legitimate candidate for the office of President of the United States.

According to Taitz, MDEC has retaliated against a witness, victim, or informant because it has "used this case ... to harass and intimidate plaintiff Taitz, intimidate her supporters and donors by making unreasonable and outlandish demands on her." First amended complaint at 41, docket no. 1-1.

e. Obama for America

Plaintiffs say that Obama for America is both a RICO enterprise, and guilty of misprision of felony for its part in aiding and abetting President Obama in his various allegedly fraudulent activities.

Plaintiffs accuse Obama for America of retaliation against a witness, victim or informant for "posting defamatory statements [on its website] in order to defame, harass, and intimidate plaintiffs." First amended complaint at 40, docket no. 1-1.

2. Injury

Plaintiffs have thrown the proverbial "kitchen sink" at the defendants, but seem to hang their hats on claims of fraud, including mail and wire fraud, misprision of felony, defamation, and witness tampering as the source of their injuries. The fraud, mail fraud, and wire fraud allegations all center around President Obama obtaining fraudulent identification documents and then publicizing them to show he is eligible to be President of the United States, thus harming the legitimacy of the electoral process. Regarding the witness tampering statutes, plaintiffs say that the alleged defamation and insults carried out by President Obama's supporters are acts of intimidation.

The court does not pass on whether plaintiffs have alleged acts which fit the definitions of the any of the cornucopia of predicate acts alleged, but will focus here on whether plaintiffs suffered injuries cognizable under RICO. The court, however, will not entertain accusations of predicate acts based solely on the plaintiffs' copying-and-pasting a criminal statute into their pleadings.

a. Injury related to predicate acts of fraud, mail fraud and wire fraud

The plaintiffs say that President Obama has caused them injury by "usurping" the presidency of the United States via fraudulent means. According to the complaint, the plaintiffs have been "deprived of their First Amendment right to free speech, in that they were deprived of their right of participating in free elections." First amended complaint at 42, docket no. 1-1; *see* RICO statement at 25, docket no. 49. In the RICO statement, plaintiffs also allege they have suffered violation of their First Amendment right to redress grievances "under color of authority," and violation of their Fifth Amendment due process rights "under color of authority."[67] RICO statement at 28-29, docket no. 49. Plaintiffs also claim to have been injured by Attorneys Scott Tepper ("Tepper") and Begley, who asked this court to take judicial notice of President Obama's birth certificate, despite plaintiffs' contention that the document is forged.

***29** While the plaintiffs say that they "suffered damages as a result of [the] violations by the defendants," they cite no specific damages or injury other than these constitutional slights or generalized complaints. Claims of government violations of constitutional rights, generally brought under Title 18 U.S.C. § 1983,[68] are not predicate acts under the RICO statutes. *Taitz v. Obama*, 707 F.Supp.2d 1, 6 (D.D.C. 2010). Taitz already has had similar RICO claims dismissed in *Taitz v. Obama* by the United States District Court for the District of Columbia for this same reason. *Id.* (stating "neither violations of 42 U.S.C. § 1983 nor 42 U.S.C. § 1985 are 'racketeering activities' which could be the basis for Ms. Taitz's RICO claim."). These Constitutional slights are not the types of injuries RICO was created to address. The court finds that the injuries alleged by the plaintiffs related to fraud, mail fraud, and wire fraud are not cognizable under RICO and cannot serve to provide standing for these claims.

b. Injury related to misprision of felony and obstruction of justice

Plaintiffs accuse all defendants of misprision of felony for aiding and abetting Obama in his fraudulent schemes. They also attack various defendants for purported obstruction of justice, computer forgery, and other related activities inherently necessary in a scheme of this magnitude. Much like their allegations of fraud, these attacks lack any underpinning of RICO-type injuries. The plaintiffs claim that their injuries are Constitutional in nature, related to the negative impact of Obama's Presidency on the electoral process and the nation. These "injuries" are not losses to plaintiffs' business and property, and thus do not lend standing to the plaintiffs to pursue civil RICO claims.

Further, plaintiffs Fedorka, Roth, MacLeran, and Lax have alleged no injury to business or property at all. These plaintiffs have voiced only generalized complaints about damage to the integrity of the political process in the United States, vague

and conclusory allegations that the defendants have harassed them, and accusations that the government has violated their constitutional rights "under color of law." Consequently, this court finds that all RICO claims lodged by these plaintiffs must be dismissed.

c. Injury related to predicate acts in violation of witness tampering statutes

Taitz is the only plaintiff who has cited any conceivable injury to her business or property. Taitz says she has suffered financial injury related to attacks on her California bar license, her dental practice, commercial subleases, and her other property. According to Taitz, she was forced to spend over $10,000.00 in legal fees to defend her California bar license, when Tepper, attorney for President Obama, caused the California Bar Association to investigate her.

Taitz also complains that unknown Obama supporters have vandalized her property, harassed her, harassed her tenants, and tampered with her car, email account, and website. This harassment, says Taitz, has cost her approximately $400,000.00 in rental income, $500,000.00 in lost income to her dental practice, and thousands of dollars in repairs to her websites.

Taitz alleges that a $20,000.00 sanction, imposed on her by Judge Clay Land ("Judge Land") of the United States District Court for the Middle District of Georgia under Rule 11 of the Federal Rules of Civil Procedure for pursuing frivolous litigation, was a RICO injury caused by these defendants' racketeering activity. *See Rhodes v. MacDonald*, 670 F.Supp.2d 1363 (M.D. Ga. 2009) *aff'd* 368 Fed.Appx. 949 (11th Cir. 2010). Taitz argues that Judge Land's sanctioning her is proof that she is "persecuted by the Establishment." Docket no. 69 at 32.

***30** Finally, says Taitz, George Soros, a contributor to the Obama Campaign, has harassed and attempted to intimidate her by commissioning artist Dan Lacey to paint "pancake paintings" of her. This artist has painted numerous "pancake paintings" of political figures and celebrities in odd circumstances, adorned with pancakes. Taitz says that Lacey painted graphic depictions of her in the nude, giving birth to a pancake.

Taitz argues that these actions constitute violations of Title 18 U.S.C. §§ 1461 *et seq.,* 1512, 1513, and other criminal statutes, all crimes that qualify as predicate acts under RICO. According to Taitz, Soros has committed these predicate acts by commissioning Lacey to create the pancake paintings, then posting pictures of the paintings on the internet to defame, intimidate, and harass her. Taitz says that Obama supporters have even emailed these images to her children.

Taitz, however, does not say that President Obama or any other defendant directed Soros to commission these paintings, or that there was an agreement between Soros and any defendant. She also does not claim that the proceeds used by Soros to commission the paintings came from any racketeering activity. Further, Taitz does not allege that she suffered economic injury to her business or property as a result of this painting, so these alleged injuries are not cognizable under RICO.

Taitz charges the defendants with conspiring to violate the RICO statutes, citing Title 18 U.S.C. § 1962(d). Under § 1962(d), a plaintiff must show that: "(1) two or more persons agreed to commit a substantive RICO offense, and (2) the defendant knew of and agreed to the overall objective of the RICO offense." *Davis-Lynch, Inc. v. Moreno*, 667 F.3d 539, 551 (5th Cir. 2012). A defendant does not have to "commit or agree to commit the requisite two or more predicate acts of 'racketeering activity' to be held criminally liable as a conspirator under RICO." *Id.* at 552. The defendant need only know of, and agree to, the overall scheme. *Id.* The specific act or acts that allegedly cause the plaintiff injury, however, must be independently wrongful under RICO. *Id.*

As an initial matter, neither Judge Land [69] nor Tepper has been joined as a defendant in this lawsuit. Although the actions of an alleged conspirator can be imputed upon all members of the conspiracy, this court will not permit Taitz to litigate the alleged wrongdoings of non-joined individuals without first joining those individuals so that they may defend themselves. *See, generally, Beck v. Prupis*, 529 U.S. 494, 503, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000).

In the meantime, Taitz's claims that President Obama was involved in a conspiracy with Tepper and Judge Land must fail. Taitz only makes conclusory allegations linking the two (2) men with a criminal conspiracy. Taitz does not provide any factual allegation that Tepper or Judge Land were part of a conspiracy or that their actions were intended to further a criminal conspiracy that was approved by President Obama and the other defendants. Therefore, Taitz's pleadings fall short of Rule 8 [70] of the Federal Rules of Civil Procedure,

as articulated in *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 127 S.Ct 1955, 167 L.Ed.2d 929 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

***31** In *Twombly*, the United States Supreme Court held that to state a claim for conspiracy the complaint must offer "enough factual matter (taken as true) to suggest that an agreement was made.... [A] bare assertion of conspiracy will not suffice." *Twombly*, 550 U.S. at 556. Likewise, in *Iqbal*, the United States Supreme Court held that, although the court must accept the complaint's factual allegations as true, the court was not bound to accept "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 663.

Taitz, in linking Tepper's actions to a criminal conspiracy allegedly approved by President Obama, only says that "Tepper misused and abused his position as a part time investigator to launch collateral attacks on Taitz, in order to attack her CA license and prevent her from going after Obama and his forged IDs." Taitz's statement is no more than a conclusory allegation for which she alleges no facts in support. Even assuming that this conclusory allegation was true, Taitz alleges no facts that would demonstrate that Tepper engaged in this activity to further a criminal conspiracy that was approved by President Obama. Furthermore, when this court asked Taitz to clarify her RICO statement by filing a supplemental RICO statement, she failed to mention Tepper. Docket no. 73.

Regarding threats and intimidation, which Taitz says have caused her loss of rental income and income to her dental clinic, Taitz does not identify the perpetrators, nor tie them to these defendants or to a conspiracy that involves these defendants. She goes so far as to acknowledge in her RICO statement that the perpetrators had no connection to Obama nor knew of the purported RICO scheme. RICO statement at 30, docket no. 49 ("Plaintiff Taitz received multiple death threats from Obama supporters who do not believe that their 'messiah' is capable of committing elections fraud [or of using] forged documents.").

Similar to the claims against Tepper, Taitz's complaint and RICO statement do not link Judge Land to a conspiracy. Taitz claims that Judge Land "arbitrarily refused to address grievances by Taitz's clients," "attacked Taitz and her clients with defamatory statements and sanctions," and denied her due process. RICO statement at 28-29, docket no. 48. Taitz, however, does not allege facts showing that Judge Land is a member of a RICO conspiracy approved by President Obama. Nor does Taitz allege any facts showing that Judge Lands' actions were in furtherance of the alleged RICO conspiracy.

Taitz, in essence, has failed to meet the Rule 8 pleading standards, and her RICO claims against the defendants must fail.

D. Conclusion

Plaintiffs here lack standing to sue for the injunctive and declaratory relief sought. The plaintiffs have asserted a generalized grievance against President Obama and his eligibility to hold the office of President of the United States, but they can show no unique or particularized injury which would allow them to bring suit in federal court. Nor have plaintiffs succeeded in alleging injury under the federal RICO statutes. Further, plaintiffs have failed to plead their claims with sufficient particularity under the Federal Rules of Civil Procedure. This court, therefore, is persuaded that the motion by MDEC for judgment on the pleadings is well-taken and should be granted. Plaintiffs' claims for declaratory relief, injunctive relief, and for damages under RICO are dismissed.

IV. Motion to Dismiss filed by Onaka and Fuddy

***32** Defendants Onaka and Fuddy have filed a motion to dismiss under Rule 12 of the Federal Rules of Civil Procedure [docket no. 57]. These defendants say that this court lacks personal jurisdiction [71] over them because the plaintiffs failed to serve them properly with process, and that the plaintiffs have failed to state a claim against them. Defendants Onaka and Fuddy also filed a motion to strike the plaintiffs' alleged proof of service [docket no. 72].

This court has evaluated the complaint, RICO statement, and supplemental RICO statement and determined that all of plaintiffs' claims must be dismissed. The court, therefore, need not address defendant Onaka's and Fuddy's arguments, because all of plaintiffs' claims have been found deficient. This motion to dismiss and the motion to strike, therefore, are moot.

V. Conclusion

Plaintiffs have sued these defendants for relief under the Mississippi election statutes, for injunctive relief, for

declaratory relief, and for treble damages under federal RICO statutes. This court has reviewed the extensive and jumbled pleadings by the plaintiffs, as well as hundreds of pages of documents filed in the docket. For the reasons explained above, this court is not persuaded that the plaintiffs have asserted any viable causes of action here. This court, thus, dismisses the plaintiffs' claims. The motions for Judgment on the Pleadings [docket nos. 8 and 15] are granted. In addition, the motion to dismiss [docket no. 57] and the motion to strike [docket no. 72] are dismissed as moot.

Because this court is dismissing the plaintiff's case, this court also dismisses as moot plaintiffs' motion to bifurcate [docket no. 46], plaintiffs motion for an evidentiary hearing [docket no. 64], and James R. Grinol's motion to intervene [docket no. 83].

SO ORDERED AND ADJUDGED, this, the 31 st of March, 2015.

All Citations

Not Reported in Fed. Supp., 2015 WL 11017373

Footnotes

1 During the pendency of this lawsuit, defendant Fuddy died in a plane accident. No party, however, has filed a "suggestion of death," authorizing this court to substitute parties.

2 The primary and general elections have taken place in Mississippi. The Secretary of State thus, argues mootness. While plaintiffs' claims are arguably moot, especially because President Obama's opponent, Mitt Romney, garnered all of Mississippi's Electoral College votes in the 2012 presidential election, this court dismisses the claims against the Secretary of State based on plaintiffs' failure to comply with state election law, and plaintiffs' failure to state a claim.

3 U.S. CONST. art. II, § 1, cl. 4 states that

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

4 Miss. Code Ann. § 23-15-961 addresses challenges to candidate qualifications in primary elections. *Town of Terry v. Smith*, 48 So.3d 507, 508 (Miss. 2010). Section 4 of the statute addresses the bond requirement and states in pertinent part:

> Any party aggrieved by the action or inaction of the appropriate executive committee may file a petition for judicial review to the circuit court of the county in which the executive committee whose decision is being reviewed sits.... Such person filing for judicial review shall give a cost bond in the sum of Three Hundred Dollars ($300.00) with two (2) or more sufficient sureties conditioned to pay all costs in case his petition be dismissed ....

The Mississippi Legislature amended Miss. Code Ann. § 23-15-961, effective September 17, 2012. Because these events happened before the amended version went into effect, this court applies the previous, 1999 version.

5 Miss. Code Ann. § 23-15-963(1) states:

> Any person desiring to contest the qualifications of another person who has qualified pursuant to the provisions of Section 23-15-359, Mississippi Code of 1972, as a candidate for any office elected at a general election, shall file a petition specifically setting forth the grounds of the challenge not later than thirty-one (31) days after the date of the first primary election set forth in Section 23-15-191, Mississippi Code of 1972. Such petition shall be filed with the same body with whom the candidate in question qualified pursuant to Section 23-15-359, Mississippi Code of 1972.

6 As mentioned in this court's prior order denying plaintiffs' motion to remand, the first amended complaint is far from clear. This court has examined the complaint to parse the specific claims alleged. Plaintiffs seem to allege additional claims in their RICO case statement, specifically: aiding and abetting fraud, misprision of felony, violation of plaintiffs' constitutional rights "under color of authority," and defamation. Because these claims are contained in the RICO case statement, this court will treat them as additional allegations brought under the RICO statutes.

7 U.S. Const. art. II, § 1, cl. 2 states:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

8 Brandon H. Robb, *Making the Electoral College Work Today: The Agreement Among the States to Elect the President by National Popular Vote*, 54 LOY. L. REV. 419, 427 (2008).

9 "Although we did not address the same question petitioner raises here, in *McPherson v. Blacker*, 146 U.S. 1, 25, 13 S.Ct. 3, 36 L.Ed. 869 (1892), we said:

> '[Art. II, § 1, cl. 2,] does not read that the people or the citizens shall appoint, but that 'each State shall'; and if the words 'in such manner as the legislature thereof may direct,' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.' "

Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. at 76.

10 U.S. CONST. amend. XIV, § 1 states, in its pertinent part: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."

11 U.S. CONST. amend. I states: "Congress shall make no law respecting ... the right of the people peaceably to assemble ...."

12 Rule 9 of the Federal Rules of Civil Procedure states, in its pertinent parts:

> b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.
>
> * * *
>
> (f) Time and Place. An allegation of time or place is material when testing the sufficiency of a pleading

13 Miss. Code Ann. § 23-15-961(7) states:

> The *procedure set forth above shall be the sole and only manner in which the qualifications of a candidate seeking public office as a party nominee may be challenged prior to the time of his nomination or election.* After a party nominee has been elected to public office, the election may be challenged as otherwise provided by law. After a party nominee assumes an elective office, his qualifications to hold that office may be contested as otherwise provided by law.

(emphasis added)

14 Miss. Code Ann. § 23-15-961(1) states:

> Any person desiring to contest the qualifications of another person as a candidate for nomination in a political party primary election shall file a petition specifically setting forth the grounds of the challenge *within ten (10) days after the qualifying deadline for the office* in question. Such petition shall be *filed with the executive committee* with whom the candidate in question qualified.

(emphasis added).

15 Miss. Code Ann. § 23-15-961(2) states:

> *Within ten (10) days of receipt of the petition described above, the appropriate executive committee shall meet and rule upon the petition.* At least two (2) days before the hearing to consider the petition, the appropriate executive committee shall give notice to both the petitioner and the contested candidate of the time and place of the hearing on the petition. Each party shall be given an opportunity to be heard at such meeting and present evidence in support of his position.

(emphasis added)

16 Miss. Code Ann. § 23-15-961(3) states:

> If the appropriate executive committee *fails to rule upon the petition within the time required above, such inaction shall be interpreted as a denial of the request* for relief contained in the petition."

(emphasis added).

17 Miss. Code Ann. § 23-15-961(4), *supra* footnote 4.

18 Miss. Code Ann. § 1-3-67 states:

> When process shall be required to be served or notice given any number of days, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday, or any other day when the courthouse or the clerk's office is in fact closed, whether with or without legal authority, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or any other day when the courthouse or the clerk's office is closed. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

19 M.R.C.P. Rule 6(a) states

> In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday,

> or a legal holiday, as defined by statute, or any other day when the courthouse or the clerk's office is in fact closed, whether with or without legal authority, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or any other day when the courthouse or the clerk's office is closed. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. In the event any legal holiday falls on a Sunday, the next following day shall be a legal holiday.

20 Plaintiffs' complaint is confusing. It does not clearly articulate specific claims under Mississippi election law, but rather expends four (4) pages quoting Miss. Code Ann. §§ 23-15-961 and 23-15-963. First amended complaint at 9-12, docket no. 1-1. Defendant Secretary of State and this court have surmised from the plaintiffs' lengthy recitation of the statutes and from plaintiffs' demands for relief that plaintiffs have made two claims: (1) a challenge to President Obama's credentials for placement on the ballot in the presidential preference primary, and (2) a challenge to President Obama's credentials to be placed on the ballot in the general election.

21 MISSISSIPPI SECRETARY OF STATE'S OFFICE, 2012 CANDIDATE QUALIFYING GUIDE, *available at* http://www.sos.ms.gov/links/elections/candidates_lobbyist_center/tab1/2012%20Candidate%20Qualifying%20Guide.pdf (last visited Mar. 31, 2015).

22 Miss. Code Ann. § 23-15-963(7) states:

> The procedure set forth above shall be the sole and only manner in which the qualifications of a candidate seeking public office who qualified pursuant to the provisions of Section 23-15-359, Mississippi Code of 1972, may be challenged prior to the time of his election. After any such person has been elected to public office, the election may be challenged as otherwise provided by law. After any person assumes an elective office, his qualifications to hold that office may be contested as otherwise provided by law.

23 Miss. Code Ann. § 23-15-359(1) names the candidates who may be challenged under § 23-15-963. Section 23-15-359(1) states in pertinent part:

> The ballot shall contain the names of all *party nominees certified by the appropriate executive committee, and independent and special election candidates who have timely filed petitions containing the required signatures.*

(emphasis added)

24 Miss. Code Ann. § 23-15-963(1), *supra* footnote 5.

25 Miss. Code Ann. § 23-15-963(5), states:

> If the appropriate election officials fail to rule upon the petition within the time required above, such inaction shall be interpreted as a denial of the request for relief contained in the petition.

26 Miss. Code Ann. § 23-15-963(6) states:

> Any party aggrieved by the action or inaction of the appropriate election officials *may file a petition for judicial review to the circuit court of the county in which the election officials whose decision is being reviewed sits. Such petition must be filed no later than fifteen (15) days after the date the petition was originally filed with the appropriate election officials.* Such person filing for judicial review *shall give a cost bond in the sum of Three Hundred Dollars ($300.00) with two (2) or more sufficient sureties conditioned to pay all costs in case his petition be dismissed*, and an additional bond may be required, by the court, if necessary, at any subsequent stage of the proceedings.

(emphasis added).

27 A writ of mandamus is “a writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usually to correct a prior action or failure to act.” BLACK'S LAW DICTIONARY-MANDAMUS (9th ed. 2009).

28 Federal law requirements for a writ of mandamus against federal officers are similar to Mississippi state law requirements. Under Title 28 U.S.C. § 1361, a district court may issue a writ of mandamus “to compel an officer or employee of the United States or agency thereof to perform a duty owed to the plaintiff.” Mandamus relief is appropriate “only when the plaintiff's claim is clear and certain and the duty of the officer is ministerial and so plainly prescribed as to be free from doubt.” *Giddings*, 979 F.2d at 1108. Thus, both state and federal law require the petitioner to show that the official has a legal duty to do the thing petitioner seeks to compel.

29 A writ of prohibition is: “1. A law or order that forbids a certain action. 2. An extraordinary writ issued by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a nonjudicial officer or entity from exercising a power.” BLACK'S LAW DICTIONARY-PROHIBITION (9th ed. 2009).

30 At the time of this opinion, no court in Mississippi has ruled on or interpreted this statute. This court finds no opinion by either a Mississippi state court or a federal court citing Mississippi Code Ann. § 23-15-1089.

31 U.S. CONST. art II, § 1, cl. 4 states, in its pertinent part: “no person ... shall be eligible to the Office of President ... who shall not have attained the Age of thirty five Years.”

32 One case has interpreted Miss. Code. Ann. § 23-15-785. *See Moore*, 591 F.3d at 741, *remanded to* 2010 WL 3190755 (S.D. Miss. 2010). That case, however, deals with the Secretary of State's discretion to refuse to certify a candidate who submitted his application after the close of business on the deadline day.

33 U.S. CONST. amend. XII

> The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no

person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

34 Title 3 U.S.C. § 15 states in pertinent part:

> Congress shall be in session on the sixth day of January succeeding every meeting of the electors.... Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes ...; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, ... *Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision*; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.

(emphasis added)

35 *In Grinols*, Attorney Taitz represented five (5) plaintiffs: James Grinols, Robert Odden, Edward Noonan, Keith Judd, and Thomas Gregory MacLeran. Thomas Gregory MacLeran is also a plaintiff in this lawsuit.

36 The President of the Senate is the sitting Vice President of the United States.

37 U.S. CONST. amend. XX, § 3 states in pertinent part:

> If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

38 U.S. Const., amend. XXV § 4 states:

> Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.
>
> Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers

and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

39 U.S. Const. art. III, § 2, cl. 1 states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

40 Ripeness and standing are closely related doctrines which limit federal court's jurisdiction under Article III of the Constitution. *Barbour*, 529 F.3d at 544. Both require that an “injury be imminent rather than conjectural or hypothetical.” *Id.* at 545. Ripeness is primarily concerned with timing–“whether the harm asserted has matured sufficiently to warrant judicial intervention.” *Id.* at 544.

41 This court has found a transcript of the hearing conducted by Judge Malihi and the Judge's February 3, 2012, opinion in the records of the Georgia Office of State Administrative Hearings at http://www.osah.ga.gov/recent-cases.html (last visited Mar. 31, 2015).

42 Judge Malihi, in his written opinion, stated that “plaintiffs presented the testimony of eight witnesses and seven exhibits in support of their position.... The Court finds the testimony of the witnesses, as well as the exhibits tendered, to be of little, if any, probative value, and thus wholly insufficient to support plaintiffs' allegations.” The court found that Taitz failed to qualify the alleged “expert witnesses” as experts, and that “[n]one of the testifying witnesses provided persuasive testimony.”

Judge Malihi addressed Taitz's legal arguments regarding the definition of a “natural born citizen,” and her assertion that President Obama does not meet that definition. Judge Malihi found that Taitz failed to show that President Obama was not born within the territorial borders of the United States, and that President Obama is a natural born citizen, eligible to be a candidate for the presidential primary election under Georgia law.

43 This court has reviewed the dockets and documents for cases referenced by plaintiffs in support of their arguments. The court may consider documents in another court's record to establish facts such as, “that a specific document was filed, that a party took a certain position, that certain judicial findings, allegations, or admissions were made.” *In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 205 (3d Cir. 1995).

Under the authority of Rule 201 of the Federal Rules of Evidence, this court may take judicial notice of an adjudicative fact that is “not subject to reasonable dispute ... as long as it is not unfair to a party to do so and does not undermine the trial court's factfinding authority.” *Id.* at 205-206 (citing Fed.R.E. 201).

While this court has reviewed dockets and pleadings from cases cited by plaintiffs in order to clarify the plaintiffs' somewhat jumbled arguments, this court has not relied on any factual findings or legal determinations from those cases.

44 Title 18 U.S.C. § 4 states:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

45 Title 18 U.S.C. § 1961(4) defines an “enterprise as, “any individual, partnership, corporation, association, or other legal entity, and *any union or group of individuals associated in fact although not a legal entity*;” (emphasis added).

46 Title 18 U.S.C. § 1964(c) states in part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee ....

47 Title 18 U.S.C. § 1961(1) provides a long list of state and federal law crimes which constitute RICO predicate acts.

Title 18 U.S.C. § 1961(1)(A) states that “[a]ny act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year” is an act of racketeering.

Title 18 U.S.C. § 1961(1)(B) provides a list of federal crimes, found in Title 18 of the United States Code, which constitute RICO predicate acts.

48 In her RICO statement and supplemental RICO statement [docket nos. 49 and 73]. Taitz accuses the defendants of the following laundry list of predicate acts taken from the RICO statute: Title 18, Section 201 (relating to bribery); sections 471-473 (relating to counterfeiting); section 1028 (relating to fraud and related activity in connection with identification documents); section 1341 (relating to mail fraud); section 1343 (relating to wire fraud); section 1344 (relating to financial institution fraud); section 1425 (relating to the procurement of citizenship or nationalization unlawfully); section 1426 (relating to the reproduction of naturalization or citizenship papers); section 1427 (relating to the sale of naturalization or citizenship papers); sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice); section 1510 (relating to obstruction of criminal investigations); section 1511 (relating to the obstruction of State or local law enforcement); section 1512 (relating to tampering with a witness, victim, or an informant); section 1513 (relating to retaliating against a witness, victim, or an informant); section 1542 (relating to false statement in application and use of passport); section 1543 (relating to forgery or false use of passport); section 1544 (relating to misuse of passport); section 1546 (relating to fraud and misuse of visas, permits, and other documents); section 1951 (relating to interference with commerce, robbery, or extortion); section 1952 (relating to racketeering); section 1956 (relating to the laundering of monetary instruments); section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity); section 1960 (relating to illegal money transmitters); sections 2314 and 2315 (relating to interstate transportation of stolen property); section 2320 (relating to trafficking in goods or services bearing counterfeit marks).

Title 18 U.S.C. § 1961(1)(F) cites crimes indictable under the Immigration and Nationality Act. Taitz accuses these defendants of violating the following sections of the Act: section 274 (relating to bringing in and harboring certain aliens); section 277 (relating to aiding or assisting certain aliens to enter the United States); and section 278 (relating to importation of alien for immoral purpose), if the act indictable under such section of such Act was committed for the purpose of financial gain.

Finally Taitz cites Title 18 U.S.C. § 1961(1)(G), which makes "any act that is indictable under any provision listed in section 2332b(g)(5)(B)," a predicate act. This section of the criminal code relates to acts of terrorism transcending national boundaries.

49 The elements necessary to prove mail or wire fraud under Title 18 U.S.C. §§ 1341 and 1343 are: "(1) a scheme to defraud, (2) money or property [as the object of the scheme], and (3) use of the mails [or wires] to further the scheme." *Fountain v. United States*, 357 F.3d 250, 255 (2d Cir. 2004).

50 "The elements of misprision of felony are: 1) the principal committed and completed the alleged felony; 2) defendant had full knowledge of that fact; 3) defendant failed to notify the authorities; and 4) defendant took steps to conceal the crime." *United States v. Cefalu*, 85 F.3d 964, 969 (2d Cir. 1996) (citations omitted).

51 Title 18 U.S.C. § 4, *supra* footnote 44.

52 Plaintiffs cite Title 18 U.S.C. § 1503, which is a predicate act under the RICO statutes. Title 18 U.S.C. § 1503(a) states, in its pertinent part:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).

53 The elements of a *prima facie* case of obstruction of justice are "that there was a pending judicial proceeding, the defendant had knowledge or notice of the pending proceeding, and the defendant acted corruptly with the specific intent to obstruct or impede the proceeding or the due administration of justice." *United States v. Neal*, 951 F.2d 630, 632 (5th Cir. 1992).

54 Taitz served as the plaintiffs' attorney in that lawsuit.

55 Violation of Title 18 U.S.C. § 1512, the federal witness tampering statute, is a predicate act under RICO and makes it a federal crime to attempt to prevent a witness from testifying in a federal court through the use of force or coercion. *See United States v. Lester*, 749 F.2d 1288, 1293 (9th Cir. 1984).

56 Retaliation against a federal witness is a RICO predicate act. This federal crime is codified at Title 18 U.S.C. § 1513. A *prima facie* case under this statute has the following elements: (1) the defendant knowingly engaged in conduct either causing, or threatening to cause, bodily injury to another person, and (2) acted with the intent to retaliate for, *inter alia,* the testimony of a witness at an official proceeding." *United States v. Wardell*, 591 F.3d 1279, 1291 (10th Cir. 2009).

57 In a blog post from November 19, 2011, on President Obama's campaign website, Julianna Smoot stated:

> Yesterday, four Republicans in the New Hampshire State House allowed a hearing requested by Orly Taitz, the notorious dentist-lawyer-birther who wants President Obama officially removed from the state's primary ballot.
>
> So in honor of conspiracy theorists everywhere, we're re-releasing the campaign's limited-edition "Made in the USA" mugs. There's clearly nothing we can do to satisfy this crowd—or anyone else who insists on wasting time and energy on nonsense like this.
>
> But when it starts to make your head hurt, I've found the best remedy is to have some tea in my "Made in the USA" mug.
>
> > Works like a charm. I recommend Earl Grey.

Julianna Smoot, *Release the Mugs*, BARACKOBAMA.COM, www.barackobama.com/news/entry/release-the-mugs (last visited Mar. 7, 2014).

58 Defendant Astrue, Commissioner of the United States Social Security Administration, has not responded to this lawsuit. This court, in a prior order, denied a motion for default judgment against Astrue, finding that the plaintiffs have not properly served Astrue with process. Docket no. 93.

59 As discussed in Section III.A. above, Taitz attempted to compel Fuddy to comply with a subpoena to appear and produce President Obama's original long form birth certificate in *Taitz v. Astrue*, Civil case no. 1:11-cv-519-SOM-RLP, in the United States District Court for the District of Hawaii. The district court denied Taitz motion to compel and dismissed the action.

60 Title 18 U.S.C. § 471 states that, "[w]hoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both."

61 Title 18 U.S.C. § 472 state that, "[w]hoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both."

62 Title 18 U.S.C. § 473 states that "[w]hoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined under this title or imprisoned not more than 20 years, or both."

63 Title 18 U.S.C. §§ 471, 472, and 473 deal with counterfeiting of money or United States government monetary obligations, and not general allegations of fraud. *See Barbee v. United States*, 392 F.2d 532, 536 (5th Cir. 1968) (stating:

> The purpose of (the existing counterfeiting statute) is the protection of the bonds or currency of the United States, and not the punishment of any fraud or wrong upon individuals. Nevertheless, the sanctions should be applied when the physical integrity of the currency is challenged in any way. As stated by our Court in *Brooks v. United States*, 76 F.2d 871 (5th Cir. 1935), 'The manifest object of the statute here involved is to protect against all attempts at fraud upon the genuine monetary obligations or securities of the United States.').

64 Title 18 U.S.C. § 1028 makes it a federal crime, among other things, to produce, transfer, or possess "a document of a type intended or commonly accepted for the purposes of identification of individuals and that document be or appear to be made by or under the authority of the United States, [which] the defendant

knew ... was stolen or produced without the authority of the United States." *United States v. Fuller*, 531 F.3d 1020, 1027 (9th Cir. 2008).

65 Title 18 U.S.C.A. § 1341 states in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

66 Title 18 U.S.C.A. § 1343 states in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

67 In the RICO Statement, plaintiffs list "causes of action" starting with the "Second Cause of Action." RICO statement at 17, docket no. 49. The "causes of action" listed in the RICO statement are: (1) RICO-predicate crime fraud; (2) RICO-mail and wire fraud; (3) RICO-predicate crime misprision of felony-social security fraud; (4) RICO-predicate crime misprision of felony-elections fraud; (5) RICO-predicate crime misprision of felony-use of a forged postal stamp on the selective service certificate of Obama; (6) violation under the color of authority of the First Amendment and Fourteenth Amendment right to free speech; (7) violation of the First Amendment and Fourteenth Amendment right for redress of grievances under color of law; (8) violation of Fifth Amendment of due process and Fourteenth Amendment equal protection of rights under color of authority; and (9) defamation. While these are styled as "causes of action," they are listed in the plaintiffs' RICO statement, and the plaintiffs have not moved to amend their complaint. The court, therefore, will treat these "causes of action" as claims made under the umbrella of RICO.

68 Taitz has relied, unsuccessfully, on Title 42 U.S.C. § 1983 to sue President Obama in the past. *Taitz v. Obama*, 707 F.Supp.2d at 1. This statute allows plaintiffs to sue government entities for depriving individuals of their rights guaranteed under the United States Constitution and federal law. The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails. *Wyatt v. Cole*, 504 U.S. 158, 161, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992).

69 Judge Land, of course, is entitled to judicial immunity for any alleged actions he took in his capacity as a judge. *Forrester v. White*, 484 U.S. 219, 225, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988) ("judicial immunity ...insulate[s] judges from vexatious actions prosecuted by disgruntled litigants").

70 Rule 8(a) of the Federal Rules of Civil Procedure states:

> (a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

71 Fed.R.Civ.P. 12(b)(2), (4), and (5) call for dismissal for “lack of personal jurisdiction; ... “insufficient process;” and “insufficient service of process,” respectively.

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APPENDIX 9

2012 WL 4739216 (Wash.Super.) (Trial Order)
Superior Court of Washington.
Thurston County

Linda JORDAN, Plaintiff,
v.
SECRETARY OF STATE SAM REED, Defendant.

No. 12-2-01763-5.
August 29, 2012.

West Headnotes (1)

[1] **Constitutional Law** Encroachment on legislature
United States Presidential eligibility and qualification
The trial court lacked subject matter jurisdiction over voter's action against the Secretary of State, which alleged the Secretary of State had failed in his responsibilities and violated the law when he failed to investigate whether presidential candidate met the eligibility requirements of the United States Constitution; Congress had the authority to resolve the issue of a presidential candidate's qualifications to serve as president.

Court's Opinion and Decision

Thomas McPhee, Judge.

***1** The birther movement has been a subplot on the fringe of the political spectrum in the U.S. for about five years. Recent history is not the first time it has been raised. In 1880 Chester Arthur, the son of a father of Irish citizenship and a mother of U.S. citizenship, was rumored to have been born not in Vermont where all credible evidence established his birthplace, but in Canada. This unfounded rumor did not receive much traction, perhaps because the internet had not been as fully developed then as it is now.

In the past five years all manner of court action has sought to entice courts to enter into the process of determining the qualifications of two persons who were nominated for president in 2008, and one who has served; a process reserved in the U.S. Constitution to the congress, not the courts. I mentioned two candidates. I was surprised to learn that candidate Senator McCain was challenged on at least two occasions, once for being a sitting senator and running for president, and the other for being born in the Panama Canal Zone.

The vast majority of these cases however involved President Obama. The first wave occurred during the presidential campaign of 2008, and involved issues similar or identical to those raised in this case. Plaintiff Linda Jordan cannot be unaware of those cases. None were successful. Most were dismissed on standing grounds; a question not directly at issue in this case because plaintiff purports to bring this case under RCW 29A.68.011, subparts 1 and 3, which confers standing on any elector. But others, including *Ankeny v. Governor of State of Indiana,* 916 N.E.2d 678 (2009) addressed the merits.

In the case brought by plaintiff Jordan, she alleges a number of ways in which the Secretary of State has failed his responsibilities and violated the law. The Secretary of State has answered by responding to the allegations and by contending that this court, or any state court for that matter, lacks subject matter jurisdiction to determine the eligibility of a candidate for president of the United States, and by contending that plaintiff has failed to join an indispensible party, President Obama, in this lawsuit.

I am persuaded by every defense raised by the Secretary of State.

1. An analysis of indispensible party under CR 19 leads only to the conclusion that this case must be dismissed because plaintiff has failed to join President Obama as a party. I find that President Obama meets the standards of a person described in CR 19(a)(2)(A); and having considered the four factors in CR 19(b) conclude that he is an indispensible party.

2. I conclude that this court lacks subject matter jurisdiction. The primacy of congress to resolve issues of a candidate's qualifications to serve as president is established in the U.S. Constitution, in the passages cited by the Secretary of State. Two reported appellate decisions make this clear. In *Robinson v Bowen,* 567 F.Supp.2d 1144 (2008), the U.S. District Court wrote, at page 1147:

> Therefore, this order holds that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance. Judicial review - if any - should occur only after the electoral and Congressional processes have run their course.

***2** In 2010, the California Court of Appeals, in *Keyes v Bowen,* 117 Cal.Rptr.3d 207, addressed this issue in a case remarkably similar in its facts to this case. There the court wrote, at page 215:

> In any event, the truly absurd result would be to require each state's election official to investigate and determine whether the proffered candidate met eligibility criteria of the United States Constitution, giving each the power to override a party's selection of a presidential candidate. The presidential nominating process is not subject to each of the 50 states' election officials independently deciding whether a presidential nominee is qualified, as this could lead to chaotic results. Were the courts of 50 states at liberty to issue injunctions restricting certification of duly-elected presidential electors, the result could be conflicting rulings and delayed transition of power in derogation of statutory and constitutional deadlines. Any investigation of eligibility is best left to each party, which presumably will conduct the appropriate background check or risk that its nominee's election will be derailed by an objection in Congress, which is authorized to entertain and resolve the validity of objections following the submission of the electoral votes.

3. Plaintiff dramatically misconstrues the law governing the Secretary of State's acceptance and processing of declarations of candidacy. Her arguments, even if the law she argues applied to presidential candidates, would not be persuasive. But that law does not apply. RCW 29A.56.360 applies. It does not impose on the Secretary of State the duties plaintiff urges; indeed it does not permit them.

Nevertheless, plaintiff contends that the Secretary of State must investigate the "identity and citizenship status of candidates" [1], and relies on *Dumas v. Gagner,* 137 Wn.2d 268 (1999), as Washington Supreme Court authority for that contention. *Dumas* does not apply and does not support plaintiff's contention if it did. *Dumas* and all other cases addressing a Washington election

official's duties to investigate candidates before the election address the information provided in the declaration of candidacy. These declarations are created by RCW 29A.24.030, which provides in relevant part:

A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration of candidacy.

Plaintiff knows the law, she quotes the text of §.030 in her motion.[2] Nevertheless, she contends that the Secretary of State has the duty, apparently under this statute, to investigate President Obama's citizenship before placing him on the ballot. Even if §.030 applied to candidates for president, *Dumas* does not support plaintiff's contention; it specifically rejects such a broad interpretation of that law. I conclude that the Secretary of State has not violated the law by provisionally certifying President Obama's candidacy without undertaking an investigation into his citizenship. Further, I conclude that he will not have violated the law when he removes the "provisional" condition after President Obama is officially nominated.

***3** 4. Plaintiff contends that the Secretary of State violated RCW 29A.56.360 because he provisionally certified President Obama's candidacy before the Democratic Party nominates him. He did the same for candidate Mr. Romney. The reason for doing so is clear. The step must occur before ballots are printed, and if the Secretary of State delays certification there is substantial risk that county auditors across the state will miss the deadline established by state and federal law for mailing ballots to overseas and military voters. Plaintiff objects contending that President Obama has not yet been nominated, but she offers no evidence or argument that his nomination is uncertain. In fact, on July 24, the day the Secretary of State provisionally certified President Obama as a nominee, he received a letter from chair of the Democratic National Committee that informed him:

> As your office may be aware, the 2012 Democratic National Convention (the "Convention") will be held on September 3-6, 2012 in Charlotte, North Carolina. At that time, the Convention will formally nominate the following candidates as the Democratic Party's nominees for President and Vice President of the United States, respectively, in the November 6, 2012 general election:

[For President of the United States, Barack Obama]

> In advance of the Convention, *I* am providing this provisional statement to enable your office to fulfill all of its statutory duties regarding certificates of nomination in a timely and efficient manner, and to ensure that Barack Obama and Joseph R. Biden, Jr., appear as the Democratic Party's nominees for President and Vice President of the United States, respectively, on the ballot for the general election to be held on November 6, 2012, This includes, without limitation, appearance on all absentee and early voting ballots and inclusion on all voter information documents.

No rational person could conclude that the there exists any substantial uncertainty about the nomination of either President Obama or Mr. Romney. I conclude that no violation of the law has occurred in this regard.

5. Plaintiff contends that it is wrong to treat nominated candidates for president differently than write-in candidates are treated. She contends that write-in candidates for president "have to swear an eligibility oath and if they don't swear the oath their declarations will not be accepted."[3] She compares write-in candidates with major party nominees, but it really is a comparison of write-in candidates with all nominees, both major and minor party nominees - there is no significant difference in the treatment of major and minor party presidential nominees, except that the minor party nominee must consent to his or her nomination. Plaintiff does not contend that the law treating write-in candidates differently is unconstitutional or is being misapplied by the Secretary of State, just that it is wrong. Her argument is not persuasive.

I began this explanation of my decision with some history of the birther movement, and I conclude with some more history.

Even after the election of 2008, so-called birther lawsuits continued. A lawyer, self styled as the leader of the birther movement, filed a series of lawsuits on behalf of service members seeking to avoid deployment to war zones on the grounds that President Obama, the commander in chief, did not legitimately hold that office. Some federal courts eventually forbade him from filing any additional lawsuits.

One such case, *Rhodes v. MacDonald,* 2009 WL 2997605 (M.D. Ga. 2009), contained a passage that particularly resonated in light of the type of evidence plaintiff offers in this case. The federal district court wrote, in relevant part at paragraph 3:

> ***4** [Plaintiff] has presented no credible evidence and has made no reliable factual allegations to support her unsubstantiated, conclusory allegations and conjecture that President Obama is ineligible to serve as President of the United States.... Then, implying that the President is either a wandering nomad or a prolific identity fraud crook, she alleges that the President *"might* have used as many as 149 addresses and 39 social security numbers prior to assuming the office of President. Acknowledging the existence of a document that shows the President was born in Hawaii, Plaintiff alleges that the document "cannot be verified as genuine, and should be *presumed* fraudulent." ... Finally, in a remarkable shifting of the traditional legal burden of proof, Plaintiff unashamedly alleges that Defendant has the burden to prove his "natural born" status. Thus, Plaintiff's counsel, who champions herself as a defender of liberty and freedom, seeks to use the power of the judiciary to compel a citizen, albeit the President of the United States, to "prove his innocence" to "charges" that are based upon conjecture and speculation. Any middle school civics student would readily recognize the irony of abandoning fundamental principles upon which our Country was founded in order to purportedly "protect and preserve" those very principles."

In her Memorandum, plaintiff Jordan seems to anticipate that the Secretary of State would seek dismissal under CR 12(b)(6), and argues that she has presented substantial evidence that President Obama's birth certificate is forged. She quotes the standard for substantial evidence. "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding."

She offers as evidence the musings of the infamous Arizona sheriff Joe Arpiao, supported by the report by a part-time computer programmer last employed in XX/XX/2007, who examined a copy of the pdf image of President Obama's birth certificate and concluded that the original was forged. She offers the affidavit of a private investigator who opines that President Obama is fraudulently using the social security number of another person who was born in 1890[4] and was issued the social security number in 1977. The investigator is not able to identify the person and does not offer any insight as to why this hypothetical person waited until he or she was 87 years old before applying for and receiving a social security number. The rest of plaintiff's evidence is the standard fare of the blogosphere that has been floating around since 2008.

In light of this evidence, I close with an additional passage from *Rhodes v McDonald,* cited above. On the issue of evidence, the court wrote at paragraph 4:

> Although the Court has determined that the appropriate analysis here involves principles of abstention and not an examination of whether Plaintiff's complaint fails to state a claim under Federal Rule of Civil Procedure 12(b)(6), the Court does find the Rule 12(b)(6) analysis helpful in confirming the Court's conclusion that Plaintiff's claim has no merit. To state a claim upon which relief may be granted, Plaintiff must allege sufficient facts to state a claim to relief that is "plausible on its face." For a complaint to be facially plausible, the Court must be able "to draw the reasonable inference that the defendant is liable for the misconduct alleged" based upon a review of the factual content pled by the Plaintiff. The factual allegations must be sufficient "to raise a right to relief above the speculative level." Plaintiff's complaint is not plausible on its face .... Unlike in *Alice in Wonderland,* simply saying something is so does not make it so.

[Citations omitted]

I do not usually devote so much time quoting the decisions of other courts in other cases. I do so here to make the point that just as all the so-called evidence offered by plaintiff has been in the blogosphere for years, in one form or another, so too has all the law rejecting plaintiff's allegations. I can conceive of no reason why this lawsuit was brought, except to join the chorus of noise in that blogosphere. The case is dismissed.

Date: August 29, 2012

.....

Thomas McPhee, Judge

Footnotes

1 Plaintiff's Memorandum, page 2.

2 Plaintiff's Motion for Order to Show Cause, page 5.

3 Plaintiff's Motion for Order to Show Cause, page 4. Plaintiff does not identify the eligibility oath she is referring to; probably she means the declaration of candidacy.

4 Just ten years after Chester Arthur was elected President!

APPENDIX 10

2023 WL 7110390
United States District Court, D. New Hampshire.

John Anthony CASTRO
v.
NEW HAMPSHIRE SECRETARY OF STATE, David M. Scanlan, and Donald J. Trump

Civil No. 23-cv-416-JL
|
Signed October 27, 2023

Synopsis

Background: Political candidate brought action against New Hampshire Secretary of State, and naming former President as a nominal defendant, seeking injunction barring the placement of former President's name on state's presidential primary ballot on grounds of ineligibility under Fourteenth Amendment clause stating that anyone who has participated in a rebellion against the government cannot hold state or federal office. Candidate moved for preliminary injunction, and former President moved to dismiss.

Holdings: The District Court, Joseph N. Laplante, J., held that:

[1] candidate did not show he was suffering an actual injury as required for standing, and

[2] candidate's claim raised a nonjusticiable political question.

Former President's motion granted; candidate's motion denied.

Procedural Posture(s): Motion for Preliminary Injunction; Motion to Dismiss for Lack of Subject Matter Jurisdiction.

West Headnotes (18)

[1] **Federal Courts** Limited jurisdiction; jurisdiction as dependent on constitution or statutes

Federal Courts Necessity of Objection; Power and Duty of Court

Federal Courts Presumptions and burden of proof

Federal courts, as courts of limited jurisdiction, may not presume the existence of subject matter jurisdiction, but rather, must appraise their own authority to hear and determine particular cases.

[2] **Federal Courts** Weight and sufficiency

Party who asserts jurisdiction bears the burden of establishing that it exists by a preponderance of the evidence.

[3] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

Under Article III of the Constitution, a plaintiff needs a personal stake in the case to have standing; more specifically, the plaintiff must have suffered an "injury in fact"—a concrete and imminent harm to a legally protected interest, like property or money—that is fairly traceable to the challenged conduct and that is likely to be redressed by the lawsuit. U.S. Const. art. 3, § 2, cl. 1.

[4] **Federal Civil Procedure** In general; injury or interest

Inquiry into standing must be based on the facts as they existed when the action was commenced.

[5] **Injunction** Persons entitled to apply; standing

A person exposed to a risk of future harm may have standing to pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial; the injury, however, must be concrete and particularized and not conjectural or hypothetical.

[6] **Federal Civil Procedure** In general; injury or interest

Plaintiff bears the burden of establishing standing.

[7] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

Plaintiff must satisfy the three-part standing test, which requires injury in fact causally connected to conduct complained of that is redressable by favorable decision, against each defendant with the manner and degree of evidence required at the successive stages of the litigation. U.S. Const. art. 3, § 2, cl. 1.

[8] **Federal Civil Procedure** In general; injury or interest

Where the court has held an evidentiary hearing on the jurisdictional issues including standing, plaintiff bears the burden to establish by a preponderance of the evidence that he has standing to litigate his claim.

[9] **Election Law** Persons entitled to bring contest

For standing purposes, to demonstrate an injury as a political competitor, a plaintiff must show that he has a chance of prevailing in the election. U.S. Const. art. 3, § 2, cl. 1.

[10] **Federal Civil Procedure** In general; injury or interest

An injury based on speculation about the decisions of independent actors does not confer standing. U.S. Const. art. 3, § 2, cl. 1.

[11] **Injunction** Persons entitled to apply; standing

Political candidate failed to demonstrate that he was competing with former President to win New Hampshire primary election and thus, he did not show he was suffering an actual, competitive injury if former President was listed on presidential primary ballot, and thus, he lacked standing to seek injunction barring placement of former President's name on the primary ballot on grounds of ineligibility pursuant to Fourteenth Amendment clause stating that anyone who has participated in a rebellion against the government cannot hold state or federal office; candidate had no campaign activity, he acknowledged he would not win any delegates in the primary, it was speculative that he would win over any voters if former President did not appear on the ballot, and by his own admission, he declared himself a candidate in order to manufacture standing. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 14.

1 Case that cites this headnote
More cases on this issue

[12] **Federal Civil Procedure** Causation; redressability

Traceability element of standing, essentially a causation element of Article III standing, requires the plaintiff to show a sufficiently direct causal connection between the challenged action and the identified harm. U.S. Const. art. 3, § 2, cl. 1.

[13] **Federal Civil Procedure** Causation; redressability

Redressability element of Article III standing requires proof that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. U.S. Const. art. 3, § 2, cl. 1.

[14] **Federal Civil Procedure** Causation; redressability

In many cases, traceability and redressability elements of Article III standing are addressed

together as two sides of a causation coin. U.S. Const. art. 3, § 2, cl. 1.

[15] Injunction Persons entitled to apply; standing

Requested remedy, an injunction barring New Hampshire Secretary of State's placement of former President's name on state's presidential primary ballot, would not redress political candidate's purported competitive injury, and thus, candidate lacked standing in action alleging that former President was ineligible pursuant to Fourteenth Amendment clause stating that anyone who has participated in a rebellion against the government cannot hold state or federal office; former President's absence from primary ballot would not affect number of votes or contributions candidate would receive, former President's name could still appear on completed ballots as a write-in candidate and still receive votes, Secretary could not stop former President's campaign activities in the state, and candidate sought no restraint against former President. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 14.

1 Case that cites this headnote
More cases on this issue

[16] Constitutional Law Political Questions

Political question doctrine bars courts from adjudicating issues that are entrusted to one of the political branches or involve no judicially enforceable rights.

[17] Constitutional Law Political Questions

Nonjusticiability of political questions is essentially a function of the separation of powers of the federal government. U.S. Const. art. 3, § 1.

[18] Constitutional Law Elections

Political candidate's claim challenging former President's eligibility as a presidential candidate under Fourteenth Amendment clause stating that anyone who has participated in a rebellion against the government cannot hold state or federal office raised nonjusticiable political question, and thus, district court lacked jurisdiction to hear candidate's claim and issue injunction barring New Hampshire Secretary of State's placement of former President's name on state's presidential primary ballot, since the federal Constitution committed to Congress and the electors the responsibility of determining matters of presidential candidates' qualifications. U.S. Const. Amends. 12, 14.

1 Case that cites this headnote
More cases on this issue

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MEMORANDUM ORDER

Joseph N. Laplante, United States District Judge

***1** This case presents jurisdictional issues of standing and justiciability that the court must resolve before addressing the merits of the plaintiff's claim. Plaintiff John Anthony Castro seeks an injunction barring the New Hampshire Secretary of State from placing former President Donald J. Trump's name on the New Hampshire Republican Presidential primary ballot, on the ground that Trump is ineligible to serve as president under Section 3 of the Fourteenth Amendment of the U.S. Constitution.[1] Castro named the Secretary as a defendant and Trump as a nominal defendant.[2] The defendants argue that the case should be dismissed because Castro does not have standing to seek the requested relief, and his claim raises a nonjusticiable political question.

After reviewing the parties' filings and holding an evidentiary hearing and oral argument on October 20, 2023, the court finds that it lacks jurisdiction to consider Castro's request for

injunctive relief. Castro has not established that he has or will suffer a political competitive injury arising from Trump's participation in the New Hampshire Republican Presidential primary. Thus, Castro has not carried his burden to show that he has standing to bring his claim. Further, even if Castro had standing, the court is inclined to find, consistent with the weight of authority, that Castro's claim raises a nonjusticiable political question. The court accordingly denies Castro's motion for a preliminary injunction and dismisses the case.

I. Background

Castro "asks this Court to issue an injunction preventing Defendant Secretary of State from accepting and/or processing Defendant Donald John Trump's ballot access documentation, including, but not limited to nominating papers and nominating petitions."[3] As grounds for relief, Castro alleges that Trump "provided 'aid or comfort' to an insurrection in violation of Section 3 of the [Fourteenth] Amendment to the U.S. Constitution and is, therefore, constitutionally ineligible to pursue or hold any public office in the United States."[4] Castro also alleges that Trump is a "nominal" defendant; he brings no claim requesting relief against Trump.[5]

Shortly after filing a complaint in this court on September 5, 2023, Castro filed a motion for an expedited preliminary injunction, on September 17.[6] A few weeks later, the court granted the New Hampshire Republican State Committee's motion to intervene in the case. The court then held an evidentiary hearing and oral argument on October 20, to address jurisdictional issues prior to considering the merits of Castro's claim.[7] Castro, counsel for the defendants, and counsel for the intervenor attended and participated in the hearing. Castro, the Secretary, and Trump also filed witness lists, exhibit lists, and proposed findings of fact and rulings of law.

***2** The following facts are agreed to or based on the evidence (testimony, exhibits, and stipulations) presented at the hearing, as noted. Castro has declared his candidacy for the New Hampshire Republican Presidential primary and paid the filing fee.[8] Castro has also declared his candidacy in the Nevada Republican Presidential primary.[9] Trump has now (five days after the hearing) also declared his candidacy in the New Hampshire Republican Presidential primary and paid the filing fee.

Castro and the defendants stipulated to the following description of Castro's campaign in New Hampshire:

> Presently, Plaintiff's campaign has no serious prospect of getting any New Hampshire delegates to the Republican National Convention, nor any significant number of votes that would otherwise have gone to Donald Trump, nor any appreciable share of donations that otherwise would have gone to Donald Trump; as of right now.[10]

Castro further acknowledges that he is, at best, a "longshot Republican Presidential candidate."[11] Trump introduced evidence of Castro's filings with the Federal Election Commission, which show that Castro's campaign has no contributions and no expenditures.[12] Further, Castro's campaign has not run or purchased any advertising in New Hampshire or any other state.[13]

During the hearing, Trump called Michael Dennehy to testify as an expert witness regarding Castro's campaign in New Hampshire and the effects, if any, of Trump's participation in the New Hampshire Presidential primary on Castro's prospects as a candidate. Dennehy has worked as a political consultant and strategist for over three decades and has a consulting firm in New Hampshire, Dennehy & Bouley.[14] He has served in a variety of positions in Republican politics, including as a committeeman on the Republican National Committee, Executive Director of the New Hampshire Republican Party, and a political director and campaign manager in several Republican political campaigns.[15] The parties agreed to the admissibility of Dennehy's opinion testimony under Federal Rule of Evidence 702, and Castro cross-examined Dennehy.

Dennehy opined that Castro has no chance of winning a delegate in the New Hampshire Presidential primary election.[16] In explaining this opinion, Dennehy enumerated a number of observations regarding Castro's campaign. He testified that "polling data" on Castro was "nonexistent"[17]; to his knowledge, and consistent with Castro's admissions,

Castro has no advertisements, campaign office, or employees in New Hampshire [18]; and Castro's campaign website is "amateur" and "incomplete." [19] Dennehy also testified that the presence or absence of Trump on the primary ballot in New Hampshire would not affect Castro's chances in that election "[b]ecause there is no activity to [Castro's] campaign." [20]

***3** Castro testified at the hearing and was cross-examined by Trump's counsel as well. In response to questions from Trump's counsel, Castro could not identify any New Hampshire voter to whom he has spoken for purposes of his campaign (although he testified that he had "[d]iscussions with voters"). [21] He also confirmed that his FEC filings show that his campaign has no contributors, other than himself, and almost no money. [22] Castro also agreed that a primary goal of his candidacy is to establish the impermissibility of Trump's presidency, and that he has filed 27 lawsuits seeking to keep Trump's name off of the ballot in various states. [23]

II. Applicable legal standard

[1] **[2]** "Federal courts, as courts of limited jurisdiction, may not presume the existence of subject matter jurisdiction, but rather, must appraise their own authority to hear and determine particular cases." Watchtower Bible & Tract Soc. of N.Y., Inc. v. Colombani, 712 F.3d 6, 10 (1st Cir. 2013); accord United States v. Rivera-Rodríguez, 75 F.4th 1, 13 (1st Cir. 2023). The party who asserts jurisdiction bears the burden of establishing that it exists by a preponderance of the evidence. Woo v. Spackman, 988 F.3d 47, 53 (1st Cir. 2021); U.S. ex rel. Ondis v. City of Woonsocket, 587 F.3d 49, 54 (1st Cir. 2009).

III. Analysis

The defendants challenge Castro's claim on two jurisdictional grounds—lack of standing and nonjusticiability under the political question doctrine. The court considers standing first and then turns to the issue of justiciability.

A. Standing

[3] **[4]** **[5]** "Under Article III of the Constitution, a plaintiff needs a 'personal stake' in the case." Biden v. Nebraska, —— U.S. ——, 143 S. Ct. 2355, 2365, 216 L.Ed.2d 1063 (2023) (quoting TransUnion LLC v. Ramirez, —— U.S. ——, 141 S. Ct. 2190, 2203, 210 L.Ed.2d 568 (2021)). More specifically, "the plaintiff must have suffered an injury in fact—a concrete and imminent harm to a legally protected interest, like property or money—that is fairly traceable to the challenged conduct and that is likely to be redressed by the lawsuit." Id. (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Also, "[a]n inquiry into standing must be based on the facts as they existed when the action was commenced." Ramírez v. Sánchez Ramos, 438 F.3d 92, 97 (1st Cir. 2006). Nevertheless, "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." Webb v. Injured Workers Pharm., LLC, 72 F.4th 365, 372 (1st Cir. 2023) (quoting TransUnion, 141 S. Ct. at 2210). The injury, however, must be "concrete and particularized" and "not conjectural or hypothetical." Lujan, 504 U.S. at 560, 112 S.Ct. 2130.

[6] **[7]** **[8]** The plaintiff bears the burden of establishing standing. TransUnion, 141 S. Ct. at 2207. To carry that burden, the plaintiff must satisfy the three-part standing test against each defendant "with the manner and degree of evidence required at the successive stages of the litigation." Webb, 72 F.4th at 371-72 (quoting TransUnion, 141 S. Ct. at 2208); see also Disability Rts. S.C. v. McMaster, 24 F.4th 893, 900 (4th Cir. 2022); Sierra Club, Inc. v. Granite Shore Power LLC, No. 19-CV-216-JL, 2019 WL 8407255, at *4 (D.N.H. Sept. 13, 2019). Here, where the court has held an evidentiary hearing on the jurisdictional issues including standing, Castro bears the burden to establish by a preponderance of the evidence that he has standing to litigate his claim. ForUsAll, Inc. v. U.S. Dep't of Labor, —— F. Supp. 3d ——, ——, 2023 WL 5559682, at *3 (D.D.C. Aug. 29, 2023) (the plaintiff bears the burden of showing standing by a preponderance of the evidence (citing Lujan, 504 U.S. at 561, 112 S.Ct. 2130)).

***4** In attempting to satisfy his burden, Castro invokes the theory of competitor standing. This theory arose in the context of the commercial marketplace, specifically when government-imposed restrictions put certain market participants at a competitive disadvantage. [24] Katin v. Nat'l Real Est. Info. Servs., Inc., No. 07-10882-DPW, 2009 WL 929554, at *4 (D. Mass. Mar. 31, 2009). "In discrete contexts, courts have extended competitor standing to the political marketplace." AB PAC v. Fed. Election Comm'n, No. 22-2139(TJK), 2023 WL 4560803, at *4 (D.D.C. July 17, 2023) (citing Shays v. FEC, 414 F.3d 76, 83-89, 92 (D.C. Cir. 2005) (candidates) and Natural Law Party of U.S. v. FEC, 111 F. Supp. 2d 33, 45-46 (D.D.C. 2000) (political parties)); see also Schulz v. Williams, 44 F.3d 48, 53 (2d Cir. 1994)

(political parties); Fulani v. Hogsett, 917 F.2d 1028, 1030 (7th Cir. 1990) (same); Nelson v. Warner, 472 F. Supp. 3d 297, 303-04 (S.D. W. Va. 2020) (finding competitor standing because a statute that prescribed the ballot order of candidates harmed plaintiff's electoral prospects).

In particular, courts have found a competitive injury in the political context where the plaintiff is subjected to "the burden of being forced to compete under the weight of a state-imposed disadvantage." Mecinas v. Hobbs, 30 F.4th 890, 899 (9th Cir. 2022). For example, in Shays v. FEC, the District of Columbia Circuit Court of Appeals concluded that "when regulations illegally structure a competitive environment—whether an agency proceeding, a market, or a reelection race—parties defending concrete interests (e.g., retention of elected office) in that environment suffer legal harm under Article III." 414 F.3d at 87; see also Mecinas, 30 F.4th at 898 (holding that that a ballot-order statute created an illegally structured competitive environment that supported standing).

Outside of state-imposed disadvantages in elections, "courts have [also] held that a candidate or his political party has standing to challenge the inclusion of an allegedly ineligible rival on the ballot, on the theory that doing so hurts the candidate's or party's own chances of prevailing in the election." Hollander v. McCain, 566 F. Supp. 2d 63, 68 (D.N.H. 2008) (citing Tex. Dem. Party v. Benkiser, 459 F.3d 582, 586-87 & n.4 (5th Cir. 2006); Schulz, 44 F.3d at 53; and Fulani, 917 F.2d at 1030 and noting Gottlieb v. FEC, 143 F.3d 618, 622 (D.C. Cir. 1998) (distinguishing voters who challenge candidate's eligibility)). Having traced the general contours of the relevant standing theories, the court now assesses Castro's evidence as to each of the three elements of standing, beginning with his purported injury, and then turning to traceability and redressability, which are analyzed together.

*5 [9] ***Injury.*** To demonstrate an injury as a political competitor, a plaintiff must show that he has "a chance of prevailing in the election." Grinols v. Electoral College, No. 12-cv-2997-MCE, 2013 WL 2294885, at *8 (E.D. Cal. May 23, 2013). That is, the plaintiff must "truly [be] in competition" with the allegedly ineligible candidate. Liberty Legal Found. v. Nat'l Dem. Party of the USA, Inc., 875 F. Supp. 2d 791, 800-01 (W.D. Tenn. 2012) (finding no political competitor standing for plaintiffs challenging President Obama's eligibility to run for president, where neither plaintiff "alleged that he is a Tennessee political party's nominee for the office, that his name will appear on the ballot for Tennessee's general election in November, that he is campaigning in the state of Tennessee, that any registered voter in Tennessee intends to cast a vote for him, or that President Obama's presence on the ballot will in any way injure either candidate's campaign.").

Castro makes no attempt to demonstrate that he is actually competing with Trump for votes and contributions, as required under the operative competitor standing theory. The evidence shows that Castro has not campaigned in New Hampshire or elsewhere. Castro has not provided any evidence suggesting that he has voters or contributors in New Hampshire or elsewhere, or that he will benefit from voter or contributor defections from Trump to himself.[25] To the contrary, he acknowledges that he will not win any delegates in the primary. Consistent with this, Dennehy opined (without serious challenge) that Castro cannot win a single delegate in the New Hampshire primary, and he has no campaign activity.

[10] The weaknesses in Castro's theory of competitive injury do not stop there. His claimed injury is also speculative, as it depends on what voters and contributors—independent, third parties—may do if Trump's name is not listed on the New Hampshire primary ballot. Castro provides no evidence that any Trump supporter would support Castro under that circumstance. By contrast, Trump provided Dennehy's opinion that no Trump supporters would switch allegiance to Castro if Trump does not appear on the ballot. An injury based on speculation about the decisions of independent actors does not confer standing. See Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 379 (W.D. Pa. 2020) (holding that it would not "endorse standing theories that rest on speculation about the decisions of independent actors" (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013)).

Further, the evidence indicates that Castro is creating his own injury in order to manufacture standing to challenge Trump's eligibility to run for president. Indeed, by his own admission, Castro declared as a candidate and paid the filing fee to show the impermissibility of Trump's presidency. He asserts that one of his goals in the campaign is "to demonstrate his legal ingenuity, ability to effectuate a national litigation strategy with minimal resources (i.e. guerrilla lawfare), and demonstrate executive leadership capabilities."[26] This practice of manufacturing standing to pursue a cause through litigation is not supported by the law. See Equal Means Equal v. Ferriero, 3 F.4th 24, 30 (1st Cir. 2021); accord Elizabeth Cady Stanton Tr. v. Neronha, —— F. Supp. 3d ——, ——,

2023 WL 6387874, at *5 (D.R.I. Sept. 8, 2023); see also Webb, 72 F.4th at 373 (holding that "plaintiff could not manufacture standing by incurring mitigation costs in the absence of an impending harm").

*6 **[11]** In sum, the evidence demonstrates that Castro is not competing and will not compete with Trump to win the New Hampshire primary, and for that reason, he is not a political competitor in the primary. Contrary to Castro's contention, he does not have a cognizable injury simply because his name is on the New Hampshire primary ballot, and he cannot manufacture standing by declaring his candidacy and paying the fee. For all of these reasons, Castro has not shown that he is suffering or would suffer an actual, competitive injury if Trump's name is listed on the New Hampshire Presidential primary ballot.

[12] **[13]** **[14]** ***Traceability and redressability.*** The traceability element of standing, "essentially a causation element of Article III standing, requires the plaintiff to show a sufficiently direct causal connection between the challenged action and the identified harm." Dantzler, Inc. v. Empresas Berrios Inventory & Operations, Inc., 958 F.3d 38, 47 (1st Cir. 2020) (cleaned up). While some indirect causation may be sufficient, "[t]he Supreme Court has cautioned against courts finding that a plaintiff's injury is fairly traceable to a defendant's conduct where the plaintiff alleges a causal chain dependent on actions of third parties." Id. at 48. The redressability element, in turn, requires proof that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 561, 112 S.Ct. 2130 (1992); accord Dep't of Educ. v. Brown, 600 U.S. 551, 561, 143 S.Ct. 2343, 216 L.Ed.2d 1116 (2023). In many cases, traceability and redressability are addressed together as "two sides of a causation coin." Brookline Opportunities, LLC v. Town of Brookline, —— F. Supp. 3d ——, —— n.8, 2023 WL 4405659 at *5 n.8 (D.N.H. July 7, 2023) (quoting Dynalantic Corp. v. Dep't of Def., 115 F.3d 1012, 1017 (D.C. Cir. 1997)).

Because Castro has not shown a concrete and particularized injury, which is essential to carry his burden of establishing standing, the court need not address the traceability and redressability elements. Nevertheless, the court takes this opportunity to note that, even if Castro could establish an injury, he cannot meet the traceability and redressability requirements for standing.

[15] Castro is seeking injunctive relief barring the Secretary from placing Trump's name on the New Hampshire Presidential primary ballot. This remedy would not redress Castro's purported injury because Dennehy testified, and Castro acknowledges, that Trump's absence from the primary ballot would not affect the number of votes or contributions Castro would receive. Further, even if the Secretary refused to accept Trump's declaration of candidacy, as Castro requests, Trump could appear on completed ballots as a write-in candidate and still compete for and receive votes. Finally, the Secretary is not causing Trump's campaign to be active in New Hampshire and cannot stop its activities here. In other words, Trump's campaign activities and presence on the ballot are traceable to Trump, but not to the Secretary.

Finally, Castro seeks no relief from Trump in the complaint, and he seeks no restraint against Trump in his motion for injunctive relief. He simply names Trump as a "nominal" defendant. In the absence of any relief to redress his alleged injury, Castro lacks standing to maintain this lawsuit, even if he can show a competitive injury. Castro's motion for injunctive relief is thus denied, and his complaint dismissed, for lack of standing.

B. Political question doctrine

[16] **[17]** The defendants also argue that Castro's claim should be dismissed because it turns on a nonjusticiable political question—Mr. Trump's eligibility to run for and serve as president. The political question doctrine bars courts from adjudicating issues that are "entrusted to one of the political branches or involve[ ] no judicially enforceable rights." Vieth v. Jubelirer, 541 U.S. 267, 277, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (internal citations omitted). The nonjusticiability of political questions is "essentially a function of the separation of powers" of the federal government. Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

*7 In Baker v. Carr, the Supreme Court described six circumstances that can give rise to a political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility

> of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. The Baker Court held that, "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." Id.

The defendants contend that Castro's claim triggers the first Baker formulation, and they cite a number of cases that support their position. Indeed, state and federal district courts have consistently found that the U.S. Constitution assigns to Congress and the electors, and not the courts, the role of determining if a presidential candidate or president is qualified and fit for office—at least in the first instance. Courts that have considered the issue have found this textual assignment in varying combinations of the Twelfth Amendment and the Electoral Count Act, 3 U.S.C. § 15, which prescribe the process for transmitting, objecting to, and counting electoral votes; the Twentieth Amendment, which authorizes Congress to fashion a response if the president elect and vice president elect are unqualified; and the Twenty-Fifth amendment and Article I impeachment clauses, which involve Congress in the removal of an unfit president from office.

For example, in Robinson v. Bowen, the plaintiff moved for a preliminary injunction removing Senator McCain from the 2008 California general election ballot on the ground that he was not a "natural-born citizen," as required under Article II of the U.S. Constitution. 567 F. Supp. 2d 1144, 1145 (N.D. Cal. 2008). The Robinson Court denied the motion and dismissed the case upon finding, in part, that the plaintiff's challenge raised a nonjusticiable political question. The Robinson Court noted that the Twelfth Amendment and the Electoral Count Act provide that "Congress shall be in session on the appropriate day to count the electoral votes," and that Congress decides upon the outcome of any objections to the electoral votes.[27] Id. at 1147. The Robinson Court reasoned that

> it is clear that mechanisms exist under the Twelfth Amendment and [the Electoral Count Act] for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify. Issues regarding qualifications for president are quintessentially suited to the foregoing process.... Therefore, this order holds that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance. Judicial review—if any—should occur only after the electoral and Congressional processes have run their course.

***8** Id. (citing Texas v. United States, 523 U.S. 296, 300-02, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998)).

Similarly, in Grinols v. Electoral Coll., the plaintiffs moved for a temporary restraining order halting the re-election of then-President Obama on the ground that he was ineligible for office because he was not a natural-born citizen. 2013 WL 211135, at *1 (E.D. Cal. Jan. 16, 2013). The Grinols Court denied the motion largely because it found the plaintiffs' claim "legally untenable." Id. at *2. It reasoned, in part, that "numerous articles and amendments of the Constitution," including the Twelfth Amendment, Twentieth Amendment, Twenty-Fifth Amendment, and the Article I impeachment clauses, "make it clear that the Constitution assigns to Congress, and not the Courts, the responsibility of determining whether a person is qualified to serve as President. As such, the question presented by Plaintiffs in this case—whether President Obama may legitimately run for office and serve as President—is a political question that the Court may not answer." Id. at *4.

***9** Courts across the country have reached the same conclusion, based on similar reasoning. See, e.g., Kerchner

v. Obama, 669 F. Supp. 2d 477, 483 n.5 (D.N.J. 2009) (referencing the Twelfth and Twentieth Amendments, as well as Congress's role in counting electoral votes, and concluding that "it appears that" the plaintiffs' constitutional claims premised on President Obama's purported ineligibility are "barred under the 'political question doctrine' as a question demonstrably committed to a coordinate political department"), aff'd 612 F.3d 204 (3d Cir. 2010); Taitz v. Democrat Party of Mississippi, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *16 (S.D. Miss. Mar. 31, 2015) ("find[ing] no authority in the Constitution which would permit [the court] to determine that a sitting president is unqualified for office or a president-elect is unqualified to take office[,]" and concluding that "[t]hese prerogatives are firmly committed to the legislative branch of our government"); Jordan v. Secretary of State Sam Reed, No. 12-2-01763-5, 2012 WL 4739216, at *1 (Wash. Super. Aug. 29, 2012) ("The primacy of congress to resolve issues of a candidate's qualifications to serve as president is established in the U.S. Constitution.").

Critically, Castro does not present case law that contradicts the authority discussed above—nor has the court found any. To the contrary, Castro agrees that his claim may raise a political question that precludes jurisdiction, but he quibbles (without reason) about the timing of this jurisdictional effect. Castro asserts that the cases that the defendants cite were initiated or decided after the political parties held their national conventions to select presidential nominees. According to Castro, this circumstance alone "proves that the political question doctrine applies only after the major political parties hold their conventions and submit the nomination paperwork to the state for placement on the general election ballot."[28] Even if Castro's factual premise regarding the timing of the cases and decisions is accurate—a conclusion that the court does not and need not draw—Castro's argument is wholly underdeveloped and unsubstantiated. Castro does not point to any factual or legal authority to support the notion that the political question doctrine, and the separation-of-powers principle at its core, simply lay dormant until after the national conventions, and the court finds no reasoned basis for such a conclusion.

[18] In sum, the vast weight of authority has held that the Constitution commits to Congress and the electors the responsibility of determining matters of presidential candidates' qualifications.[29] Castro provides no reason to deviate from this consistent authority. Thus, it appears to the court that Castro's claim—which challenges Trump's eligibility as a presidential candidate under Section 3 of the Fourteenth Amendment—raises a nonjusticiable political question. As such, even if Castro did have standing to assert his claim, the court would lack jurisdiction to hear it under the political question doctrine.

IV. Conclusion

For the reasons stated above, Castro's motion for a preliminary injunction[30] is DENIED, Trump's motion to dismiss[31] is GRANTED, and the case is dismissed.

***10 SO ORDERED.**

All Citations

--- F.Supp.3d ----, 2023 WL 7110390, 2023 DNH 137

Footnotes

1 While Castro is appearing pro se in this litigation, he represents that he has two law degrees. He also represents that he is not a member of the bar in any state or jurisdiction.

2 For ease of reference, the court refers to both Trump and the Secretary as defendants throughout this Order.

3 Compl. (doc. no. 1) at ¶ 16. Because Trump has now filed his declaration as a candidate in the New Hampshire primary and paid the filing fee, Castro's claim for injunctive relief may have become moot. Assuming, without deciding, that an injunction could stop the Secretary from "accepting and/or processing" Trump's "ballot access documentation," the court proceeds to address the other jurisdictional issues, which are determinative.

4 Id. at 5 (emphasis in original).

5 Id. at ¶ 5.

6 See Motion for Preliminary Injunction (doc no. 6).

7 Summary Order (doc. no. 20); Procedural Order (doc. no. 36).

8 Pl. ex. 1.

9 Pl. ex. 2.

10 Stipulation (doc. no. 53) at ¶ 12.

11 Id. at ¶ 4.

12 Castro's FEC Filings (Trump Exs. 2, 4-6). Castro testified that he would correct and update the FEC filings to show expenditures for his filing fees and other litigation expenses, including his expenses incurred in this case.

13 See Oct. 20, 2023 Hearing Tr. (doc. no. 58) at 54:19-24 (Castro Testimony) ("Q. So your campaign hasn't run any advertisements in New Hampshire; is that right? A. Not as of now, correct. Q. Okay. And it hasn't run any advertisements in any other state, correct? A. Correct. Yes."); Stipulation (doc. no. 53) at ¶ 10 ("Plaintiff's campaign is not yet running any advertisements in New Hampshire. Plaintiff's campaign strategy is to postpone advertising until the right moment.").

14 See Oct. 20, 2023 Hearing Tr. (doc. no. 58) at 26:6-17 (Dennehy testimony).

15 See id. at 27:10-28:1 (Dennehy testimony).

16 See id. at 33:12-19, 37:3-13 (Dennehy testimony).

17 Id. at 31:13 (Dennehy testimony).

18 See id. at 35:15-36:23 (Dennehy testimony).

19 Id. at 34:5-6 (Dennehy testimony).

20 Id. at 38:1-6 (Dennehy testimony).

21 See id. at 58:11-21 (Castro testimony).

22 See id. at 61:2-63:15 (Castro testimony).

23 See id. at 68:24-69:6, 71:14-21 (Castro testimony); see also Stipulation (doc. no. 53) at ¶ 16 ("One of many goals of this campaign is for Plaintiff to demonstrate his legal ingenuity, ability to effectuate a national litigation strategy with minimal resources (i.e. guerrilla lawfare), and demonstrate executive leadership capabilities.").

24 During the hearing, Castro relied heavily on the decision in New World Radio, Inc. v. F.C.C. to support his theory of competitor standing. 294 F.3d 164 (D.C. Cir. 2002). In that case, the plaintiff challenged the Federal Communications Commission's decision to allow another company to renew its license for a radio station. The plaintiff asserted that the FCC's action brought that company "one step closer to competing with, and therefore economically injuring," the plaintiff's Washington, D.C. radio station. Id. at 170. The New World court concluded that the plaintiff lacked competitor standing in part because the FCC's action was, "at most, the first step in the direction of future competition." Id. at 172 (competitor standing is "premised on the petitioner's

status as a direct and current competitor whose bottom line may be adversely affected by the challenged government action") (emphasis in original). Neither the facts, the reasoning, nor the holding of New World support Castro's position.

25 Castro's testimony at the hearing about his media coverage, which is not supported by any substantiating evidence, is not persuasive. The court has no way of knowing whether the purported media coverage focused on Castro as a candidate actually seeking the Republican nomination for president, or as a litigant seeking to disqualify Trump. The evidence in this case suggests the latter, and not the former, and does not support standing. Dennehy testified at length about the extent of media coverage that would be necessary to make Castro a viable candidate, and there is no dispute that Castro has not received that type of attention. Further, even if Castro were able to attract substantial media attention in the future, standing depends on the circumstances that existed when Castro filed his complaint and cannot be based on subsequent events.

26 Stipulation (doc. no. 53) at ¶ 16.

27 Castro contends that the Robinson Court's reasoning is no longer valid insofar as it relied on the Electoral Count Act's objection process to support its conclusion. He claims, without elaboration, that the Act was revised in 2022 "to limit objections only on the basis that either electors were not lawfully certified or that the vote count was irregular[.]" Castro's Supp. Resp. to Defs.' Mot. to Dismiss (doc. no. 44) at 3. Castro is correct that the Electoral Count Act was revised in 2022, after the Robinson order was issued, but, to the extent that he is arguing that this amendment limited the grounds for objections, that does not appear to be the case.

Both versions of the statute use the same terms to describe two exclusive grounds for objections to electoral votes. The amended version of the Act states that "[t]he only grounds for objections shall be as follows: (I) [t]he electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors according to section 5(a)(1) [and] (II) [t]he vote of one or more electors has not been regularly given." 3 U.S.C. § 15(d)(2)(B)(ii). The Act further provides that objections may only be "sustained by separate concurring votes of each House." Id. § 15(d)(2)(C). Prior to the amendment, the Act provided that all objections must be submitted for consideration to the Senate and House of Representatives, and "no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to ... shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified." 62 Stat. 675 (1948) (current version at 3 U.S.C. § 15). Castro does not argue, nor does it appear to the court, that the relevant terms—"lawfully certified" and "regularly given"—took on new meaning through the amendment process, thereby materially altering the grounds for objections to electoral votes.

28 Castro's Supp. Resp. to Defs.' Mot. to Dismiss (doc. no. 44) at 3-4 (emphasis in original).

29 It bears noting that courts dealing with this justiciability question have not undertaken a searching analysis of the text and history of, for example, the Electoral Count Act and the Twentieth Amendment, which potentially impact the proper application of the political question doctrine. As Castro has not referred to, much less argued for, the inapplicability of the doctrine on these grounds, this court deems these arguments waived, and declines to engage them. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

30 Doc. no. 6.

31 Doc. no. 31.

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APPENDIX 11

2023 WL 8078010
Only the Westlaw citation is currently available.
United States Court of Appeals, First Circuit.

John Anthony CASTRO, Plaintiff, Appellant,

v.

David SCANLAN, New Hampshire Secretary of State; Donald J. Trump, Defendants, Appellees.

No. 23-1902

November 21, 2023

Synopsis

Background: Registered presidential primary candidate brought action seeking injunction barring placement of former President's name on state's presidential primary ballot. The United States District Court for the District of New Hampshire, Joseph N. Laplante, J., 2023 WL 7110390, dismissed complaint, and plaintiff appealed.

Holdings: The Court of Appeals, Barron, Chief Judge, held that:

[1] candidate could not establish standing based on developments occurring after he filed complaint;

[2] to establish standing, candidate had to show that he was competing with former President for voters and/or contributors; and

[3] candidate did not suffer concrete and particularized injury-in-fact required to establish his standing.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss for Lack of Standing; Motion to Dismiss for Lack of Subject Matter Jurisdiction.

West Headnotes (9)

[1] Federal Civil Procedure In general; injury or interest

To establish standing, plaintiff must allege familiar amalgam of injury in fact, causation, and redressability, which injury must be both concrete and particularized and actual or imminent, not conjectural or hypothetical.

[2] Federal Civil Procedure Pleading

In ruling on motion to dismiss for lack of standing, facts that matter are facts as they existed at time that operative complaint was filed.

[3] Injunction Persons entitled to apply; standing

Registered presidential primary candidate could not show that he satisfied injury-in-fact requirement for standing to bring action seeking injunction barring placement of former President's name on state's presidential primary ballot on basis of developments concerning candidate's participation in presidential primary that occurred after he filed his complaint, even assuming that those developments might suffice to establish that he did have standing as of that time but not before.

[4] Federal Civil Procedure In general; injury or interest

Under doctrine of economic competitor standing, plaintiff can satisfy injury-in-fact requirement for standing based on showing of probable economic injury resulting from governmental actions that alter competitive conditions.

[5] Federal Civil Procedure In general; injury or interest

In order to establish injury pursuant to economic competitor standing doctrine, plaintiff must show that he personally competes in same arena with party to whom government has bestowed assertedly illegal benefit.

[6] **Federal Civil Procedure** In general; injury or interest

If plaintiff who seeks to establish standing pursuant to economic competitor standing doctrine does not show already realized loss, then asserted injury must be premised, at minimum, on particularized future economic injury that, though latent, nonetheless qualifies as imminent.

[7] **Federal Civil Procedure** Rights of third parties or public

Limitation on judicial power prevents plaintiff from invoking federal court's Article III jurisdiction by asserting what is merely general interest common to all members of public. U.S. Const. art. 3, § 2, cl. 1.

[8] **Injunction** Persons entitled to apply; standing

In order for presidential primary candidate to show that he was direct and current competitor of former President at time he filed his complaint, and thus suffered concrete and particularized injury-in-fact required to establish his standing to bring action to enjoin placement of former President's name on state's presidential primary ballot, he had to show, at very least, that at time he filed complaint he was competing with former President for voters and/or contributors in state's presidential primary.

[9] **Injunction** Persons entitled to apply; standing

Presidential primary candidate was not direct and current competitor of former President, and thus did not suffer concrete and particularized injury-in-fact required to establish his standing to bring action to enjoin placement of former President's name on state's presidential primary ballot on ground that he had engaged in insurrection, even though he had registered as candidate, and, after filing complaint, paid filing fee to appear on state's presidential primary ballot; at time he filed complaint, candidate did not intend to do more than take steps that would enable him to qualify as officially recognized write-in candidate, and record gave no indication that he was competing in primary race in way that could show that he had suffered diminution in either votes or contributions. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 14, § 3.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE [Hon. Joseph N. Laplante, U.S. District Judge]

Attorneys and Law Firms

John Anthony Castro, pro se.

Samuel R.V. Garland, Senior Assistant Attorney General, New Hampshire Department of Justice, with whom John M. Formella, New Hampshire Attorney General, and Anthony J. Galdieri, New Hampshire Solicitor General, were on brief, for appellee David Scanlan.

Gary M. Lawkowski, with whom Ronald D. Colman, Dhillon Law Group, Inc., Richard J. Lehhmann, and Lehmann Major List, PLLC, were on the brief, for appellee Donald J. Trump.

Before Barron, Chief Judge, Gelpí and Montecalvo, Circuit Judges.

Opinion

BARRON, Chief Judge.

***1** Does Section 3 of the Fourteenth Amendment to the U.S. Constitution ("Section 3") bar the former President, Donald J. Trump, from "holding" the Office of President of the United States again on the ground that he "engaged in insurrection or rebellion against [the U.S. Constitution], or [gave] aid or comfort to the enemies thereof"? [1] John Anthony Castro filed suit in the federal District Court in New Hampshire alleging that Section 3 does impose that bar, and, on that basis, he sought to enjoin the New Hampshire Secretary of State (the "Secretary") from "accepting or processing" the former President's "ballot access documentation" for the 2024 Republican presidential primary in that state. The District Court then dismissed the suit on jurisdictional grounds, ruling that Castro lacked standing under Article III of the U.S. Constitution, see U.S. Const. art. III, § 2 (limiting "the judicial

power" to "Cases" or "Controversies"), and that his Section 3 claim presented a nonjusticiable "political question," see Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); Rucho v. Common Cause, —— U.S. ——, 139 S. Ct. 2484, 204 L.Ed.2d 931 (2019). Castro now challenges the rulings in this appeal.

Castro's underlying suit raises a host of questions about the meaning of Section 3 and the role, if any, that federal courts may play in enforcing it. The questions range from whether Section 3 applies to a political party's primary election to whether the provision's prohibition is self-executing to what kind of conduct constitutes "engag[ing] in insurrection or rebellion against the [U.S. Constitution], or giv[ing] aid or comfort to the enemies thereof." We may address such questions, however, only if Castro's suit is a "Case[ ]" or "Controversy[ ]" within the meaning of Article III of the U.S. Constitution. And, as we will explain, we conclude that Castro's suit is not because, although he is a registered political candidate for president, he has failed to show that he can satisfy what is known as the "injury-in-fact" component of Article III standing. Accordingly, we affirm the District Court's judgment.

I.

Appearing pro se, Castro filed his complaint in the District of New Hampshire on September 5, 2023. The complaint named as defendants both the Secretary, David Scanlan, and the former President, Donald J. Trump.[2] The New Hampshire Republican State Committee later intervened as a party of interest pursuant to Federal Rule of Civil Procedure 24.

***2** Castro alleged in his complaint that he is a U.S. Citizen, a resident of Mansfield, Texas, and a "Republican primary presidential candidate ... for the 2024 [p]residential election." He further alleged that he was registered as a candidate in that election with the U.S. Federal Election Commission (the "FEC") and that he was "currently competing against Donald J. Trump for the Republican nomination for the Presidency of the United States."

Castro attached a "Verification" to his complaint in which he "declare[d]" that he "intend[ed] to either appear on the 2024 Republican primary ballot in [New Hampshire] or to file documentation to be a formally recognized write-in candidate in both the primary and general elections."[3] The complaint also alleged that "[b]ecause [New Hampshire] permits write-in candidates and their votes to be counted, ballot placement is not legally determinative of the legal inquiry as to whether an individual is a 'candidate' under [New Hampshire] law."

The complaint asserted that Section 3 "creates an implied cause of action for a fellow candidate to obtain relief for a political competitive injury by challenging another candidate's constitutional eligibility on the grounds that they engaged in or provided 'aid or comfort' to an insurrection." The complaint also asserted that Section 3 's bar applies to the Office of the President of the United States and that the bar applies to the former President because his conduct in relation to the last presidential election amounted to providing " 'aid or comfort' to an insurrection." The complaint then described various specific actions that the former President assertedly took before and after the 2020 presidential election that, according to the complaint, constitute the kind of conduct that triggers Section 3 's bar.

Castro moved on September 17 for a temporary restraining order to prevent the Secretary from accepting the former President's declaration of candidacy and requested an expedited preliminary injunction hearing consolidated with a bench trial on the merits. Castro noted in the motion that the Secretary had announced, on September 13, that the filing period for declarations of candidacy, which candidates must submit along with a $1,000 filing fee in order to appear on the primary ballot in New Hampshire,[4] would open on October 11 and close on October 27, and Castro asserted that he intended to file his declaration of candidacy and pay his filing fee on October 11.

[1] The Secretary opposed the motion on the ground that Castro lacked standing under Article III of the Constitution, which limits the judicial power to the resolution of "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1; see Webb v. Injured Workers Pharmacy, LLC, 72 F.4th 365, 371 (1st Cir. 2023). To establish standing, a plaintiff must allege the " 'familiar amalgam of injury in fact, causation, and redressability,' which injury must be 'both concrete and particularized and actual or imminent, not conjectural or hypothetical.' " Efreom v. McKee, 46 F.4th 9, 21 (1st Cir. 2022) (internal quotation marks omitted) (quoting Hochendoner v. Genzyme Corp., 823 F.3d 724, 731 (1st Cir. 2016)).

***3** Castro alleged in his complaint that he had standing under the doctrine of "political competitor standing," as he alleged that he would "suffer a concrete competitive injury"

in the form of "a diminution of votes and/or fundraising" in New Hampshire if the former President were permitted to appear on New Hampshire's 2024 Republican primary ballot despite Section 3. The Secretary argued, however, that Castro could not establish standing because he could not satisfy the causation and redressability requirements. According to the Secretary, Castro's alleged injury was traceable only to the former President's candidacy itself and not to the Secretary's acceptance of the former President's ballot-access documentation. In advancing that contention, the Secretary pointed out that the former President could run as a write-in candidate in the primary even if the Secretary were enjoined from placing the former President's name on the primary ballot. The Secretary took no position, however, on whether Castro had alleged an injury in fact, though the Secretary did urge the District Court to fulfill its "independent obligation to assure that standing exists." Sec. State Obj. Pl.'s Req. Injunctive Relief at ¶ 19, Castro v. Scanlan, Civ. No. 23-0416-JL (D.N.H. Sept. 29, 2023), ECF No. 27 (quoting Hernández-Gotay v. United States, 985 F.3d 71, 77 (1st Cir. 2021)).

On the same day that the Secretary filed his opposition to Castro's motion, the former President moved to dismiss Castro's complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). The former President's motion incorporated the Secretary's causation and redressability arguments and asserted that Castro had not established standing because he had failed to satisfy the injury-in-fact requirement. The motion argued that Castro had "fail[ed] to plausibly allege that [competing with the former President] injures him in any particularized or concrete fashion," such as by "identif[ying] a single voter who identifies Castro as his or her 'second choice' after Donald Trump" or otherwise "support[ing] the inherently improbable claim that there is a latent Castro movement that would surface, if only Trump [were] not on the ballot." In addition, the motion asserted that Castro's Section 3 claim presented a nonjusticiable political question.

The District Court held an evidentiary hearing on October 20 on the question of jurisdiction. Prior to the hearing, Castro submitted an affidavit and receipt showing that on October 11, which was five weeks after he had filed his complaint, he had filed his New Hampshire declaration of candidacy and paid the requisite $1,000 filing fee to the Secretary. At the evidentiary hearing, the District Court admitted into evidence both Castro's affidavit and receipt as well as the parties' joint stipulation of facts.

The District Court then heard the testimony of Michael Dennehy, a witness put forward by the New Hampshire Republican State Committee and a political consultant and campaign strategist. Dennehy testified to his opinion that Castro "[i]s not a serious candidate" for president and that Trump's absence from the New Hampshire primary ballot "would have no impact" on Castro's primary chances "[b]ecause there is no activity to [Castro's] campaign." Dennehy did acknowledge that he had located and viewed a website advertising Castro's presidential campaign, but he described the website as "amateur," "incomplete," and "certainly not what you would consider a national campaign website."

Finally, the District Court heard testimony from Castro, who asserted that he planned to "ramp up [his campaign] activities" leading up to the New Hampshire primary. But on cross-examination, Castro admitted that his campaign, to date, had employed no staff in New Hampshire or any other state, had run no advertisements in New Hampshire or any other state, and had engaged in no campaign activities in New Hampshire or any other state "apart from lawsuits" similar to this one. Castro also confirmed that, in a series of Twitter posts published on November 18, 2021, he had "stated [his] belief that Section 3 of the Fourteenth Amendment disqualified Donald Trump from holding public office," written that "only a fellow Republican presidential primary candidate has federal judicial standing to sue Trump to remove him from the ballot," and then announced that he "intend[ed] to pursue the Republican nomination for the presidency of the United States in 2024 [and to] bring a federal lawsuit against Trump to disqualify him from being on the ballot in every swing state." As to the issue of his forward-looking "campaign strategy," Castro averred, "Keep watching and learn."

***4** A week after the hearing, on October 27, the District Court issued a memorandum and order that denied Castro's request for injunctive relief and granted the former President's motion to dismiss Castro's complaint for lack of subject matter jurisdiction. The District Court reasoned that Castro had failed to establish that he had standing and that his Section 3 claim presented a political question.

With respect to standing, the District Court first determined that Castro had failed to satisfy the injury-in-fact requirement. The District Court reasoned that Castro had made "no attempt to demonstrate that he is actually competing with Trump for votes and contributions, as required under the operative competitor standing theory"; that the alleged injury

was too "speculative, as it depends on what voters and contributors ... may do if Trump's name is not listed on the New Hampshire primary ballot"; and that, by filing as a Republican presidential primary candidate, Castro had impermissibly attempted to "creat[e] his own injury in order to manufacture standing to challenge Trump's eligibility to run for president."

The District Court also concluded that Castro failed to establish standing because had not met his burden to satisfy the causation and redressability requirements. The District Court reasoned that Castro had not shown that his alleged injury was traceable to the Secretary or that it could be redressed by the requested relief because "Castro acknowledges[ ] that [the former President's] absence from the primary ballot would not affect the number of votes or contributions Castro would receive."

The District Court then shifted focus and explained why, the issue of standing aside, the complaint had to be dismissed because Castro's Section 3 claim presented a nonjusticiable political question. Here, the District Court determined that "state and federal district courts have consistently found that the U.S. Constitution assigns to Congress and the electors, and not the courts, the role of determining if a presidential candidate or president is qualified and fit for office -- at least in the first instance."

In so ruling, the District Court rejected as "wholly underdeveloped and unsubstantiated" Castro's argument that the political question doctrine did not bar his suit because the political question cases that the defendants cited "were initiated or decided after the political parties held their national conventions to select presidential nominees," and that "this circumstance alone 'proves that the political question doctrine applies only after the major political parties hold their conventions.' " Observing that Castro had not presented "any factual or legal authority" on which to rest such a distinction, the District Court found that it could not accept Castro's position.

Castro timely filed his notice of appeal. He then requested an expedited briefing schedule, which we granted, though we denied his motion for initial hearing en banc.

In his brief on appeal, Castro takes aim at both grounds that the District Court gave for dismissing the complaint. Castro notes in his brief, with respect to standing, that on October 23, the former President filed his declaration of candidacy in New Hampshire and paid the requisite $1,000 filing fee to the Secretary. [5] Castro also argues that the District Court erred by not "reserv[ing] ruling on jurisdiction to allow the facts [to] materialize" that Castro claims establish his standing, including that he ultimately registered as a New Hampshire primary candidate and has since "dispatched campaign staffers to New Hampshire to knock on doors and place hundreds of campaign signs" and ordered "thousands of postcards" to mail to New Hampshire voters. He asserts in that regard that the District Court's standing ruling rested on a "baseless assumption that [Castro] would never engage in any campaign activity in New Hampshire," and he asks us to reverse and remand for a trial on the merits of his request for injunctive relief.

II.

***5** The District Court dismissed Castro's complaint on two independently sufficient jurisdictional grounds. See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974) (summarizing that "the concept of justiciability ... embodies both the standing and political question doctrines," such that "either the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party"). We confine our analysis, however, to the issue of standing and, specifically, to the question of whether Castro has met his burden to satisfy the injury-in-fact requirement, see TransUnion LLC v. Ramirez, —— U.S. ——, 141 S. Ct. 2190, 2207–08, 210 L.Ed.2d 568 (2021). We do so both because Castro has clearly failed to meet that burden and because of the limited nature of the arguments that he makes about the more generally consequential political question issue. Cf. Doe v. Bush, 323 F.3d 133, 139–40 (1st Cir. 2003) (clarifying that this court affirmed dismissal "based on ripeness rather than the political question doctrine," and noting that like the Supreme Court, "[o]ur court has been similarly sparing in its reliance on the political question doctrine").

A.

[2] **[3]** In undertaking our independent obligation to ensure that Castro has met his burden to satisfy the injury-in-fact requirement, Hernández-Gotay, 985 F.3d at 77, we emphasize that the facts that matter are "the facts as they existed at the time the [operative] complaint was filed." Steir v. Girl Scouts

of the USA, 383 F.3d 7, 15 (1st Cir. 2004) (citing Mangual v. Rotger-Sabat, 317 F.3d 45, 58 (1st Cir. 2003)); see Keene Corp. v. United States, 508 U.S. 200, 207–08, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993) (in affirming a motion to dismiss for lack of jurisdiction, considering the facts as they existed at the time the complaint was filed, rather than, as plaintiff urged, at the time of the trial court's ruling on the motion to dismiss); see also Lujan v. Defs. of Wildlife, 504 U.S. 555, 569 n.4, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (rejecting the theory that events after the filing of a suit's operative complaint had "retroactively created a redressability (and hence a jurisdiction) that did not exist at the outset" of litigation). Castro thus cannot show that he has satisfied the injury-in-fact requirement on the basis of developments that concern his participation in the New Hampshire Republican presidential primary that occurred after he filed his complaint, even assuming that those developments might suffice to establish that he did have standing as of that time but not before.

Notably, Castro does not suggest that his claimed injury stems from a restriction that has been placed on his ability to run in the 2024 New Hampshire Republican presidential primary. He contends that his injury stems solely from the absence of a restriction on the ability of someone else to run in that race. Castro thus premises his claimed injury-in-fact entirely on a theory of political competitor standing, see, e.g., Tex. Democratic Party v. Benkiser, 459 F.3d 582, 586–87 (5th Cir. 2006); Shays v. FEC, 414 F.3d 76, 83, 87 (D.C. Cir. 2005); Fulani v. League of Women Voters Educ. Fund, 882 F.2d 621, 626–27 (2d Cir. 1989), even though neither our Circuit nor the Supreme Court of the United States yet has had occasion to expressly recognize that theory.

[4] That said, the theory of standing that Castro asks us to accept derives its logic from a standing doctrine that the Supreme Court and our Circuit have expressly recognized: the doctrine of economic competitor standing. See Clinton v. City of New York, 524 U.S. 417, 433, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998); Adams v. Watson, 10 F.3d 915, 921–22 (1st Cir. 1993). Under that doctrine, a plaintiff can satisfy the injury-in-fact requirement based on a showing of "probable economic injury resulting from [governmental actions] that alter competitive conditions." Clinton, 524 U.S. at 433, 118 S.Ct. 2091 (alteration in original) (quoting 3 K. Davis & R. Pierce, Admin. L. Treatise 13–14 (3d ed. 1994)).

[5] The logic of the economic competitor standing doctrine is "firmly rooted in the basic law[ ] of economics" that one direct competitor's gain of market share is another's loss. United Transp. Union v. Interstate Com. Comm'n, 891 F.2d 908, 912 n.7 (D.C. Cir. 1989). Not surprisingly, therefore, "[i]mplicit in the reasoning" of the cases that recognize economic competitor standing is "a requirement that in order to establish an injury as a competitor a plaintiff must show that he personally competes in the same arena with the party to whom the government has bestowed the assertedly illegal benefit." In re U.S. Cath. Conf. (Abortion Rights Mobilization Inc. v. Baker), 885 F.2d 1020, 1029 (2d Cir. 1989).

***6** **[6]** In other words, the notion that a competitive injury can satisfy the injury-in-fact requirement is "premised on the [plaintiff's] status as a direct and current competitor whose bottom line may be adversely affected by the challenged government action." New World Radio, Inc. v. FCC, 294 F.3d 164, 170 (D.C. Cir. 2002) (emphasis in original). At the same time, to show such an injury, a plaintiff need not show "currently realized economic loss." Watson, 10 F.3d at 920–21 (emphasis in original). However, if a plaintiff who seeks to show such an injury does not show an already realized loss, then the asserted injury must be premised, "at a minimum, on particularized future economic injury which, though latent, nonetheless qualifies as imminent."[6] Id.

We do also note, however, that although the parties make no mention of it, there is precedent from our Circuit that draws on the logic of the theory of political competitor standing without directly adopting it. See Becker v. Fed. Election Comm'n, 230 F.3d 381, 385–89 & n.5 (1st Cir. 2000) (concluding that third-party presidential candidate Ralph Nader had standing to challenge FEC regulations permitting corporate sponsorship of presidential debates because the regulations "threatened to force Nader to decline an invitation to participate in the debates, and that threat affected the conduct of his campaign" and put him "at a competitive disadvantage in the presidential race"); see also Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 37 (1st Cir. 1993) (concluding that a gubernatorial candidate had standing to challenge a state public campaign financing scheme in part because "having decided to forgo [public financing], she had to structure her campaign to account for her adversaries' potential receipt of television time, fundraising advantages, and the like"). We draw on this precedent, too, in the analysis that follows.

B.

Castro contends that he can satisfy the injury-in-fact requirement here because he can show that he is "a direct and current competitor" of the former President in the 2024 New Hampshire Republican presidential primary, New World Radio, 294 F.3d at 170 (emphasis in original). Thus, Castro's contention on appeal is that the District Court erred in determining that he failed to show that he was a competitor of such a direct and current kind.

Because political markets are hardly governed by the same "basic law[ ]" as economic ones, United Transp. Union, 891 F.2d at 913 n.7, there is necessarily some uncertainty as to how we should analogize the political realm to the economic one for standing purposes. As a result, there is also some uncertainty as to what it means to be a "direct and current" competitor in the political context. We find some guidance, though, in the fact that Article III empowers federal courts to address only "Cases" or "Controversies."

***7** **[7]** This limitation on the judicial power prevents a plaintiff from invoking the Article III jurisdiction of a federal court by asserting what is merely a "general interest common to all members of the public." Carney v. Adams, —— U.S. ——, 141 S. Ct. 493, 499, 208 L.Ed.2d 305 (2020) (quoting Lance v. Coffman, 549 U.S. 437, 440, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (per curiam)). Therefore, we must be careful not to define "a direct and current competitor" in the political context, New World Radio, 294 F.3d at 170 (emphasis omitted), in a manner that would "weaken the longstanding legal doctrine preventing [federal courts] from providing advisory opinions at the request of one who, without other concrete injury, believes that the government is not following the law." Carney, 141 S. Ct at 501.

As a result, we cannot define a "direct and current competitor" in the political context so loosely that a claim of political competitor injury becomes a means by which a federal court entertains a suit based on what is, in effect, a generalized concern that a particular individual is not lawfully entitled to run for office. We must define such a competitor in a manner that ensures that the plaintiff who claims political competitor standing has "[t]he requisite personal interest," id. at 499 (citation and quotation marks omitted), in the determination of the constitutionality of a rival candidate's eligibility for office in consequence of a "concrete, particularized 'injury in fact' over and above the abstract generalized grievance suffered by all citizens ... who (if [the plaintiff] is right) must live in a State subject to an unconstitutional" electoral process. Id.

This conclusion accords, we add, with our decision in Becker. There, we held that a presidential candidate, Ralph Nader, had standing to challenge the FEC's regulations permitting corporate sponsorship of debates put on by the Commission on Presidential Debates ("CPD"). Becker, 230 F.3d at 385-89. We explained that Nader satisfied the injury-in-fact requirement by showing that the FEC's regulations put him to the "coerced choice" of either participating in a presidential debate with corporate sponsorship or suffering a competitive disadvantage by not participating. See id. at 387.

We then went on in a footnote to describe as "flawed" the FEC's contention that Nader could not satisfy the causation component of standing. See id. at 387 n.5. We explained that the FEC had argued that insofar as Nader was claiming standing based on the FEC's having placed him at a competitive disadvantage in the presidential race, the FEC had so placed him only by giving a benefit to the CPD. See id. Yet, the FEC emphasized, Nader was not "compet[ing] in the same arena" as the CPD itself. Id. We were not persuaded because, as we pointed out, the FEC's argument ignored the fact that the challenged FEC regulations resulted in "free television exposure for the debate participants; and obviously Nader competes in the same arena with these other candidates." Id. (emphasis added).

[8] Against this backdrop, we conclude that for Castro to show that he was a "direct and current competitor" at the time he filed his complaint he must show, at the very least, that at that time he was "competing" with the former President and that he was doing so in the 2024 New Hampshire Republican presidential primary itself. Otherwise, we do not see how Castro can show that at the time he was "compet[ing] in the same arena" with the former President, id., and that he stood to be "adversely affected [in that arena] by the challenged government action." New World Radio, 294 F.3d at 170. In addition, we conclude that for Castro to show that he was a "direct and current" competitor at that time, id. -- or, to use Becker's way of putting it, that he was a competitor "in the same arena," 230 F.3d at 387 n.5 -- he must show that he was then competing with the former President for voters and/or contributors in that primary.

***8** Our reasons for this last conclusion are as follows. Not even Castro disputes that, to distinguish his claimed injury from a generalized interest in ensuring legal compliance, he must show that his status as a political candidate gave rise to the kind of injury that he claims. And Castro himself describes

his injury in his complaint as "a diminution of votes and/or fundraising" in the primary at issue. Thus, it stands to reason that he must show that, at the time of his complaint, he was competing with the former President for voters or contributors in relation to the New Hampshire race itself -- or, at the least, that it would not be overly speculative to conclude that he would do so. For, otherwise, his claimed injury would not be "concrete and particularized," and would instead be "conjectural or hypothetical." Carney, 141 S. Ct. at 498 (quoting Lujan, 504 U.S. at 560–61, 112 S.Ct. 2130).

C.

[9] Having laid out the applicable legal framework in some detail, we are now ready to apply it to the record at hand. As we will explain, we conclude that, reviewing de novo, see Bingham v. Massachusetts, 616 F.3d 1, 5 (1st Cir. 2010), Castro has failed to show that he was a "direct and current competitor."

1.

As an initial matter, Castro did not allege in his complaint that, when he filed it, he was on the ballot in the 2024 New Hampshire Republican presidential primary, had taken the steps necessary for him to appear on that ballot, or even intended to take such steps. Instead, with respect to that primary, he merely stated in the "Verification" attached to his complaint that he "intend[ed] to either appear on the 2024 Republican primary ballot in [New Hampshire] or to file documentation to be a formally recognized write-in candidate in both the primary and general elections" (emphasis added). It was on that limited basis that, at the time of the complaint's filing, he asserted: "As such, I will maintain 'standing' throughout the course of this litigation" (emphasis added).

The Verification's conditional phrasing shows -- at least concretely -- no more than that Castro intended, at the time of the complaint, to seek documentation that would permit him to become a "formally recognized" write-in candidate in the New Hampshire Republican presidential primary. Moreover, the record reveals that thereafter Castro made no showing that, as of the time of filing his complaint, he was in fact competing for votes or contributions in that contest, let alone competing with the former President for them. In fact, while Castro alleged that at the time of the complaint's filing he had registered with the FEC as a candidate for President, he stipulated (and later confirmed through his testimony at the evidentiary hearing) that, as of that time, and indeed for weeks afterward, he did "not yet have a campaign office in New Hampshire," did "not yet have employees in New Hampshire," was "not yet running any advertisements in New Hampshire," and was "not yet engaging in campaign activities in New Hampshire other than this lawsuit" (emphasis added). And, with respect to the question of whether he had a "campaign strategy," Castro asserted, "Keep watching and learn."

Thus, the record from the evidentiary hearing reveals what is at most an overly speculative basis for finding that, as of the time of the filing of the complaint, Castro intended to do more than take steps that would enable him to qualify as an "officially recognized" write-in candidate. But no authority of which we are aware -- or that Castro has identified -- suggests that the mere statement of an intention to seek write-in votes suffices in and of itself to make an individual a "current and direct competitor." New World Radio, 294 F.3d at 170. In fact, persuasive authority is directly to the contrary, as Sibley v. Alexander explains that a plaintiff's "status as a write-in candidate is insufficient" to establish injury-in-fact, 916 F. Supp. 2d 58, 61 (D.D.C. 2013), "because if it were sufficient any citizen could obtain standing (in violation of Article III of the U.S. Constitution) by merely 'self[-]declaring.' " Sibley v. Obama, No. 12-5198, 2012 WL 6603088, at *1 (D.C. Cir. Dec. 6, 2012) (internal citation omitted).

***9** Thus, for all the record shows, Castro was, at least as of the time of the complaint, in a similar position to the plaintiffs in Liberty Legal Foundation v. National Democratic Party of the USA, Inc., 875 F. Supp. 2d 791 (W.D. Tenn. 2012), aff'd 575 F. App'x 662 (6th Cir. 2014). Those plaintiffs claimed to be "candidates" for the presidency in the 2012 general election in Tennessee and they claimed on that basis to have standing to challenge then-President Obama's eligibility to appear on the ballot in that contest. Id. at 800-01. But those plaintiffs were deemed not to have satisfied the injury-in-fact requirement for standing because they had not alleged that they were "truly in competition" with their claimed rival, as they had not shown either that they "w[ould] appear" on the relevant ballot or that "[they were] campaigning in the state of Tennessee, [or] that any registered voter in Tennessee intend[ed] to cast a vote for [them]." Id. The district court in that case, we note, also determined that those plaintiffs had not done anything to show "that President Obama's presence on the ballot [would] in any way injure either candidate's campaign." Id. at 801.

Notwithstanding Sibley and Liberty, Castro develops no argument that he can satisfy his obligation to show injury-in-fact at the time of his complaint if he can show no more than the unsuccessful litigants in those cases did. And even though neither Sibley nor Liberty binds us here, we do not see how we may accept a definition of a "direct and current competitor" in the political context that is based on a plaintiff's mere "self-declaration" of political candidacy.

Were we to do so, we would be doing what the Supreme Court explained that it was taking care not to do in Carney: "weaken[ing] the longstanding legal doctrine" that prevents federal courts from offering advisory opinions about whether the law is being followed. 141 S. Ct. at 501. We would be doing so, moreover, in a case that asks us to render an opinion on a matter as important to our democratic system of government as any that is likely to arise in connection with a claim of political competitor standing: may a former President run for the Office of the President of the United States again even if he is shown to "have engaged in insurrection or rebellion against the [U.S. Constitution], or given aid or comfort to the enemies thereof"? The nature of the question itself shows the need for us to ensure that the limits on our power to render advisory opinions remain as strong after we decide this case as they were before it came to us.

We add, too, that our analysis in Becker points in the same direction. We made clear there that we should not "second-guess a candidate's reasonable assessment of his own campaign" by "assum[ing]" the "guises" of "campaign consultants or political pundits" in assessing the candidate's assertion of how a challenged governmental action affects their capacity to compete politically. Becker, 230 F.3d at 387 (emphasis added). But, at the same time, we were careful in Becker not to adopt a rule that would "grant[ ] standing to any political entrant to challenge" any aspect of an election that might "someday" affect them, id. at 386 n.4 (emphasis in original) (internal quotation marks omitted), and we therefore required the candidate to show a "plausible" chance of being competitively affected by the conditions that they challenged. Id.

It follows that, on this record, we must conclude that Castro has not shown what he must to establish that he was a direct and current competitor at the time that he filed his complaint. Accordingly, it follows that he has not shown that, as of that time, he had satisfied the injury-in-fact component of the standing inquiry.

2.

We are not quite finished. The reason is that we are aware that there is evidence in the record that shows that, after Castro filed the operative complaint, he expressed his intent to travel to New Hampshire on October 11 to file his declaration of candidacy and pay the $1,000 filing fee to appear on the state's 2024 Republican presidential primary ballot -- and that on October 11, he did so.

***10** True, Castro did not amend his complaint at that time. And, as we have explained, he cannot predicate his standing on post-complaint developments. See Keene Corp., 508 U.S. at 207–08, 113 S.Ct. 2035. Nor is it evident what issues concerning mootness or remedies may arise in relation to any new complaint that may be filed based on those developments. Nonetheless, Castro does appear to be contending that a plaintiff who sues to block another's access to the ballot necessarily shows that he is a direct and current competitor -- and thus satisfies the injury-in-fact requirement -- by showing that he will appear (or is likely to appear) on the relevant ballot. And if that contention were correct, it would be evident that an amended complaint in this case might be filed that could suffice to satisfy the injury-in-fact requirement.

The precedents that Castro cites in support of this contention, though, do not support such a sweeping proposition, at least given the nature of the plaintiffs who were involved in those cases and the circumstances of them. See Shays, 414 F.3d at 82 (sitting members of Congress seeking re-election); Fulani, 882 F.2d at 625–26 ("significant" third-party candidate for presidential election contesting the criteria for invitation to national debate, which invited only "significant" candidates belonging to a major party, and "not claim[ing] the [debate] was obligated to include ... every individual who had announced his or her candidacy"). Nor are we aware of any case that, when considered in context, would support such a broad proposition. Cf. Becker, 230 F.3d at 386 (observing that it was "certainly possible that Nader would be able to meet the ... fifteen-percent showing of support in the national polls" required to qualify for the presidential debates at issue).

We also do not see how the logic of political competitor standing requires this categorical conclusion. In some cases, the record might reveal that the only activity in relation to the race in which a plaintiff seeking such standing engaged

-- beyond, that is, taking steps to secure ballot access like those Castro took here -- was the pursuit of the legal challenge itself. And, in such cases, the record might also show scant indication that any foreseeable future activity by the plaintiff in relation to that race would amount to anything more than the further pursuit of that legal challenge.

In cases with such a record, though, we could not agree that the plaintiff had political competitor standing. And that is because, given that record, we could not agree that the likely prospect of the plaintiff's nominal appearance on the ballot would suffice in and of itself to show a competitive injury with the requisite degree of concreteness and particularity.

After all, although steps to secure ballot placement may suffice on their own to show some kinds of injury-in-fact, cf. Carney, 141 S. Ct. at 502, a plaintiff like Castro who asserts political competitor standing does not predicate the claimed injury on a bar to the plaintiff's right to receive votes or campaign funds. Rather, such a plaintiff predicates the claimed injury on a failure to limit someone else's right to campaign or receive votes, as it is that failure that is claimed to give rise to the competitive injury.

Thus, because a plaintiff incurs the kind of competitive injury that grounds Castro's assertion of standing by actually being a putative rival's competitor for either votes or contributions, we cannot agree that a showing that a plaintiff has taken the steps required to be placed on the ballot in the primary contest at issue necessarily always suffices to show such an injury. Indeed, if the rule were otherwise, then the theory of political competitor standing would seem to offer those invoking it a significant means of effecting an end-run around the usual bar to a federal court's power to remedy what is in the end merely a generalized grievance. For, under a rule of that sort, plaintiffs would be permitted to secure standing without adequately distinguishing their interest in the legal outcome of the case from that of anyone in the same state who is interested in ensuring legal compliance with that state's ballot access rules for candidates. And, we note once again, Becker shows that our own precedent is not to the contrary. See Becker, 230 F.3d at 386 n.4 (declining to adopt a rule that would "grant[ ] standing to any political entrant to challenge" any aspect of an election that might "someday" affect them (emphasis in original) (internal quotation marks omitted)).

***11** This general point can be made more concrete by zeroing in on the features of the record that show what Castro did, post-complaint, when he went to New Hampshire to secure his placement on the ballot. Notably, the record gives no indication that Castro was competing even as of that time in the primary race at hand in a way that could show that he had suffered -- or was at imminent risk of suffering -- a diminution in either votes or contributions absent his requested relief. Cf. Shays, 414 F.3d at 82; Fulani, 882 F.2d at 625–26.

In that regard, Castro's brief points to nothing in the record that refutes the District Court's determination that "Castro makes no attempt to demonstrate that he is actually competing with Trump for votes and contributions." Indeed, the record shows that, beyond taking steps to be placed on the ballot, Castro's efforts to compete for votes and contributors in the specific New Hampshire primary at issue were non-existent. And, consistent with that conclusion, we note that Castro's brief also cites to nothing in the record that undermines the District Court's findings that Castro neither "provided any evidence suggesting that he has voters or contributors in New Hampshire" nor made any showing that "he will benefit from voter or contributor defections from Trump to himself." [7]

Thus, on this record, any claim that the former President's presence on the ballot in the contest at issue will diminish Castro's votes or contributions is simply too speculative to credit, even allowing for the probabilistic nature of a claim of competitive injury. And we see no reason to conclude that a claim of political competitive injury that is purely conjectural fares any better than a purely conjectural claim of injury otherwise does. Cf. Watson, 10 F.3d at 923 (explaining that an allegation of standing must be more than "unadorned speculation"). [8]

III.

For these reasons, the judgment of the District Court is **AFFIRMED**.

All Citations

--- F.4th ----, 2023 WL 8078010

Footnotes

1 Section 3 provides: "No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability." U.S. Const. amend. XIV, § 3.

2 In their briefings on appeal, the parties dispute former President Trump's status as a merely "nominal defendant" against whom Castro seeks no redress. Because we do not reach the issue of redressability, however, we need not resolve this dispute.

3 "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Fed. R. Civ. P. 10(c); see also Newman v. Lehman Bros. Holdings Inc., 901 F.3d 19, 26 (1st Cir. 2018).

4 See N.H. Rev. Stat. Ann. §§ 655:47 ("The names of any persons to be voted upon as candidates for president at the presidential primary shall be printed on the ballots upon the filing of declarations of candidacy with the secretary of state"), 655:48 ("No candidate for the office of president shall have his or her name placed on the ballot for the presidential primary unless the candidate shall pay to the secretary of state at the time of filing the declaration of candidacy a fee of $1,000.").

5 Because the sole relief that Castro seeks is an injunction preventing the Secretary from "accepting [or] processing ... Trump's ballot access documentation," there is a question as to whether this case is moot. See Harris v. Univ. Mass. Lowell, 43 F.4th 187, 191–92 (1st Cir. 2022). But because we conclude that Castro lacks standing, we need not address this potential alternative ground for dismissal, which we note the parties have not briefed.

6 In a case upon which Castro relies heavily, Mendoza v. Perez, 754 F.3d 1002, 1014 (D.C. Cir. 2014), the D.C. Circuit held that a group of plaintiffs had standing to challenge conditions in the sheep herding market even though they did "not currently work as herders and ha[d] not filled out formal job applications." This was because the plaintiffs were nonetheless still "informal[ly]" but directly and currently "involve[d] in [the] market" due to their continued monitoring of it with the intention and ability to enter it "if conditions improve[d]." Id. In recognizing that "informal" involvement in a market can satisfy competitor standing, Mendoza did not undermine the rule that a plaintiff must show that they are "in fact a direct and current competitor" to have competitor standing. Air Excursions LLC v. Yellen, 66 F.4th 272, 280 (D.C. Cir. 2023) (discussing Mendoza) (internal quotation marks omitted).

7 We note that the District Court found Castro's testimony "about his media coverage" unpersuasive because "[t]he court ha[d] no way of knowing whether the purported media coverage focused on Castro as a candidate actually seeking the Republican nomination for president, or as a litigant seeking to disqualify Trump." Castro points to nothing in the record that contradicts that assessment.

8 The District Court also concluded that Castro could not satisfy the causation and redressability elements of standing because "Trump's absence from the primary ballot would not affect the number of votes or contributions Castro would receive." On this record, as discussed above, we have concluded that Castro did not show injury because he was not competing at all. We thus have no reason to address those other components of standing in this case. We do note, though, that, as the District Court recognized, if a further claim of standing is advanced based on post-complaint developments in the relevant primary race,

assessments of causation and redressability, like injury-in-fact, will depend on the state of the record as it will exist at the time of the advancement of that claim.

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APPENDIX 12

2022 WL 1468157
Only the Westlaw citation is currently available.

Unreported disposition. See AZ ST S CT Rule 111.

Supreme Court of Arizona.

Thomas HANSEN, et al., Plaintiffs/Appellants,
v.
Mark FINCHEM, et al., Defendants/Appellees.

Arizona Supreme Court No. CV-22-0099-AP/EL
|
FILED 05/09/2022

Maricopa County Superior Court, No. CV2022-004321

DECISION ORDER

ROBERT BRUTINEL, Chief Justice

***1** Before the Court is an expedited election appeal regarding Arizona Representative Mark Finchem, U.S. Representative Paul Gosar, and U.S. Representative Andy Biggs (the "Candidates").

Pursuant to A.R.S. § 16-351(B), Plaintiffs Hansen, et al., filed a Verified Complaint and an Application for Preliminary and Permanent Injunction in separate proceedings to disqualify the Candidates from the August 2022 Primary Election Ballot. Plaintiffs alleged the Candidates fell under Section 3 of the Fourteenth Amendment to the United States Constitution, known as the "Disqualification Clause" which provides, "No person shall be a Senator or Representative in Congress ... or hold any office, ... under any state, who, having previously taken an oath ... to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof." Plaintiffs allege that the Candidates are ineligible to run for office because of their alleged involvement in the events that occurred in Washington, D.C., on January 6, 2021. Specifically, Plaintiffs allege that the Candidates engaged in acts that amounted to an insurrection or rebellion under Section 3. These proceedings were consolidated in the superior court.

The Candidates filed motions to dismiss, arguing that Plaintiffs failed to state a claim under Rule 12(b)(6) of the Arizona Rules of Civil Procedure.

After oral arguments, the superior court issued a ruling granting the motions to dismiss on April 22, 2022. It determined that: 1) Congress has not created a civil practice right of action to enforce the Disqualification Clause, and the criminal statute prohibiting rebellion or insurrection, 18 U.S.C. § 2382, does not authorize the challenge by a private citizen; 2) A.R.S. § 16-351 does not provide a private right of action to argue a candidate is proscribed by law from holding office; 3) it is unnecessary to decide if the Amnesty Act of 1872 is applicable because no private right of action exists under the United States Constitution or Arizona law; 4) the Constitution reserves the determination of the qualifications of members of Congress exclusively to the U.S. House of Representatives; 5) the doctrine of laches is not applicable at this time; 6) Plaintiffs do not satisfy the legal standards for injunctive relief; and 7) there is no need for an advisory trial. Plaintiffs timely appealed.

The Court, en banc, has considered the briefs and authorities in this appeal, and agrees with the superior court that Plaintiffs have failed to state a claim upon which relief may be granted. [1] We note that Section 5 of the Fourteenth Amendment appears to expressly delegate to Congress the authority to devise the method to enforce the Disqualification Clause ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"), which suggests that A.R.S. § 16-351(B) does not provide a private right of action to invoke the Disqualification Clause against the Candidates. We further recognize that the Qualifications Clause, Article 1, Section 5 of the United States Constitution, which provides that "[e]ach House shall be the Judge of the ... Qualifications of its own Members," appears to vest Congress with exclusive authority to determine whether to enforce the Disqualification Clause against its prospective members. However, we need not decide these issues because we hold that A.R.S. § 16-351(B), which authorizes an elector to challenge a candidate "for any reason relating to qualifications for the office sought as prescribed by law, including age, residency, professional requirements or failure to fully pay fines ...," is not the proper proceeding to initiate a Disqualification Clause challenge. By its terms, the statute's scope is limited to challenges based upon "qualifications ... as prescribed by law," and does not include the Disqualification Clause, a legal proscription from holding office. Therefore,

***2 IT IS ORDERED** affirming the superior court's judgment. The Candidates are not disqualified from appearing on the ballot for the 2022 primary election.

IT IS FURTHER ORDERED denying Gosar's request for attorneys' fees.

All Citations

Not Reported in Pac. Rptr., 2022 WL 1468157

Footnotes

1 Justice Bolick did not participate in the determination of this matter.

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APPENDIX 13

IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re

IMPEACHMENT OF
PRESIDENT DONALD J. TRUMP

TRIAL MEMORANDUM OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN THE IMPEACHMENT TRIAL OF PRESIDENT DONALD J. TRUMP

United States House of Representatives

Adam B. Schiff
Jerrold Nadler
Zoe Lofgren
Hakeem S. Jeffries
Val Butler Demings
Jason Crow
Sylvia R. Garcia

U.S. House of Representatives Managers

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INTRODUCTION

President Donald J. Trump used his official powers to pressure a foreign government to interfere in a United States election for his personal political gain, and then attempted to cover up his scheme by obstructing Congress's investigation into his misconduct. The Constitution provides a remedy when the President commits such serious abuses of his office: impeachment and removal. The Senate must use that remedy now to safeguard the 2020 U.S. election, protect our constitutional form of government, and eliminate the threat that the President poses to America's national security.

The House adopted two Articles of Impeachment against President Trump: the first for abuse of power, and the second for obstruction of Congress.[1] The evidence overwhelmingly establishes that he is guilty of both. The only remaining question is whether the members of the Senate will accept and carry out the responsibility placed on them by the Framers of our Constitution and their constitutional Oaths.

Abuse of Power

President Trump abused the power of his office by pressuring the government of Ukraine to interfere in the 2020 U.S. Presidential election for his own benefit. In order to pressure the recently elected Ukrainian President, Volodymyr Zelensky, to announce investigations that would advance President Trump's political interests and his 2020 reelection bid, the President exercised his official power to withhold from Ukraine critical U.S. government support—$391 million of vital military aid and a coveted White House meeting.[2]

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[1] H. Res. 755, 116th Cong. (2019).

[2] *See* Statement of Material Facts (Statement of Facts) (Jan. 18, 2020), ¶¶ 1-151 (filed as an attachment to this Trial Memorandum).

During a July 25, 2019 phone call, after President Zelensky expressed gratitude to President Trump for American military assistance, President Trump immediately responded by asking President Zelensky to "do us a favor though."[3] The "favor" he sought was for Ukraine to publicly announce two investigations that President Trump believed would improve his domestic political prospects.[4] One investigation concerned former Vice President Joseph Biden, Jr.—a political rival in the upcoming 2020 election—and the false claim that, in seeking the removal of a corrupt Ukrainian prosecutor four years earlier, then-Vice President Biden had acted to protect a company where his son was a board member.[5] The second investigation concerned a debunked conspiracy theory that Russia did not interfere in the 2016 Presidential election to aid President Trump, but instead that Ukraine interfered in that election to aid President Trump's opponent, Hillary Clinton.[6]

These theories were baseless. There is no credible evidence to support the allegation that the former Vice President acted improperly in encouraging Ukraine to remove an incompetent and corrupt prosecutor in 2016.[7] And the U.S. Intelligence Community, the Senate Select Committee on Intelligence, and Special Counsel Robert S. Mueller, III unanimously determined that Russia, not Ukraine, interfered in the 2016 U.S. Presidential election "in sweeping and systematic fashion" to help President Trump's campaign.[8] In fact, the theory that Ukraine, rather than Russia, interfered in the 2016 election has been advanced by Russia's intelligence services as part of Russia's propaganda campaign.[9]

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[3] *Id.* ¶¶ 75-76.
[4] *Id.* ¶¶ 76-77.
[5] *Id.* ¶¶ 11-12.
[6] *Id.* ¶¶ 11, 76.
[7] *Id.* ¶ 12.
[8] *Id.* ¶ 13.
[9] *Id.* ¶ 14.

Although these theories were groundless, President Trump sought a public announcement by Ukraine of investigations into them in order to help his 2020 reelection campaign.[10] An announcement of a Ukrainian investigation into one of his key political rivals would be enormously valuable to President Trump in his efforts to win reelection in 2020—just as the FBI's investigation into Hillary Clinton's emails had helped him in 2016. And an investigation suggesting that President Trump did not benefit from Russian interference in the 2016 election would give him a basis to assert—falsely—that he was the victim, rather than the beneficiary, of foreign meddling in the last election. Ukraine's announcement of that investigation would bolster the perceived legitimacy of his Presidency and, therefore, his political standing going into the 2020 race.

Overwhelming evidence shows that President Trump solicited these two investigations in order to obtain a personal political benefit, not because the investigations served the national interest.[11] The President's own National Security Advisor characterized the efforts to pressure Ukraine to announce investigations in exchange for official acts as a "drug deal."[12] His Acting Chief of Staff candidly confessed that President Trump's decision to withhold security assistance was tied to his desire for an investigation into alleged Ukrainian interference in the 2020 election, stated that there "is going to be political influence in foreign policy," and told the American people to "get over it."[13] Another one of President Trump's key national security advisors testified that the agents pursuing the President's bidding were "involved in a domestic political errand," not national security policy.[14] And, immediately after speaking to President Trump by phone about the investigations, one of President Trump's ambassadors involved in carrying out the President's agenda in Ukraine

[10] *See, e.g.*, *id.* ¶ 53.
[11] *See, e.g.*, *id.* ¶¶ 16, 18.
[12] *Id.* ¶ 59.
[13] *Id.* ¶¶ 120-21.
[14] *Id.* ¶ 122.

said that President Trump "did not give a [expletive] about Ukraine," and instead cared only about "big stuff" that benefitted him personally, like "the Biden investigation."[15]

To execute his scheme, President Trump assigned his personal attorney, Rudy Giuliani, the task of securing the Ukrainian investigations.[16] Mr. Giuliani repeatedly and publicly emphasized that he was *not* engaged in foreign policy but was instead seeking a personal benefit for his client, Donald Trump.[17]

President Trump used the vast powers of his office as President to pressure Ukraine into announcing these investigations. President Trump illegally withheld $391 million in taxpayer-funded military assistance to Ukraine that Congress had appropriated for expenditure in fiscal year 2019.[18] That assistance was a critical part of long-running bipartisan efforts to advance the security interests of the United States by ensuring that Ukraine is properly equipped to defend itself against Russian aggression.[19] Every relevant Executive Branch agency agreed that continued American support for Ukraine was in America's national security interests, but President Trump ignored that view and personally ordered the assistance held back, even after serious concerns—now confirmed by the Government Accountability Office (GAO)[20]—were raised within his Administration about the legality of withholding funding that Congress had already appropriated.[21] President Trump released the funding only after he got caught trying to use the security assistance as leverage to obtain foreign interference in his reelection campaign. When news of his scheme to withhold the funding broke,

[15] *Id.* ¶ 88.
[16] *See, e.g.*, *id.* ¶ 24.
[17] *See, e.g.*, *id.* ¶¶ 19, 25, 145-47.
[18] *Id.* ¶¶ 28-48.
[19] *Id.* ¶¶ 30-31.
[20] *Id.* ¶ 46.
[21] *Id.* ¶¶ 43, 46-48.

and shortly after investigative committees in the House opened an investigation, President Trump relented and released the aid.[22]

As part of the same pressure campaign, President Trump withheld a crucial White House meeting with President Zelensky—a meeting that he had previously promised and that was a shared goal of both the United States and Ukraine.[23] Such face-to-face Oval Office meetings with a U.S. President are immensely important for international credibility.[24] In this case, an Oval Office meeting with President Trump was critical to the newly elected Ukrainian President because it would signal to Russia—which had invaded Ukraine in 2014 and still occupied Ukrainian territory—that Ukraine could count on American support.[25] That meeting still has not occurred, even though President Trump has met with over a dozen world leaders at the White House since President Zelensky's election—including an Oval Office meeting with Russia's top diplomat.[26]

President Trump's solicitation of foreign interference in our elections to secure his own political success is precisely why the Framers of our Constitution provided Congress with the power to impeach a corrupt President and remove him from office. One of the Founding generation's principal fears was that foreign governments would seek to manipulate American elections—the defining feature of our self-government. Thomas Jefferson and John Adams warned of "foreign Interference, Intrigue, Influence" and predicted that, "as often as Elections happen, the danger of foreign Influence recurs."[27] The Framers therefore would have considered a President's attempt to corrupt America's democratic processes by demanding political favors from foreign powers to be a singularly pernicious act. They designed impeachment as the remedy for such misconduct because a

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[22] *See, e.g.*, *id.* ¶¶ 127, 131.
[23] *See id.* ¶¶ 49-69.
[24] *Id.* ¶ 50.
[25] *Id.* ¶¶ 3-4, 50.
[26] *See id.* ¶ 137.
[27] Letter from John Adams to Thomas Jefferson (Dec. 6, 1787) (Adams-Jefferson Letter), https://perma.cc/QWD8-222B.

President who manipulates U.S. elections to his advantage can avoid being held accountable by the voters through those same elections. And they would have viewed a President's efforts to encourage foreign election interference as all the more dangerous where, as here, those efforts are part of an ongoing pattern of misconduct for which the President is unrepentant.

The House of Representatives gathered overwhelming evidence of President Trump's misconduct, which is summarized in the attached Statement of Material Facts and in the comprehensive reports prepared by the House Permanent Select Committee on Intelligence and the Committee on the Judiciary.[28] On the strength of that evidence, the House approved the First Article of Impeachment against President Trump for abuse of power.[29] The Senate should now convict him on that Article. President Trump's continuing presence in office undermines the integrity of our democratic processes and endangers our national security.

Obstruction of Congress

President Trump obstructed Congress by undertaking an unprecedented campaign to prevent House Committees from investigating his misconduct. The Constitution entrusts the House with the "sole Power of Impeachment."[30] The Framers thus ensured what common sense requires—that the House, and not the President, determines the existence, scope, and procedures of an impeachment investigation into the President's conduct. The House cannot conduct such an investigation effectively if it cannot obtain information from the President or the Executive Branch about the Presidential misconduct it is investigating. Under our constitutional system of divided

[28] *See Impeachment of Donald J. Trump, President of the United States: Report of the Comm. on the Judiciary of the H. of Representatives, together with Dissenting Views, to Accompany H. Res. 755*, H. Rep. No. 116-346 (2019); *Report of the H. Permanent Select Comm. on Intelligence on the Trump-Ukraine Impeachment Inquiry, together with Minority Views*, H. Rep. No. 116-335 (2019); *see also* Majority Staff of the H. Comm. on the Judiciary, 116th Cong., *Constitutional Grounds for Presidential Impeachment* (Comm. Print 2019).

[29] H. Res. 755, at 2-5.

[30] U.S. Const., Art. I, § 2, cl. 5.

powers, a President cannot be permitted to hide his offenses from view by refusing to comply with a Congressional impeachment inquiry and ordering Executive Branch agencies to do the same. That conclusion is particularly important given the Department of Justice's position that the President cannot be indicted. If the President could both avoid accountability under the criminal laws and preclude an effective impeachment investigation, he would truly be above the law.

But that is what President Trump has attempted to do, and why President Trump's conduct is the Framers' worst nightmare. He directed his Administration to defy every subpoena issued in the House's impeachment investigation.[31] At his direction, the White House, Department of State, Department of Defense, Department of Energy, and Office of Management and Budget (OMB) refused to produce a single document in response to those subpoenas.[32] Several witnesses also followed President Trump's orders, defying requests for voluntary appearances and lawful subpoenas, and refusing to testify.[33] And President Trump's interference in the House's impeachment inquiry was not an isolated incident—it was consistent with his past efforts to obstruct the Special Counsel's investigation into Russian interference in the 2016 election.[34]

By categorically obstructing the House's impeachment inquiry, President Trump claimed the House's sole impeachment power for himself and sought to shield his misconduct from Congress and the American people. Although his sweeping cover-up effort ultimately failed—seventeen public officials courageously upheld their duty, testified, and provided documentary evidence of the President's wrongdoing[35]—his obstruction will do long-lasting and potentially irreparable damage to our constitutional system of divided powers if it goes unchecked.

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[31] *See* Statement of Facts ¶¶ 164-69.
[32] *Id.* ¶¶ 179-83.
[33] *See, e.g.*, *id.* ¶¶ 186-87.
[34] *See id.* ¶¶ 191-93.
[35] *Id.* ¶¶ 187-90.

Based on the overwhelming evidence of the President's misconduct in attempting to thwart the impeachment inquiry, the House approved the Second Article of Impeachment, for obstruction of Congress.[36] The Senate should now convict President Trump on that Article. If it does not, future Presidents will feel empowered to resist any investigation into their own wrongdoing, effectively nullifying Congress's power to exercise the Constitution's most important safeguard against Presidential misconduct. That outcome would not only embolden this President to continue seeking foreign interference in our elections but would telegraph to future Presidents that they are free to engage in serious misconduct without accountability or repercussions.

* * *

The Constitution entrusts Congress with the solemn task of impeaching and removing from office a President who engages in "Treason, Bribery, or other high Crimes and Misdemeanors."[37] The impeachment power is an essential check on the authority of the President, and Congress must exercise this power when the President places his personal and political interests above those of the Nation. President Trump has done exactly that. His misconduct challenges the fundamental principle that Americans should decide American elections, and that a divided system of government, in which no single branch operates without the check and balance of the others, preserves the liberty we all hold dear.

The country is watching to see how the Senate responds. History will judge each Senator's willingness to rise above partisan differences, view the facts honestly, and defend the Constitution. The outcome of these proceedings will determine whether generations to come will enjoy a safe and secure democracy in which the President is not a king, and in which no one, particularly the President, is above the law.

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[36] *See id.* ¶ 178; H. Res. 755, at 5-8.
[37] U.S. Const., Art. II, § 4.

BACKGROUND

I. CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT

To understand why President Trump must be removed from office now, it is necessary to understand why the Framers of our Constitution included the impeachment power as an essential part of the republic they created.

The Constitution entrusts Congress with the exclusive power to impeach the President and to convict and remove him from office. Article I vests the House with the "sole Power of Impeachment,"[38] and the Senate with the "sole Power to try all Impeachments" and to "convict[]" upon a vote of two thirds of its Members.[39] The Constitution specifies that the President "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[40] The Constitution further provides that the Senate may vote to permanently "disqualif[y]" an impeached President from government service.[41]

The President takes an oath to "faithfully execute the Office of the President of the United States."[42] Impeachment imposes a check on a President who violates that oath by using the powers of the office to advance his own interests at the expense of the national interest. Fresh from their experience under British rule by a king, the Framers were concerned that corruption posed a grave threat to their new republic. As George Mason warned the other delegates to the Constitutional Convention, "if we do not provide against corruption, our government will soon be at an end."[43] The Framers stressed that a President who "act[s] from some corrupt motive or other" or "willfully

[38] U.S. Const., Art. I, § 2, cl. 5.
[39] U.S. Const., Art. I, § 3, cl. 6.
[40] U.S. Const., Art. II, § 4.
[41] U.S. Const., Art. I, § 3, cl. 6.
[42] U.S. Const., Art. II, § 1, cl. 8.
[43] 2 *The Records of the Federal Convention of 1787*, at 392 (Max Farrand ed.,1911) (Farrand).

abus[es] his trust" must be impeached,[44] because the President "will have great opportunitys of abusing his power."[45]

The Framers recognized that a President who abuses his power to manipulate the democratic process cannot properly be held accountable by means of the very elections that he has rigged to his advantage.[46] The Framers specifically feared a President who abused his office by sparing "no efforts or means whatever to get himself re-elected."[47] Mason asked: "Shall the man who has practised corruption & by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?"[48]

Thus, the Framers resolved to hold the President "impeachable whilst in office" as "an essential security for the good behaviour of the Executive."[49] By empowering Congress to immediately remove a President when his misconduct warrants it, the Framers established the people's elected representatives as the ultimate check on a President whose corruption threatened our democracy and the Nation's core interests.[50]

The Framers particularly feared that foreign influence could undermine our new system of self-government.[51] In his farewell address to the Nation, President George Washington warned Americans "to be constantly awake, since history and experience prove that foreign influence is one

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[44] *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 49 (1998) (quoting James Iredell).

[45] 2 Farrand at 67.

[46] *See id.* at 65.

[47] *Id.* at 64.

[48] *Id.* at 65.

[49] *Id.* at 64.

[50] *See The Federalist No. 65* (Alexander Hamilton).

[51] *See, e.g.*, 2 Farrand at 65-66; George Washington, Farewell Address (Sept. 19, 1796), *George Washington Papers, Series 2, Letterbooks 1754-1799: Letterbook 24, April 3, 1793–March 3, 1797,* Library of Congress (Washington Farewell Address); Adams-Jefferson Letter, https://perma.cc/QWD8-222B.

of the most baneful foes of republican government."[52] Alexander Hamilton cautioned that the "most deadly adversaries of republican government" may come "chiefly from the desire in foreign powers to gain an improper ascendant in our councils."[53] James Madison worried that a future President could "betray his trust to foreign powers," which "might be fatal to the Republic."[54] And, of particular relevance now, in their personal correspondence about "foreign Interference," Thomas Jefferson and John Adams discussed their apprehension that "as often as Elections happen, the danger of foreign Influence recurs."[55]

Guided by these concerns, the Framers included within the Constitution various mechanisms to ensure the President's accountability and protect against foreign influence—including a requirement that Presidents be natural-born citizens of the United States,[56] prohibitions on the President's receipt of gifts, emoluments, or titles from foreign states,[57] prohibitions on profiting from the Presidency,[58] and, of course, the requirement that the President face reelection after a four-year Term.[59] But the Framers provided for impeachment as a final check on a President who sought foreign interference to serve his personal interests, particularly to secure his own reelection.

In drafting the Impeachment Clause, the Framers adopted a standard flexible enough to reach the full range of potential Presidential misconduct: "Treason, Bribery, or other high Crimes and Misdemeanors."[60] The decision to denote "Treason" and "Bribery" as impeachable conduct

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[52] Washington Farewell Address.
[53] *The Federalist No. 68* (Alexander Hamilton).
[54] 2 Farrand at 66.
[55] Adams-Jefferson Letter, https://perma.cc/QWD8-222B.
[56] U.S. Const., Art. II, § 1, cl. 5.
[57] U.S. Const., Art. I, § 9, cl. 8.
[58] U.S. Const., Art. II, § 1, cl. 7.
[59] U.S. Const., Art. II, § 1, cl. 1.
[60] U.S. Const., Art. II, § 4; *see* 2 Farrand at 550.

reflects the Founding-era concerns over foreign influence and corruption. But the Framers also recognized that "many great and dangerous offenses" could warrant impeachment and immediate removal of a President from office.[61] These "other high Crimes and Misdemeanors" provided for by the Constitution need not be indictable criminal offenses. Rather, as Hamilton explained, impeachable offenses involve an "abuse or violation of some public trust" and are of "a nature which may with peculiar propriety be denominated political, as they relate chiefly to injuries done immediately to the society itself."[62] The Framers thus understood that "high crimes and misdemeanors" would encompass acts committed by public officials that inflict severe harm on the constitutional order.[63]

II. THE HOUSE'S IMPEACHMENT OF PRESIDENT DONALD J. TRUMP AND PRESENTATION OF THIS MATTER TO THE SENATE

Committees of the House have undertaken investigations into allegations of misconduct by President Trump and his Administration. On September 9, 2019, after evidence surfaced that the President and his associates were seeking Ukraine's assistance in the President's reelection, the House Permanent Select Committee on Intelligence, together with the Committees on Oversight and Reform and Foreign Affairs, announced a joint investigation into the President's conduct and issued document requests to the White House and State Department.[64]

On September 24, 2019, Speaker Nancy Pelosi announced that the House was "moving forward with an official impeachment inquiry" and directed the Committees to "proceed with their investigations under that umbrella of [an] impeachment inquiry."[65] They subsequently issued

[61] 2 Farrand at 550.

[62] *The Federalist No. 65* (Alexander Hamilton) (capitalization altered).

[63] These issues are discussed at length in the report by the House Committee on the Judiciary. *See* H. Rep. No. 116-346, at 28-75.

[64] Statement of Facts ¶ 160.

[65] *Id.* ¶ 161.

multiple subpoenas for documents as well as requests and subpoenas for witness interviews and testimony.[66] On October 31, 2019, the House approved a resolution adopting procedures to govern the impeachment inquiry.[67]

Both before and after Speaker Pelosi's announcement, President Trump categorically refused to provide any information in response to the House's inquiry. He stated that "we're fighting all the subpoenas," and that "I have an Article II, where I have the right to do whatever I want as president."[68] Through his White House Counsel, the President later directed his Administration not to cooperate.[69] Heeding the President's directive, the Executive Branch did not produce any documents in response to subpoenas issued by the three investigating Committees,[70] and nine current or former Administration officials, including the President's top aides, continue to refuse to comply with subpoenas for testimony.[71]

Notwithstanding the President's attempted cover-up, seventeen current and former government officials courageously complied with their legal obligations and testified before the three investigating Committees in depositions or transcribed interviews that all Members of the Committees—as well as staff from the Majority and Minority—were permitted to attend.[72] Some witnesses produced documentary evidence in their possession. In late November 2019, twelve of these witnesses, including three requested by the Minority, testified in public hearings convened by the Intelligence Committee.[73]

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[66] *See id.* ¶¶ 166, 180, 183, 189-90.
[67] *Id.* ¶ 162.
[68] *Id.* ¶ 164.
[69] *Id.* ¶¶ 164-69.
[70] *Id.* ¶ 183.
[71] *Id.* ¶ 187.
[72] *Id.* ¶¶ 188-89.
[73] *Id.* ¶ 189.

Stressing the "overwhelming" evidence of misconduct already uncovered by the investigation, on December 3, 2019, the Intelligence Committee released a detailed nearly 300-page report documenting its findings, which it transmitted to the Judiciary Committee.[74] The Judiciary Committee held public hearings evaluating the constitutional standard for impeachment and the evidence against President Trump—in which the President's counsel was invited, but declined, to participate—and then reported two Articles of Impeachment to the House.[75]

On December 18, 2019, the House voted to impeach President Trump and adopted two Articles of Impeachment.[76] The First Article for Abuse of Power states that President Trump "abused the powers of the Presidency" by "soliciting the Government of Ukraine to publicly announce investigations that would benefit his reelection, harm the election prospects of a political opponent, and influence the 2020 United States Presidential election to his advantage."[77] President Trump sought to "pressure the Government of Ukraine to take these steps by conditioning official United States Government acts of significant value to Ukraine on its public announcement of the investigations."[78] President Trump undertook these acts "for corrupt purposes in pursuit of personal political benefit"[79] and "used the powers of the Presidency in a manner that compromised the national security of the United States and undermined the integrity of the United States democratic process."[80] These actions were "consistent" with President Trump's "previous invitations of foreign interference in United States elections,"[81] and demonstrated that President

[74] *Id.* ¶ 176; *see also* H. Rep. No. 116-335.
[75] Statement of Facts ¶ 176; *see also* H. Res. 755.
[76] Statement of Facts ¶ 178; H. Res. 755.
[77] H. Res. 755, at 2-3.
[78] *Id.*
[79] *Id.* at 3.
[80] *Id.*
[81] *Id.* at 4.

Trump "will remain a threat to national security and the Constitution if allowed to remain in office."[82]

The Second Article for Obstruction of Congress states that President Trump "abused the powers of the Presidency in a manner offensive to, and subversive of, the Constitution" when he "directed the unprecedented, categorical, and indiscriminate defiance of subpoenas issued by the House of Representatives pursuant to its 'sole Power of Impeachment.'"[83] Without "lawful cause or excuse, President Trump directed Executive Branch agencies, offices, and officials not to comply with those subpoenas" and "thus interposed the powers of the Presidency against the lawful subpoenas of the House of Representatives, and assumed to himself functions and judgments necessary to the exercise of the 'sole Power of Impeachment' vested by the Constitution in the House of Representatives."[84] The President's "complete defiance of an impeachment inquiry . . . served to cover up the President's own repeated misconduct and to seize and control the power of impeachment."[85] President Trump's misconduct was "consistent" with his "previous efforts to undermine United States Government investigations into foreign interference in United States elections,"[86] demonstrated that he has "acted in a manner grossly incompatible with self-governance," and established that he "will remain a threat to the Constitution if allowed to remain in office."[87]

[82] *Id.* at 5.
[83] *Id.* at 6.
[84] *Id.*
[85] *Id.* at 8.
[86] *Id.* at 7.
[87] *Id.* at 5, 8.

ARGUMENT

I. THE SENATE SHOULD CONVICT PRESIDENT TRUMP OF ABUSE OF POWER

President Trump abused the power of the Presidency by pressuring a foreign government to interfere in an American election on his behalf.[88] He solicited this foreign interference to advance his reelection prospects at the expense of America's national security and the security of Ukraine, a vulnerable American ally at war with Russia, an American adversary.[89] His effort to gain a personal political benefit by encouraging a foreign government to undermine America's democratic process strikes at the core of misconduct that the Framers designed impeachment to protect against. President Trump's abuse of power requires his conviction and removal from office.

An officer abuses his power if he exercises his official power to obtain an improper personal benefit while ignoring or undermining the national interest.[90] An abuse that involves an effort to solicit foreign interference in an American election is uniquely dangerous. President Trump's misconduct is an impeachable abuse of power.[91]

A. President Trump Exercised His Official Power to Pressure Ukraine into Aiding His Reelection

After President Zelensky won a landslide victory in Ukraine in April 2019, President Trump pressured the new Ukrainian President to help him win his own reelection by announcing investigations that were politically favorable for President Trump and designed to harm his political rival.[92]

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[88] *See* Statement of Facts ¶¶ 1-157.

[89] *See id.* ¶¶ 1-157.

[90] *See, e.g.*, *Report of the Impeachment Trial Comm. on the Articles Against Judge G. Thomas Porteous, Jr.*, S. Rep. No. 111-347, at 6-7 (2010); *Impeachment of Judge Alcee L. Hastings: Report of the H. Comm. of the Judiciary to Accompany H. Res. 499*, H. Rep. No. 100-810, at 1-5, 8, 41 (1988); 132 Cong. Rec. H4710-22 (daily ed. July 22, 1986) (impeachment of Judge Claiborne).

[91] For a more detailed discussion of abuse of power as an impeachable offense, see H. Rep. No. 116-346, at 43-48, 68-70, 78-81.

[92] Statement of Facts ¶¶ 1-151.

First, President Trump sought to pressure President Zelensky publicly to announce an investigation into former Vice President Biden and a Ukrainian gas company, Burisma Holdings, on whose board Biden's son sat.[93] As Vice President, Biden had in late 2015 encouraged the government of Ukraine to remove a Ukrainian prosecutor general who had failed to combat corruption.[94] The Ukrainian parliament removed the prosecutor in March 2016.[95] President Trump and his allies have asserted that the former Vice President acted in order to stop an investigation of Burisma and thereby protect his son.[96] This is false. There is no evidence that Vice President Biden acted improperly.[97] He was carrying out official United States policy—with the backing of the international community and bipartisan support in Congress—when he sought the removal of the prosecutor, who was himself corrupt.[98] In addition, the prosecutor's removal made it *more likely* that the investigation into Burisma would be pursued.[99] President Trump nevertheless sought an official Ukrainian announcement of an investigation into this theory.[100]

Second, President Trump sought to pressure President Zelensky publicly to announce an investigation into a conspiracy theory that Ukraine had colluded with the Democratic National Committee to interfere in the 2016 U.S. Presidential election in order to help the campaign of Hillary Clinton against then-candidate Donald Trump.[101] This theory was not only pure fiction, but malign Russian propaganda.[102] In the words of one of President Trump's own top National Security Council officials, President Trump's theory of Ukrainian election interference is "a fictional narrative

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[93] *Id.* ¶¶ 11-12.
[94] *See id.* ¶ 12.
[95] *Id.*
[96] *Id.* ¶¶ 11, 17.
[97] *Id.* ¶ 12.
[98] *Id.*
[99] *Id.*
[100] *Id.*; *see also id.* ¶¶ 83-84, 150.
[101] *Id.* ¶¶ 11, 84.
[102] *Id.* ¶¶ 12-14.

that is being perpetrated and propagated by the Russian security services themselves" to deflect from Russia's culpability and to drive a wedge between the United States and Ukraine.[103] President Trump's own FBI Director confirmed that American law enforcement has "no information that indicates that Ukraine interfered with the 2016 presidential election."[104] The Senate Select Committee on Intelligence similarly concluded that Russia, not Ukraine, interfered in the 2016 U.S. Presidential election.[105] President Trump nevertheless seized on the false theory and sought an announcement of an investigation that would give him a basis to assert that Ukraine rather than Russia interfered in the 2016 election. Such an investigation would eliminate a perceived threat to his own legitimacy and boost his political standing in advance of the 2020 election.[106]

In furtherance of the corrupt scheme, President Trump exercised his official power to remove a perceived obstacle to Ukraine's pursuit of the two sham investigations. On April 24, 2019—one day after the media reported that former Vice President Biden would formally enter the 2020 U.S. Presidential race[107]—the State Department executed President Trump's order to recall the U.S. ambassador to Ukraine, a well-regarded career diplomat and anti-corruption crusader.[108] President Trump needed her "out of the way" because "she was going to make the investigations difficult for everybody."[109] President Trump then proceeded to exercise his official power to pressure Ukraine into announcing his desired investigations by withholding valuable support that Ukraine desperately needed and that he could leverage only by virtue of his office: $391 million in security assistance and a White House meeting.

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[103] *Id.* ¶ 14.
[104] *Id.* ¶ 13.
[105] *Id.*
[106] *See id.* ¶¶ 11-13, 83-84.
[107] *Id.* ¶ 6.
[108] *Id.* ¶¶ 7-9.
[109] *Id.* ¶ 10 (quoting Mr. Giuliani).

Withheld Security Assistance

President Trump illegally ordered the Office of Management and Budget to withhold $391 million in taxpayer-funded military and other security assistance to Ukraine.[110] This assistance would provide Ukraine with sniper rifles, rocket-propelled grenade launchers, counter-artillery radars, electronic warfare detection and secure communications, and night vision equipment, among other military equipment, to defend itself against Russian forces that occupied part of eastern Ukraine since 2014.[111] The new and vulnerable government headed by President Zelensky urgently needed this assistance—both because the funding itself was critically important to defend against Russia, and because the funding was a highly visible sign of American support for President Zelensky in his efforts to negotiate an end to the conflict from a position of strength.[112]

Every relevant Executive Branch agency supported the assistance, which also had broad bipartisan support in Congress.[113] President Trump, however, personally ordered OMB to withhold the assistance after the bulk of it had been appropriated by Congress and all of the Congressionally mandated conditions on assistance—including anti-corruption reforms—had been met.[114] The Government Accountability Office has determined that the President's hold was illegal and violated the Impoundment Control Act, which limits the President's authority to withhold funds that Congress has appropriated.[115]

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[110] *Id.* ¶¶ 28-48.
[111] *Id.* ¶ 35.
[112] *See id.* ¶¶ 30-31, 34-35.
[113] *Id.* ¶ 39.
[114] *Id.* ¶¶ 39, 41-42.
[115] *Id.* ¶ 46. The GAO opinion addresses only the portion of the funds appropriated to the Department of Defense. The opinion explains that OMB and the State Department have not provided the information GAO needs to evaluate the legality of the hold placed by the President on the remaining funds.

The evidence is clear that President Trump conditioned release of the vital military assistance on Ukraine's announcement of the sham investigations. During a telephone conversation between the two Presidents on July 25, immediately after President Zelensky raised the issue of U.S. military support for Ukraine, President Trump replied: "I would like you to do us a favor though."[116] President Trump then explained that the "favor" he wanted President Zelensky to perform was to begin the investigations, and President Zelensky confirmed his understanding that the investigations should be done "openly."[117] In describing whom he wanted Ukraine to investigate, President Trump mentioned only two people: former Vice President Biden and his son.[118] And in describing the claim of foreign interference in the 2016 election, President Trump declared that "they say a lot of it started with Ukraine," and that "[w]hatever you can do, it's very important that you do it if that's possible."[119] Absent from the discussion was any mention by President Trump of anti-corruption reforms in Ukraine.

One of President Trump's chief agents for carrying out the President's agenda in Ukraine, Ambassador Gordon Sondland, testified that President Trump's effort to condition release of the much-needed security assistance on an announcement of the investigations was as clear as "two plus two equals four."[120] Sondland communicated to President Zelensky's advisor that Ukraine would likely not receive assistance unless President Zelensky publicly announced the investigations.[121] And President Trump later confirmed to Ambassador Sondland that President Zelensky "must announce the opening of the investigations and he should want to do it."[122]

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[116] *Id.* ¶ 76.
[117] *Id.* ¶¶ 76, 80.
[118] *Id.* ¶ 82.
[119] *Id.* ¶ 77.
[120] *Id.* ¶ 101.
[121] *Id.* ¶ 110.
[122] *Id.* ¶ 114.

President Trump ultimately released the military assistance, but only after the press publicly reported the hold, after the President learned that a whistleblower within the Intelligence Community had filed a complaint about his misconduct, and after the House publicly announced an investigation of the President's scheme. In short, President Trump released the security assistance for Ukraine only after he got caught.[123]

Withheld White House Meeting

On April 21, 2019, the day President Zelensky was elected, President Trump invited him to a meeting at the White House.[124] The meeting would have signaled American support for the new Ukrainian administration, its strong anti-corruption reform agenda, and its efforts to defend against Russian aggression and to make peace.[125] President Trump, however, exercised his official power to withhold the meeting as leverage in his scheme to pressure President Zelensky into announcing the investigations to help his reelection campaign.

The evidence is unambiguous that President Trump and his agents conditioned the White House meeting on Ukraine's announcement of the investigations. Ambassador Sondland testified that President Trump wanted "a public statement from President Zelensky" committing to the investigations as a "prerequisite[]" for the White House meeting.[126] Ambassador Sondland further testified: "I know that members of this committee frequently frame these complicated issues in the form of a simple question: Was there a quid pro quo? As I testified previously with regard to the requested White House call and the White House meeting, the answer is yes."[127]

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[123] *Id.* ¶¶ 103, 130-31.
[124] *Id.* ¶ 3.
[125] *See, e.g., id.* ¶ 4.
[126] *Id.* ¶ 88.
[127] *Id.* ¶ 52.

To this day, President Trump maintains leverage over President Zelensky. A White House meeting has still not taken place,[128] and President Trump continues publicly to urge Ukraine to conduct these investigations.[129]

B. President Trump Exercised Official Power to Benefit Himself Personally

Overwhelming evidence demonstrates that the announcement of investigations on which President Trump conditioned the official acts had no legitimate policy rationale, and instead were corruptly intended to assist his 2020 reelection campaign.[130]

First, although there was no basis for the two conspiracy theories that President Trump advanced,[131] public announcements that these theories were being investigated would be of immense political value to him—and him alone. The public announcement of an investigation of former Vice President Biden would yield enormous political benefits for President Trump, who viewed the former Vice President as a serious political rival in the 2020 U.S. Presidential election. Unsurprisingly, President Trump's efforts to advance the conspiracy theory accelerated after news broke that Vice President Biden would run for President in 2020.[132] President Trump benefited from such an announcement of a criminal investigation into his Presidential opponent in 2016.[133] An announcement of a criminal investigation regarding a 2020 rival would likewise be extremely helpful to his reelection prospects.

President Trump would similarly have viewed an investigation into Ukrainian interference in the 2016 election as helpful in undermining the conclusion that he had benefitted from Russian election interference in 2016, and that he was the preferred candidate of President Putin—both of

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[128] *Id.* ¶ 137.
[129] *Id.* ¶¶ 141-42, 150.
[130] *See generally* Statement of Facts; H. Rep. No. 116-346; H. Rep. No. 116-335.
[131] Statement of Facts ¶¶ 11-15.
[132] *Id.* ¶¶ 16-19.
[133] *See id.* ¶¶ 154-56 (then-candidate Trump's actions relating to the FBI's investigation into Hillary Clinton).

which President Trump viewed as calling into question the legitimacy of his Presidency. An announcement that Ukraine was investigating its own alleged 2016 election interference would have turned these facts on their head. President Trump would have grounds to claim—falsely—that he was elected President in 2016 not because he was the beneficiary of Russian election interference, but *in spite of* Ukrainian election interference aimed at helping his opponent.

Second, agents and associates of President Trump who helped carry out his agenda in Ukraine confirmed that his efforts to pressure President Zelensky into announcing the desired investigations were intended for his personal political benefit rather than for a legitimate policy purpose. For example, after speaking with President Trump, Ambassador Sondland told a colleague that President Trump "did not give a [expletive] about Ukraine," and instead cared only about "big stuff" that benefitted him personally "like the Biden investigation that Mr. Giuliani was pushing."[134] And Mick Mulvaney, President Trump's Acting Chief of Staff, acknowledged to a reporter that there was a quid pro quo with Ukraine involving the military aid, conceded that "[t]here is going to be political influence in foreign policy," and stated, "I have news for everybody: get over it."[135]

Third, the involvement of President Trump's personal attorney, Mr. Giuliani—who has professional obligations to the President but not the Nation—underscores that President Trump sought the investigations for personal and political reasons rather than legitimate foreign policy reasons. Mr. Giuliani openly and repeatedly acknowledged that he was pursuing the Ukrainian investigations to advance the President's interests, stating: "this isn't foreign policy."[136] Instead, Mr.

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[134] *Id.* ¶ 88.

[135] *Id.* ¶ 121. Mr. Mulvaney, along with his deputy Robert Blair and OMB official Michael Duffey—who were subpoenaed by the House, but refused to testify at the President's direction, *see id.* ¶ 187—would provide additional firsthand testimony regarding the President's withholding of official acts in exchange for Ukraine's assistance with his reelection.

[136] *Id.* ¶ 18.

Giuliani said that he was seeking information that "will be very, very helpful to my client."[137] Mr. Giuliani made similar representations to the Ukrainian government. In a letter to President-elect Zelensky, Mr. Giuliani stated that he "represent[ed] him [President Trump] *as a private citizen*, not as President of the United States" and was acting with the President's "knowledge and consent."[138] President Trump placed Mr. Giuliani at the hub of the pressure campaign on Ukraine, and directed U.S. officials responsible for Ukraine to "talk to Rudy."[139] Indeed, during their July 25 call, President Trump pressed President Zelensky to speak with Mr. Giuliani directly, stating: "Rudy very much knows what's happening and he is a very capable guy. If you could speak to him that would be great."[140]

Fourth, President Trump's pursuit of the sham investigations marked a dramatic deviation from longstanding bipartisan American foreign policy goals in Ukraine. Legitimate investigations could have been recognized as an anti-corruption foreign policy goal, but there was no factual basis for an investigation into the Bidens or into supposed Ukrainian interference in the 2016 election.[141] To the contrary, the requested investigations were precisely the type of political investigations that American foreign policy dissuades other countries from undertaking. That explains why the scheme to obtain the announcements was pursued through the President's chosen political appointees and his personal attorney;[142] why Trump Administration officials attempted to keep the scheme from becoming public due to its "sensitive nature";[143] why no credible explanation for the hold on security assistance was provided even within the U.S. government;[144] why, over Defense Department

[137] *Id.*
[138] *Id.* ¶ 19 (emphasis added).
[139] *Id.* ¶ 24.
[140] *Id.* ¶ 78.
[141] *Id.* ¶¶ 11-15, 122.
[142] *Id.*
[143] *Id.* ¶ 42.
[144] *Id.* ¶¶ 43-48.

objections, President Trump and his allies violated the law by withholding the aid;[145] and why, after the scheme was uncovered, President Trump falsely claimed that his pursuit of the investigations did not involve a quid pro quo.[146]

Fifth, American and Ukrainian officials alike saw President Trump's scheme for what it was: improper and political. As we expect the testimony of Ambassador John Bolton would confirm, President Trump's National Security Advisor stated that he wanted no "part of whatever drug deal" President Trump's agents were pursuing in Ukraine.[147] Dr. Hill testified that Ambassador Sondland was becoming involved in a "domestic political errand" in pressing Ukraine to announce the investigations.[148] Jennifer Williams, an advisor to Vice President Mike Pence, testified that the President's solicitation of investigations was a "domestic political matter."[149] Lt. Col. Alexander Vindman, the NSC's Director for Ukraine, testified that "[i]t is improper for the President of the United States to demand a foreign government investigate a U.S. citizen and a political opponent."[150] William Taylor, who took over as Chargé d'Affaires in Kyiv after President Trump recalled Ambassador Yovanovitch, emphasized that "I think it's crazy to withhold security assistance for help with a political campaign."[151] And George Kent, a State Department official, testified that "asking another country to investigate a prosecution for political reasons undermines our advocacy of the rule of law."[152]

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[145] *Id.* ¶¶ 45-46.
[146] *Id.* ¶ 140.
[147] *Id.* ¶ 59. Although Bolton has not cooperated with the House's inquiry, he has offered to testify to the Senate if subpoenaed.
[148] *Id.* ¶ 58.
[149] *Id.* ¶ 84.
[150] *Id.* ¶ 83.
[151] *Id.* ¶ 118.
[152] *Id.* ¶ 55 (recalling his statement to Ambassador Volker in July 2019).

Ukrainian officials also understood that President Trump's corrupt effort to solicit the sham investigations would drag them into domestic U.S. politics. In response to the President's efforts, a senior Ukrainian official conveyed to Ambassador Taylor that President Zelensky "did not want to be used as a pawn in a U.S. reelection campaign."[153] Another Ukrainian official later stated that "it's critically important for the west not to pull us into some conflicts between their ruling elites[.]"[154] And when Ambassador Kurt Volker tried to warn President Zelensky's advisor against investigating President Zelensky's former political opponent—the prior Ukrainian president—the advisor retorted, "What, you mean like asking us to investigate Clinton and Biden?"[155] David Holmes, a career diplomat at the U.S. Embassy in Kyiv, highlighted this hypocrisy: "While we had advised our Ukrainian counterparts to voice a commitment to following the rule of law and generally investigating credible corruption allegations," U.S. officials were making "a demand that President Zelensky personally commit on a cable news channel to a specific investigation of President Trump's political rival."[156]

Finally, there is no credible alternative explanation for President Trump's conduct. It is not credible that President Trump sought announcements of the investigations because he was in fact concerned with corruption in Ukraine or burden-sharing with our European allies, as he claimed after the scheme was uncovered.[157]

Before news of former Vice President Biden's candidacy broke, President Trump showed no interest in corruption in Ukraine, and in prior years he approved military assistance to Ukraine without controversy.[158] After his candidacy was announced, President Trump remained indifferent

[153] *Id.* ¶ 68.
[154] *Id.* ¶ 104.
[155] *Id.* ¶ 150.
[156] *Id.* ¶ 151.
[157] *Id.* ¶ 143.
[158] *See id.* ¶¶ 2, 33.

to anti-corruption measures beyond the two investigations he was demanding.[159] When he first spoke with President Zelensky on April 21, President Trump ignored the recommendation of his national security advisors and did not mention corruption at all—even though the purpose of the call was to congratulate President Zelensky on a victory based on an anti-corruption platform.[160] President Trump's entire policy team agreed that President Zelensky was genuinely committed to reforms, yet President Trump refused a White House meeting that the team advised would support President Zelensky's anti-corruption agenda.[161] President Trump's own Department of Defense, in consultation with the State Department, had certified in May 2019 that Ukraine satisfied all anti-corruption standards needed to receive the Congressionally appropriated military aid, yet President Trump nevertheless withheld that vital assistance.[162] He recalled without explanation Ambassador Yovanovitch, who was widely recognized as a champion in fighting corruption,[163] disparaged her while praising a corrupt Ukrainian prosecutor general,[164] and oversaw efforts to cut foreign programs tasked with combating corruption in Ukraine and elsewhere.[165]

Moreover, had President Trump truly sought to assist Ukraine's anti-corruption efforts, he would have focused on ensuring that Ukraine actually *conducted* investigations of the purported issues he identified. But actual investigations were never the point. President Trump was interested only in the *announcement* of the investigations because that announcement would accomplish his real goal—bolstering his reelection efforts.[166]

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[159] *See id.* ¶ 88.
[160] *See id.* ¶¶ 1-2.
[161] *See id.* ¶¶ 22-24.
[162] *See id.* ¶¶ 36 n.73, 39.
[163] *See id.* ¶ 7.
[164] *See id.* ¶¶ 8-9, 81.
[165] *See id.* ¶ 82 n.138.
[166] *See e.g.*, *id.* ¶¶ 82, 131.

President Trump's purported concern about sharing the burden of assistance to Ukraine with Europe is equally without basis. From the time OMB announced the illegal hold until it was lifted, no credible reason was provided to Executive Branch agencies for the hold, despite repeated efforts by national security officials to obtain an explanation.[167] It was not until September—approximately two months after President Trump had directed the hold and after the President had learned of the whistleblower complaint—that the hold, for the first time, was attributed to the President's concern about other countries not contributing more to Ukraine.[168] If the President was genuinely concerned about burden-sharing, it makes no sense that he kept his own Administration in the dark about the issue for months, never made any contemporaneous public statements about it, never ordered a review of burden-sharing,[169] never ordered his officials to push Europe to increase their contributions,[170] and then released the aid without any change in Europe's contribution.[171] The concern about burden-sharing is an after-the-fact rationalization designed to conceal President Trump's abuse of power.

C. President Trump Jeopardized U.S. National Interests

President Trump's efforts to solicit foreign interference to help his reelection campaign is pernicious, but his conduct is all the more alarming because it endangered U.S. national security, jeopardized our alliances, and undermined our efforts to promote the rule of law globally.

Ukraine is a "strategic partner of the United States" on the front lines of an ongoing conflict with Russia.[172] The United States has approved military assistance to Ukraine with bipartisan support since 2014, and that assistance is critical to preventing Russia's expansion and aggression.

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[167] *See id.* ¶¶ 41-48.
[168] *See id.* ¶¶ 43-45.
[169] *See id.* ¶ 44.
[170] *See id.*
[171] *See id.* ¶ 131.
[172] *Id.* ¶ 28.

This military assistance—which President Trump withheld in service of his own political interests—"saves lives" by making Ukrainian resistance to Russia more effective.[173] It likewise advances American national security interests because, "[i]f Russia prevails and Ukraine falls to Russian dominion, we can expect to see other attempts by Russia to expand its territory and influence."[174] Indeed, the reason the United States provides assistance to the Ukrainian military is "so that they can fight Russia over there, and we don't have to fight Russia here."[175] President Trump's delay in providing the military assistance jeopardized these national security interests and emboldened Russia even though the funding was ultimately released—particularly because the delay occurred "when Russia was watching closely to gauge the level of American support for the Ukrainian Government."[176] But for a subsequent act of Congress, approximately $35 million of military assistance to Ukraine would have lapsed and been unavailable as a result of the President's abuse of power.[177]

The White House meeting that President Trump promised President Zelensky—but continues to withhold—would similarly have signaled to Russia that the United States stands behind Ukraine, showing "U.S. support at the highest levels."[178] By refusing to hold this meeting, President Trump denied Ukraine a showing of strength that could deter further Russian aggression and help Ukraine negotiate a favorable end to its war with Russia.[179] The withheld meeting also undercuts President Zelensky's domestic standing, diminishing his ability to advance his ambitious anti-corruption reforms.[180]

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[173] *Id.* ¶ 31.
[174] *Id.*
[175] *Id.*
[176] *Id.* ¶ 4.
[177] *Id.* ¶¶ 132-33.
[178] *Id.* ¶ 4 & n.8.
[179] *See id.* ¶ 50.
[180] *See id.*

Equally troubling is that President Trump's scheme sent a clear message to our allies that the United States may capriciously withhold critical assistance for our President's personal benefit, causing our allies to constantly "question the extent to which they can count on us."[181] Because American leadership depends on "the power of our example and the consistency of our purpose," President Trump's "conduct undermines the U.S., exposes our friends, and widens the playing field for autocrats like President Putin."[182] And President Trump's use of official acts to pressure Ukraine to announce politically motivated investigations harms our credibility in promoting democratic values and the rule of law in Ukraine and around the world. American credibility abroad "is based on a respect for the United States," and "if we damage that respect," American foreign policy cannot do its job.[183]

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President Trump abused the powers of his office to invite foreign interference in an election for his own personal political gain and to the detriment of American national security interests. He abandoned his oath to faithfully execute the laws and betrayed his public trust. President Trump's misconduct presents a danger to our democratic processes, our national security, and our commitment to the rule of law. He must be removed from office.

II. THE SENATE SHOULD CONVICT PRESIDENT TRUMP OF OBSTRUCTION OF CONGRESS

In exercising its responsibility to investigate and consider the impeachment of a President of the United States, the House is constitutionally entitled to the relevant information from the

[181] Transcript, *Impeachment Inquiry: Fiona Hill and David Holmes: Hearing Before the H. Permanent Select Comm. on Intelligence*, 116th Cong. 175 (Nov. 21, 2019).

[182] Transcript, *Impeachment Inquiry: Ambassador Marie "Masha" Yovanovitch: Hearing Before the H. Permanent Select Comm. on Intelligence*, 116th Cong. 19 (Nov. 15, 2019) (Yovanovitch Hearing Tr.).

[183] Transcript, *Impeachment Inquiry: Ambassador William B. Taylor and George Kent: Hearing Before the H. Permanent Select Comm. on Intelligence*, 116th Cong. 165 (Nov. 13, 2019).

Executive Branch concerning the President's misconduct.[184] The Framers, the courts, and past Presidents have recognized that honoring Congress's right to information in an impeachment investigation is a critical safeguard in our system of divided powers.[185] Otherwise, a President could hide his own wrongdoing to prevent Congress from discovering impeachable misconduct, effectively nullifying Congress's impeachment power.[186] President Trump's sweeping effort to shield his misconduct from view and protect himself from impeachment thus works a grave constitutional harm and is itself an impeachable offense.

A. The House Is Constitutionally Entitled to the Relevant Information in an Impeachment Inquiry

The House has the power to issue subpoenas and demand compliance in an impeachment investigation. The Supreme Court has long recognized that, "[w]ithout the power to investigate—including of course the authority to compel testimony, either through its own processes or through judicial trial—Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively."[187] The Court has stressed that it is the "duty of all citizens" and "their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation."[188] The Court has repeatedly emphasized that Congress's "power of inquiry—with

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[184] 4 Annals of Cong. 601 (1796) (statement of Rep. William Lyman) (noting that Congress has "the right to inspect every paper and transaction in any department" during an impeachment inquiry).

[185] *See, e.g.*, *The Federalist No. 65* (Alexander Hamilton) (referring to the House as the "inquisitors for the nation" for purposes of impeachment); *Kilbourn v. Thompson*, 103 U.S. 168, 193 (1880); 4 James D. Richardson ed., Messages and Papers of Presidents 434-35 (1896); *see also* H. Rep. No. 116-346, at 139-42 (collecting examples of past Presidents beginning with George Washington acknowledging the importance of Congress's right to information from the Executive Branch in impeachment inquiries).

[186] *See generally* H. Rep. No. 116-346, at 139-48.

[187] *Quinn v. United States*, 349 U.S. 155, 160-61 (1955).

[188] *Watkins v. United States*, 354 U.S. 178, 187-88 (1957).

process to enforce it—is an essential and appropriate auxiliary to the legislative function."[189] Congress "cannot legislate wisely or effectively in the absence of information."[190]

This principle is most compelling when the House exercises its "sole Power of Impeachment." Congress's already "broad" investigatory authority,[191] and its need for information, are at their apex in an impeachment inquiry. The principle that the President cannot stand in the way of an impeachment investigation is "of great consequence" because, as Supreme Court Justice Joseph Story long ago explained, "the president should not have the power of preventing a thorough investigation of [his] conduct, or of securing [himself] against the disgrace of a public conviction by impeachment, if [he] should deserve it."[192] A Presidential impeachment is "a matter of the most critical moment to the Nation" and it is "difficult to conceive of a more compelling need than that of this country for an unswervingly fair inquiry based on all the pertinent information."[193] The Supreme Court thus recognized nearly 140 years ago that where the House or Senate is determining a "question of . . . impeachment," there is "no reason to doubt the right to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases."[194]

Like the Supreme Court, members of the earliest Congresses understood that, without "the right to inspect every paper and transaction in any department . . . the power of impeachment could never be exercised with any effect."[195] Previous Presidents have acknowledged their obligation to

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[189] *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

[190] *Id.* at 175.

[191] *Watkins*, 354 U.S. at 187.

[192] 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1501 (2d ed. 1851).

[193] *In re Report & Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives*, 370 F. Supp. 1219, 1230 (D.D.C. 1974).

[194] *Kilbourn*, 103 U.S. at 190. The Court in *Kilbourn* invalidated a contempt order by the House but explained that the "whole aspect of the case would have changed" if it had been an impeachment proceeding. *Id.* at 193.

[195] 4 Annals of Cong. 601 (statement of Rep. William Lyman).

comply with an impeachment investigation, explaining that such an inquiry "penetrate[s] into the most secret recesses of the Executive Departments" and "could command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial, and to testify on oath to all facts within their knowledge."[196] That acknowledgement is a matter of common sense. An impeachment inquiry cannot root out bad actors if those same bad actors control the scope and nature of the inquiry.

President Trump is an aberration among Presidents in refusing any and all cooperation in a House impeachment investigation. Even President Nixon produced numerous documents in response to Congressional subpoenas and instructed "[a]ll members of the White House Staff . . . [to] appear voluntarily when requested by the [House]," to "testify under oath," and to "answer fully all proper questions"[197]—consistent with the near uniform cooperation of prior Executive Branch officials who had been subject to impeachment investigations.[198]

Because President Nixon's production of records in response to the House Judiciary Committee's inquiry was incomplete in important respects, however, the Committee voted to adopt an article of impeachment for his obstruction of the inquiry.[199] As the Committee explained, in refusing to provide materials that the Committee "deemed necessary" to the impeachment investigation, President Nixon had "substitute[ed] his judgment" for that of the House and interposed "the powers of the presidency against the lawful subpoenas of the House of Representatives, thereby assuming to himself functions and judgments necessary to exercise the sole

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[196] Cong. Globe, 29th Cong., 1st Sess. 698 (1846) (statement of President James K. Polk); *see also* H. Rep. No. 116-346, at 139-42.

[197] Remarks by President Nixon (Apr. 17, 1973), *reprinted in Statement of Information: Hearings Before the Comm. on the Judiciary, H. of Representatives: Book IV—Part 2, Events Following the Watergate Break-in* (1974).

[198] H. Rep. No. 116-346, at 142; *see Impeachment of Richard M. Nixon, President of the United States: Report of the Comm. on the Judiciary, H. of Representatives*, H. Rep. No. 93-1305, at 196 (1974).

[199] *See* H. Rep. No. 93-1305, at 10.

power of impeachment vested by the Constitution in the House."[200] The Committee stated that it was not "within the power of the President to conduct an inquiry into his own impeachment, to determine which evidence, and what version or portion of that evidence, is relevant and necessary to such an inquiry. These are matters which, under the Constitution, the House has the sole power to determine."[201] In the face of Congress's investigation and the mounting evidence of his misdeeds, President Nixon resigned before the House had the chance to impeach him for this misconduct.

B. President Trump's Obstruction of the Impeachment Inquiry Violates Fundamental Constitutional Principles

The Senate should convict President Trump of Obstruction of Congress as charged in the Second Article of Impeachment. President Trump unilaterally declared the House's investigation "illegitimate."[202] President Trump's White House Counsel notified the House that "President Trump cannot permit his Administration to participate in this partisan inquiry under these circumstances."[203] President Trump then directed his Administration categorically to withhold documents and testimony from the House.

The facts are undisputed. As charged in the Second Article of Impeachment, President Trump "[d]irect[ed] the White House to defy a lawful subpoena by withholding the production of documents" to the Committees; "[d]irect[ed] other Executive Branch agencies and offices to defy lawful subpoenas and withhold the production of documents and records from the Committees"; and "[d]irected current and former Executive Branch officials not to cooperate with the Committees."[204] In response to President Trump's directives, OMB, the Department of State, Department of Energy, and Department of Defense refused to produce any documents to the

[200] *Id.* at 4.
[201] *Id.* at 194.
[202] *See* Statement of Facts ¶ 177.
[203] *See id.* ¶ 169.
[204] H. Res. 755, at 7; *see* Statement of Facts ¶ 169.

House, even though witness testimony has revealed that additional highly relevant records exist.[205] To date, the House Committees have not received a single document or record from these departments and agencies pursuant to subpoenas, which remain in effect.

President Trump personally demanded that his top aides refuse to testify in response to subpoenas, and nine Administration officials followed his directive and continue to defy subpoenas for testimony.[206] For example, when the Intelligence Committee issued a subpoena for Mick Mulvaney's testimony, he produced a November 8 letter from the White House stating: "the President directs Mr. Mulvaney not to appear at the Committee's scheduled deposition on November 8, 2019."[207] When President Trump was unable to silence witnesses, he resorted to tactics to penalize and intimidate them. These efforts include President Trump's sustained attacks on the anonymous whistleblower, and his public statements designed to discourage witnesses from coming forward and to embarrass those who did testify.[208]

Refusing to comply with a Congressional impeachment investigation is not a constitutionally valid decision for a President to make. President Trump's unprecedented "complete defiance of an impeachment inquiry . . . served to cover up the President's own repeated misconduct and to seize and control the power of impeachment."[209] President Trump's directive rejects one of the key features distinguishing our Republic from a monarchy: that "[t]he President of the United States [is] liable to be impeached, tried, and, upon conviction . . . removed."[210] Allowing President Trump to avoid conviction on the Second Article would set a dangerous precedent for future Presidents to

[205] Statement of Facts ¶¶ 179-83.
[206] *Id.* ¶¶ 186-87.
[207] *Id.* ¶ 186.
[208] *Id.* ¶ 190 & nn.309-10.
[209] H. Res. 755, at 8.
[210] *The Federalist No. 69* (Alexander Hamilton).

hide their misconduct from Congressional scrutiny during an impeachment inquiry without fear of accountability.

Notwithstanding President Trump's obstruction, the House obtained compelling evidence that he abused his power. The failure of President Trump's obstruction and attempted cover-up, however, does not excuse his misconduct. There can be no doubt that the withheld documents and testimony would provide Congress with highly pertinent information about the President's corrupt scheme. Indeed, witnesses have testified about specific withheld records concerning President Trump's July 25 call with President Zelensky and related materials,[211] and public reports have referred to additional responsive documents, including "hundreds of documents that reveal extensive efforts to generate an after-the-fact justification for" withholding the security aid.[212]

C. President Trump's Excuses for His Obstruction Are Meritless

President Trump has offered various unpersuasive excuses for his blanket refusal to comply with the House's impeachment inquiry. President Trump's refusal to provide information is not a principled assertion of executive privilege, but rather is a transparent attempt to cover-up wrongdoing and amass power that the Constitution does not give him, including the power to decide whether and when Congress can hold him accountable.

First, while Congressional investigators often accommodate legitimate Executive Branch interests, the President's blanket directive to all Executive Branch agencies and witnesses to defy Congressional subpoenas was not based on any actual assertion of executive privilege or

[211] *See* Statement of Facts ¶ 184 & nn.296-97.

[212] *Id.* ¶ 45. As noted above, the testimony of Messrs. Mulvaney, Blair, and Duffey would shed additional light on the White House's efforts to create an after-the-fact justification for the President's withholding of security assistance. Ambassador Bolton's testimony would likewise be illuminating in this regard given public reporting of his repeated, yet unsuccessful, efforts to convince the President to lift the hold.

identification of particular sensitive information.[213] The White House Counsel's letter alluded to "long-established Executive Branch confidentiality interests and privileges" that the State Department could theoretically invoke,[214] and the Justice Department's Office of Legal Counsel preemptively dismissed certain subpoenas as "invalid" on the ground that responsive information was "*potentially* protected by executive privilege."[215] But neither document conveyed an actual assertion of executive privilege,[216] which would require, at a minimum, identification by the President of particular communications or documents containing protected material.[217] The White House cannot justify a blanket refusal to respond to Congressional subpoenas based on an executive or other privilege it never in fact invoked.

Regardless, executive privilege is inapplicable here, both because it may not be used to conceal wrongdoing—particularly in an impeachment inquiry—and because the President and his agents have already diminished any confidentiality interests by speaking at length about these events in every forum except Congress.[218] President Trump has been impeached for Obstruction of Congress not based upon discrete invocations of privilege or immunity, but for his directive that the Executive Branch categorically stonewall the House impeachment inquiry by refusing to comply with all subpoenas.[219]

To the extent President Trump claims that he has concealed evidence to protect the Office of the President, the Framers considered and rejected that defense. Several delegates at the Constitutional Convention warned that the impeachment power would be "destructive of [the

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[213] *See id.* ¶ 172.
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *See, e.g.*, *Landry v. Fed. Deposit Ins. Corp.*, 204 F.3d 1125, 1135 (D.C. Cir. 2000).
[218] *See, e.g.*, *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997); Statement of Facts ¶ 173 & n.280.
[219] *See* H. Res. 755, at 7.

executive's] independence."[220] But the Framers adopted an impeachment power anyway because, as Alexander Hamilton observed, "the powers relating to impeachments" are "an essential check in the hands of [Congress] upon the encroachments of the executive."[221] The impeachment power does not exist to protect the Presidency; it exists to protect the nation from a corrupt and dangerous President like Donald Trump.

Second, President Trump has no basis for objecting to how the House conducted its impeachment proceedings. The Constitution vests the House with the "sole Power of Impeachment"[222] and the power to "determine the Rules of its Proceedings."[223]

The rights that President Trump has demanded have never been recognized and have not been afforded in any prior Presidential impeachment.[224] President Trump has been afforded protections equal to or greater than those afforded Presidents Nixon and Clinton during their impeachment proceedings in the House.[225] Any claim that President Trump was entitled to due process rights modeled on a criminal trial during the entirety of the House impeachment inquiry ignores both law and history. A House impeachment inquiry cannot be compared to a criminal trial because the Senate, not the House, possesses the "sole Power to try Impeachments."[226] The Constitution does not entitle President Trump to a separate, full trial first in the House.

Even indulging the analogy to a criminal trial, no person appearing before a prosecutor or grand jury deciding whether to bring charges would have the rights President Trump has claimed.

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[220] 2 Farrand at 67.

[221] *The Federalist No. 66* (Alexander Hamilton).

[222] U.S. Const., Art. I, § 2, cl. 5.

[223] U.S. Const., Art. I, § 5, cl. 2.

[224] *See, e.g.*, Statement of Facts ¶ 163; *see also* U.S. Const., Art. I, § 2, cl. 5.

[225] Statement of Facts ¶ 163; 165 Cong. Rec. E1357 (2019) (Impeachment Inquiry Procedures in the Committee on the Judiciary Pursuant to H. Res. 660); *Investigatory Powers of the Comm. on the Judiciary with Respect to its Impeachment Inquiry*, H. Rep. No. 105-795 (1998); H. Rep. No. 93-1305, at 8.

[226] U.S. Const., Art. I, § 3, cl. 6.

As the House Judiciary Committee Chairman observed during Watergate, "it is not a right but a privilege or a courtesy" for the President to participate through counsel in House impeachment proceedings.[227] President Trump's demands are just another effort to obstruct the House in the exercise of its constitutional duty.

Third, President Trump's assertion that his impeachment for obstruction of Congress is invalid because the Committees did not first seek judicial enforcement of their subpoenas ignores again the Constitutional dictate that the House has sole authority to determine how to proceed with an impeachment. It also ignores President Trump's own arguments to the federal courts.

President Trump is telling one story to Congress while spinning a different tale in the courts. He is saying to Congress that the Committees should have sued the Executive Branch in court to enforce their subpoenas. But he has argued to that court that Congressional Committees *cannot sue* the Executive Branch to enforce their subpoenas.[228] President Trump cannot tell Congress that it must pursue him in court, while simultaneously telling the courts that they are powerless to enforce Congressional subpoenas.

President Trump's approach to the Judicial Branch thus mirrors his obstruction of the Legislative Branch—in his view, neither can engage in any review of his conduct. This position conveys the President's dangerously misguided belief that no other branch of government may

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[227] *Impeachment Inquiry: Hearings Before the H. Comm. on the Judiciary, Book I*, 93d Cong. 497 (1974) (statement of Chairman Peter W. Rodino, Jr.).

[228] *See* Statement of Facts ¶ 192; Def.'s Mot. to Dismiss, or in the Alternative, for Summ. J. at 20, *Kupperman v. U.S. House of Representatives*, No. 19-3224 (D.D.C. Nov. 14, 2019), ECF No. 40; Defs.' and Def.-Intervenors' Mot. to Dismiss at 46-47, *Comm. on Ways & Means v. U.S. Dep't of the Treasury*, No. 19-1974 (D.D.C. Sept. 6, 2019), ECF No. 44; *see also* Brief for Def.-Appellant at 2, 32-33, *Comm. on the Judiciary v. McGahn*, No. 19-5331 (D.C. Cir. Dec. 9, 2019).

check his power or hold him accountable for abusing it.[229] That belief is fundamentally incompatible with our form of government.

Months or years of litigation over each of the House's subpoenas is in any event no answer in this time-sensitive inquiry. The House's subpoena to former White House Counsel Don McGahn was issued in April 2019, but it is still winding its way through the courts over President Trump's strong opposition, even on an expedited schedule.[230] Litigating President Trump's direction that each subpoena be denied would conflict with the House's urgent duty to act on the compelling evidence of impeachable misconduct that it has uncovered. Further delay could also compromise the integrity of the 2020 election.

* * *

When the Framers entrusted the House with the sole power of impeachment, they obviously meant to equip the House with the necessary tools to discover abuses of power by the President. Without that authority, the Impeachment Clause would fail as an effective safeguard against tyranny. A system in which the President cannot be charged with a crime, as the Department of Justice believes, and in which he can nullify the impeachment power through blanket obstruction, as President Trump has done here, is a system in which the President is above the law. The Senate should convict President Trump for his categorical obstruction of the House's impeachment inquiry and ensure that this President, and any future President, cannot commit impeachable offenses and then avoid accountability by covering them up.

[229] *See also* Statement of Facts ¶ 164 ("I have an Article II, where I have the right to do whatever I want as president.").

[230] *See id.* ¶ 192 & n.316.

III. THE SENATE SHOULD IMMEDIATELY REMOVE PRESIDENT TRUMP FROM OFFICE TO PREVENT FURTHER ABUSES

President Trump has demonstrated his continued willingness to corrupt free and fair elections, betray our national security, and subvert the constitutional separation of powers—all for personal gain. President Trump's ongoing pattern of misconduct demonstrates that he is an immediate threat to the Nation and the rule of law. It is imperative that the Senate convict and remove him from office now, and permanently bar him from holding federal office.

A. President Trump's Repeated Abuse of Power Presents an Ongoing Threat to Our Elections

President Trump's solicitation of Ukrainian interference in the 2020 election is not an isolated incident. It is part of his ongoing and deeply troubling course of misconduct that, as the First Article of Impeachment states, is "consistent with President Trump's previous invitations of foreign interference in United States elections."[231]

These previous efforts include inviting Russian interference in the 2016 Presidential election.[232] As Special Counsel Mueller concluded, the "Russian government interfered in the 2016 presidential election in sweeping and systematic fashion."[233] Throughout the 2016 election cycle, the Trump Campaign maintained significant contacts with agents of the Russian government who were offering damaging information concerning then-candidate Trump's political opponent, and Mr. Trump repeatedly praised—and even publicly requested—the release of politically charged Russian-hacked emails.[234] The Trump Campaign welcomed Russia's election interference because it "expected it would benefit electorally from information stolen and released through Russian efforts."[235]

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[231] H. Res. 755, at 5.
[232] Statement of Facts ¶¶ 191-93.
[233] *Id.* ¶ 13.
[234] *Id.* ¶¶ 152-56.
[235] *Id.* ¶ 152.

President Trump's recent actions confirm that public censure is insufficient to deter him from continuing to facilitate foreign interference in U.S. elections. In June 2019, President Trump declared that he sees "nothing wrong with listening" to a foreign power that offers information detrimental to a political adversary. In the President's words: "I think I'd take it."[236] Asked whether such information should be reported to law enforcement, President Trump retorted: "Give me a break, life doesn't work that way."[237]

Only one day after Special Counsel Mueller testified to Congress that the Trump Campaign welcomed and sought to capitalize on Russia's efforts to damage the President's political rival in 2016, President Trump spoke to President Zelensky, pressuing Ukraine to announce investigations to damage President Trump's political opponent in the 2020 election and undermine Special Counsel Mueller's findings.[238] President Trump still embraces that call as both "routine" and "perfect."[239] President Trump's conduct would have horrified the Framers of our republic.

In its findings, the Intelligence Committee emphasized the "proximate threat of further presidential attempts to solicit foreign interference in our next election."[240] That threat has not abated. In a sign that President Trump's corrupt efforts to encourage interference in the 2020 election persist, he reiterated his desire for Ukraine to investigate his political opponents even after the scheme was discovered and the impeachment inquiry was announced. When asked in October 2019 what he hoped President Zelensky would do about "the Bidens," President Trump answered

[236] *Id.* ¶ 156.
[237] *Id.*
[238] *Id.* ¶¶ 76, 157.
[239] *Id.* ¶ 77 n.132.
[240] H. Rep. No. 116-335, at XI.

that it was "very simple" and he hoped Ukraine would "start a major investigation."[241] Unsolicited, he added that "China should [likewise] start an investigation into the Bidens."[242]

President Trump has also continued to engage Mr. Giuliani to pursue the sham investigations on his behalf.[243] One day after President Trump was impeached, Mr. Giuliani claimed that he gathered derogatory evidence against Vice President Biden during a fact-finding trip to Ukraine—a trip where he met with a current Ukrainian official who attended a KGB school in Moscow and has led calls in Ukraine to investigate Burisma and the Bidens.[244] During the trip, Mr. Giuliani tweeted: "The conversation about corruption in Ukraine was based on compelling evidence of criminal conduct by then VP Biden, in 2016, that has not been resolved and until it is will be a major obstacle to the US assisting Ukraine with its anti-corruption reforms."[245] Not only was Mr. Giuliani perpetuating the false allegations against the former Vice President, but he was reiterating the threat that President Trump had used to pressure President Zelensky to announce the investigations: that U.S. assistance to Ukraine would be withheld until Ukraine pursued the sham investigations. Mr. Giuliani has stated that he and the President continue to be "on the same page."[246] Ukraine, as well, understands that Mr. Giuliani represents President Trump's interests.[247]

President Trump's unrepentant embrace of foreign election interference illustrates the threat posed by his continued occupancy of the Office of the President. It also refutes the assertion that the consequences of his misconduct should be decided by the voters in the 2020 election. The aim of President Trump's Ukraine scheme was to corrupt the integrity of the 2020 election by enlisting a foreign power to give him an unfair advantage—in short, to cheat. That threat persists today.

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[241] Statement of Facts ¶ 142.
[242] *Id.*
[243] *See id.* ¶¶ 144-49.
[244] *Id.*
[245] *Id.* ¶ 146.
[246] *Id.* ¶ 149.
[247] *Id.* ¶¶ 19, 69, 89.

B. President Trump's Obstruction of Congress Threatens Our Constitutional Order

President Trump's obstruction of the House's impeachment inquiry intended to hold him accountable for his misconduct presents a serious danger to our constitutional checks and balances.

President Trump has made clear that he refuses to accept Congress's express—and exclusive—constitutional role in conducting impeachments.[248] He has thereby subverted the Constitution that he pledged to uphold when he was inaugurated on the steps of the Capitol. By his words and deeds, President Trump has obstructed the House's impeachment inquiry at every turn: He has dismissed impeachment as "illegal, invalid, and unconstitutional";[249] directed the Executive Branch not to comply with House subpoenas for documents and testimony;[250] and intimidated and threatened the anonymous intelligence community whistleblower as well as the patriotic public servants who honored their subpoenas and testified before the House.[251]

President Trump's obstruction is part of an ominous pattern of efforts "to undermine United States Government investigations into foreign interference in United States elections."[252] Rather than assist Special Counsel Mueller's investigation into Russian interference in the 2016 election and his own campaign's exploitation of that foreign assistance, President Trump repeatedly used the powers of his office to impede it. Among other actions, President Trump directed the White House Counsel to fire the Special Counsel and then create a false record of the firing, tampered with witnesses in the Special Counsel's investigation, and repeatedly and publicly attacked the legitimacy of the investigation.[253] President Trump has instructed the former White House

[248] *See, e.g.*, *id.* ¶¶ 169-71; U.S. Const., Art. I, § 2, cl. 5; U.S. Const., Art. I, § 3, cl. 6.
[249] Statement of Facts ¶ 177.
[250] *Id.* ¶ 169.
[251] *Id.* ¶ 177.
[252] H. Res. 755, at 7-8.
[253] *See* Statement of Facts ¶ 193.

Counsel to defy a House Committee's subpoena for testimony concerning these matters and the Department of Justice has argued that the courts cannot even hear the Committee's action to enforce its subpoena.[254]

President Trump's current obstruction of Congress is, therefore, not the first time he has committed misconduct concerning a federal investigation into election interference and then sought to hide it. Allowing this pattern to continue without repercussion would send the clear message that President Trump is correct in his view that *no* governmental body can hold him accountable for wrongdoing. That view is erroneous and exceptionally dangerous.

C. The Senate Should Convict and Remove President Trump to Protect Our System of Government and National Security Interests

The Senate should convict and remove President Trump to avoid serious and long-term damage to our democratic values and the Nation's security.

If the Senate permits President Trump to remain in office, he and future leaders would be emboldened to welcome, and even enlist, foreign interference in elections for years to come. When the American people's faith in their electoral process is shaken and its results called into question, the essence of democratic self-government is called into doubt.

Failure to remove President Trump would signal that a President's personal interests may take precedence over those of the Nation, alarming our allies and emboldening our adversaries. Our leadership depends on the power of our example and the consistency of our purpose," but because of President Trump's actions, "[b]oth have now been opened to question."[255]

Ratifying President Trump's behavior would likewise erode longstanding U.S. anti-corruption policy, which encourages countries to refrain from using the criminal justice system to

[254] *Id.* ¶ 192 & n.316.
[255] Yovanovitch Hearing Tr. at 19.

investigate political opponents. As many witnesses explained, urging Ukraine to engage in "selective politically associated investigations or prosecutions" undermines the power of America's example and our longstanding efforts to promote the rule of law abroad.[256]

An acquittal would also provide license to President Trump and his successors to use taxpayer dollars for personal political ends. Foreign aid is not the only vulnerable source of funding; Presidents could also hold hostage federal funds earmarked for States—such as money for natural disasters, highways, and healthcare—unless and until State officials perform personal political favors. Any Congressional appropriation would be an opportunity for a President to solicit a favor for his personal political purposes—or for others to seek to curry favor with him. Such an outcome would be entirely incompatible with our constitutional system of self-government.

* * *

President Trump has betrayed the American people and the ideals on which the Nation was founded. Unless he is removed from office, he will continue to endanger our national security, jeopardize the integrity of our elections, and undermine our core constitutional principles.

Respectfully submitted,

Adam B. Schiff
Jerrold Nadler
Zoe Lofgren
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January 18, 2020

U.S. House of Representatives Managers[*]

[256] Statement of Facts ¶ 122.

[*] The House Managers wish to acknowledge the assistance of the following individuals in preparing this trial memorandum: Douglas N. Letter, Megan Barbero, Josephine Morse, Adam A. Grogg, William E. Havemann, and Jonathan B. Schwartz of the House Office of General Counsel; Daniel Noble, Daniel S. Goldman, and Maher Bitar of the House Permanent Select Committee on Intelligence; Norman L. Eisen, Barry H. Berke, Joshua Matz, and Sophia Brill of the House Committee on the Judiciary; the investigative staff of the House Committee on Oversight and Reform; and David A. O'Neil, Anna A. Moody, and Laura E. O'Neill.

IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re

IMPEACHMENT OF
PRESIDENT DONALD J. TRUMP

STATEMENT OF MATERIAL FACTS

ATTACHMENT TO THE TRIAL MEMORANDUM OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN THE IMPEACHMENT TRIAL OF PRESIDENT DONALD J. TRUMP

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INTRODUCTION

The U.S. House of Representatives has adopted Articles of Impeachment charging President Donald J. Trump with abuse of office and obstruction of Congress. The House's Trial Memorandum explains why the Senate should convict and remove President Trump from office, and permanently bar him from government service. The Memorandum relies on this Statement of Material Facts, which summarizes key evidence relating to the President's misconduct.

As further described below, and as detailed in House Committee reports,[1] President Trump used the powers of his office and U.S. taxpayers' money to pressure a foreign country, Ukraine, to interfere in the 2020 U.S. Presidential election on his behalf. President Trump's goals—which became known to multiple U.S. officials who testified before the House—were simple and starkly political: he wanted Ukraine's new President to announce investigations that would assist his 2020 reelection campaign and tarnish a political opponent, former Vice President Joseph Biden, Jr. As leverage, President Trump illegally withheld from Ukraine nearly $400 million in vital military and other security assistance that had been appropriated by Congress, and an official White House meeting that President Trump had promised Volodymyr Zelensky, the newly elected President of Ukraine. President Trump did this despite U.S. national security officials' unanimous opposition to withholding the aid from Ukraine, placing his own personal and political interests above the national security interests of the United States and undermining the integrity of our democracy.

When this scheme became known and Committees of the House launched an investigation, the President, for the first time in American history, ordered the categorical obstruction of an

[1] *See Report of the H. Permanent Select Comm. on Intelligence on the Trump-Ukraine Impeachment Inquiry, together with Minority Views*, H. Rep. No. 116-335 (2019); *Impeachment of Donald J. Trump, President of the United States: Report of the Comm. on the Judiciary of the H. of Representatives, together with Dissenting Views, to Accompany H. Res. 755*, H. Rep. No. 116-346 (2019).

impeachment inquiry. President Trump directed that no witnesses should testify and no documents should be produced to the House, a co-equal branch of government endowed by the Constitution with the "sole Power of Impeachment."[2] President Trump's conduct—both in soliciting a foreign country's interference in a U.S. election and then obstructing the ensuing investigation into that interference—was consistent with his prior conduct during and after the 2016 election.

STATEMENT OF MATERIAL FACTS

I. PRESIDENT TRUMP'S ABUSE OF POWER

A. The President's Scheme to Solicit Foreign Interference in the 2020 Election from the New Ukrainian Government Began in Spring 2019

1. On April 21, 2019, Volodymyr Zelensky, a political neophyte, won a landslide victory in Ukraine's Presidential election.[3] Zelensky campaigned on an anti-corruption platform, and his victory reaffirmed the Ukrainian people's strong desire for reform.[4]

2. When President Trump called to congratulate Zelensky later that day, President Trump did not raise any concerns about corruption in Ukraine, although his staff had prepared written materials for him recommending that he do so, and the White House call readout incorrectly indicated he did.[5]

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[2] U.S. Const., Art. I, § 2, cl. 5.

[3] Transcript, Deposition of Lt. Colonel Alexander S. Vindman Before the H. Permanent Select Comm. on Intelligence 16 (Oct. 29, 2019) (Vindman Dep. Tr.); Anton Troianovski, *Comedian Volodymyr Zelensky Unseats Incumbent in Ukraine's Presidential Election, Exit Polls Show*, Wash. Post (Apr. 21, 2019), https://perma.cc/J8KE-2UJU.

[4] *Id.*

[5] *See* White House, *Memorandum of Telephone Conversation* (Apr. 21, 2019) (Apr. 21 Memorandum), https://perma.cc/EY4N-B8VS; Deb Riechmann et al., *Conflicting White House Accounts of 1st Trump-Zelenskiy Call*, Associated Press (Nov. 15, 2019), https://perma.cc/A6U9-89ZG.

3. During the call, President Trump promised President-elect Zelensky that a high-level U.S. delegation would attend his inauguration and told him, "When you're settled in and ready, I'd like to invite you to the White House."[6]

4. Both events would have demonstrated strong support by the United States as Ukraine fought a war—and negotiated for peace—with Russia. "Russia was watching closely to gauge the level of American support for the Ukrainian Government."[7] A White House visit also would have bolstered Zelensky's standing at home as he pursued his anti-corruption agenda.[8]

5. Following the April 21 call, President Trump asked Vice President Mike Pence to lead the American delegation to President Zelensky's inauguration. During his own call with President-elect Zelensky on April 23, Vice President Pence confirmed that he would attend the inauguration "if the dates worked out."[9]

6. On April 23, the media reported that former Vice President Biden was going to enter the 2020 race for the Democratic nomination for President of the United States.[10]

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[6] Apr. 21 Memorandum at 2, https://perma.cc/EY4N-B8VS.

[7] Transcript, *Impeachment Inquiry: Ambassador William B. Taylor and George Kent: Hearing Before the H. Permanent Select Comm. on Intelligence*, 116th Cong. 40 (Nov. 13, 2019) (Taylor-Kent Hearing Tr.).

[8] *See, e.g.*, Transcript, Interview of Kurt Volker Before the H. Permanent Select Comm. on Intelligence 58-59 (Oct. 3, 2019) (Volker Interview Tr.); Transcript, Interview of George Kent Before the H. Permanent Select Comm. on Intelligence 202 (Oct. 15, 2019) (Kent Dep. Tr.); Transcript, Deposition of Fiona Hill Before the H. Permanent Select Comm. on Intelligence 64-65 (Oct. 14, 2019) (Hill Dep. Tr.); *see also* Transcript, Deposition of David A. Holmes Before the H. Permanent Select Comm. on Intelligence 18 (Nov. 15, 2019) (Holmes Dep. Tr.) ("[A] White House visit was critical to President Zelensky," because "[h]e needed to demonstrate U.S. support at the highest levels, both to advance his ambitious anti-corruption agenda at home and to encourage Russian President Putin to take seriously President Zelensky's peace efforts.").

[9] Transcript, Deposition of Jennifer Williams Before the H. Permanent Select Comm. on Intelligence 36-37 (Nov. 7, 2019) (Williams Dep. Tr.).

[10] Matt Viser, *Joe Biden to Enter 2020 Presidential Race with Thursday Video Announcement*, Wash. Post (Apr. 23, 2019), https://perma.cc/M2B9-6J48.

7. The next day, April 24, the State Department executed President Trump's order to recall the U.S. ambassador to Ukraine, Marie "Masha" Yovanovitch, who was a well-regarded career diplomat and champion for anti-corruption reforms in Ukraine.[11]

8. The removal of Ambassador Yovanovitch was the culmination of a months-long smear campaign waged by the President's personal lawyer, Rudy Giuliani, and other allies of the President.[12] The President also helped amplify the smear campaign.[13]

9. Upon her return to the United States, Ambassador Yovanovitch was informed by State Department officials that there was no substantive reason or cause for her removal, but that President Trump had simply "lost confidence" in her.[14]

10. Mr. Giuliani later disclosed the true motive for Ambassador Yovanovitch's removal: Mr. Giuliani "believed that [he] needed Yovanovitch out of the way" because "[s]he was going to make the investigations difficult for everybody."[15]

11. Mr. Giuliani was referring to the two politically motivated investigations that President Trump solicited from Ukraine in order to assist his 2020 reelection campaign: one into former Vice President Biden and a Ukrainian gas company, Burisma Holdings, on whose board

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[11] Transcript, *Impeachment Inquiry: Ambassador Marie "Masha" Yovanovitch: Hearing Before the H. Permanent Select Comm. on Intelligence*, 116th Cong. 21-22 (Nov. 15, 2019) (Yovanovitch Hearing Tr.); Transcript, *Impeachment Inquiry: Fiona Hill and David Holmes: Hearing Before the H. Permanent Select Comm. on Intelligence*, 116th Cong. 18-19 (Nov. 21, 2019) (Hill-Holmes Hearing Tr.); Holmes Dep. Tr. at 13-14, 142.

[12] *See, e.g.*, Taylor-Kent Hearing Tr. at 25; Yovanovitch Hearing Tr. at 21-22; Hill-Holmes Hearing Tr. at 19-21.

[13] *See, e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (Mar. 20, 2019, 7:40 PM), https://perma.cc/D4UT-5M6F (referencing Sean Hannity's interview with John Solomon regarding his opinion piece in *The Hill* titled *As Russia Collusion Fades, Ukrainian Plot to Help Clinton Emerges* (Mar. 20, 2019), https://perma.cc/2M35-LUQE).

[14] Yovanovitch Hearing Tr. at 21-22, 34-35.

[15] Adam Entous, *The Ukrainian Prosecutor Behind Trump's Impeachment*, New Yorker (Dec. 16, 2019), https://perma.cc/5XMR-BS8L (quoting Mr. Giuliani).

Biden's son sat;[16] the other into a discredited conspiracy theory that Ukraine, not Russia, had interfered in the 2016 U.S. election to help Hillary Clinton's campaign. One element of the latter conspiracy theory was that CrowdStrike—a NASDAQ-listed cybersecurity firm based in Sunnyvale, California, that the President erroneously believed was owned by a Ukrainian oligarch—had colluded with the Democratic National Committee (DNC) to frame Russia and help the election campaign of Hillary Clinton.[17]

12. There was no factual basis for either investigation. As to the first, witnesses unanimously testified that there was no credible evidence to support the allegations that, in late 2015, Vice President Biden corruptly encouraged Ukraine to remove then-Prosecutor General Viktor Shokin because he was investigating Burisma.[18] Rather, Vice President Biden was carrying out official U.S. policy—with bipartisan support[19]—and promoting anti-corruption reforms in Ukraine because Shokin was viewed by the United States, its European partners, and the International Monetary Fund to be ineffectual at prosecuting corruption and was himself corrupt.[20]

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[16] *See* White House, *Memorandum of Telephone Conversation* 4 (July 25, 2019) (July 25 Memorandum), https://perma.cc/8JRD-6K9V; Kyle Cheney, *"Of Course I Did": Giuliani Acknowledges Asking Ukraine to Investigate Biden*, Politico (Sept. 19, 2019), https://perma.cc/J7PY-N3SG.

[17] July 25 Memorandum at 3, https://perma.cc/8JRD-6K9V; *see also Remarks by President Trump and President Putin of the Russian Federation in Joint Press Conference*, White House (July 16, 2018), https://perma.cc/6M5R-XW7F ("[A]ll I can do is ask the question. My people came to me, Dan Coates came to me and some others—they said they think it's Russia. I have President Putin; he just said it's not Russia. I will say this: I don't see any reason why it would be, but I really do want to see the server."); *Transcript of AP Interview with Trump*, Associated Press (Apr. 23, 2017), https://perma.cc/2EFT-84N8 ("TRUMP: . . . Why wouldn't (former Hillary Clinton campaign chairman John) Podesta and Hillary Clinton allow the FBI to see the server? They brought in another company that I hear is Ukrainian-based. AP: CrowdStrike? TRUMP: That's what I heard. I heard it's owned by a very rich Ukrainian, that's what I heard.").

[18] *See, e.g.*, Volker Interview Tr. at 203.

[19] *See, e.g.*, Press Release, Senator Rob Portman, Portman, Durbin, Shaheen, and Senate Ukraine Caucus Reaffirm Commitment to Help Ukraine Take on Corruption (Feb. 12, 2016), https://perma.cc/9WD2-CZ29 (quoting bipartisan letter urging then-President Poroshenko of Ukraine "to press ahead with urgent reforms to the Prosecutor General's office and judiciary").

[20] *See, e.g.*, Kent Dep. Tr. at 45, 91-94 (describing "a broad-based consensus" among the United States, European allies, and international financial institutions that Mr. Shokin was "a typical

In fact, witnesses unanimously testified that the removal of Shokin made it *more likely* that Ukraine would investigate corruption, including Burisma and its owner, not less likely.[21] The Ukrainian Parliament removed Shokin in March 2016.[22]

13. As to the second investigation, the U.S. Intelligence Community determined that Russia—not Ukraine—interfered in the 2016 election.[23] The Senate Select Committee on Intelligence reached the same conclusion following its own lengthy bipartisan investigation.[24] Special Counsel Robert Mueller, III, likewise concluded that the "Russian government interfered in the 2016 presidential election in sweeping and systematic fashion."[25] And FBI Director Christopher

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Ukraine prosecutor who lived a lifestyle far in excess of his government salary, who never prosecuted anybody known for having committed a crime" and who "covered up crimes that were known to have been committed."); Daryna Krasnolutska et al., *Ukraine Prosecutor Says No Evidence of Wrongdoing by Bidens*, Bloomberg (May 16, 2019), https://perma.cc/YYX8-U33C (quoting Yuriy Lutsenko, Ukraine's then-Prosecutor General: "Hunter Biden did not violate any Ukrainian laws—at least as of now, we do not see any wrongdoing. A company can pay however much it wants to its board . . . . Biden was definitely not involved . . . . We do not have any grounds to think that there was any wrongdoing starting from 2014 [when Hunter Biden joined the board of Burisma].").

[21] *See* Kent Dep. Tr. at 45, 93-94; Volker Interview Tr. at 36-37, 330, 355.

[22] *See* Kent Dep. Tr. at 101-02.

[23] Office of the Dir. of Nat'l Intelligence, ICA 2017-01D, *Assessing Russian Activities and Intentions in Recent U.S. Elections* (Jan. 6, 2017), https://perma.cc/M4A3-DWML; *see, e.g.*, *id.* at ii ("We assess Russian President Vladimir Putin ordered an influence campaign in 2016 aimed at the US presidential election. Russia's goals were to undermine public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency. We further assess Putin and the Russian Government developed a clear preference for President-elect Trump. We have high confidence in these judgements.").

[24] Senate Select Comm. on Intelligence, *Russian Active Measures Campaigns and Interference in the 2016 U.S. Election, Vol. II* (May 8, 2018), https://perma.cc/96EC-22RU; *see, e.g.*, *id.* at 4-5 ("The Committee found that the [Russian-based Internet Research Agency (IRA)] sought to influence the 2016 U.S. presidential election by harming Hillary Clinton's chances of success and supporting Donald Trump at the direction of the Kremlin. . . . The Committee found that the Russian government tasked and supported the IRA's interference in the 2016 U.S. election.").

[25] Robert S. Mueller III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election*, Vol. I at 1 (2019) (Mueller Report), https://perma.cc/DN3N-9UW8.

Wray, a Trump appointee, recently confirmed that law enforcement "ha[s] no information that indicates that Ukraine interfered with the 2016 presidential election."[26]

14. As Dr. Fiona Hill—who served until July 2019 as the Senior Director of European and Russian Affairs at the National Security Council (NSC) under President Trump until July 2019—testified, the theory of Ukrainian interference in the 2016 election is a "fictional narrative that is being perpetrated and propagated by the Russian security services themselves" to deflect from Russia's own culpability and to drive a wedge between the United States and Ukraine.[27] In fact, shortly after the 2016 U.S. election, this conspiracy theory was promoted by none other than President Vladimir Putin himself.[28] On May 3, 2019, shortly after President Zelensky's election, President Trump and President Putin spoke by telephone, including about the so-called "'Russian Hoax."[29]

15. President Trump's senior advisors had attempted to dissuade the President from promoting this conspiracy theory, to no avail. Dr. Hill testified that President Trump's former Homeland Security Advisor Tom Bossert and former National Security Advisor H.R. McMaster "spent a lot of time trying to refute this [theory] in the first year of the administration."[30] Bossert

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[26] Luke Barr & Alexander Mallin, *FBI Director Pushes Back on Debunked Conspiracy Theory About 2016 Election Interference*, ABC News (Dec. 9, 2019), https://perma.cc/8JKC-6RB8 (quoting Mr. Wray).

[27] Hill-Holmes Hearing Tr. at 40-41, 56-57.

[28] Press Statement, President of Russ., Joint News Conference with Hungarian Prime Minister Viktor Orban (Feb. 2, 2017), https://perma.cc/5Z2R-ZECB ("[A]s we all know, during the presidential campaign in the United States, the Ukrainian government adopted a unilateral position in favour of one candidate. More than that, certain oligarchs, certainly with the approval of the political leadership, funded this candidate, or female candidate, to be more precise.").

[29] *See* Kent Dep. Tr. at 338; @realDonaldTrump (May 3, 2019, 10:06 AM) https://perma.cc/7LS9-P35U.

[30] Hill Dep. Tr. at 234; *see also id.* at 235.

later said the false narrative about Ukrainian interference in the 2016 election was "not only a conspiracy theory, it is completely debunked."[31]

B. The President Enlisted His Personal Attorney and U.S. Officials to Help Execute the Scheme for His Personal Benefit

16. Shortly after his April 21 call with President Zelensky, President Trump began to publicly press for the two investigations he wanted Ukraine to pursue. On April 25—the day that former Vice President Biden announced his candidacy for the Democratic nomination for President—President Trump called into Sean Hannity's prime time *Fox News* show. Referencing alleged Ukrainian interference in the 2016 election, President Trump said, "It sounds like big stuff," and suggested that the Attorney General might investigate.[32]

17. On May 6, in a separate *Fox News* interview, President Trump claimed Vice President Biden's advocacy for Mr. Shokin's dismissal in 2016 was "a very serious problem" and "a major scandal, major problem."[33]

18. On May 9, the *New York Times* reported that Mr. Giuliani was planning to travel to Ukraine to urge President Zelensky to pursue the investigations.[34] Mr. Giuliani acknowledged that "[s]omebody could say it's improper" to pressure Ukraine to open investigations that would benefit President Trump, but he argued:

> [T]his isn't foreign policy—I'm asking them to do an investigation that they're doing already, and that other people are telling them to stop. And I'm going to give them reasons why they shouldn't stop it because

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[31] Chris Francescani, *President Trump's Former National Security Advisor "Deeply Disturbed" by Ukraine Scandal: "Whole World Is Watching,"* ABC News (Sept. 29, 2019), https://perma.cc/C76K-7SMA (quoting Mr. Bossert).

[32] *Full Video: Sean Hannity Interviews Trump on Biden, Russia Probe, FISA Abuse, Comey*, Real Clear Politics (Apr. 26, 2019), https://perma.cc/3CLR-9MVA.

[33] *Transcript: Fox News Interview with President Trump*, Fox News (May 6, 2019), https://perma.cc/NST6-X7WS.

[34] Kenneth P. Vogel, *Rudy Giuliani Plans Ukraine Trip to Push for Inquiries That Could Help Trump*, N.Y. Times (May 9, 2019) (*Giuliani Plans Ukraine Trip*), https://perma.cc/SC6J-4PL9.

> that information will be very, very helpful to my client, and may turn out to be helpful to my government.[35]

Ukraine was not, in fact, "already" conducting these investigations. As described below, the Trump Administration repeatedly tried but failed to get Ukrainian officials to instigate these investigations. According to Mr. Giuliani, the President supported his actions, stating that President Trump "basically knows what I'm doing, sure, as his lawyer."[36]

19. In a letter dated May 10, 2019, and addressed to President-elect Zelensky, Mr. Giuliani wrote that he "represent[ed] him [President Trump] as a private citizen, not as President of the United States." In his capacity as "personal counsel to President Trump, and with his knowledge and consent," Mr. Giuliani requested a meeting with President Zelensky the following week to discuss a "specific request."[37]

20. On the evening of Friday, May 10, however, Mr. Giuliani announced that he was canceling his trip.[38] He later explained, "I'm not going to go" to Ukraine "because I'm walking into a group of people that are enemies of the President."[39]

21. By the following Monday morning, May 13, President Trump had ordered Vice President Pence not to attend President Zelensky's inauguration in favor of a lower-ranking delegation led by Secretary of Energy Rick Perry.[40]

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[35] *Id.* (quoting Mr. Giuliani).

[36] *Id.* (quoting Mr. Giuliani).

[37] Lev Parnas Production to the House Permanent Select Comm. on Intelligence at 28 (Jan. 14, 2019), https://perma.cc/PWX4-LEMS (letter from Rudolph Giuliani to Volodymyr Zelensky, President-elect of Ukraine (May 10, 2019)).

[38] *See* Andrew Restuccia & Darren Samuelsohn, *Giuliani Cancels Ukraine Trip amid Political Meddling Charges*, Politico (May 11, 2019), https://perma.cc/V5S8-2FV4.

[39] *Giuliani: I Didn't Go to Ukraine to Start an Investigation, There Already Was One*, Fox News (May 11, 2019), https://perma.cc/HT7V-2ZYA.

[40] Williams Dep. Tr. at 37; Volker Interview Tr. at 288-90; Vindman Dep. Tr. at 125-27.

22. The U.S. delegation—which also included Ambassador to the European Union Gordon Sondland, Special Representative for Ukraine Negotiations Ambassador Kurt Volker, and NSC Director for Ukraine Lieutenant Colonel Alexander Vindman—returned from the inauguration convinced that President Zelensky was genuinely committed to anti-corruption reforms.[41]

23. At a meeting in the Oval Office on May 23, members of the delegation relayed their positive impressions to President Trump and encouraged him to schedule the promised Oval Office meeting for President Zelensky. President Trump, however, said he "didn't believe" the delegation's positive assessment, claiming "that's not what I hear" from Mr. Giuliani.[42] The President cast his dim view of Ukraine in personal terms, stating that Ukraine "tried to take me down" during the 2016 election—an apparent reference to the debunked conspiracy theory that Ukraine interfered in the 2016 election to help Hillary Clinton and harm his campaign.[43]

24. Rather than commit to a date for an Oval Office meeting with President Zelensky, President Trump directed the delegation to "[t]alk to Rudy, talk to Rudy."[44] Ambassador Sondland testified that "if [the delegation] never called Rudy and just left it alone nothing would happen with Ukraine," and "if [the President] was going to have his mind changed, that was the path."[45] Following the May 23 meeting, Secretary Perry and Ambassadors Sondland and Volker began to coordinate and work with Mr. Giuliani to satisfy the President's demands.[46]

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[41] Volker Interview Tr. at 29–30, 304.

[42] *Id.* at 305.

[43] *Id.* at 304; Transcript, Interview of Gordon Sondland Before the H. Permanent Select Comm. on Intelligence 337 (Oct. 17, 2019) (Sondland Dep. Tr.).

[44] Sondland Dep. Tr. at 62, 69-70; Volker Interview Tr. at 305; Transcript, *Impeachment Inquiry: Ambassador Kurt Volker and Timothy Morrison: Hearing Before the H. Permanent Select Comm. on Intelligence*, 116th Cong. 39-40 (Nov. 19, 2019) (Volker-Morrison Hearing Tr.).

[45] Sondland Dep. Tr. at 90.

[46] *See id.* at 77-78; Volker-Morrison Hearing Tr. at 17, 19; *see also* Timothy Puko & Rebecca Ballhaus, *Rick Perry Called Rudy Giuliani at Trump's Direction on Ukraine Concerns*, Wall Street J. (Oct. 16, 2019) (*Rick Perry Called Rudy Giuliani*), https://perma.cc/E4F2-9U23.

25. Mr. Giuliani is not a U.S. government official and has never served in the Trump Administration. Rather, as he has repeatedly made clear, his goal was to obtain "information [that] will be very, very helpful to my client"—President Trump.[47] Mr. Giuliani made clear to Ambassadors Sondland and Volker, who were in direct communications with Ukrainian officials, that a White House meeting would not occur until Ukraine announced its pursuit of the two political investigations.[48]

26. On June 17, Ambassador Bill Taylor, whom Secretary of State Mike Pompeo had asked to replace Ambassador Yovanovitch, arrived in Kyiv as the new Chargé d'Affaires.[49]

27. Ambassador Taylor quickly observed that there was an "irregular channel" led by Mr. Giuliani that, over time, began to undermine the official channel of U.S. diplomatic relations with Ukraine.[50] Ambassador Sondland similarly testified that the agenda described by Mr. Giuliani became more "insidious" over time.[51] Mr. Giuliani would prove to be, as the President's National Security Advisor Ambassador John Bolton told a colleague, a "hand grenade that was going to blow everyone up."[52]

C. The President Froze Vital Military and Other Security Assistance for Ukraine

28. Since 2014, Ukraine has been engaged in an ongoing armed conflict with Russia in the Donbas region of eastern Ukraine.[53] Ukraine is a "strategic partner of the United States," and

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[47] *Giuliani Plans Ukraine Trip*, https://perma.cc/SC6J-4PL9.

[48] *See, e.g.*, Transcript, *Impeachment Inquiry: Ambassador Sondland: Hearing Before the H. Permanent Select Comm. on Intelligence*, 116th Cong. 18 (Nov. 20, 2019) (Sondland Hearing Tr.) ("[A]s I testified previously . . . Mr. Giuliani's requests were a quid pro quo for arranging a White House visit for President Zelensky"); *id.* at 34, 42-43.

[49] Transcript, Deposition of William B. Taylor Before the H. Permanent Select Comm. on Intelligence (Oct. 22, 2019) (Taylor Dep. Tr.).

[50] Taylor-Kent Hearing Tr. at 34-36.

[51] Sondland Dep. Tr. at 240.

[52] Hill Dep. Tr. at 127 (Dr. Hill, quoting Mr. Bolton).

[53] *See* Taylor Dep. Tr. at 20, 23, 27-28, 31, 33-34; Transcript, Deposition of Ambassador Marie "Masha" Yovanovitch Before the H. Permanent Select Comm. on Intelligence 16, 18, 73, 302

the United States has long supported Ukraine in its conflict with Russia.[54] As Ambassador Volker and multiple other witnesses testified, supporting Ukraine is "critically important" to U.S. interests, including countering Russian aggression in the region.[55]

29. Ukrainians face casualties on a near-daily basis in their ongoing conflict with Russia.[56] Since 2014, Russian aggression has resulted in more than 13,000 Ukrainian deaths on Ukrainian territory,[57] including approximately 3,331 civilians, and has wounded another 30,000 persons.[58]

30. Since 2014, following Russia's invasion of Ukraine and its annexation of the Crimean Peninsula, Congress has allocated military and other security assistance funds to Ukraine on a broad bipartisan basis.[59] Since 2014, the United States has provided approximately $3.1 billion in foreign assistance to Ukraine: $1.5 billion in military and other security assistance, and $1.6 billion in non-military, non-humanitarian aid to Ukraine.[60]

(Oct. 11, 2019) (Yovanovitch Dep. Tr.); *see also Conflict in Ukraine Enters Its Fourth Year with No End in Sight*, Office of the U.N. High Comm'r for Human Rights (June 13, 2017), https://perma.cc/K9N8-F22E.

[54] Taylor-Kent Hearing Tr. at 28.

[55] Volker Interview Tr. at 329; *see* Yovanovitch Hearing Tr. at 17-18; Volker-Morrison Hearing Tr. at 11.

[56] Transcript, Deposition of Catherine Croft Before the H. Permanent Select Comm. on Intelligence 16 (Oct. 30, 2019) (Croft Dep. Tr.).

[57] Kent Dep. Tr. at 338-39.

[58] Viacheslav Shramovych, *Ukraine's Deadliest Day: The Battle of Ilovaisk, August 2014*, BBC News (Aug. 29, 2019), https://perma.cc/6B2F-B72W.

[59] *See* Transcript, Deposition of Laura Katherine Cooper Before the H. Permanent Select Comm. on Intelligence 16, 38, 98 (Oct. 23, 2019) (Cooper Dep. Tr.); Vindman Dep. Tr. at 41, 57, 165; Transcript, Deposition of Mark Sandy Before the H. Permanent Select Comm. on Intelligence 59-60 (Nov. 16, 2019) (Sandy Dep. Tr.); Taylor-Kent Hearing Tr. at 29-30; Taylor Dep. Tr. at 38, 40-41, 171, 217-18, 281-82; Letter from Senators Jeanne Shaheen et al. to Acting White House Chief of Staff Mick Mulvaney (Sept. 3, 2019) (Sept. 3 Letter), https://perma.cc/4TU8-H7UR; Letter from Senator Christopher Murphy to Chairman Adam B. Schiff, House Permanent Select Comm. on Intelligence, and Acting Chairwoman Carolyn Maloney, House Comm. on Oversight and Reform (Nov. 19, 2019) (Nov. 19 Letter), https://perma.cc/4BDP-2SRJ.

[60] Cory Welt, Cong. Research Serv., R45008, *Ukraine: Background, Conflict with Russia, and U.S. Policy* 30 (Sept. 19, 2019), https://perma.cc/4HCR-VKA5; *see also* Hill-Holmes Hearing Tr. at 97

31. The military assistance provided by the United States to Ukraine "saves lives" by making Ukrainian resistance to Russia more effective.[61] It likewise advances U.S. national security interests because, "[i]f Russia prevails and Ukraine falls to Russian dominion, we can expect to see other attempts by Russia to expand its territory and influence."[62] Indeed, the reason the United States provides assistance to the Ukrainian military is "so that they can fight Russia over there, and we don't have to fight Russia here."[63]

32. The United States' European allies have similarly provided political and economic support to Ukraine. Since 2014, the European Union (EU) has been the largest donor to Ukraine.[64] The EU has extended more macro-financial assistance to Ukraine—approximately €3.3 billion—than to any other non-EU country and has committed to extend another €1.1 billion.[65] Between 2014 and September 30, 2019, the EU and the European financial institutions (including the European Investment Bank, European Bank for Reconstruction and Development, and others) committed over €15 billion in grants and loans to support the reform process in Ukraine.[66] According to EU data, Germany contributed €786.5 million to Ukraine between 2014 and 2017; the United Kingdom contributed €105.6 million; and France contributed €61.9 million over that same period (not including the amounts these countries contribute through the EU).[67]

(testimony of David Holmes) ("The United States has provided combined civilian and military assistance to Ukraine since 2014 of about $3 billion, plus two $1 billion—three $1 billion loan guarantees. That is not—those get paid back largely. So just over $3 billion.").

[61] Taylor Dep. Tr. at 153.

[62] Yovanovitch Hearing Tr. at 18.

[63] Volker-Morrison Hearing Tr. at 11.

[64] Iain King, *Not Contributing Enough? A Summary of European Military and Development Assistance to Ukraine Since 2014*, Ctr. for Strategic & Int'l Stud. (Sept. 26, 2019), https://perma.cc/FF6F-Q9MX.

[65] *EU-Ukraine Relations—Factsheet*, European External Action Serv. (Sept. 30, 2019), https://perma.cc/4YKE-T2WT.

[66] *Id.*

[67] *See EU Aid Explorer: Donors*, European Comm'n, https://perma.cc/79H6-AFHY.

33. In 2017 and 2018, the United States provided approximately $511 million and $359 million, respectively, in foreign assistance to Ukraine, including military and other security assistance.[68] During those two years, President Trump and his Administration allowed the funds to flow to Ukraine unimpeded.[69]

34. For fiscal year 2019, Congress appropriated and authorized $391 million in taxpayer-funded security assistance to Ukraine: $250 million in funds administered by the Department of Defense (DOD) and $115 million in funds administered by the State Department, with another $26 million carried over from fiscal year 2018.[70]

35. DOD planned to use the funds to provide Ukraine with sniper rifles, rocket-propelled grenade launchers, counter-artillery radars, electronic warfare detection and secure communications, and night vision equipment, among other military equipment, to defend itself against Russian forces, which have occupied part of eastern Ukraine since 2014.[71] These purposes were consistent with the goals of Congress, which had appropriated the funds administered by DOD under the Ukraine Security Assistance Initiative (USAI) for the purpose of providing "training; equipment; lethal assistance; logistics support, supplies and services; sustainment; and

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[68] *U.S. Foreign Aid by Country*, USAID, https://perma.cc/9YK2-9BKJ (last updated Sept. 23, 2019) (Ukraine data for fiscal year 2017 and fiscal year 2018).

[69] Transcript, *Impeachment Inquiry: Ms. Laura Cooper and Mr. David Hale: Hearing Before the H. Permanent Select Comm. on Intelligence*, 116th Cong. 22-23 (Nov. 20, 2019) (Cooper-Hale Hearing Tr.); Cooper Dep. Tr. at 95-96.

[70] Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, § 9013 (2018); Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 7046(a)(2) (2019); *Conference Report to Accompany H.J. Res. 31*, H. Rep. No. 116-9, at 869 (2019) (allocating $115,000,000 in assistance to Ukraine for the Foreign Military Financing Program); Aaron Mehta, *U.S. State Department Clears Ukraine Security Assistance Funding. Is the Pentagon Next?*, Def. News (Sept. 12, 2019), https://perma.cc/723T-9XUN (noting that approximately $26 million rolled over from fiscal year 2018).

[71] Press Release, Dep't of Def., DOD Announces $250M to Ukraine, (June 18, 2019) (DOD Announces $250M to Ukraine), https://perma.cc/U4HX-ZKXP.

intelligence support to the military and national security forces of Ukraine, and . . . replacement of any weapons or articles provided to the Government of Ukraine."[72]

36. On June 18, 2019, after all Congressionally mandated conditions on the DOD-administered aid—including certification that Ukraine had adopted sufficient anti-corruption reforms—were met, DOD issued a press release announcing its intention to provide the $250 million in security assistance to Ukraine.[73]

37. On June 19, the Office of Management and Budget (OMB) received questions from President Trump about the funding for Ukraine.[74] OMB, in turn, made inquiries with DOD.[75]

38. On June 27, Acting Chief of Staff Mick Mulvaney reportedly emailed his senior advisor Robert Blair, "Did we ever find out about the money for Ukraine and whether we can hold it back?" Mr. Blair responded that it would be possible, but they should "[e]xpect Congress to become unhinged" if the President held back the appropriated funds.[76]

39. Around this time, despite overwhelming support for the security assistance from every relevant Executive Branch agency,[77] and despite the fact that the funds had been authorized

[72] Pub. L. No. 115-245, § 9013.

[73] DOD Announces $250M to Ukraine, https://perma.cc/U4HX-ZKXP. DOD had certified in May 2019 that Ukraine satisfied all anti-corruption standards needed to receive the Congressionally appropriated military aid. *See* Letter from John C. Rood, Under Sec'y of Def. for Pol'y, Dep't of Def., to Chairman Eliot L. Engel, House Comm. on Foreign Affairs (May 23, 2019), https://perma.cc/68FS-ZXZ6 ("Ukraine has taken substantial actions to make defense institutional reforms for the purposes of decreasing corruption . . . . [N]ow that this defense institution reform has occurred, we will use the authority provided . . . to support programs in Ukraine further.").

[74] Sandy Dep. Tr. at 24-25; Cooper Dep. Tr. at 33-34.

[75] Sandy Dep. Tr. at 24-28.

[76] Eric Lipton et al., *Behind the Ukraine Aid Freeze: 84 Days of Conflict and Confusion*, N.Y. Times (Dec. 29, 2019) (*Behind the Ukraine Aid Freeze*), https://perma.cc/TA5J-NJFX.

[77] *See, e.g.*, Cooper Dep. Tr. at 13, 16, 32, 46, 60-62, 64-65; Taylor Dep. Tr. at 28, 132, 170.

and appropriated by Congress with strong bipartisan support,[78] the President ordered a hold on all military and other security assistance for Ukraine.[79]

40. By July 3, OMB had blocked the release of $141 million in State Department funds. By July 12, all military and other security assistance for Ukraine had been blocked.[80]

41. On July 18, OMB announced to the relevant Executive Branch agencies during a secure videoconference that President Trump had ordered a hold on all Ukraine security assistance.[81] No explanation for the hold was provided.[82]

42. On July 25—approximately 90 minutes after President Trump spoke by phone with President Zelensky—OMB's Associate Director for National Security Programs, Michael Duffey, a political appointee, instructed DOD officials: "Based on guidance I have received and in light of the Administration's plan to review assistance to Ukraine, including the Ukraine Security Assistance Initiative, please hold off on any additional DoD obligations of these funds, pending direction from that process."[83] He added: "Given the sensitive nature of the request, I appreciate your keeping that information closely held to those who need to know to execute the direction."[84]

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[78] *See* Nov. 19 Letter, https://perma.cc/4BDP-2SRJ; Sept. 3 Letter, https://perma.cc/4TU8-H7UR.

[79] Williams Dep. Tr. at 54; Croft Dep. Tr. at 15; Kent Dep. Tr. at 303-305; Transcript, Deposition of Ambassador David Maclain Hale Before the H. Permanent Select Comm. on Intelligence 81 (Oct. 31, 2019) (Hale Dep. Tr.); Sandy Dep. Tr. at 99; Vindman Dep. Tr. at 181-82; Transcript, Deposition of Ambassador Tim Morrison Before the H. Permanent Select Comm. on Intelligence 264 (Nov. 6, 2019) (Morrison Dep. Tr.).

[80] Cooper-Hale Hearing Tr. at 14; Vindman Dep. Tr. at 178-79; *see also Stalled Ukraine Military Aid Concerned Members of Congress for Months*, CNN (Sept. 30, 2019), https://perma.cc/5CHF-HFKJ; Sandy Dep. Tr. at 38-39 (describing July 12 email from White House to OMB stating "that the President is directing a hold on military support funding for Ukraine.").

[81] *See* Sandy Dep. Tr. at 90; Hill Dep. Tr. at 225; Taylor-Kent Hearing Tr. at 35; Vindman Dep. Tr. at 181; Holmes Dep. Tr. at 153-54.

[82] Taylor-Kent Hearing Tr. at 35; Hill Dep. Tr. at 225.

[83] Email from Michael Duffey, Assoc. Dir. for Nat'l Sec. Programs, Office of Mgmt. & Budget, to David Norquist et al. (July 25, 2019, 11:04 AM), https://perma.cc/PG93-3M6B.

[84] *Id.*

43. In late July, the NSC convened a series of interagency meetings during which senior Executive Branch officials discussed the hold on security assistance.[85] Over the course of these meetings, a number of facts became clear: (1) the President personally directed the hold through OMB; [86] (2) no credible justification was provided for the hold;[87] (3) with the exception of OMB, all relevant agencies supported the Ukraine security assistance because, among other things, it was in the national security interests of the United States;[88] and (4) there were serious concerns about the legality of the hold.[89]

44. Although President Trump later claimed that the hold was part of an effort to get European allies to share more of the costs for security assistance for Ukraine, officials responsible for the security assistance testified they had not heard that rationale discussed in June, July, or August. For example, Mark Sandy, OMB's Deputy Associate Director for National Security Programs, who is responsible for DOD's portion of the Ukraine security assistance, testified that the European burden-sharing explanation was first provided to him in September—following his

[85] Kent Dep. Tr. at 303, 307, 311; Taylor-Kent Hearing Tr. at 36; Vindman Dep. Tr. at 182-85, Cooper Dep. Tr. at 45.

[86] Kent Dep. Tr. at 303-305; Hale Dep. Tr. at 81.

[87] Croft Dep. Tr. at 15; Hale Dep. Tr. at 105; Holmes Dep. Tr. at 21; Kent Dep. Tr. at 304, 310; Cooper Dep. Tr. at 44-45; Sandy Dep. Tr. at 91, 97; Morrison Dep. Tr. at 162-63. Mr. Morrison testified that, during a Deputies Committee meeting on July 26, OMB stated that the "President was concerned about corruption in Ukraine, and he wanted to make sure that Ukraine was doing enough to manage that corruption." Morrison Dep. Tr. at 165. Mr. Morrison did not testify that concerns about Europe's contributions were raised during this meeting. In addition, Mark Sandy testified that, as of July 26, despite OMB's own statement, senior OMB officials were unaware of the reason for the hold at that time. *See* Sandy Dep. Tr. at 55-56.

[88] Sandy Dep. Tr. at 99; Vindman Dep. Tr. at 181-82; Kent Dep. Tr. at 305; Morrison Dep. Tr. at 264.

[89] Morrison Dep. Tr. at 163; Cooper Dep. Tr. at 47-48. For example, Deputy Assistant Secretary of Defense Laura Cooper testified that, during an interagency meeting on July 26 involving senior leadership from the State Department and DOD and officials from the National Security Council, "immediately deputies began to raise concerns about how this could be done in a legal fashion" and there "was a sense that there was not an available mechanism to simply not spend money" that already had been notified to Congress or earmarked for Ukraine. Cooper Dep. Tr. at 47-48.

repeated requests to learn the reason for the hold.[90] Deputy Assistant Secretary of Defense Laura Cooper, whose responsibilities include the Ukraine security assistance, testified that she had "no recollection of the issue of allied burden sharing coming up" in the three meetings she attended about the freeze on security assistance, nor did she recall hearing about a lack of funding from Ukraine's allies as a reason for the freeze.[91] Ms. Cooper further testified that there was no policy or interagency review process relating to the Ukraine security assistance that she "participated in or knew of" in August 2019.[92] In addition, while the aid was being withheld, Ambassador Sondland, the U.S. Ambassador to the EU, was never asked to reach out to the EU or its member states to ask them to increase their contributions to Ukraine.[93]

45. Two OMB career officials, including one of its legal counsel, ultimately resigned, in part, over concerns about the handling of the hold on security assistance.[94] A confidential White House review has reportedly "turned up hundreds of documents that reveal extensive efforts to generate an after-the-fact justification" for the hold.[95]

46. Throughout August, officials from DOD warned officials from OMB that, as the hold continued, there was an increasing risk that the funds for Ukraine would not be timely obligated, in violation of the Impoundment Control Act of 1974.[96] On January 16, 2020, the U.S.

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[90] Sandy Dep. Tr. at 42-43.

[91] Cooper-Hale Hearing Tr. at 75-76.

[92] Cooper Dep. Tr. at 91.

[93] Sondland Dep. Tr. at 338-39.

[94] Sandy Dep. Tr. at 149-55.

[95] Josh Dawsey et al., *White House Review Turns Up Emails Showing Extensive Efforts to Justify Trump's Decision to Block Ukraine Military Aid*, Wash. Post (Nov. 24, 2019), https://perma.cc/99TX-5KFE. Because the President obstructed the House's investigation, the House was unable to obtain documents to confirm this reporting.

[96] *See* Sandy Dep. Tr. at 75; Kate Brannen, *Exclusive: Unredacted Ukraine Documents Reveal Extent of Pentagon's Legal Concerns*, Just Security (Jan. 2, 2020) (Just Security Report), https://perma.cc/VA6U-RYPK (reporting about review of unredacted copies of OMB documents that were produced to the Center for Public Integrity in redacted form).

Government Accountability Office (GAO) concluded that OMB had, in fact, violated the Impoundment Control Act when it withheld from obligation funds appropriated by Congress to DOD for security assistance to Ukraine. GAO stated that "[f]aithful execution of the law does not permit the President to substitute his own policy priorities for those that Congress has enacted into law."[97]

47. In late August, Secretary of Defense Mike Esper, Secretary of State Pompeo, and National Security Advisor Bolton reportedly urged the President to release the aid to Ukraine, advising the President that the aid was in America's national security interest.[98] On August 30, however, an OMB official advised a Pentagon official by email that there was a "clear direction from POTUS to continue to hold."[99]

48. Contrary to U.S. national security interests—and over the objections of his own advisors—President Trump continued to withhold the funding to Ukraine through August and into September, without any credible explanation.[100]

D. President Trump Conditioned a White House Meeting on Ukraine Announcing It Would Launch Politically Motivated Investigations

49. Upon his arrival in Kyiv in June 2019, Ambassador Taylor sought to schedule the promised White House meeting for President Zelensky, which was "an agreed-upon goal" of policymakers in Ukraine and the United States.[101]

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[97] Matter of Office of Mgmt. & Budget—Withholding of Ukraine Sec. Assistance, B-331564 (Comp. Gen. Jan. 16, 2020), https://perma.cc/5CDX-XLX6.

[98] *See Behind the Ukraine Aid Freeze*, https://perma.cc/TA5J-NJFX.

[99] *See* Just Security Report, https://perma.cc/VA6U-RYPK (quoting email from Michael Duffey to Elaine McCusker).

[100] *See, e.g.*, Sandy Dep. Tr. at 133 ("[W]ere we ever given any reason for the hold? And I would say only in September did we receive an explanation that the hold—that the President's direction reflected his concerns about the contributions from other countries for Ukraine."); Cooper Dep. Tr. at 93-94; Vindman Dep. Tr. at 181-82; Williams Dep. at 91-92.

[101] Taylor Dep. Tr. at 24-25 ("In late June, one of the goals of both channels was to facilitate a visit by President Zelensky to the White House for a meeting with President Trump, which

50. As Ambassador Volker explained, a White House visit by President Zelensky would constitute "a tremendous symbol of support" for Ukraine and would "enhance[] [President Zelensky's] stature."[102]

51. Ambassador Taylor learned, however, that President Trump "wanted to hear from Zelensky," who had to "make clear" to President Trump that he was not "standing in the way of 'investigations.'"[103] It soon became clear to Ambassador Taylor and others that the White House meeting would not be scheduled until the Ukraine committed to the investigations of "Burisma and alleged Ukrainian influence in the 2016 elections."[104]

52. Ambassador Sondland was unequivocal in describing this conditionality. He testified:

> I know that members of this committee frequently frame these complicated issues in the form of a simple question: Was there a quid pro quo? As I testified previously with regard to the requested White House call and the White House meeting, the answer is yes.[105]

53. According to Ambassador Sondland, the public *announcement* of the investigations—and not necessarily the pursuit of the investigations themselves—was the price President Trump sought in exchange for a White House meeting with Ukrainian President Zelensky.[106]

54. Both Ambassadors Volker and Sondland explicitly communicated this quid pro quo to Ukrainian government officials. For example, on July 2, in Toronto, Canada, Ambassador Volker

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President Trump had promised in his congratulatory letter of May 29. [The] Ukrainians were clearly eager for the meeting to happen. During a conference call with Ambassador Volker, Acting Assistant Secretary of State for European and Eurasian Affairs Phil Reeker, Secretary Perry, Ambassador Sondland, and Counselor of the U.S. Department of State Ulrich Brechbuhl on June 18, it was clear that a meeting between the two presidents was an agreed-on—agreed-upon goal.").

[102] Volker Interview Tr. at 59, 328.

[103] *Id.*

[104] Taylor Dep. Tr. at 26.

[105] Sondland Hearing Tr. at 26.

[106] *Id.* at 43.

conveyed the message directly to President Zelensky and referred to the "Giuliani factor" in President Zelensky's engagement with the United States.[107] Ambassador Volker told Ambassador Taylor that during the Toronto conference, he counseled President Zelensky about how he "could prepare for the phone call with President Trump"—specifically, that President Trump "would like to hear about the investigations."[108]

55. Ambassador Volker confirmed that, in "a pull-aside" meeting in Toronto, he "advise[d] [President Zelensky] that he should call President Trump personally because he needed to . . . be able to convey to President Trump that he was serious about fighting corruption, investigating things that happened in the past and so forth."[109] Upon hearing about this discussion, Deputy Assistant Secretary of State for European and Eurasian Affairs George Kent told Ambassador Volker that "asking for another country to investigate a prosecution for political reasons undermines our advocacy of the rule of law."[110]

56. On July 10, at a meeting with Ukrainian officials in Ambassador Bolton's office at the White House, Ambassador Sondland was even more explicit about the quid pro quo. He stated—in front of multiple witnesses, including two top advisors to President Zelensky and Ambassador Bolton—that he had an arrangement with Mr. Mulvaney to schedule the White House visit after Ukraine initiated the "investigations."[111]

57. In a second meeting in the White House Ward Room shortly thereafter, "Ambassador Sondland, in front of the Ukrainians . . . was talking about how he had an agreement with Chief of Staff Mulvaney for a meeting with the Ukrainians if they were going to go forward

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[107] Kurt Volker Text Messages Received by the House Committees at KV00000027 (Oct. 2, 2019) (Volker Text Messages), https://perma.cc/CG7Y-FHXZ.

[108] Taylor Dep. Tr. at 65-66.

[109] Volker-Morrison Hearing Tr. at 70.

[110] Kent Dep. Tr. at 246-47.

[111] Hill Dep. Tr. at 67.

with investigations."[112] More specifically, Lt. Col. Vindman testified that Ambassador Sondland said "[t]hat the Ukrainians would have to deliver an investigation into the Bidens."[113]

58. During that meeting, Dr. Hill and Lt. Col. Vindman objected to Ambassador Sondland intertwining what Dr. Hill later described as a "domestic political errand" with official national security policy toward Ukraine.[114]

59. Following the July 10 meetings, Dr. Hill discussed what had occurred with Ambassador Bolton, including Ambassador Sondland's reiteration of the quid pro quo to the Ukrainians in the Ward Room. Ambassador Bolton told her to "go and tell [the NSC Legal Advisor] that I am not part of whatever drug deal Sondland and Mulvaney are cooking up on this."[115]

60. Both Dr. Hill and Lt. Col. Vindman separately reported Sondland's description of the quid pro quo during the July 10 meetings to NSC Legal Advisor, John Eisenberg, who said he would follow up.[116]

61. After the July 10 meetings, Andriy Yermak, a top aide to President Zelensky who was in the meetings, followed up with Ambassador Volker by text message: "Thank you for

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[112] *Id.* at 69.

[113] Vindman Dep. Tr. at 64.

[114] *Id.* at 69-70; Vindman Dep. Tr. at 31; *see* Hill-Holmes Hearing Tr. at 92.

[115] Hill Dep. Tr. at 70-72.

[116] *Id.* at 139 ("I told him exactly, you know, what had transpired and that Ambassador Sondland had basically indicated that there was an agreement with the Chief of Staff that they would have a White House meeting or, you know, a Presidential meeting if the Ukrainians started up these investigations again."); Vindman Dep. Tr. at 37 ("Sir, I think I—I mean, the top line I just offered, I'll restate it, which is that Mr. Sondland asked for investigations, for these investigations into Bidens and Burisma. I actually recall having that particular conversation. Mr. Eisenberg doesn't really work on this issue, so I had to go a little bit into the back story of what these investigations were, and that I expressed concerns and thought it was inappropriate."). A third NSC official, P. Wells Griffith, also reported the July 10 meeting to the NSC Legal Advisor, but he refused to comply with a subpoena and did not testify before the House.

meeting and your clear and very logical position . . . I feel that the key for many things is Rudi [*sic*] and I [am] ready to talk with him at any time."[117]

62. Over the next two weeks, Ambassadors Sondland and Volker coordinated with Mr. Giuliani and senior Ukrainian and American officials to arrange a telephone call between President Trump and President Zelensky. They also worked to ensure that, during that phone call, President Zelensky would convince President Trump of his willingness to undertake the investigations in order to get the White House meeting scheduled.[118]

63. On July 19, Ambassador Volker had breakfast with Mr. Giuliani at the Trump Hotel in Washington, D.C. After the meeting, Ambassador Volker reported back to Ambassadors Sondland and Taylor about his conversation with Mr. Giuliani, stating, "Most impt is for Zelensky to say that he will help investigation—and address any specific personnel issues—if there are any."[119]

64. The same day, Ambassador Sondland spoke with President Zelensky and recommended that the Ukrainian leader tell President Trump that he "will leave no stone unturned" regarding the investigations during the upcoming Presidential phone call.[120]

65. Following his conversation with President Zelensky, Ambassador Sondland emailed top Trump Administration officials, including Secretary Pompeo, Mr. Mulvaney, and Secretary Perry. Ambassador Sondland stated that President Zelensky confirmed that he would "assure"

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[117] Volker Text Messages at KV00000018.

[118] *See, e.g.*, *id.* at KV00000037; Ambassador Gordon D. Sondland, *Opening Statement Before the U.S. House of Representatives Permanent Select Comm. on Intelligence* 15 (Nov. 20, 2019) (Sondland Opening Statement), https://perma.cc/Z2W6-A9HS ("As I communicated to the team, I told President Zelensky in advance that assurances to run a fully transparent investigation and turn over every stone were necessary in his call with President Trump.").

[119] Volker Text Messages at KV00000037.

[120] Taylor-Kent Hearing Tr. at 37-38 (Ambassador Taylor quoting Ambassador Sondland).

President Trump that "he intends to run a fully transparent investigation and will 'turn over every stone.'"[121]

66. Secretary Perry responded to Ambassador Sondland's email, "Mick just confirmed the call being set up for tomorrow by NSC." About an hour later, Mr. Mulvaney replied, "I asked NSC to set it up for tomorrow."[122]

67. According to Ambassador Sondland, this email—and other correspondence with top Trump Administration officials—showed that his efforts regarding Ukraine were not part of a rogue foreign policy. To the contrary, Ambassador Sondland testified that "everyone was in the loop."[123]

68. The Ukrainians also understood the quid pro quo—and the domestic U.S. political ramifications of the investigations they were being asked to pursue. On July 20, a close advisor to President Zelensky warned Ambassador Taylor that the Ukrainian leader "did not want to be used as a pawn in a U.S. reelection campaign."[124] The next day, Ambassador Taylor warned Ambassador Sondland that President Zelensky was "sensitive about Ukraine being taken seriously, not merely as an instrument in Washington domestic, reelection politics."[125]

69. Nevertheless, President Trump, directly and through his hand-picked representatives, continued to press the Ukrainian government for the announcement of the investigations, including during President Trump's July 25 call with President Zelensky.[126]

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[121] Sondland Hearing Tr. at 27; Sondland Opening Statement at 21, Ex. 4.
[122] Sondland Opening Statement at 21, Ex. 4.
[123] Sondland Hearing Tr. at 27.
[124] Taylor Dep. Tr. at 30.
[125] Volker Text Messages at KV00000037.
[126] *See, e.g.*, *id.* at KV00000019; July 25 Memorandum at 3-4, https://perma.cc/8JRD-6K9V.

E. President Trump Directly Solicited Election Interference from President Zelensky

70. In the days leading up to President Trump's July 25 call with President Zelensky, U.S. polling data showed former Vice President Biden leading in a head-to-head contest against President Trump.[127]

71. Meanwhile, Ambassadors Sondland and Volker continued to prepare President Zelensky and his advisors for the call with President Trump until right before it occurred.

72. On the morning of July 25, Ambassador Sondland spoke with President Trump in advance of his call with President Zelensky. Ambassador Sondland then called Ambassador Volker and left a voicemail.[128]

73. After receiving Ambassador Sondland's message, Ambassador Volker sent a text message to President Zelensky's aide, Mr. Yermak, approximately 30 minutes before the call:

> Heard from White House—assuming President Z convinces trump he will investigate / "get to the bottom of what happened" in 2016, we will nail down date for visit to Washington. Good luck![129]

74. In his public testimony, Ambassador Sondland confirmed that Ambassador Volker's text message to Mr. Yermak accurately summarized the directive he had received from President Trump earlier that morning.[130]

75. During the roughly 30-minute July 25 call, President Zelensky thanked President Trump for the "great support in the area of defense" provided by the United States and stated that Ukraine would soon be prepared to purchase additional Javelin anti-tank missiles from the United States.[131]

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[127] *See, e.g.*, *Washington Post–ABC News Poll, June 28–July 1, 2019*, Wash. Post (July 11, 2019), https://perma.cc/NS4B-PRWC.

[128] Sondland Hearing Tr. at 53-54.

[129] Volker Text Messages at KV00000019.

[130] Sondland Hearing Tr. at 53-55.

[131] *See* July 25 Memorandum at 2, https://perma.cc/8JRD-6K9V.

76. President Trump immediately responded with his own request: "I would like you to do us a favor though," which was "to find out what happened" with alleged Ukrainian interference in the 2016 election and to "look into" former Vice President Biden's role in encouraging the removal of the former Ukrainian prosecutor general.

77. Referencing Special Counsel Mueller's investigation into Russian interference in the 2016 election, President Trump told President Zelensky, "[T]hey say a lot of it started with Ukraine," and "[w]hatever you can do, it's very important that you do it if that's possible."[132]

78. President Trump repeatedly pressed the Ukrainian President to consult with his personal lawyer, Mr. Giuliani, as well as Attorney General William Barr, about the two specific investigations.[133] President Trump stated, "Rudy very much knows what's happening and he is a very capable guy. If you could speak to him that would be great."[134]

79. President Zelensky agreed, referencing Mr. Giuliani's back-channel role, noting that Mr. Yermak "spoke with Mr. Giuliani just recently and we are hoping very much that Mr. Giuliani will be able to travel to Ukraine and we will meet once he comes to Ukraine."[135]

80. Later in the call, President Zelensky heeded the directives he had received from Ambassadors Sondland and Volker: he thanked President Trump for his invitation to the White House and then reiterated that, "[o]n the other hand," he would "ensure" that Ukraine pursued "the

[132] *Id.* at 3-4. President Trump continues to embrace this call as both "routine" and "perfect." *See, e.g.*, *Remarks by President Trump upon Arriving at the U.N. General Assembly*, White House (Sept. 24, 2019) (Trump Sept. 24 Remarks), https://perma.cc/ZQ4P-FGT4; Colby Itkowitz, *Trump Defends Call with Ukrainian President, Calling It "Perfectly Fine and Routine,"* Wash. Post (Sept. 21, 2019), https://perma.cc/T3ZM-GKLB.

[133] *See* July 25 Memorandum at 4-5, https://perma.cc/8JRD-6K9V.

[134] *Id.* at 4.

[135] *Id.*

investigation" that President Trump had requested. President Zelensky confirmed the investigations should be done "openly."[136]

81. During the call, President Trump also attacked Ambassador Yovanovitch. He said, "The former ambassador from the United States, the woman, was bad news and the people she was dealing with in the Ukraine were bad news so I just want to let you know that." He later added, "Well, she's going to go through some things." President Trump also defended then-Ukrainian Prosecutor General Yuriy Lutsenko, who was widely known to be corrupt.[137]

82. The President did not mention any other issues relating to Ukraine, including concerns about Ukrainian corruption, President Zelensky's anti-corruption reforms, or the ongoing war with Russia. The President only identified two people in reference to investigations: Vice President Biden and his son.[138]

83. Listening to the call as it transpired, several White House staff members became alarmed. Lt. Col. Vindman immediately reported his concerns to NSC lawyers because, as he testified, "[i]t is improper for the President of the United States to demand a foreign government investigate a U.S. citizen and a political opponent."[139]

84. Jennifer Williams, an advisor to Vice President Pence, testified that the call struck her as "unusual and inappropriate" and that "the references to specific individuals and investigations, such as former Vice President Biden and his son, struck me as political in nature."[140]

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[136] *Id.* at 3, 5.

[137] *See id.* at 2.

[138] *See generally id.* Mr. Trump had previously engaged in efforts to cut aid to anti-corruption programs in Ukraine and other foreign nations. *See* Erica Werner, *Trump Administration Sought Billions of Dollars in Cuts to Programs Aimed at Fighting Corruption in Ukraine and Elsewhere*, Wash. Post (Oct. 23, 2019), https://perma.cc/R9AJ-AZ65.

[139] Transcript, *Impeachment Inquiry: Ms. Jennifer Williams and Lieutenant Colonel Alexander Vindman: Hearing Before the H. Permanent Select Comm. on Intelligence*, 116th Cong. 19 (Nov. 19, 2019) (Vindman-Williams Hearing Tr.).

[140] *Id.* at 34; Williams Dep. Tr. at 148-49.

She believed President Trump's solicitation of an investigation was "inappropriate" because it "appeared to be a domestic political matter."[141]

85. Timothy Morrison, Dr. Hill's successor as the NSC's Senior Director for Europe and Russia and Lt. Col. Vindman's supervisor, said that "the call was not the full-throated endorsement of the Ukraine reform agenda that I was hoping to hear."[142] He too reported the call to NSC lawyers, worrying that the call would be "damaging" if leaked publicly.[143]

86. In response, Mr. Eisenberg and his deputy, Michael Ellis, tightly restricted access to the call summary, which was placed on a highly classified NSC server even though it did not contain any highly classified information.[144]

87. On July 26, the day after the call, Ambassador Sondland had lunch with State Department aides in Kyiv, including David Holmes, the Counselor for Political Affairs at the U.S. Embassy in Kyiv. During the lunch, Ambassador Sondland called President Trump directly from his cellphone. President Trump asked Ambassador Sondland whether President Zelensky was "going to do the investigation." Ambassador Sondland stated that President Zelensky was "going to do it" and would "do anything you ask him to."[145]

88. After the call, it was clear to Ambassador Sondland that "a public statement from President Zelensky" committing to the investigations was a "prerequisite" for a White House meeting.[146] He told Mr. Holmes that President Trump "did not give a [expletive] about Ukraine." Rather, the President cared only about "big stuff" that benefited him personally, like "the Biden

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[141] Vindman-Williams Hearing Tr. at 15.
[142] Morrison Dep. Tr. at 41.
[143] *Id.* at 43.
[144] *Id.* at 43, 47-50, 52; *see also* Vindman Dep. Tr. at 49-51, 119-22.
[145] Holmes Dep. Tr. at 24.
[146] Sondland Hearing Tr. at 26-27.

investigation that Mr. Giuliani was pushing," and that President Trump had directly solicited during the July 25 call.[147]

F. President Trump Conditioned the Release of Security Assistance for Ukraine, and Continued to Leverage a White House Meeting, to Pressure Ukraine to Launch Politically Motivated Investigations

89. As discussed further below, following the July 25 call, President Trump's representatives, including Ambassadors Sondland and Volker, in coordination with Mr. Giuliani, pressed the Ukrainians to issue a public statement announcing the investigations. At the same time, officials in both the United States and Ukraine became increasingly concerned about President Trump's continuing hold on security assistance.[148]

90. The Ukrainian government was aware of the hold by at least late July, around the time of President Trump's July 25 call with President Zelensky. On the day of the call itself, DOD officials learned that diplomats at the Ukrainian Embassy in Washington, D.C., had made multiple overtures to DOD and the State Department "asking about security assistance."[149]

91. Around this time, two different officials at the Ukrainian Embassy approached Ambassador Volker's special advisor to ask her about the hold.[150]

92. By mid-August, before the hold was public, Lt. Col. Vindman also received inquiries from the Ukrainian Embassy. Lt. Col. Vindman testified that during this timeframe, "it was no secret, at least within government and official channels, that security assistance was on hold."[151]

93. The former Ukrainian deputy foreign minister, Olena Zerkal, has acknowledged that she became aware of the hold on security assistance no later than July 30 based on a diplomatic

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[147] Holmes Dep. Tr. at 25-26.

[148] *See, e.g.*, Cooper-Hale Hearing Tr. at 13-14; Vindman Dep. Tr. at 222; Sandy Dep. Tr. at 59-60.

[149] Cooper-Hale Hearing Tr. at 13-14.

[150] Croft Dep. Tr. at 86-88.

[151] Vindman Dep. Tr. at 222.

cable—transmitted the previous week—from Ukrainian officials in Washington, D.C.[152] She said that President Zelensky's office had received a copy of the cable "simultaneously."[153] Ms. Zerkal further stated that President Zelensky's top advisor, Andriy Yermak, told her "to keep silent, to not comment without permission" about the hold or about when the Ukrainian government became aware of it.[154]

94. In early August, Ambassadors Sondland and Volker, in coordination with Mr. Giuliani, endeavored to pressure President Zelensky to make a public statement announcing the investigations. On August 10—in a text message that showed the Ukrainians' understanding of the quid pro quo—President Zelensky's advisor, Mr. Yermak, told Ambassador Volker that, once a date was set for the White House meeting, he would "call for a press briefing, announcing upcoming visit and outlining vision for the reboot of US-UKRAINE relationship, including among other things Burisma and election meddling in investigations[.]"[155]

95. On August 11, Ambassador Sondland emailed two State Department officials, one of whom acted as a direct line to Secretary Pompeo, to inform them about the agreement for President Zelensky to issue a statement that would include an announcement of the two investigations. Ambassador Sondland stated that he expected a draft of the statement to be "delivered for our review in a day or two[,]" and that he hoped the statement would "make the boss [*i.e.*, President Trump] happy enough to authorize an invitation" for a White House meeting.[156]

96. On August 12, Mr. Yermak texted Ambassador Volker an initial draft of the statement. The draft referred to "the problem of interference in the political processes of the

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[152] Andrew E. Kramer, *Ukraine Knew of Aid Freeze in July, Says Ex-Top Official in Kyiv*, N.Y. Times (Dec. 3, 2019), https://perma.cc/SD98-VPRN.

[153] *Id.* (quoting Ms. Zerkal).

[154] *Id.* (quoting Ms. Zerkal's summary of a statement by Mr. Yermak).

[155] Volker Text Messages at KV00000019.

[156] Sondland Opening Statement at 22, Ex. 7; Sondland Hearing Tr. at 28, 102.

United States," but it did not explicitly mention the two investigations that President Trump had requested in the July 25 call.[157]

97. The next day, Ambassadors Volker and Sondland discussed the draft statement with Mr. Giuliani, who told them, "If [the statement] doesn't say Burisma and 2016, it's not credible[.]"[158] As Ambassador Sondland would later testify, "Mr. Giuliani was expressing the desires of the President of the United States, and we knew these investigations were important to the President."[159]

98. Ambassadors Volker and Sondland relayed this message to Mr. Yermak and sent him a revised statement that included explicit references to "Burisma and the 2016 U.S. elections."[160]

99. In light of President Zelensky's anti-corruption agenda, Ukrainian officials resisted issuing the statement in August and, as a result, there was no movement toward scheduling the White House meeting.[161]

100. Meanwhile, there was growing concern about President Trump's continued hold on the security assistance for Ukraine. The hold remained in place through August, against the unanimous judgment of American national security officials charged with overseeing U.S.-Ukraine policy. For example, during a high-level interagency meeting in late July, officials unanimously advocated for releasing the hold—with the sole exception of OMB, which was acting under

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[157] Volker Text Messages at KV00000020.

[158] Volker Interview Tr. at 113.

[159] Sondland Hearing Tr. at 18.

[160] Volker Text Messages at KV00000023. Ambassador Volker claimed that he "stopped pursuing" the statement from the Ukrainians around this time because of concerns raised by Mr. Yermak. Ambassador Kurt Volker, *Testimony Before the House of Representatives Committee on Foreign Affairs, Permanent Select Committee on Intelligence, and Committee on Oversight* 8 (Oct. 3, 2019) (Volker Opening Statement), https://perma.cc/9DDN-2WFW; Volker Interview Tr. at 44-45, 199; Volker-Morrison Hearing Tr. at 21.

[161] *See, e.g.*, Sondland Opening Statement at 16 ("[M]y goal, at the time, was to do what was necessary to get the aid released, to break the logjam. I believed that the public statement we had been discussing for weeks was essential to advancing that goal.").

"guidance from the President and from Acting Chief of Staff Mulvaney to freeze the assistance."[162] But even officials within OMB had internally recommended that the hold be removed because "assistance to Ukraine is consistent with [U.S.] national security strategy," provides the "benefit . . . of opposing Russian aggression," and is backed by "bipartisan support."[163]

101. Without an explanation for the hold, and with President Trump already conditioning a White House visit on the announcement of the investigations, it became increasingly apparent to multiple witnesses that the security assistance was being withheld in order to pressure Ukraine to announce the investigations. As Ambassador Sondland testified, President Trump's effort to condition release of the security assistance on an announcement of the investigations was as clear as "two plus two equals four."[164]

102. On August 22, Ambassador Sondland emailed Secretary Pompeo in an effort to "break the logjam" on the security assistance and the White House meeting. He proposed that President Trump should arrange to speak to President Zelensky during an upcoming trip to Warsaw, during which President Zelensky could "look [President Trump] in the eye and tell him" he was prepared "to move forward publicly . . . on those issues of importance to Potus and to the U.S."—*i.e.*, the announcement of the two investigations.[165]

103. On August 28, news of the hold was publicly reported by *Politico*.[166]

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[162] Hale Dep. Tr. at 81; Vindman Dep. Tr. at 184.

[163] Sandy Dep. Tr. at 59-60.

[164] Sondland Hearing Tr. at 56-58; *see also* Taylor Dep. Tr. at 190 (Ambassador Taylor's "clear understanding" was that "security assistance money would not come until the [Ukrainian] President committed to pursue the investigation"); Hill-Holmes Hearing Tr. at 32 (Mr. Holmes's "clear impression was that the security assistance hold was likely intended by the President either as an expression of dissatisfaction with the Ukrainians, who had not yet agreed to the Burisma/Biden investigation, or as an effort to increase the pressure on them to do so.").

[165] Sondland Opening Statement at 23.

[166] Caitlin Emma & Connor O'Brien, *Trump Holds Up Ukraine Military Aid Meant to Confront Russia*, Politico (Aug. 28, 2019), https://perma.cc/54RZ-Q6NJ.

104. As soon as the hold became public, Ukrainian officials expressed significant concern to U.S. officials.[167] They were deeply worried not only about the practical impact that the hold would have on efforts to fight Russian aggression, but also about the symbolic message the now-publicized lack of support from the Trump Administration sent to the Russian government, which would almost certainly seek to exploit any real or perceived crack in U.S. resolve toward Ukraine. Mr. Yermak and other Ukrainian officials told Ambassador Taylor that they were "desperate" and would be willing to travel to Washington to raise with U.S. officials the importance of the assistance.[168] The recently appointed Ukrainian prosecutor general later remarked, "It's critically important for the west not to pull us into some conflicts between their ruling elites[.]"[169]

105. On September 1—within days of President Trump rejecting the request from Secretaries Pompeo and Esper and Ambassador Bolton to release the hold[170]—Vice President Pence met with President Zelensky in Warsaw, Poland after President Trump cancelled his trip.[171]

106. In advance of this meeting, Ambassador Sondland told Vice President Pence that he "had concerns that the delay in aid had become tied to the issue of investigations."[172] Sondland testified that Vice President Pence "nodded like, you know, he heard what I said, and that was pretty much it."[173]

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[167] Volker Text Messages at KV00000020; Volker Interview Tr. at 80-81; Taylor Dep. Tr. at 34.

[168] Taylor Dep. Tr. at 137-38.

[169] Roman Olearchyk, *Cleaning Up Ukraine in the Shadow of Trump*, Fin. Times (Nov. 28, 2019), https://perma.cc/YMX9-XJ2B (quoting current Ukrainian Prosecutor General Ruslan Ryaboshapka).

[170] *Behind the Ukraine Aid Freeze*, https://perma.cc/TA5J-NJFX.

[171] *Readout of Vice President Mike Pence's Meeting with Ukrainian President Volodymyr Zelenskyy*, White House (Sep. 1, 2019), https://perma.cc/K2PH-YPVK; Taylor-Kent Hearing Tr. at 41.

[172] Sondland Hearing Tr. at 30.

[173] *Id.* at 38.

107. During the meeting that followed, which Ambassador Sondland also attended, "the very first question" that President Zelensky asked Vice President Pence related to the status of U.S. security assistance.[174] President Zelensky emphasized that "the symbolic value of U.S. support in terms of security assistance . . . was just as valuable to the Ukrainians as the actual dollars."[175] He also voiced concern that "any hold or appearance of reconsideration of such assistance might embolden Russia to think that the United States was no longer committed to Ukraine."[176]

108. Vice President Pence told President Zelensky that he would speak with President Trump that evening. Although Vice President Pence did speak with President Trump, the President still did not lift the hold.[177]

109. Following the meeting between Vice President Pence and President Zelensky, Ambassador Sondland pulled aside President Zelensky's advisor, Mr. Yermak, to explain that "the resumption of U.S. aid would likely not occur until Ukraine took some kind of action on [issuing a] public statement" about the investigations.[178]

110. Immediately following that conversation, Ambassador Sondland walked over to Mr. Morrison, who had been standing across the room observing their interactions. Ambassador Sondland told Mr. Morrison that "what he had communicated [to Mr. Yermak] was that . . . what could help [Ukraine] move the aid was if the prosecutor general would go to the mike [*sic*] and announce that he was opening" the investigations.[179]

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[174] Williams Dep. Tr. at 81.
[175] *Id.* at 82.
[176] *Id.* at 82-83.
[177] *Id.* at 94.
[178] Sondland Hearing Tr. at 31.
[179] Morrison Dep. Tr. at 134.

111. Later that day, Mr. Morrison reported this conversation to Ambassador Bolton, who advised him to "stay out of it" and to brief the NSC's lawyers. Mr. Morrison subsequently reported the conversation to Mr. Eisenberg.[180]

112. Mr. Morrison also informed Ambassador Taylor about his conversation with Ambassador Sondland. Ambassador Taylor was "alarmed by what Mr. Morrison told [him] about the Sondland-Yermak conversation."[181] He followed up by texting Ambassador Sondland, "Are we now saying that security assistance and WH meeting are conditioned on investigations?" Ambassador Sondland responded, "Call me."[182]

113. Ambassadors Sondland and Taylor then spoke by telephone. Ambassador Sondland again relayed what he told Mr. Yermak and explained that he had made a "mistake" in telling Ukrainian officials that *only* the White House meeting was conditioned on a public announcement of the investigations. He clarified that "everything"—the White House meeting *and* security assistance for Ukraine—was conditioned on the announcement of the investigations.[183] Ambassador Sondland explained to Ambassador Taylor that "President Trump wanted President Zelensky in a public box, by making a public statement about ordering such investigations."[184]

114. On September 7, President Trump and Ambassador Sondland spoke by telephone.[185] As Ambassador Sondland relayed later that day during a call with Mr. Morrison, President Trump

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[180] *Id.* at 182-83.

[181] Taylor-Kent Hearing Tr. at 42.

[182] Volker Text Messages at KV00000039.

[183] Taylor-Kent Hearing Tr. at 42.

[184] *Id.*; *see also* Taylor Dep. Tr. at 144.

[185] In Ambassador Sondland's testimony, he was not clear on whether he had one or two conversations with the President in which the subject of a quid pro quo came up, or on precisely which date such conversations took place during the period of September 6 through 9. Regardless of the date, Ambassador Sondland did not contest telling both Mr. Morrison and Ambassador Taylor—both of whom took contemporaneous notes—of a conversation he had with the President that reaffirmed Ambassador Sondland's understanding that President Zelensky had to make a public statement announcing the investigations in order to obtain the White House meeting and security

told him "that there was no quid pro quo, but President Zelensky must announce the opening of the investigations and he should want to do it."[186]

115. Mr. Morrison conveyed the substance of the September 7 call between President Trump and Ambassador Sondland to Ambassador Taylor. Mr. Morrison said that the call had given him "a sinking feeling" because he feared the security assistance would not be released before September 30, the end of the fiscal year, and because he "did not think it was a good idea for the Ukrainian President to . . . involve himself in our politics."[187] At Ambassador Bolton's direction, Mr. Morrison reported Ambassador Sondland's description of the President's statements to the NSC lawyers.[188]

116. The next day, September 8, Ambassador Sondland confirmed in a phone call with Ambassador Taylor that he had spoken to President Trump and that "President Trump was adamant that President Zelensky himself had to" announce the investigations publicly.[189]

117. Ambassador Sondland also told Ambassador Taylor that he had passed President Trump's message directly to President Zelensky and Mr. Yermak and had told them that "although this was not a quid pro quo, if President Zelensky did not clear things up in public, we would be at a stalemate"—meaning "Ukraine would not receive the much-needed military assistance."[190]

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assistance. *See* Sondland Hearing Tr. at 109. Both documentary evidence and testimony confirmed that the conversation described by Mr. Morrison and Ambassador Taylor occurred on September 7. *See, e.g.*, Morrison Dep. Tr. at 144-45; Taylor Dep. Tr. at 38; Volker Text Messages at KV00000053 (Sondland text message to Volker and Taylor on September 8 stating, "Guys, multiple convos with Ze, Potus. Lets talk").

[186] Morrison Dep. Tr. at 190-91.

[187] *Id.* at 145.

[188] *Id.* at 223, 238.

[189] Taylor-Kent Hearing Tr. at 44.

[190] Sondland Hearing Tr. at 7; Taylor Dep. Tr. at 39.

118. Early the next morning, on September 9, Ambassador Taylor texted Ambassadors Sondland and Volker: "As I said on the phone, I think it's crazy to withhold security assistance for help with a political campaign."[191]

119. The Ukrainians succumbed to the pressure. In early September, President Zelensky agreed to do a televised interview, during which he would publicly announce the investigations. The Ukrainians made arrangements for the interview to occur on CNN later in September.[192]

120. The White House subsequently confirmed that the release of the security assistance had been conditioned on Ukraine's announcement of the investigations. During a White House press conference on October 17, Acting Chief of Staff Mulvaney acknowledged that he had discussed security assistance with the President and that the President's decision to withhold it was directly tied to his desire that Ukraine investigate alleged Ukrainian interference in the 2016 U.S. election.[193]

121. After a reporter attempted to clarify this explicit acknowledgement of a "quid pro quo," Mr. Mulvaney replied, "We do that all the time with foreign policy." He added, "I have news for everybody: get over it. There is going to be political influence in foreign policy."[194]

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[191] Volker Text Messages at KV00000053.

[192] Sondland Hearing Tr. at 110-11; Andrew E. Kramer, *Ukraine's Zelensky Bowed to Trump's Demands until Luck Spared Him*, N.Y. Times (Nov. 7, 2019), https://perma.cc/A5JE-N25L; Fareed Zakaria, *Zelensky Planned to Announce Trump's "Quo" on My Show. Here's What Happened.*, Wash. Post (Nov. 14, 2019) (*Zelensky Planned to Announce Trump's "Quo"*), https://perma.cc/MMT7-D8XJ.

[193] *Press Briefing by Acting Chief of Staff Mick Mulvaney*, White House (Oct. 17, 2019) (Oct. 17 Briefing), https://perma.cc/Q45H-EMC7 ("Q. So the demand for an investigation into the Democrats was part of the reason that he ordered to withhold funding to Ukraine? MR. MULVANEY: The look back to what happened in 2016— Q. The investigation into Democrats. MR. MULVANEY: —certainly was part of the thing that he was worried about in corruption with that nation. And that is absolutely appropriate. Q. And withholding the funding? MR. MULVANEY: Yeah. Which ultimately, then, flowed.").

[194] *Id.*

122. Multiple foreign policy and national security officials testified that the pursuit of investigations into the Bidens and alleged Ukrainian interference in the 2016 election was not part of official U.S. policy.[195] Instead, as Dr. Hill described, these investigations were part of a "domestic political errand" of President Trump.[196] Mr. Kent further explained that urging Ukraine to engage in "selective politically associated investigations or prosecutions" undermines our longstanding efforts to promote the rule of law abroad.[197]

123. Ambassador Volker, in response to an inquiry from President Zelensky's advisor, Mr. Yermak, confirmed that the U.S. Department of Justice (DOJ) did not make an official request for Ukraine's assistance in these investigations.[198]

124. Within hours after the White House publicly released a record of the July 25 call, DOJ itself confirmed in a statement that no such request was ever made:

> The President has not spoken with the Attorney General about having Ukraine investigate anything related to former Vice President Biden or his son. The President has not asked the Attorney General to contact Ukraine—on this or any other matter. The Attorney General has not communicated with Ukraine—on this or any other subject.[199]

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[195] Volker-Morrison Hearing Tr. at 146-47 (Mr. Morrison did not follow up on the President's request to "investigate the Bidens" because he "did not understand it as a policy objective"); Vindman-Williams Hearing Tr. at 119 (Mr. Vindman confirmed that he was not "aware of any written product" from the NSC suggesting that these investigations were "part of the official policy of the United States"); Taylor-Kent Hearing Tr. at 179 ("Mrs. Demings[:] Was Mr. Giuliani promoting U.S. national interests or policy in Ukraine . . . ? Ambassador Taylor[:] I don't think so, ma'am. . . . Mr. Kent[:] No, he was not.").

[196] Hill-Holmes Hearing Tr. at 92.

[197] Taylor-Kent Hearing Tr. at 24.

[198] Volker Interview Tr. at 197.

[199] Morgan Chalfant & Brett Samuels, *White House Memo Shows Trump Pressed Ukraine Leader to Look into Biden*, Hill (Sept. 25, 2019), https://perma.cc/5LHW-V4EB (quoting DOJ spokesperson Kerri Kupec).

G. President Trump Was Forced to Lift the Hold but Has Continued to Solicit Foreign Interference in the Upcoming Election

125. As noted above, by early September 2019, President Zelensky had signaled his willingness to announce the two investigations to secure a White House meeting and the security assistance. He was scheduled to make the announcement during a CNN interview later in September, but other events intervened.[200]

126. On September 9, the House Permanent Select Committee on Intelligence, the Committee on Oversight and Reform, and the Committee on Foreign Affairs announced a joint investigation into the scheme by President Trump "to improperly pressure the Ukrainian government to assist the President's bid for reelection."[201] The same day, the Committees sent document production and preservation requests to the White House and the State Department.[202]

127. NSC staff members believed that the Congressional investigation "might have the effect of releasing the hold" on Ukraine military assistance, because it would have been "potentially politically challenging" to "justify that hold."[203]

128. Later that day, the Inspector General of the Intelligence Community (ICIG) wrote to the Chairman and Ranking Member of the Intelligence Committee notifying them that a

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[200] Taylor Dep. Tr. at 207-209; Taylor-Kent Hearing Tr. at 158 ("[A]s we've determined, as we've discussed here on September 11th, just before any CNN discussion or interview, the hold was released, the hold on the security assistance was released." (quoting Ambassador Taylor)).

[201] Press Release, House Permanent Select Comm. on Intelligence, Three House Committees Launch Wide-Ranging Investigation into Trump-Giuliani Ukraine Scheme (Sept. 9, 2019) (Sept. 9 Press Release), https://perma.cc/AX4Y-PWSH.

[202] Letter from Chairman Eliot L. Engel, House Comm. on Foreign Affairs, et al., to Pat A. Cipollone, Counsel to the President 3-4 (Sept. 9, 2019) (Sept. 9 Letter), https://perma.cc/R2GH-TZ9P; Letter from Chairman Eliot L. Engel, House Comm. on Foreign Affairs, et al., to Michael R. Pompeo, Sec'y, Dep't of State (Sept. 9, 2019), https://perma.cc/C4W4-UBTF.

[203] Vindman Dep. Tr. at 304.

whistleblower had filed a complaint on August 12 that the ICIG had determined to be both an "urgent concern" and "credible." The ICIG did not disclose the contents of the complaint.[204]

129. The ICIG further stated that the Acting Director of National Intelligence (DNI) had taken the unprecedented step of withholding the whistleblower complaint from Congress.[205] It was later revealed that the Acting DNI had done so as a result of communications with the White House and the Department of Justice.[206] The next day, September 10, Chairman Schiff wrote to Acting DNI Joseph Maguire to express his concern about the Acting DNI's "unprecedented departure from past practice" in withholding the whistleblower complaint and observed that the "failure to transmit to the Committee an urgent and credible whistleblower complaint, as required by law, raises the prospect that an urgent matter of a serious nature is being purposefully concealed from the Committee."[207]

130. The White House was aware of the contents of the whistleblower complaint since at least August 26, when the Acting DNI informed the White House Counsel's Office of the complaint.[208] White House Counsel Pat Cipollone and Mr. Eisenberg reportedly briefed President

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[204] Letter from Michael K. Atkinson, Inspector Gen. of the Intelligence Community, to Chairman Adam Schiff, House Permanent Select Comm. on Intelligence, and Ranking Member Devin Nunes, House Permanent Select Comm. on Intelligence 2 (Sept. 9, 2019), https://perma.cc/K78N-SMRR.

[205] *Id.*

[206] Maguire Hearing Tr. at 14, 19-24.

[207] Letter from Chairman Adam B. Schiff, House Permanent Select Comm. on Intelligence, to Joseph Maguire, Acting Dir. of Nat'l Intelligence (Sept. 10, 2019), https://perma.cc/9X9V-G5ZN.

[208] Transcript, *Whistleblower Disclosure: Hearing Before the H. Permanent Select Comm. on Intelligence*, 116th Cong. 110 (Sept. 26, 209) (testimony of Joseph Maguire, Acting Dir., Nat'l Intelligence) (Maguire Hearing Tr.) ("Chairman Schiff, when I received the letter from Michael Atkinson on the 26th of August, he concurrently sent a letter to the Office of White House Counsel asking the White House counsel to control and keep any information that pertained to that phone call on the 25th.").

Trump on the whistleblower complaint in late August and discussed whether they had to give it to Congress.[209]

131. On September 11—two days after the ICIG notified Congress of the whistleblower complaint and the three House Committees announced their investigation—President Trump lifted the hold on security assistance. As with the implementation of the hold, no credible reason was provided for lifting the hold.[210] At the time of the release, there had been no discernible changes in international assistance commitments for Ukraine or Ukrainian anti-corruption reforms.[211]

132. Because of the hold the President placed on security assistance for Ukraine, DOD was unable to spend approximately $35 million—or 14 percent—of the funds appropriated by Congress for fiscal year 2019.[212]

133. Congress was forced to pass a new law to extend the funding in order to ensure the full amount could be used by Ukraine to defend itself.[213] Still, by early December 2019, Ukraine had not received approximately $20 million of the military assistance.[214]

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[209] Michael S. Schmidt et al., *Trump Knew of Whistle-Blower Complaint When He Released Aid to Ukraine*, N.Y. Times (Nov. 26, 2019), https://perma.cc/7473-YFSY.

[210] *See* Morgan Philips, *Trump Administration Lifts Hold on $250M in Military Aid for Ukraine*, Fox News (Sept. 12, 2019), https://perma.cc/8ABM-XNPV.

[211] *See, e.g.*, Morrison Dep. Tr. at 244; Vindman Dep. Tr. at 306; Williams Dep. Tr. at 147. Mr. Sandy testified that he was not aware of any other countries committing to provide more financial assistance to Ukraine prior to the lifting of the hold on September 11. Sandy Dep. Tr. at 180. Lt. Col. Vindman similarly confirmed that none of the "facts on the ground" changed before the President lifted the hold. Vindman Dep. Tr. at 306.

[212] Sandy Dep. Tr. at 146-47; H. Rep. No. 116-335, at 474.

[213] Continuing Appropriations Act, 2020, and Health Extenders Act of 2019, Pub. L. No. 116-59, § 124 (2019).

[214] Molly O'Toole & Sarah D. Wire, *Millions in Military Aid at Center of Impeachment Hasn't Reached Ukraine*, L.A. Times (Dec. 12, 2019), https://perma.cc/AR26-3KY2 (citing a DOD aide).

134. Although the hold was lifted, the White House still had not announced a date for President Zelensky's meeting with President Trump, and there were indications that President Zelensky's interview with CNN would still occur.[215]

135. On September 18, a week before President Trump was scheduled to meet with President Zelensky on the sidelines of the U.N. General Assembly in New York, Vice President Pence had a telephone call with President Zelensky. During the call, Vice President Pence "ask[ed] a bit more about . . . how Zelensky's efforts were going."[216] Additional details about this call were provided to the House by Vice President Pence's advisor, Jennifer Williams, but were classified by the Office of the Vice President.[217] Despite repeated requests, the Vice President has refused to declassify Ms. Williams' supplemental testimony.

136. On September 18 or 19, at the urging of Ambassador Taylor, [218] President Zelensky cancelled the CNN interview.[219]

137. To date, almost nine months after the initial invitation was extended by President Trump on April 21, a White House meeting for President Zelensky has not occurred.[220] Since the initial invitation, President Trump has met with more than a dozen world leaders at the White

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[215] Hill-Holmes Hearing Tr. at 33; Taylor-Kent Hearing Tr. at 106-07; *see also Zelensky Planned to Announce Trump's "Quo"*, https://perma.cc/MMT7-D8XJ.

[216] Williams Dep. Tr. at 156.

[217] Classified Supp'l Submission of Jennifer Williams to the House Permanent Select Comm. on Intelligence (Nov. 26, 2019) (describing additional details of the Vice President's call with President Zelensky on September 18).

[218] Taylor-Kent Hearing Tr. at 106-07; Hill-Holmes Hearing Tr. at 33.

[219] *Zelensky Planned to Announce Trump's "Quo"*, https://perma.cc/MMT7-D8XJ.

[220] Hill-Holmes Hearing Tr. at 46-47 (testimony of David Holmes) ("And although the hold on the security assistance may have been lifted, there were still things they wanted that they weren't getting, including a meeting with the President in the Oval Office. . . . And I think that continues to this day.").

House, including a meeting in the Oval Office with the Foreign Minister of Russia on December 10.[221]

138. Since lifting the hold, and even after the House impeachment inquiry was announced on September 24, President Trump has continued to press Ukraine to investigate Vice President Biden and alleged 2016 election interference by Ukraine.[222]

139. On September 24, in remarks at the opening session of the U.N. General Assembly, President Trump stated: "What Joe Biden did for his son, that's something they [Ukraine] should be looking at."[223]

140. On September 25, in a joint public press availability with President Zelensky, President Trump stated that "I want him to do whatever he can" in reference to the investigation of the Bidens.[224] The same day, President Trump denied that his pursuit of the investigation involved a quid pro quo.[225]

141. On September 30, during remarks at the swearing-in of the new Labor Secretary, President Trump stated: "Now, the new President of Ukraine ran on the basis of no corruption. . . . But there was a lot of corruption having to do with the 2016 election against us. And we want to get to the bottom of it, and it's very important that we do."[226]

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[221] John Hudson & Anne Gearan, *Trump Meets Russia's Top Diplomat amid Scrap over Election Interference*, Wash. Post (Dec. 10, 2019), https://perma.cc/X5WC-LKT5; *see also* Philip Bump, *Trump Promised Zelensky a White House Meeting. More Than a Dozen Other Leaders Got One Instead*, Wash. Post (Dec. 13, 2019), https://perma.cc/4XSP-R3JB (compiling White House meetings involving foreign officials since April 2019).

[222] *E.g.*, H. Rep. No. 116-346, at 124; *see also* Hill-Holmes Hearing Tr. at 46-47.

[223] Trump Sept. 24 Remarks, https://perma.cc/ZQ4P-FGT4.

[224] *Remarks by President Trump and President Zelensky of Ukraine Before Bilateral Meeting*, White House (Sept. 25, 2019) (Trump Sept. 25 Remarks), https://perma.cc/XCJ4-A67L.

[225] *Trump Quotes Sondland Quoting Him: "I Want Nothing. I Want No Quid Pro Quo.,"* CBS News (Nov. 20, 2019), https://perma.cc/X34R-QG3R.

[226] *Remarks by President Trump at the Swearing-In Ceremony of Secretary of Labor Eugene Scalia*, White House (Sept. 30, 2019) (Trump Sept. 30 Remarks), https://perma.cc/R94C-5HAY.

142. On October 3, when asked by a reporter what he had hoped President Zelensky would do following their July 25 call, President Trump responded: "Well, I would think that, if they were honest about it, they'd start a major investigation into the Bidens. It's a very simple answer."[227] The President also suggested that "China should start an investigation into the Bidens, because what happened in China is just about as bad as what happened with—with Ukraine.[228]

143. On October 4, President Trump equated his interest in "looking for corruption" to the investigation of two particular subjects: the Bidens and alleged Ukrainian interference in the 2016 election. He told reporters:

> What I want to do—and I think I have an obligation to do it, probably a duty to do it: corruption—we are looking for corruption. When you look at what Biden and his son did, and when you look at other people—what they've done. And I believe there was tremendous corruption with Biden, but I think there was beyond—I mean, beyond corruption—having to do with the 2016 campaign, and what these lowlifes did to so many people, to hurt so many people in the Trump campaign—which was successful, despite all of the fighting us. I mean, despite all of the unfairness.[229]

When asked by a reporter, "Is someone advising you that it is okay to solicit the help of other governments to investigate a potential political opponent?," Trump replied in part, "Here's what's okay: If we feel there's corruption, like I feel there was in the 2016 campaign—there was tremendous corruption against me—if we feel there's corruption, we have a right to go to a foreign country."[230]

144. As the House's impeachment inquiry unfolded, Mr. Giuliani, on behalf of the President, also continued to urge Ukraine to pursue the investigations and dig up dirt on former

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[227] *Remarks by President Trump Before Marine One Departure*, White House (Oct. 3, 2019) (Trump Oct. 3 Remarks), https://perma.cc/WM8A-NRA2.

[228] *Id.*

[229] *Remarks by President Trump Before Marine One Departure*, White House (Oct. 4, 2019) (Trump Oct. 4 Remarks), https://perma.cc/C78K-NMDS.

[230] *Id.*

Vice President Biden. Mr. Giuliani's own statements about these efforts further confirm that he has been working in furtherance of the President's personal and political interests.[231]

145. During the first week of December, Mr. Giuliani traveled to Kyiv and Budapest to meet with both current and former Ukrainian government officials,[232] including a current Ukrainian member of Parliament who attended a KGB school in Moscow and has led calls to investigate Burisma and the Bidens.[233] Mr. Giuliani also met with the corrupt former prosecutor generals, Viktor Shokin and Yuriy Lutsenko, who had promoted the false allegations underlying the investigations President Trump wanted.[234] Mr. Giuliani told the *New York Times* that in meeting with Ukrainian officials he was acting on behalf of his client, President Trump: "[L]ike a good lawyer, I am gathering evidence to defend my client against the false charges being leveled against him."[235]

146. During his trip to Ukraine, on December 5, Mr. Giuliani tweeted: "The conversation about corruption in Ukraine was based on compelling evidence of criminal conduct by then VP Biden, in 2016, that has not been resolved and until it is will be a major obstacle to the US assisting Ukraine with its anti-corruption reforms."[236] Not only was Mr. Giuliani perpetuating the

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[231] *See, e.g.*, Kenneth P. Vogel & Benjamin Novak, *Giuliani, Facing Scrutiny, Travels to Europe to Interview Ukrainians*, N.Y. Times (Dec. 4, 2019) (*Giuliani, Facing Scrutiny, Travels to Europe*), https://perma.cc/N28V-GPAC; Dana Bash & Michael Warren, *Giuliani Says Trump Still Supports His Dirt-Digging in Ukraine*, CNN (Dec. 17, 2019) (*Giuliani Says Trump Still Supports His Dirt-Digging*), https://perma.cc/F399-B9AY.

[232] *Giuliani, Facing Scrutiny, Travels to Europe*, https://perma.cc/HZ6F-E67G; David L. Stern & Robyn Dixon, *Ukraine Lawmaker Seeking Biden Probe Meets with Giuliani in Kyiv*, Wash. Post (Dec. 5, 2019) (*Ukraine Lawmaker Seeking Biden Probe*), https://perma.cc/C3GW-RF4T; Will Sommer, *Rudy's New Ukraine Jaunt Is Freaking Out Trump's Lieutenants—and He Doesn't Care*, Daily Beast (Dec. 6, 2019) (*Rudy's New Ukraine Jaunt*), https://perma.cc/UNR9-VWFZ.

[233] *Ukraine Lawmaker Seeking Biden Probe*, https://perma.cc/W3Q2-E8QY.

[234] Philip Bump, *Giuliani May Be Making a Stronger Case Against Trump Than Biden*, Wash. Post (Dec. 16, 2019), https://perma.cc/7HR4-TC9W; *Rudy's New Ukraine Jaunt*, https://perma.cc/UNR9-VWFZ.

[235] *Giuliani, Facing Scrutiny, Travels to Europe*, https://perma.cc/HZ6F-E67G.

[236] Rudy Giuliani (@RudyGiuliani), Twitter (Dec. 5, 2019, 1:42 PM), https://perma.cc/829X-TSKJ.

false allegations against Vice President Biden, but he was reiterating the threat that President Trump had used to pressure President Zelensky to announce the investigations: that U.S. assistance to Ukraine could be in jeopardy until Ukraine investigated Vice President Biden.

147. Mr. Giuliani told the *Wall Street Journal* that when he returned to New York on December 7, President Trump called him as his plane was still taxiing down the runway. "'What did you get?' he said Mr. Trump asked. 'More than you can imagine,' Mr. Giuliani replied."[237]

148. Later that day, President Trump told reporters that he was aware of Mr. Giuliani's efforts in Ukraine and believed that Mr. Giuliani wanted to report the information he'd gathered to the Attorney General and Congress.[238]

149. On December 17, Mr. Giuliani confirmed that President Trump has been "very supportive" of his continuing efforts to dig up dirt on Vice President Biden in Ukraine and that they are "on the same page."[239]

150. Such ongoing efforts by President Trump, including through his personal attorney, to solicit an investigation of his political opponent have undermined U.S. credibility. On September 14, Ambassador Volker advised Mr. Yermak against the Zelensky Administration conducting an investigation into President Zelensky's own former political rival, former Ukrainian President Petro Poroshenko. When Ambassador Volker raised concerns about such an investigation, Mr. Yermak

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[237] Rebecca Ballhaus & Julie Bykowicz, *"Just Having Fun": Giuliani Doubles Down on Ukraine Probes*, Wall Street J. (Dec. 13, 2019), https://perma.cc/5B69-2AVR.

[238] David Jackson, *Trump Says Rudy Giuliani Will Give Information About Ukraine to Justice Department, Congress*, USA Today (Dec. 7, 2019), https://perma.cc/7RXJ-JG7F.

[239] *Giuliani Says Trump Still Supports His Dirt-Digging*, https://perma.cc/F399-B9AY; *see also* Asawin Suebsaeng & Erin Banco, *Trump Tells Rudy to Keep Pushing the Biden Conspiracies*, Daily Beast (Dec. 18, 2019), https://perma.cc/S5K6-K8J9 (quoting source who reported that President Trump told Mr. Giuliani to "keep at it").

retorted, "What, you mean like asking us to investigate Clinton and Biden?"[240] Ambassador Volker offered no response.[241]

151. Mr. Holmes, a career diplomat, highlighted this hypocrisy: "While we had advised our Ukrainian counterparts to voice a commitment to following the rule of law and generally investigating credible corruption allegations," U.S. officials were making "a demand that President Zelensky personally commit on a cable news channel to a specific investigation of President Trump's political rival."[242]

H. President Trump's Conduct Was Consistent with His Previous Invitations of Foreign Interference in U.S. Elections

152. President Trump's efforts to solicit Ukraine's interference in the 2020 U.S. Presidential election to help his own reelection campaign were consistent with his prior solicitation and encouragement of Russia's interference in the 2016 election, when the Trump Campaign "expected it would benefit electorally from information stolen and released through Russian efforts."[243]

153. As a Presidential candidate, Mr. Trump repeatedly sought to benefit from Russia's actions to help his campaign. For example, during a public rally on July 27, 2016, then-candidate Trump declared: "Russia, if you're listening, I hope you're able to find the 30,000 emails that are missing" from opposing candidate Hillary Clinton's personal server.[244] Within hours, Russian hackers targeted Clinton's personal office for the first time.[245]

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[240] Volker-Morrison Hearing Tr. at 139; *see* Kent Dep. Tr. at 329.
[241] Kent Dep. Tr. at 329.
[242] Hill-Holmes Hearing Tr. at 32.
[243] Mueller Report, Vol. I at 1-2.
[244] Mueller Report, Vol. I at 49 (quoting then-candidate Donald Trump).
[245] *Id.* Beginning in early November 2019, while the House's impeachment inquiry was ongoing, Russian military hackers reportedly hacked Burisma's server using "strikingly similar" tactics to those used to hack the DNC in 2016. *See* Nicole Perlroth & Matthew Rosenberg, *Russians*

154. Days earlier, WikiLeaks had begun releasing emails and documents that were stolen by Russian military intelligence services in order to damage the Clinton campaign.[246] WikiLeaks continued releasing stolen documents through October 2016.[247] Then-candidate Trump repeatedly applauded and sought to capitalize on WikiLeaks's releases of these stolen documents, even after Russia's involvement was heavily reported by the press.[248] Members of the Trump Campaign also planned messaging and communications strategies around releases by WikiLeaks.[249] In the last month of the campaign, then-candidate Trump publicly referred to the emails hacked by Russia and disseminated by WikiLeaks over 150 times.[250]

155. Multiple members of the Trump Campaign used additional channels to seek Russia's assistance in obtaining damaging information about Clinton. For example, senior representatives of the Trump Campaign—including the Campaign's chairman and the President's son—met with a Russian attorney in June 2016 who had offered to provide damaging information about Clinton from the Russian government.[251] A foreign policy advisor to the Trump Campaign also met repeatedly with people connected to the Russian government and their associates, one of whom claimed to have "dirt" on Clinton in the form of "thousands of emails."[252]

156. Even after Special Counsel Mueller released his report, President Trump confirmed his willingness to benefit from foreign election interference. When asked during a televised

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Hacked Ukrainian Gas Company at Center of Impeachment, N.Y. Times (Jan. 13, 2019), https://perma.cc/5NSA-BELW.

[246] Mueller Report, Vol. I at 6.

[247] *Id.*, Vol. I at 58.

[248] *See* Aaron Blake, *The Trump Team's History of Flirting with—and Promoting—Now-Accused-Criminal Julian Assange*, Wash. Post (Nov. 16, 2018), https://perma.cc/UL9R-YQN.

[249] Mueller Report, Vol. I at 54; *id.*, Vol. II at 18.

[250] Judd Legum, *Trump Mentioned WikiLeaks 164 Times in Last Month of Election, Now Claims It Didn't Impact One Voter*, ThinkProgress (Jan. 8, 2017), https://perma.cc/5J46-Y8RG.

[251] Mueller Report, Vol. I at 110-20.

[252] *Id.*, Vol. I at 83-84, 87-89.

interview in June 2019 whether he would accept damaging information from a foreign government about a political opponent, the President responded, "I think I'd take it."[253] President Trump declared that he sees "nothing wrong with listening" to a foreign power that offers information detrimental to a political adversary.[254] Asked whether such an offer of information should be reported to law enforcement, President Trump retorted: "Give me a break, life doesn't work that way."[255] Just weeks later, President Trump froze security assistance to Ukraine as his agents were pushing that country to pursue investigations that would help the President's reelection campaign.[256]

157. In addition, President Trump's request for the investigations on the July 25 call with President Zelensky took place one day after former Special Counsel Mueller testified before the House Judiciary Committee and the House Permanent Select Committee on Intelligence about the findings of his investigation into Russia's interference in the 2016 Presidential election and President Trump's efforts to undermine that investigation.[257] During his call with President Zelensky, President Trump derided former Special Counsel Mueller's "poor performance" in his July 24 testimony and speculated that "that whole nonsense . . . started with Ukraine."[258]

II. PRESIDENT TRUMP'S OBSTRUCTION OF CONGRESS

158. President Trump ordered categorical obstruction of the impeachment inquiry undertaken by the House under Article I of the Constitution, which vests the House with the "sole Power of Impeachment."[259]

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[253] *Transcript: ABC News' George Stephanopoulos' Exclusive Interview with President Trump*, ABC News (June 16, 2019), https://perma.cc/C8DS-637R.

[254] *Id.*

[255] *Id.*

[256] Sandy Dep. Tr. at 37-39; Morrison Dep. Tr. at 161.

[257] *See* Press Release, House Permanent Select Comm. on Intelligence, House Judiciary and House Intelligence Committees to Hold Open Hearing with Special Counsel Robert Mueller (July 19, 2019), https://perma.cc/6TZZ-BJKS.

[258] The July 25 Memorandum at 3, https://perma.cc/8JRD-6K9V.

[259] U.S. Const., Art. I, § 2, cl. 5.

A. The House Launched an Impeachment Inquiry

159. During the 116th Congress, a number of Committees of the House have undertaken investigations into allegations of misconduct by President Trump and his Administration, including to determine whether to recommend articles of impeachment.[260]

160. As discussed above, on September 9, the Intelligence Committee and the Committees on Oversight and Reform and Foreign Affairs announced they would conduct a joint investigation into the President's scheme to pressure Ukraine to announce the politically motivated investigations.[261]

161. Given the gravity of the allegations that President Trump was soliciting foreign interference in the upcoming 2020 election, Speaker Nancy P. Pelosi announced on September 24 that the House was "moving forward with an official impeachment inquiry."[262] Speaker Pelosi directed the Committees to "proceed with their investigations under that umbrella of [an] impeachment inquiry."[263]

162. On October 31, the House enacted a resolution confirming the Committees' authority to conduct the impeachment inquiry and adopting procedures governing the inquiry.[264]

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[260] *See, e.g.*, *Resolution Recommending That the House of Representatives Find William P. Barr, Attorney General, U.S. Department of Justice, in Contempt of Congress for Refusal to Comply with a Subpoena Duly Issued by the Committee on the Judiciary*, H. Rep. No. 116-105, at 13 (June 6, 2019) ("The purposes of this investigation include . . . considering whether any of the conduct described in the Special Counsel's Report warrants the Committee in taking any further steps under Congress' Article I powers. That includes whether to approve articles of impeachment with respect to the President[.]"); *Directing Certain Committees to Continue Their Ongoing Investigations as Part of the Existing House of Representatives Inquiry into Whether Sufficient Grounds Exist for the House of Representatives to Exercise its Constitutional Power to Impeach Donald John Trump, President of the United States of America, and for Other Purposes*, H. Rep. No. 116-266, at 4 (Oct. 2019).

[261] Sept. 9 Press Release, https://perma.cc/AX4Y-PWSH.

[262] Press Release, Speaker of the House, Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019), https://perma.cc/6EQM-34PT.

[263] *Id.*

[264] H. Res. 660, 116th Cong. (2019).

163. The procedures adopted by the House afforded procedural privileges to the President that were equivalent to, or in some instances exceeded, those afforded during prior impeachment inquiries.[265] Transcripts of all witness interviews and depositions were released to the public, and President Trump was offered—but refused—multiple opportunities to have his counsel participate in proceedings before the Judiciary Committee, including by cross-examining witnesses and presenting evidence.[266]

B. President Trump Ordered Categorical Obstruction of the House's Impeachment Inquiry

164. Even before the House launched its impeachment inquiry into President Trump's misconduct concerning Ukraine, he rejected Congress's Article I investigative and oversight authority, proclaiming, "[W]e're fighting all the subpoenas,"[267] and "I have an Article II, where I have the right to do whatever I want as president."[268]

165. In response to the House impeachment inquiry regarding Ukraine, the Executive Branch categorically refused to provide any requested documents or information at President Trump's direction.

166. On September 9, 2019, three House Committees sent a letter to White House Counsel Pat Cipollone requesting six categories of documents relevant to the Ukraine investigation

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[265] *Compare* 165 Cong. Rec. E1357 (2019) (Impeachment Inquiry Procedures in the Committee on the Judiciary Pursuant to H. Res. 660), *with Investigatory Powers of the Committee on the Judiciary with Respect to Its Impeachment Inquiry*, H. Rep. No. 105-795 (1998), *and with Impeachment Inquiry: Hearings Before the H. Comm. on the Judiciary, Book III*, 93d Cong. 2249-52 (1974); *see also* H. Rep. No. 116-346, at 17-25.

[266] H. Rep. No. 116-346, at 22-24.

[267] *Remarks by President Trump Before Marine One Departure*, White House (Apr. 24, 2019), https://perma.cc/W7VZ-FZ3T.

[268] *Remarks by President Trump at Turning Point USA's Teen Student Action Summit 2019*, White House (July 23, 2019), https://perma.cc/EFF6-9BE7.

by September 16.[269] When the White House did not respond, the Committees sent a follow-up letter on September 24.[270]

167. Instead of responding directly to the Committees, the President publicly declared the impeachment inquiry "a disgrace," and stated that "it shouldn't be allowed" and that "[t]here should be a way of stopping it."[271]

168. When the White House still did not respond to the Committees' request, the Committees issued a subpoena compelling the White House to turn over documents.[272]

169. The President's response to the House's inquiry—sent by Mr. Cipollone on October 8—sought to accomplish the President's goal of "stopping" the House's investigation. Mr. Cipollone wrote "on behalf of President Donald J. Trump" to notify Congress that "President Trump cannot permit his Administration to participate in this partisan inquiry under these circumstances."[273]

170. Despite the Constitution's placement of the "sole Power" of impeachment in the House, Mr. Cipollone's October 8 letter opined that the House's inquiry was "constitutionally invalid," "lack[ed] . . . any basis," "lack[ed] the necessary authorization for a valid impeachment," and was merely "labeled . . . as an 'impeachment inquiry.'"[274]

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[269] Sept. 9 Letter, https://perma.cc/R2GH-TZ9P.

[270] Letter from Chairman Eliot L. Engel, House Comm. on Foreign Affairs, et al., to Pat A. Cipollone, Counsel to the President 3 (Sept. 24, 2019), https://perma.cc/SCG3-6UEW.

[271] *Remarks by President Trump upon Air Force One Arrival*, White House (Sept. 26, 2019), https://perma.cc/5RWE-8VTB.

[272] Letter from Chairman Elijah E. Cummings, House Comm. on Oversight and Reform, et al., to John Michael Mulvaney, Acting Chief of Staff to the President (Oct. 4, 2019) (Oct. 4 Letter), https://perma.cc/6RXE-WER8.

[273] Letter from Pat A. Cipollone, Counsel to the President, to Speaker Nancy Pelosi, House of Representatives, et al. 7 (Oct. 8, 2019), https://perma.cc/5P57-773X (Oct. 8 Cipollone Letter).

[274] *Id.* at 1-3, 6.

171. The letter's rhetoric aligned with the President's public campaign against the impeachment inquiry, which he has branded "a COUP, intended to take away the Power of the People,"[275] an "unconstitutional abuse of power,"[276] and an "open war on American Democracy."[277]

172. Although President Trump has categorically sought to obstruct the House's impeachment inquiry, he has never formally asserted a claim of executive privilege as to any document or testimony. Mr. Cipollone's October 8 letter refers to "long-established Executive Branch confidentiality interests and privileges" but the President did not actually assert executive privilege.[278] Similarly, a Department of Justice Office of Legal Counsel November 1, 2019 opinion only recognized that information responsive to the subpoenas was "*potentially* protected by executive privilege."[279]

173. In addition, the President and his agents have spoken at length about these events to the press and on social media. Since the impeachment inquiry was announced on September 24, the President has made numerous public statements about his communications with President Zelensky and his decision-making relating to the hold on security assistance.[280]

174. The President's agents have done the same. For example, on October 16, Secretary Perry gave an interview to the *Wall Street Journal*. During the interview, Secretary Perry stated that

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[275] @realDonaldTrump (Oct. 1, 2019, 4:41 PM), https://perma.cc/UX8Z-BFKL.

[276] Letter from President Donald J. Trump to Speaker Nancy Pelosi, House of Representatives (Dec. 17, 2019), https://perma.cc/MY49-HRXH.

[277] *Id.*

[278] Oct. 8 Cipollone Letter at 4.

[279] Exclusion of Agency Counsel from Congressional Depositions in the Impeachment Context, 43 O.L.C. *1 (Nov. 1, 2019), https://perma.cc/T2PH-KC9V (emphasis added).

[280] *See, e.g.*, Trump Sept. 25 Remarks, https://perma.cc/XCJ4-A67L; Trump Sept. 30 Remarks, https://perma.cc/R94C-5HAY; *Remarks by President Trump and President Niinistö of the Republic of Finland Before Bilateral Meeting*, White House (Oct. 2, 2019), https://perma.cc/FN4D-6D8W; Trump Oct. 3 Remarks, https://perma.cc/WM8A-NRA2; Trump Oct. 4 Remarks, https://perma.cc/C78K-NMDS; @realDonaldTrump (Nov. 10, 2019, 11:43 AM), https://perma.cc/F9XH-48Z2; *id.* (Dec. 4, 2019, 7:50 PM), https://perma.cc/Q4VY-T3CN; *id.*, https://perma.cc/3WCM-AQJG.

after the May 23 meeting at which President Trump refused to schedule a White House meeting with President Zelensky, Secretary Perry "sought out Rudy Giuliani this spring at President Trump's direction to address Mr. Trump's concerns about alleged Ukrainian corruption."[281] During a phone call with Secretary Perry, Mr. Giuliani said, "'Look, the president is really concerned that there are people in Ukraine that tried to beat him during this presidential election. . . . He thinks they're corrupt and . . . that there are still people over there engaged that are absolutely corrupt.'"[282]

175. On October 17, Acting Chief of Staff Mulvaney acknowledged during a White House press conference that he discussed security assistance with the President and that the President's decision to withhold it was directly tied to his desire that Ukraine investigate alleged Ukrainian interference in the 2016 U.S. election.[283]

176. On December 3, 2019, the Intelligence Committee transmitted a detailed nearly 300-page report documenting its findings about this scheme and about the related investigation into it, to the Judiciary Committee.[284] The Judiciary Committee held public hearings evaluating the constitutional standard for impeachment and the evidence against President Trump—in which the President's counsel was invited to participate, but declined—and then reported two Articles of Impeachment to the House.[285]

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[281] *Rick Perry Called Rudy Giuliani*, https://perma.cc/S2ED-AUPR.

[282] *Id.* (quoting Secretary Rick Perry).

[283] Oct. 17 Briefing, https://perma.cc/Q45H-EMC7.

[284] H. Rep. No. 116-346, at 11 ("On December 3, 2019, in consultation with the Committees on Oversight and Reform and Foreign Affairs, HPSCI released and voted to adopt a report of nearly 300 pages detailing its extensive findings about the President's abuse of his office and obstruction of Congress.").

[285] *The Impeachment Inquiry into President Donald J. Trump: Constitutional Grounds for Presidential Impeachment: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. (Dec. 4, 2019); *The Impeachment Inquiry into President Donald J. Trump: Presentations from H. Permanent Select Comm. on Intelligence and H. Comm. on the Judiciary Before the H. Comm. on the Judiciary*, 116th Cong. (Dec. 9, 2019).

177. The President maintained his obstructionist position throughout this process, declaring the House's investigation "illegitimate" in a letter to Speaker Nancy Pelosi on December 17, 2019.[286] President Trump further attempted to undermine the House's inquiry by dismissing impeachment as "illegal, invalid, and unconstitutional"[287] and by intimidating and threatening an anonymous Intelligence Community whistleblower as well as the patriotic public servants who honored their subpoenas and testified before the House.[288]

178. On December 18, 2019, the House voted to impeach President Trump and adopted two Articles of Impeachment.[289]

C. Following President Trump's Directive, the Executive Branch Refused to Produce Requested and Subpoenaed Documents

179. Adhering to President Trump's directive, every Executive Branch agency that received an impeachment inquiry request or subpoena defied it.[290]

180. House Committees issued document requests or subpoenas to the White House, the Office of the Vice President, OMB, the Department of State, DOD, and the Department of Energy.[291]

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[286] *See, e.g.*, Letter from President Donald J. Trump to Speaker Nancy Pelosi, U.S. House of Representatives (Dec. 17, 2019), https://perma.cc/Y6X4-TTPR.

[287] Katie Rogers, *At Louisiana Rally, Trump Lashes Out at Impeachment Inquiry and Pelosi*, N.Y. TIMES (Oct. 11, 2019), https://perma.cc/RX9Z-DQHK.

[288] *See e.g.*, Danny Cevallos, *Trump Tweeted as Marie Yovanovitch Testified: Was It Witness Tampering?*, NBC News (Nov. 16, 2019), https://perma.cc/RG5N-EQYN; @realDonaldTrump (Sept. 29, 2019, 3:53 PM), https://perma.cc/9C3P-E437; Trump War Room—Text FIGHT to 88022 (@TrumpWarRoom) (Dec. 26, 2019, 1:50 PM), https://perma.cc/M5H7-B4VS (retweeted by @realDonaldTrump on Dec. 26, 2019).

[289] H. Res. 755, 116th Cong (2019).

[290] *See* H. Rep. No. 116-335, at 180-92.

[291] Oct. 4 Letter, https://perma.cc/6RXE-WER8; Letter from Chairman Eliot L. Engel, House Comm. on Foreign Affairs, et al., to Vice President Michael R. Pence (Oct. 4, 2019), https://perma.cc/E6TR-5N5F; Letter from Chairman Adam B. Schiff, House Permanent Select Comm. on Intelligence, et al., to Russell T. Vought, Acting Dir., Office of Mgmt. & Budget (Oct. 7, 2019), https://perma.cc/2HBV-2LNB; Letter from Chairman Eliot L. Engel, House Comm. on Foreign Affairs, et al., to Michael R. Pompeo, Sec'y, Dep't of State (Sept. 27, 2019),

181. In its response, the Office of the Vice President echoed Mr. Cipollone's assertions that the impeachment inquiry was procedurally invalid,[292] while agencies such as OMB and DOD expressly cited the President's directive.[293]

182. The Executive Branch has refused to produce any documents in response to the Committees' valid, legally binding subpoenas, even though witness testimony has revealed that highly relevant records exist.[294]

183. Indeed, by virtue of President Trump's order, not a single document has been produced by the White House, the Office of the Vice President, OMB, the Department of State,

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https://perma.cc/8N7L-VSDR; Letter from Chairman Adam B. Schiff, House Permanent Select Comm. on Intelligence, et al., to Mark Esper, Sec'y, Dep't of Def. (Oct. 7, 2019), https://perma.cc/LMU8-XWE9; Letter from Chairman Eliot L. Engel, House Comm. on Foreign Affairs, et al., to Rick Perry, Sec'y, Dep't of Energy (Oct. 10, 2019), https://perma.cc/586S-AR8A.

[292] Letter from Matthew E. Morgan, Counsel to the Vice President, to Chairman Elijah E. Cummings, House Comm. on Oversight and Reform, et al. (Oct. 15, 2019), https://perma.cc/L6LD-C4YM.

[293] Letter from Jason Yaworske, Assoc. Dir. for Legislative Affairs, Office of Mgmt. & Budget, to Chairman Adam B. Schiff, House Permanent Select Comm. on Intelligence (Oct. 15, 2019), https://perma.cc/AL7W-YBLR; Letter from Robert R. Hood, Assistant Sec'y of Def. for Legislative Affairs, Dep't of Def., to Chairman Adam B. Schiff, House Permanent Select Comm. on Intelligence, et al. (Oct. 15, 2019), https://perma.cc/79ZG-ASGM.

[294] *See, e.g.*, Vindman-Williams Hearing Tr. at 31-32 (briefing materials for President Trump's call with President Zelensky on July 25 prepared by Lt. Col. Vindman, Director for Ukraine at the NSC); Vindman Dep. Tr. at 53 and Morrison Dep. Tr. at 19-20 (notes relating to the July 25 call taken by Lt. Col. Vindman and Mr. Morrison, the former Senior Director for Europe and Russia on the NSC); Vindman Dep. Tr. at 186-87 and Morrison Dep. Tr. at 166-67 (an August 15 "Presidential decision memo" prepared by Lt. Col. Vindman and approved by Mr. Morrison conveying "the consensus views from the entire deputies small group" that "the security assistance be released"); Cooper Dep. Tr. at 42-43 (NSC staff summaries of conclusions from meetings at the principal, deputy, or sub-deputy level relating to Ukraine, including military assistance); Sondland Hearing Tr. at 78-79 (call records between President Trump and Ambassador Sondland,); Vindman Dep. Tr. at 36-37 (NSC Legal Advisor Eisenberg's notes and correspondence relating to discussions with Lt. Col. Vindman regarding the July 10 meetings in which Ambassador Sondland requested investigations in exchange for a White House meeting); Holmes Dep. Tr. at 31 (the memorandum of conversation from President Trump's meeting in New York with President Zelensky on September 25); Sondland Opening Statement (emails and other messages between Ambassador Sondland and senior White House officials, including Acting Chief of Staff Mulvaney, Senior Advisor to the Chief of Staff Blair, and then-National Security Advisor Bolton, among other high-level Trump Administration officials).

DOD, or the Department of Energy in response to 71 specific, individualized requests or demands for records in their possession, custody, or control. These agencies and offices also blocked many current and former officials from producing records to the Committees.[295]

184. Certain witnesses, however, defied the President's order and identified the substance of key documents. For example, Lt. Col. Vindman described a "Presidential Decision Memo" he prepared in August that conveyed the "consensus views" among foreign policy and national security officials that the hold on aid to Ukraine should be released.[296] Other witnesses identified additional documents that the President and various agencies were withholding from Congress that were directly relevant to the impeachment inquiry.[297]

185. Some responsive documents have been released by the State Department, DOD, and OMB pursuant to judicial orders issued in response to lawsuits filed under the Freedom of Information Act (FOIA).[298] Although limited in scope and heavily redacted, these FOIA productions confirm that the Trump Administration is withholding highly pertinent documents from Congress without any valid legal basis.[299]

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[295] *See* H. Rep. No. 116-335, at 180-244.

[296] Vindman Dep. Tr. at 186-87; Morrison Dep. Tr. at 166-67; *see also, e.g.*, Sandy Dep. Tr. at 58-60 (describing an OMB memorandum prepared in August that recommended removing the hold).

[297] Taylor Dep. Tr. at 33-34, 45-46 (describing August 27 cable to Secretary Pompeo, WhatsApp messages with Ukrainian and American officials, and notes); Volker Dep. Tr. at 20 (describing State Department's possession of substantial paper trail of correspondence concerning meetings with Ukraine); Yovanovitch Dep. Tr. at 61 (describing classified email to Under Secretary Hale); *id.* at 197-200 (describing a dispute between George Kent and the State Department pertaining to subpoenaed documents).

[298] *See, e.g.*, *State Department Releases Ukraine Documents to American Oversight*, American Oversight (Nov. 22, 2019), https://perma.cc/N7K2-D7G3; Joint Status Report at 1, American Oversight v. Dep't of State, No. 19-cv-2934 (D.D.C. Nov. 25, 2019), ECF No. 19.

[299] For example, documents produced by OMB, unredacted copies of which reportedly were obtained by the online forum *Just Security*, corroborate the witnesses who testified that the military aid for Ukraine was withheld at the express direction of President Trump and that the White House was informed that doing so may violate the law. *See* Just Security Report, https://perma.cc/VA6U-RYPK.

D. President Trump Ordered Top Aides Not to Testify, Even Pursuant to Subpoena

186. President Trump directed government witnesses to violate their legal obligations and defy House subpoenas—regardless of their offices or positions. In some instances, the President personally directed that senior aides defy subpoenas on the ground that they are "absolutely immune" from compelled testimony.[300] Other officials refused to appear "as directed by" Mr. Cipollone's October 8 letter.[301] Still others refused to appear because—consistent with the House Deposition Rules drafted by the then-majority Republicans—agency counsel was not permitted in the depositions.[302]

187. This Administration-wide effort to prevent witnesses from providing testimony was coordinated and comprehensive. In total, twelve current or former Administration officials refused to testify as part of the House's impeachment inquiry into the Ukrainian matter, nine of whom did so in defiance of duly authorized subpoenas.[303] House Committees advised such witnesses that their refusal to testify may be used as an adverse inference against the President.[304] Nonetheless—despite

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[300] *See* Letter from Pat A. Cipollone, Counsel to the President, to William Pittard, Counsel to Acting Chief of Staff Mick Mulvaney (Nov. 8, 2019), https://perma.cc/9PHC-84AM; Letter from Pat A. Cipollone, Counsel to the President, to William Burck, Counsel to Deputy Counsel to the President for Nat'l Security Affairs John Eisenberg (Nov. 3, 2019), https://perma.cc/QP4G-YMKQ.

[301] *See, e.g.*, Letter from Jason A. Yaworske, Associate Dir. for Leg. Affairs, Office of Mgmt. & Budget, to Chairman Adam B. Schiff, House Permanent Select Comm. on Intelligence (Nov. 4, 2019), https://perma.cc/4AYC-8SD9 (asserting OMB's "position that, as directed by the White House Counsel's October 8, 2019 letter, OMB will not participate in this partisan and unfair inquiry," and that three OMB officials would therefore defy subpoenas for their testimony).

[302] *See* H. Rep. No. 116-335, at 195, 198-99, 201, 203. Such witnesses included Robert Blair, Michael Ellis, P. Wells Griffith, Russell Vought, and Brian McCormack. *Id.*

[303] *See id.* at 193-206 (describing and quoting from correspondence with each witness who refused to appear).

[304] *See* H. Rep. No. 116-346, at 200, 365; *see, e.g.*, Letter from Chairman Adam B. Schiff, House Permanent Select Comm. on Intelligence, et al., to Michael Duffey, Assoc. Dir. for Nat'l Sec. Programs, Office of Mgmt. & Budget (Oct. 25, 2019), https://perma.cc/3S5B-FH94; Email from Daniel S. Noble, Senior Investigative Counsel, House Permanent Select Comm. on Intelligence, to

being instructed by senior political appointees not to cooperate with the House's impeachment inquiry, in directives that frequently cited or enclosed copies of Mr. Cipollone's October 8 letter[305]—many current and former officials complied with their legal obligations to appear for testimony.

188. House Committees conducted depositions or transcribed interviews of seventeen witnesses.[306] All members of the Committees—as well as staff from the Majority and the Minority—were permitted to attend. The Majority and Minority were allotted an equal amount of time to question witnesses.[307]

189. In late November 2019, twelve of these witnesses testified in public hearings convened by the Intelligence Committee, including three witnesses called by the Minority.[308]

190. Unable to silence certain witnesses, President Trump resorted to intimidation tactics to penalize them.[309] He also levied sustained attacks on the anonymous whistleblower.[310]

Mick Mulvaney, Acting Chief of Staff to the President (Nov. 7, 2019), https://perma.cc/A62P-5ACG.

[305] *See, e.g.*, Letter from Brian Bulatao, Under Sec'y of State for Mgmt., Dep't of State, to Lawrence S. Robbins, Counsel to Ambassador Marie Yovanovitch 1 (Oct. 10, 2019), https://perma.cc/48UC-KJCM ("I write on behalf of the Department of State, pursuant to the President's instruction reflected in Mr. Cipollone's letter, to instruct your client . . . consistent with Mr. Cipollone's letter, not to appear before the Committees."); *id.* at 3-10 (enclosing Mr. Cipollone's letter); Letter from David L. Norquist, Deputy Sec'y of Def., Dep't of Def., to Daniel Levin, Counsel to Deputy Assistant Sec'y of Def. Laura K. Cooper 1-2 (Oct. 22, 2019), https://perma.cc/WM97-DZJZ ("This letter informs you and Ms. Cooper of the Administration-wide direction that Executive Branch personnel 'cannot participate in [the impeachment] inquiry under these circumstances.'" (quoting Mr. Cipollone's letter)); *id.* at 25-32 (enclosing Mr. Cipollone's letter).

[306] *See* H. Rep. No. 116-346, at 9; *see also Read for Yourself: President Trump's Abuse of Power*, House Permanent Select Comm. on Intelligence, https://perma.cc/2L54-YY9P.

[307] *See* H. Rep. No. 116-346, at 9.

[308] *See id.* at 10-11.

[309] *See* H. Rep. No. 116-335, at 217-20 (detailing the ways that "President Trump publicly attacked and intimidated witnesses who came forward to comply with duly authorized subpoenas and testify about his conduct."); H. Rep. No. 116-346, at 366-67.

[310] *See* H. Rep. No. 116-335, at 221-23 (detailing the ways that President Trump "threatened and attacked an Intelligence Community whistleblower"); H. Rep. No. 116-346, at 366-67.

E. President Trump's Conduct Was Consistent with His Previous Efforts to Obstruct Investigations into Foreign Interference in U.S. Elections

191. President Trump's obstruction of the House's impeachment inquiry was consistent with his previous efforts to undermine Special Counsel Mueller's investigation of Russia's interference in the 2016 election and of the President's own misconduct.

192. President Trump repeatedly used his powers of office to undermine and derail the Mueller investigation, particularly after learning that he was personally under investigation for obstruction of justice.[311] Among other things, President Trump ordered White House Counsel Don McGahn to fire Special Counsel Mueller;[312] instructed Mr. McGahn to create a record and issue statements falsely denying this event;[313] sought to curtail Special Counsel Mueller's investigation in a manner exempting his own prior conduct;[314] and tampered with at least two key witnesses.[315] President Trump has since instructed McGahn to defy a House Committee's subpoena for testimony, and his DOJ has erroneously argued that the courts can play no role in enforcing Congressional subpoenas.[316]

193. Special Counsel Mueller's investigation—like the House's impeachment inquiry—sought to uncover whether President Trump coordinated with a foreign government in order to obtain an improper advantage during a Presidential election.[317] And the Mueller investigation—like the House's impeachment inquiry—exposed President Trump's eagerness to benefit from foreign

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[311] *See generally* Mueller Report, Vol. II; H. Rep. No. 116-346, at 159-61.
[312] Mueller Report, Vol. II at 85-86.
[313] *Id.*, Vol. II at 114-17.
[314] *Id.*, Vol. II at 90-93.
[315] *Id.*, Vol. II at 120-56.
[316] *See* Comm. on the Judiciary v. McGahn, — F. Supp. 3d —, No. 19-2379. 2019 WL 6312011 (D.D.C. Nov. 25, 2019), *appeal pending*, No. 19-5331 (D.C. Cir.). The U.S. Court of Appeals for the D.C. Circuit heard oral argument in the case on January 3, 2020.
[317] Mueller Report, Vol. I at 1 (describing the scope of the order appointing Special Counsel Mueller).

election interference.[318] In the former instance, the President used his powers of office to undermine an investigation conducted by officials within the Executive Branch.[319] In the latter, he attempted to block the United States House of Representatives from exercising its "sole Power of Impeachment" assigned by the Constitution. In both instances, President Trump obstructed investigations into foreign election interference to hide his own misconduct.

[318] *See, e.g.*, *id.*, Vol. I at 1-2 (the Trump Campaign "expected it would benefit electorally from information stolen and released through Russian efforts").

[319] *See generally id.*, Vol. II. As the Mueller Report summarizes, the Special Counsel's investigation "found multiple acts by the President that were capable of exerting undue influence over law enforcement investigations, including the Russian-interference and obstruction investigations. The incidents were often carried out through one-on-one meetings in which the President sought to use his official power outside of usual channels. These actions ranged from efforts to remove the Special Counsel and to reverse the effect of the Attorney General's recusal; to the attempted use of official power to limit the scope of the investigation; to direct and indirect contacts with witnesses with the potential to influence their testimony." *Id.*, Vol. II at 157.

APPENDIX 14

2022 WL 4295619 (N.M. Dist.) (Trial Order)
District Court of New Mexico,
First Judicial District.
Santa Fe County

STATE of New Mexico, ex rel, Marco White, Mark Mitchell, and Leslie Lakind, Plaintiffs,
v.
Couy GRIFFIN, Defendant.

No. D-101-CV-2022-00473.
September 6, 2022.

Findings of Fact, Conclusions of Law and Judgment

Francis J. Mathew, Judge.

***1** THIS MATTER having come before the Court for a trial on the merits of the Complaint filed herein, the Plaintiffs Marco White, Mark Mitchell, and Leslie Lakind being represented by Freedman Boyd Hollander & Goldberg, P.A. (Joseph Goldberg, Esq.), Dodd Law Office, LLC (Christopher A. Dodd, Esq.), Law Office of Amber Fayerberg (Amber Fayerberg, Esq.), Citizens for Responsibility and Ethics in Washington (Noah Bookbinder, Esq., Donald Sherman, Esq., Nikhel Sus, Esq., and Stuart McPhail, Esq.) and Cohen Milstein Sellers & Toll PLLC (Daniel A. Small, Esq.); the Defendant Couy Griffin appearing pro se and Amici Curiae, Floyd Abrams, Erwin Chemerinsky, Martha Minow, Laurence H. Tribe, Maryham Ahranjani, Lynne Hinton, National Council of Jewish Women, NAACP New Mexico State Conference, NAACP Otero County Branch and Common Cause filing Amici Curiae Briefs, and the Court having taken the evidence, reviewed arguments of Counsel, reviewed the pleadings and all matters of record and being otherwise fully advised in the premises, enters the following Findings of Facts, Conclusions of Law and Order.

At the outset, it is appropriate to quote in pertinent part the Judge's charge to the grand jury in In re Charge to Grand Jury, 62 F. 828, 829-830 (D.C.N.D. Ill. 1894):

> Gentlemen of the Grand Jury: You have been summoned here to inquire whether any of the laws of the United States within this judicial district have been violated. You have come in an atmosphere and amid occurrences that may well cause reasonable men to question whether the government and laws of the United States are yet supreme. Thanks to resolute manhood, and to that enlightened intelligence which perceives the necessity of a vindication of law before any other adjustments are possible, the government of the United States is still supreme.
>
> You doubtless feel, as I do, that the opportunities of life, under present conditions, are not entirely equal, and that changes are needed to forestall some of the dangerous tendencies of current industrial tendencies. But tendencies. But neither the torch of the incendiary, nor the weapon of the insurrectionist, nor the inflamed tongue of him who incites to fire and sword is the instrument to bring about reforms. To the mind of the American people; to the calm, dispassionate sympathetic judgment of a race that is not afraid to face deep changes and responsibilities, there has, as yet, been no appeal. Men who appear as the champions of great changes must first submit them to discussion, discussion that reaches, not simply the parties interested, but the outer circles of society, and must be patient as well as persevering until the public intelligence has been reached, and a public judgment made up. An appeal to force before that hour is a crime, not only against government of existing laws, but against the cause itself; for what man of

any intelligence supposes that any settlement will abide which is induced under the light of the torch or the shadow of an overpowering threat?

***2** With the questions behind present occurrences, therefore, we have, as ministers of the law and citizens of the republic, nothing now to do. The law as it is must first be vindicated before we turn aside to inquire how law or practice, as it ought to be, can be effectually brought about. Government by law is imperiled, and that issue is paramount.

The government of the United States has enacted laws designed, first, to protect itself and its authority as a government, and, secondly, its control over those agencies to which, under the constitution and laws, it extends governmental regulation. For the former purpose,— namely, to protect itself and its authority as a government,— it has enacted that every person who incites, sets on foot, assists, or engages in, any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, 'and any two or more persons in any state or territory who conspire to overthrow, put down, or destroy by force the government of the United States, or to levy war against them, or to oppose by force the authority thereof; or by force to prevent, hinder or delay the execution of any law of the United States contrary to the authority thereof,' shall be visited with certain penalties therein named.

Insurrection is a rising against civil or political authority,— the open and active opposition of a number of persons to the execution of law in a city or state. Now, the laws of the United States forbid, under penalty, any person from obstructing or retarding the passage of the mail, and make it the duty of the officers to arrest such offenders, and bring them before the court. If, therefore, it shall appear to you that any person or persons have willfully obstructed or retarded the mails, and that their attempted arrest for such offense has been opposed by such a number of persons as would constitute a general uprising in that particular locality, then the fact of an insurrection, within the meaning of the law, has been established; and he who by speech, writing, or other inducement assists in setting it on foot, or carrying it along, or gives it aid or comfort, is guilty of a violation of law. It is not necessary that there should be bloodshed; it is not necessary that its dimensions should be so portentous as to insure probable success, to constitute an insurrection. It is necessary, however, that the rising should be in opposition to the execution of the laws of the United States, and should be so formidable as for the time being to defy the authority of the United States, When men gather to resist the civil or political power of the United States, or to oppose the execution of its laws, and are in such force that the civil authorities are inadequate to put them down, and a considerable military force is needed to accomplish that result, they become insurgents; and every person who knowingly incites, aids, or abets them, no matter what his motives may be, is likewise an insurgent. The penalty for the offense is severe, and, as I have said, is designed to protect the government and its authority against direct attack. ....

Mr. Griffin's attempts by his arguments, including his closing argument, to sanitize his actions are without merit and contrary to the evidence produced by the Plaintiffs, bearing in mind that he produced no evidence himself in his own defense. His protestations and his characterizations of his actions and the events of January 6, 2021 are not credible and amounted to nothing more than attempting to put lipstick on a pig.

***3** The irony of Mr. Griffin's argument that this Court should refrain from applying the law and consider the will of the people in District Two of Otero County who retained him as a county commissioner against a recall effort as he attempts to defend his participation in an insurrection by a mob whose goal, by his own admission, was to set aside the results of a free, fair and lawful election by a majority of the people of the entire country (the will of the people) has not escaped this Court.

In this *quo warranto* action, Plaintiffs seek to remove Otero County Commissioner Couy Griffin from office and disqualify him from any future public office pursuant to Section Three of the Fourteenth Amendment to the Constitution of the United States and NMSA. 1978, Sections 44-3-4 and 44-3-14, based on his participation in the January 6, 2021 insurrection at the United States Capitol and related events.

FINDINGS OF FACT

I, 'The Parties.

1. Plaintiff Marco White is a private citizen and resident of Santa Fe County, New Mexico. 8/15/22 Tr. 9:21-22;[1] Complaint ("Compl.") ¶ 3.

2. Plaintiff Mark Mitchell is a private citizen and resident of Los Alamos County, New Mexico. 8/15/22 Tr. 9:21-22; Compl. ¶ 4,

3. Plaintiff Leslie Lakind is a private citizen and resident of Santa Fe County, New Mexico. 8/15/22 Tr. 9:21-22; Compl. ¶ 5.

4. Defendant Couy Griffin currently serves as the District 2 Commissioner on the Otero County Board of County Commissioners ("Otero County Commission"). 8/15/22 Tr. 46:15-17 (Griffin). His term ends on December 31, 2022. *Id.* 46:18-19.

5. The Otero County Commission was created pursuant to the Constitution and statutes of New Mexico. N.M. Const. art. X, § 1; NMSA 1978, §§ 4-38-1 to 4-38-42.

6. As a county commissioner, Mr. Griffin performs "executive functions," including on spending, personnel, and election matters. 8/15/22 Tr. 52:18-57:23 (Griffin); 8/16/22 Tr. 19:12-24, 20:15-23 (Graber); Plaintiffs' Exhibit ("PX") 2-11 (Otero County Commission Resolutions and Agendas),

7. As a county commissioner, Mr. Griffin implements state law. 8/15/22 Tr. 57:3-23 (Griffin); 8/16/22 Tr. 19:12-19 (Graber); PX 2-11 (Otero County Commission Resolutions and Agendas).

8. State law required Mr. Griffin to take an oath to support the Constitution of the United States before assuming office, and Mr. Griffin did so. 8/15/22 Tr. 51:13-18 (Griffin); PX 1 (Dec. 28, 2018 Oath of Office); N.M. Const. art. XX, § 1 (requiring "[e]very person elected or appointed to any office" to take an oath "that he will support the constitution of the United States").

9. Mr. Griffin's actions as a county commissioner have had a statewide impact. 8/16/22 Tr. 19:12-24 (Graber); *see also* Br. of *Amicus Curiae* Common Cause at 6-9 (Aug. 24, 2022) (explaining how Griffin's election denialism and defiance of the law have impacted the State); 8/15/22 Tr. 14:10-15:11 (Court recognizing that Mr. Griffin's "refusal to certify election results" and resulting "mandamus action" in the New Mexico Supreme Court "affected the entire state of New Mexico").

10. Mr. Griffin is the founder and leader of "Cowboys for Trump," a political advocacy organization established in 2019 to support former President Donald Trump ami his policies. 8/15/22 Tr. 47:1-7, 49:17-21 (Griffin).

II. The "Stop the Steal" Movement to Block the Lawful Transfer of Presidential Power,

***4** 11. On November 7, 2020, the major news networks projected Joe Biden as the winner of the 2020 presidential election. PX 12 at 21 (June 2021 Senate Report).

12. President Trump did not accept the election results and pursued multiple avenues to remain in power through legal and extra-legal means, 8/16/22 Tr. 96:19-21 (Kleinfeld). The Trump campaign and its supporters filed and lost dozens of frivolous

lawsuits challenging the election results based on alleged voter fraud. PX 12 at 21 (June 2021 Senate Report), A federal judge called one such case "a historic and profound abuse of the judicial process" meant to "undermin[e] the People's faith in our democracy." *King v. Whitmer*, 556 F. Supp. 3d 680, 688-89 (E.D. Mich. 2021) (sanctioning attorneys).

13. On December 14, 2020, the Electoral College met and confirmed Joe Biden's victory in the 2020 presidential election. PX 12 at 21 (June 2021 Senate Report). President Trump thereafter continued to falsely claim the election was stolen from him. *Id.* at 22.

14. As their strategy failed in the courts, Trump's team, turned their focus to January 6, 2021, the date on which a joint session of Congress (with Vice President Mike Pence serving as presiding officer) would convene to certify the results of the election as required by the Twelfth Amendment and the Electoral Count Act, 3 U.S.C. § 15. PX 12 at 22 (June 2021 Senate Report). They ultimately devised and carried out an extra-legal scheme to pressure Vice President Pence-both privately and publicly—to take the unconstitutional action of refusing to count electoral votes from several states during the January 6 proceedings. *See Eastman v. Thompson*, 2022 WL 894256, at *1-*7 (C.D. Cal. Mar. 28, 2022); *see also* PX 12 at 1, 22. (June 2021 Senate Report) (describing the process for objections and the goal of disrupting the electoral vote count). A federal judge has held it is "more likely than not" these efforts amounted to criminal obstruction of the Joint Session of Congress on January 6, 2021 in violation of 18 U.S.C. § 1512(c)(2). *Eastman*, 2022 WL 894256, at *20-*23.

15. The public-facing component of this pressure campaign was carried out through the "Stop the Steal" movement, which championed the lie that the election was stolen and that the constitutionally-mandated transfer of presidential power needed to be stopped. *See* 8/16/22 Tr. 96:19-97:2 (KMnfeld); Initial Decision at 4, *Rowan v. Greene*, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Ga. Off Admin. Hr'gs May 6, 2022), https://perma.cc/M93H-LA7X ("May 2022 *Greene* Decision").

16. Leaders of the Stop the Steal movement undertook an expansive effort to mobilize Trump supporters across the country to travel to Washington, D.C. to intimidate Vice President Pence and Congress to not certify the election on January 6. 8/16/22 Tr. 96:21-97:7, 98:8-16 (Kleinfeld). Participants in these efforts planned to use mob intimidation and violence to stop the transfer of presidential power. *Id.* 96:21-23. Ahead of January 6, they held Stop the Steal rallies in various states, including New Mexico, where they ginned up support for the movement with violent and inflammatory rhetoric. *Id.* 103:25-105:22.

***5** 17. These state-level Stop the Steal rallies brought together a variety of groups, including "violence specialist[]" militia groups such as the Oath Keepers and Proud Boys, groups that could rally and mobilize an armed intimidatory presence, and individuals who could simply add to the size of the mob. 8/16/22 Tr. 97:10-20 (Kleinfeld).

18. President Trump later announced his own Stop the Steal rally at the White House Ellipse on January 6. PX 12 at 22 (June 2021 Senate Report). The rally was arranged in part by Women for American First, a leading Stop the Steal rally organizer. *Id.* at 44, 45; 8/16/22 Tr. 107:3-6 (Kleinfeld); PX 40.

III. Mr. Griffin's Mobilization of the Stop the Steal Movement Ahead of January 6, 2021.

19. Mr. Griffin and his organization Cowboys for Trump played a key role in the Stop the Steal movement's mobilization efforts ahead of the January 6, 2021 attack on the United States Capitol ("January 6 Attack"). 8/16/22 Tr. 100:4-7, 103:23-104:5 (Kleinfeld); *see also* 8/15/22 Tr. 69:13-21 (Griffin). Like other participants in the Stop the Steal movement, Mr. Griffin believed (and still believes) the 2020 election was fraudulent and Joe Biden was not legitimately elected President. 8/15/22 Tr. 40:7-8, 50:16-51:7, 79:1-8 (Griffin).

20. Cowboys for Trump participated in Stop the Steal rallies where Mr. Griffin spoke and spread lies about the election being stolen. 8/16/22 Tr. 103:23-104:5 (Kleinfeld): PX 245 (Nov. 7, 2020 Santa Fe New Mexican article).

21. On November 14, 2020, Mr. Griffin appeared at a Stop the Steal rally in Albuquerque along with the New Mexico Civil Guard, which had been sued as an illegal militia by the State of New Mexico. 8/16/22 Tr. 104:22-105:1 (Kleinfeld); PX 248 (Nov. 14, 2020 Albuquerque Journal article). This continued a series of appearances by Griffin at the same events as the New Mexico Civil Ciuard and other "violent specialist groups" in the leadup to January 6. 8/16/22 Tr. 103:9-105:8, 134:9-18, 159:19-160:16 (Kleinfeld); PX 246 (Sept. 14, 2020 KUNM article).

22. On social media and in public speeches, Mr. Griffin and Cowboys for Trump spent months normalizing that violence may be necessary to keep President Trump in office, and urged their followers to come to Washington, D.C. on January 6 to answer President Trump's call. Eg., PX 63, 80, 127, 165.

23. In the clays preceding the January 6 Attack, Mr. Griffin was a featured speaker on a multi-city bus tour to Washington, D.C. organized by Women, for America First, 8/15/22 Tr. 63:14-16, 69:13-17 (Griffin); PX 40 (video of Griffin describing bus tour), the same Stop the Steal group involved in President Trump's January 6 rally, *supra* Prop. Findings of Fact ¶ 18. The goal of the bus tour was to rally and inflame crowds and recruit them to come to Washington, D.C. to stop certification of the election on January 6. 8/16/22 Tr. 107:7-9 (Kleinfeld); 8/15/22 Tr. 69:18-21 (Griffin).

24. On this tour, Mr. Griffin aided the Stop the Steal mobilization and recruitment efforts with increasing fervor, calling on crowds to come to Washington, D.C. on January 6 to join the "'war" and "battle" over the presidential election results. *E.g.*, PX 162.

25. Mr. Griffin's friend, Matthew Struck, recorded videos of Griffin speaking during the pre-January 6 bus tour. *See* 8/15/22 Tr. 65:4-8 (Griffin); PX 67, 162, 164, 165, 166, 167, 168, 170, 171, 172, 173, 207 (Struck videos).

***6** 26. Mr. Griffin brought three firearms and ammunition with him on this cross-country trip to Washington, D.C. 8/15/22 Tr. 67:12-69:12 (Griffin); PX 154, 155 (videos showing Griffin loading his car with a gun and a different gun on the car's dashboard).

27. At a January 1, 2021 speech in the Woodlands, Texas, Mr. Griffin told the crowd, "We have everything to lose right now. And this is a battle and a war that we cannot lose … We have to march into this charge with a no, no, no lose, no surrender … If any of you all need a lesson on what it takes to stand, read the lesson of the Alamo … Those were men that drew a hard line. They stood on it. … Meet us in Washington, D.C. Be there. Let's stand together and let's get'er done." PX 162.

28. At a later January 1 speech in West Monroe, Louisiana, Mr. Griffin insisted that President Trump would "continue and remain in office," that "we need our President… to be confirmed through the states on the sixth," and that "right after that we're gonna have to declare martial law." PX 164. He then urged the crowd to "meet us" on "the streets of Washington, D.C. on January 6." *Id.* Griffin invoked the legitimacy of his elected office as an Otero County Commissioner and his relationship with President Trump while trying to rally the crowd. *Id.*

29. At a January 3 speech in Bowling Green, Kentucky, Mr. Griffin said, "If we allow this election to be stolen from us, we will become a third world country overnight … The elitist, gross, wicked, vile people that are in place will continue to wage war on America. Because there is a war, mind you, I promise you that." PX 167. He added, "we got to get our country back. There's no other way, there's no other option." *Id.* Mr. Griffin indicated that he expected violence to take place in Washington, D.C. on January 6, acknowledging that "there might be some of us that might lose our lives." *Id; see also* 8/16/22 Tr. 110:11-14 (Kleinfeld). He then invoked faith as support, for the cause, stating "there is nobody that really truly ever loses when you trust in the lord Jesus Christ as your personal savior." PX 167; *see also* 8/16/22 Tr. 110:14-17 (Kleinfeld),

30. At a later January 3 speech in Franklin, Tennessee, Mr. Griffin declared that "we're a nation at war right now … If we lose this election, everything is on the line." PX 168. He insisted "We're not gonna surrender to them. We're gonna charge forward."

Id. He implored the crowd to come "to D.C. on January 6," explaining that "the reason why I'm going to Washington D.C. is because my president called me there and I'm gonna be there." *Id.*

31. In a January 4 video recorded in Atlanta, Georgia, Mr. Griffin stated, "We want to win it through our democratic process, but losing is not an option. We'll win it… in the ballot box or we'll win it in the street. That's where I stand." PX 67. In those remarks, Mr. Griffin also directed a warning to the "sellouts," the "RINOs," and the "turncoats," stating that "[t]hey're the first ones that we're going to hunt down." *Id.*

32. In another January 4 video recorded in Atlanta, Mr. Griffin again anticipated possible violence in Washington D.C. on January 6, calling "men from across our nation to come to Washington, D.C. on January 6, because it might be a battle. … If it comes down to a fight, if it boils down to what it could come to, we're gonna need men standing strong shoulder to shoulder. … I encourage you to come, don't let the media try to keep you home ,.. Whenever you're in battle … that's a man's place, … If it comes down to … those kind of instances." PX 171.

***7** 33. In a January 4 video recorded in Birmingham, Alabama, Mr. Griffin urged Vice President Pence to "step up" and "do what's right for our nation" because "we will never acknowledge a Biden presidency." PX 170. Mr. Griffin threatened Republican officials, indicating he and others would "come to your places first" and "be after" them if they "sell out" Trump supporters. *Id.*

34. In a January 5 video recorded with a group of Trump supporters on his way to Washington, D.C, Mr. Griffin again called upon Vice President Pence "to do the right thing and call this election the fraud that it is, because we won't take anything less." PX 173. He added, "Losing is not an option. … Every card is on the table. Every option is available. And we fee! that we are a nation at war right now and we are men that are answering the call." *Id.*

35. While Mr. Griffin inflamed and mobilized crowds across the country to join the "war" in Washington, D.C. on January 6, threats of violence to stop certification of the election were widespread on social media and reported in the press. PX 13 at 1 (May 2022 U.S. Government Accountability Office ("GAO") Report.). Based on open-source data collection, federal agencies generated "26 threat products" identifying potential violence tied to planned "Stop the Steal" and other demonstrations in Washington, D.C. on January 6, with some predicting a "potentially violent uprising could take place at the U.S. Capitol," PX 13 at 21, 24, 39, 40.

IV. The January 6, 2021 Attack on the United States Capitol.

36. On January 6, 2021, the joint session of Congress convened to certify the presidential election. PX 12 at 23 (June 2021 Senate Report).

37. Just before noon, President Trump took the stage at his Stop the Steal rally at the White House Ellipse, where he repeated his false claims that the election was "rigged" and "stolen," and urged Vice President Pence to "do[] the right thing" by unconstitutionally refusing to certify the election. PX 12 at B-1-B-2 (June 2021 Senate Report), President Trump then told the crowd to march to the Capitol to "demand that Congress do the right thing and only count the electors who have been lawfully slated," insisting "we must stop the steal." *Id.* at B-5, B-20. He pushed them to "fight like hell," warning that, "if you don't fight like hell, you're not going to have a country anymore." *Id.* at B-22.

38. Before the speech ended, thousands of Trump supporters began marching to the Capitol, some armed with weapons and wearing full tactical gear. PX 12 at 22-23, 27-29 (June 2021 Senate Report). "They were wearing helmets, goggles, gas masks, and respirators. They were in tactical vests, exterior load bearing vests that appeared to be designed to be capable of holding within it a ballistic panel which would protect the wearer from, firearms. Many had padded gloves, tactical boots and backpacks with equipment [law enforcement] could not observe." 8/15/22 Tr. 150:12-17 (Hodges).

39. The mob, including Mr. Griffin, illegally breached security barriers surrounding the Capitol complex on the Capitol's West Front grounds, ignoring clear signage prohibiting entry. PX 12 at 23 (June 2021 Senate Report); 8/15/22 Tr. 113:4-9 (Gowdy); PX 40, PX 152, PX 159 (videos of Mr. Griffin admitting he knowingly breached a restricted area). The mob that Mr. Griffin joined then quickly and violently breached other barricades around the Capitol perimeter, overwhelmed law enforcement, and scaled walls. PX 12 at 24-25. By 2:11 p.m., the mob breached the Capitol building, where they confronted law enforcement, smashed windows, and wreaked further havoc. *Id.; see also* PX 15 at 14 (Mar. 2022 GAO Report) (timeline of attack); PX 136 (January 6 Select Committee compilation video); PX 53 (Capitol Police surveillance video compilation).

***8** 40. The mob also utilized "classical form[s] of intimidation," 8/16/22 Tr. 41:17-42:5 (Graber), including displaying a noose and gallows and chanting "hang Mike Pence" on the Capitol grounds, PX 136. In another act of intimidation, members of the mob charged toward the office of Speaker of the House Nancy Pelosi, chanting menacingly, "Nancy! Nancy! Nancy!" PX 136.

41. The mob brutally attacked police officers with a variety of actual and improvised weapons, engaged them in hand-to-hand combat, and sprayed them with chemical irritants. 8/15/22 Tr. 156:3-9, 172:4-19 (Hodges); PX 147 (Officer Hodges' body camera video); 8/15/22 Tr. 118:25-119:1 (Gowdy); PX 253 at 148-49 (Erickson Crim. Trial Testimony). Officers were shocked with cattle prods, bludgeoned with flag poles and metal poles broken apart from security barricades, and beaten with their own stolen batons and riot shields. 8/15/22 Tr. 155:11-20, 156:3-9 (Hodges).

42. The mob crushed Plaintiffs' witness Officer Daniel Hodges of the D.C, Metropolitan Police Department in a metal door frame and bashed in his face with his own baton while he was trapped there. 8/15/22 Tr. 179:1-10 (Hodges). The mob, including Mr. Griffin, chanted "Heave! Ho!" as they synchronized their movement in an attempt to ram through Officer Hodges and other police officers guarding an entrance tunnel on the Capitol's West Terrace, *Id.* 179:15-20; PX 148 (video of Officer Hodges attacked in West Terrace Tunnel); PX 153 (video of Griffin describing his chanting of "Heave! Ho!"); 8/15/22 Tr. 96:2-11 (Griffin).

43. Some officers lost their lives, others suffered broken bones, contusions, lacerations, and psychological trauma. 8/15/22 Tr. 155:11-20 (Hodges), All told, the attack led to seven deaths, injuries to more than one hundred police officers, and millions of dollars in damage to the Capitol complex. PX12 at 1, 26 (June 2021 Senate Report).

44. The "size of the mob is what enabled, them to achieve the level of success that they did." 8/15/22 Tr. 157:12-14 (Hodges) ("The size of the mob was the mob's greatest weapon."). The thousands of individuals in the mob overwhelmed and outnumbered law enforcement by approximately 50 or 75 to 1. *Id.* 157:4-7. Because of the mob's size and the chaotic atmosphere it created, law enforcement could not use their firearms, make arrests, or freely move around the Capitol grounds. *Id.* 157:25-159:13, 173:21-174:2; PX 147 (Officer Hodges' body camera video).

45. Law enforcement's efforts to secure the Capitol building were impeded by violent and non-violent members of the mob alike. 8/15/22 Tr. 159:14-25 (Hodges). Police officers could not tell in the moment which individuals were going to be violent; every trespasser within the restricted area was a potential threat and needed to be treated as such. *Id.* 157:16-21, 159:14—160:3. Non-violent members of the mob camouflaged violent members of the mob and contributed to law enforcement being overwhelmed by a "sea of potential threats." *Id.* 157:12-24, 159:14-25. Every trespasser took up space and made it harder for law enforcement to defend the Capitol building and disperse the mob away from Capitol grounds. *Id.*

46. The mob also made it clear—through their words, chants, flags, banners, and clothing—that they came to the Capitol for the explicit purpose of stopping the certification of the 2020 election and the transfer of presidential power by force, 8/15/22 Tr. 156:16-157:3, 162:2-13, 169:7-171:19, 181:16-22 (Hodges); PX 147 (Officer Hodges' body camera video); 8/15/22 Tr. 119:10-12, 132:25-133:20 (Gowdy); PX 208-243 (Nathaniel Gowdy pictures); PX 136 (January 6 Select Committee compilation video); PX 53 (Capitol Police surveillance video compilation).

***9** 47. The mob forced Vice President Pence and Congress to halt their constitutional duties and flee to more secure locations, PX 12 at 25 (June 2021 Senate Report), disrupting the peaceful transfer of presidential power for the first time in American history, 8/16/22 Tr. 148:3-5 (Kleinfeld). The Secret Service evacuated Vice President Pence to a secure loading dock and kept him there for several hours. PX 253 at 222-23, 258 (Hawa Crim. Trial Testimony); PX 55 (Capitol Police surveillance video of Vice President Pence's evacuation). Once the "Capitol went into lockdown," that meant "everything ha[d] to stop," including the election-certification proceedings over which Vice President Pence was the presiding officer. PX 253 at 224 (Hawa Crim. Trial Testimony). The Vice President could not return to the Senate chamber and the constitutionally mandated proceedings could not resume until all trespassers in the restricted area were removed. *See id.* at 225, 258.

48. To clear the mob and regain control of the Capitol, the Capitol Police called in more than 2,000 reinforcements from 19 federal, state, and local agencies. PX 14 at 20 (Feb. 2022 GAO Report). Officers used chemical spray and munitions, flash bangs, tactical teams with firearms, riot shields, and batons to fight back the mob. PX 15 at 26-33 (Mar. 2022 GAO Report); PX 14 at 21 (Feb. 2022 GAO Report); PX 253 at 148-49 (Erickson Crim. Trial Testimony); 8/15/22 Tr. 168:2-6, 176:15-16, 177:13-17 (Hodges). Even with this significant show offeree, the Capitol grounds were not deemed secure until 8:00 p.m. PX 12 at 26 (June 2021 Senate Report).

49. The mob forced both chambers of Congress to go into recess by 2:18 p.m. The Senate did not reconvene until 8:00 p.m., with the House reconvening approximately an hour later. PX 12 at 25-26 (June 2021 Senate Report). It was not until 3:42 a.m. on January 7 that Congress completed its business and certified the election. *Id* at 26.

50. Mr. Griffin disputed none of these facts at trial; instead, he blamed law enforcement for not being "better prepared" for the more than "a million … disgruntled Trump supporters" who collectively "descend[ed]" on Washington, D.C. that day. 8/15/22 Tr. 197:14-18.

51. After January 6, insurrectionists sought to mobilize violence for President-elect Biden's inauguration on January 20 in a final effort to block the transfer of presidential power required by the Twentieth Amendment. 8/16/22 Tr. 97:4-9 (Kleinfeld). The threat was so significant that the government called in 25,000 National Guardsmen to Washington, D.C.— nearly "two and a half times the number that would normally go to an inauguration." *Id.* 130:5-8. The "law enforcement presence ultimately fizzled out the plan." *Id.* 130:11-12.

V. Mr. Griffin's Participation in the January 6 Attack.

52. Mr. Griffin traveled to Washington, D.C. for the events of January 6 because he shared the goal of stopping the constitutionally-mandated certification of the 2020 presidential election. 8/16/22 Tr. 151:4-8 ("[W]e went to Washington, D.C. on January 6 … so our voices would be heard by Mike Pence so Mike Pence would vote no on the certification of the election ...."); *id* 73:21-25 (similar); *id* 167:8-10 (similar); PX 173 (similar).

53. Video from early in the morning of January 6 shows Mr. Griffin working up Trump supporters in Washington, D.C. by telling them Vice President Pence is "gonna have to find a real deep hole to crawl into" and that "we'll all be lining up at his house if he doesn't come through." PX 38. Later in the video, someone near Mr. Griffin says, "storm the Capitol." *Id.* Griffin also asked a man, "Where's your gun at? That's what I want to know," *Id.*

54. Videos from later on January 6 show Mr. Griffin illegally breaching multiple security barriers and occupying restricted Capitol grounds from at least 2:31 p.m. to 4:48 p.m.— actions for which he was later criminally convicted. PX 45 at 326:22-327:23 (Crim, Trial Bench Ruling); PX 47 (Crim. Case Judgment).

***10** 55. Around 2:31 p.m., just 20 minutes after the mob breached the Capitol building and seven minutes after President Trump tweeted that Vice President Pence had not done what he needed him to do, Mr. Griffin climbed over the Olmstead

Wall and entered restricted Capitol grounds. PX 42; PX 253 at 143 (Erickson Crim. Trial Testimony) (describing restrictions); 8/16/22 Tr. 119:3-10 (Kleinfeld) (describing Trump tweet).

56. By tills point in the day, law enforcement "had a loud speaker set up that was telling [the mob], in no uncertain terms, that their assembly was unlawful and that they needed to disperse" and law enforcement had deployed "[p]epper spray and tear gas" to make the crowd disperse, 8/15/22 Tr. 167:15—168:6 (Hodges); *see also* PX 253 at 149 (Erickson Crim. Trial Testimony).

57. Around 2:41 p.m., Mr. Griffin approached the Capitol building amid shouts of "let's fight like crazy for our country" and "this is civil Peking war." PX 25. He used a metal security barrier that the mob had repurposed into a ladder to scale another wall. *Id.* He proceeded to fist bump other members of the mob and declare "this is our house!" and "we could all be armed." *Id.* He then helped a member of the mob climb up a makeshift ramp to breach another security barrier and ran over the ramp himself. *Id.*

58. Mr. Griffin made his way to just below the inaugural stage and the Capitol's West Terrace, where he said he would wait until the mob got "this door broke down" to enter an enclosed staircase. PX 139.

59. By 2:56 p.m., the mob had broken the door and Griffin walked up to the inaugural stage on the West Terrace, where he covered his mouth presumably from the acrid smell of tear gas and pepper spray and stated gleefully "I love the smell of napalm in the air." PX 26; *see also* 8/15/22 Tr. 168:2-6 (Hodges) (describing law enforcement's deployment of tear gas and pepper spray); PX 253 at 149 (Erickson Crim. Trial Testimony) (similar).

60. Once he reached the inaugural stage, Mr. Griffin filmed a speech for social media promoting the attack. PX 27. He exhorted, "It's a great day for America! The people [are] showing that they've had enough. People are ready for fair and legal elections, or this is what you're going to get, and you're going to get more of it." *Id.* As the mob brutally attacked Officer Hodges and other law enforcement in a tunnel a short distance away from him, Mr. Griffin threatened into the camera, "We're not going anywhere. We're not gonna take 'no' for an answer … Anything to get our country back." *Id.*

61. Mr.Griffin then assumed a leadership role in the mob by using a bullhorn to gain the crowd's attention. PX 141. As he attempted to lead the mob in prayer, he riled them further. *Id.*

62. Eyewitness testimony of Plaintiffs' witness Nathaniel Gowdy confirms that Griffin's attention-seeking behavior energized the mob when violence had already been ongoing for hours. 8/15/22 Tr. 122:25-123:1 (Gowdy) ("[Griffin] was attempting to insert himself in a leadership role."); *id.* 123:3-5 ("He appeared to be reveling in everything that was happening, smiling, pumping his fists, laughing, just having a good time."); *id.* 123:14-16 (Q. Was Mr. Griffin's conduct such that it was advancing the goal and purpose of the mob? A. Yes. It was very encouraging, was my impression."); *see also* 8/16/22 Tr. 121:18-122:20 (Kleinfeld) (observing that by addressing the mob with a bullhorn from "high ground," Griffin increased the "emotional arousal of the crowd" when "violence" had been "going on for two hours").

***11** 63. Video shows Mr. Griffin on the inaugural platform from 2:57 p.m. until 4:24 p.m. PX 54, At this time, Griffin was near attackers beating police officers, stealing their riot shields. forming a human battering ram to break through. Officer Hodges and other officers in the West Terrace tunnel, and breaking windows. *E.g.*, PX 34, PX 148, PX 152.

64. By 4:27 p.m., Mr. Griffin had walked back down to the area below the West Terrace, where he sought to normalize the ongoing violence. PX 35. He is heard stating. "What a historical day, you know?" to which someone responded, "This is horrible." *Id.* Griffin replied, "It's unfortunate, but sometimes these sorts of things need to happen in order to send a signal that we're going to quit putting up with their bull crap, you know?" *Id.*

65. Mr. Griffin later confirmed that he saw and egged on the violence at the Capitol on January 6, In one video recorded while driving from Washington, D.C., Mr. Griffin stated with laughter, "It was funny, whenever those guys — all those guys were down there on that one line where they were trying to push into the Capitol, and everybody that was gathered in the dome

area, we were all screaming 'Heave! Ho! Heave! Ho!"' PX 153. Mr. Griffin appeared to be describing joining the attackers in screaming "Heave! Ho!" as they brutally crushed Officer Hodges in a metal doorframe in the West Terrace tunnel. PX 148.

66. In another video from later in January, Griffin boasted, "I watched it all. … I saw some windows getting broken out of the Capitol and I saw some people pushing on police officers down below." PX 152.

67. In a video posted to Facebook on January 7 that Mr. Griffin recorded in Roanoke, Virginia, he acknowledged that, the events at the Capitol the preceding day were violent and celebrated them. He gloated that he "climbed up on top of the Capitol building" and "saw a little bit of that action on … the inside." PX 37. He characterized the mob as "unleashing [the] whirlwinds" and a "shot over the bow." *Id.* He explained the purpose of the attack was to stop the transfer of presidential power and threatened further action to achieve that goal, stating, "[yjou saw America rise up. … You saw a people that had had enough … because we will not lose. And Joe Biden will never be President… you thought yesterday was a big day? It'll be nothing like — compared to like the next one." *Id.* Mr. Griffin previewed a more brutal attack to prevent Biden from taking office, stating "You want to say that was violence? … No, we could have a Second Amendment rally on those same steps that, we had that rally yesterday, you know, and if we do, then it's going to be a sad day because there's going to be blood running out of that building." *Id.*

68. In the same video on January 7, Mr. Griffin again insisted that Joe Biden "will never be president." PX 37; *see also* PX 62 (January 11, 2021 video where Griffin declared there "will never be a Biden presidency"). By this point, the presidential election had already been certified, so the only way to prevent Biden's inauguration as president would be physical violence, 8/16/22 Tr. 127:22-128:4 (Kleinfeld).

69. At an Otero County Commission meeting on January 14, 2021, Mr. Griffin confirmed that he knowingly breached restricted Capitol grounds on January 6, stating he saw "some fencing up and they were saying that you could not go any further because this was being reserved for Joe Biden and his inauguration," and that he breached the area anyway. PX 40; *see also* PX 152 (making similar admission); PX 159 (same). Mr. Griffin also conveyed his continued support for the insurrection and his plans to return to the Capitol with firearms on January 20 for the presidential inauguration. PX 40.

***12** 70. Mr. Griffin then traveled to Washington, D.C. for the presidential inauguration, but was arrested there on January 17, 2021 for his involvement in the January 6 Attack. Returned Arrest Warrant, *United States v. Griffin*, No. 21-cr-00092-TNM (D.D.C. Jan. 21, 2021), ECF No. 4.

71. Following a bench trial, Mr. Griffin was convicted on March 22, 2022 of entering and remaining on restricted grounds in violation of 18 U.S.C. § 1752(a)(1), and acquitted of disorderly conduct under 18 U.S.C. § 1752(a)(2). PX 45 at 324:9-337:25 (Crim. Trial Bench Ruling); PX 47 (Crim. Case Judgment).

VI. This Lawsuit and Related Federal Proceedings.

72. On March 21, 2022, Plaintiffs commenced this action against Mr. Griffin under New Mexico's *quo warranto* statute, NSMSA 1978, Section 44-3-4. Compl. at 1.

73. Plaintiffs' Complaint asserts that Mr. Griffin is disqualified from federal and state office under Section Three of the Fourteenth Amendment based on his engagement in the January 6 Attack and surrounding events. Compl. ¶¶ 97-99. The Complaint further alleges that, by taking action resulting in his disqualification under Section Three of the Fourteenth Amendment, Mr. Griffin "'workjed] a forfeiture of his office,' NMSA 1978, § 44-3-4(B), and is presently 'unlawfully hold[ing] … public office' in the State, *id.* § 44~3-4(A)." *Id.* ¶ 100,

74. As relief, the Complaint seeks a declaratory judgment that the January 6 Attack and surrounding events were an "insurrection" within the meaning of Section Three and that Mr. Griffin is disqualified from federal and state office for having engaged in that insurrection. Compl, Prayer for Relief ¶ 1.

75. The Complaint also seeks injunctive relief removing Mr. Griffin from his current position as an Otero County Commissioner, bailing him from performing any officials acts as a county commissioner, and barring him from holding any future state or federal office. Compl, Prayer for Relief ¶¶ 2-4.

76. After being timely served with the Complaint and summons on March 26, 2022, Mr. Griffin, through counsel, removed the case to federal court on April 17, 2022.

77. On May 10, 2022, Mr. Griffin, through counsel, filed a collateral federal suit against Plaintiffs under 42 U.S.C. § 1983, seeking to enjoin Plaintiffs from pursuing this *quo warranto* case on the grounds that it violates his purported First Amendment right to run for political office, his Fourteenth Amendment due process rights, and the Amnesty Act of 1872. *Griffin v. White*, No. 22-cv-0362-KG-GJF (D.N.M.).

78. On May 27, 2022, Chief Judge William P. Johnson granted Plaintiffs' motion to remand this case back to this Court for lack of federal subject-matter jurisdiction. *State ex rel White v. Griffin*, 2022 WL 1707187, at *1 (D.N.M. May 27, 2022).

79. On June 10, 2022, this Court held an initial scheduling conference. Although Mr. Griffin was represented at that hearing by counsel, his counsel moved to withdraw and the Court granted that motion at the hearing, with the caveat that counsel would assist Griffin in a limited capacity to assist in the filing of a proposed scheduling order. *See* June 14, 2022 Order Granting Motion to Withdraw.

80. On June 14, 2022, the Court entered the parties' jointly-proposed scheduling order, setting forth various pretrial deadlines and a trial date of August 15, 2022. Since that time, Mr. Griffin has proceeded *pro se* in this case.

***13** 81. On June 28, 2022, Judge Kenneth J. Gonzales denied Mr. Griffin's motion for a preliminary injunction in his parallel Section 1983 suit and dismissed the case for lack of subject-matter jurisdiction. *Griffin v. White*, 2022 WL 2315980, at *12 (D.N.M. June 28, 2022). Griffin did not appeal that ruling.

82. On July 22, 2022, this Court held a pretrial conference pursuant to the parties' jointly-proposed scheduling order. Despite being a party to the jointl-proposed scheduling order and otherwise receiving ample notice, Mr. Griffin did not attend,

83. On July 27, 2022, the Court entered a pretrial order supplementing the deadlines and details set forth in the June 14, 2022 scheduling order.

84. On August 12, 2022, the Court held a final pretrial conference.

85. On August 15 and 16, 2022, the Court held a bench trial. Plaintiffs called five witnesses and presented the prior testimony of two witnesses from Mr. Griffin's federal criminal trial Mr. Griffin cross-examined each of Plaintiffs' witnesses and provided his own testimony on cross-examination as a witness in Plaintiffs' case-in-chief. Mr. Griffin called no witnesses and offered no evidence apart from his own testimony.

VII. Mr. Griffia's Lack of Credibility as a Trial Witness.

86. In making the factual findings set forth above, the Court did not find Griffin to be a credible witness at trial.

87. Video evidence of Mr. Griffin's statements from January 2021 contradict key aspects of his trial testimony, including his testimony that he did not witness violence on January 6, *Compare* PX 152 (Mr.Griffin admitting he “watched it all,” he “saw some windows get broken out of the Capitol,” and “saw some people pushing on police officers down below,” and indicating the violence he saw was justified to prevent our “country” from “get[ting] hijacked by China”); PX 149 (Mr. Griffin admitting he

saw "those guys were down there on that one line where they were trying to push into the Capitol" and stating "everybody that was gathered in the dome area, we were all screaming 'Heave! Ho! Heave! Ho!'"); PX 37 (Mr. Griffin admitting he "climbed up on top of the Capitol building" and "saw a little bit of that action on … the inside"), *with* 8/15/22 Tr. 83:1—4 (Griffin) (testifying that "[e]verywhere where I was [on January 6], all around me in my direct vicinity, was peaceful. I didn't see one violent act inside of my area the whole time I was there"); *id* 87:10 ("It was a big peaceful crowd."); *id.* 99:7-9 ("[Mjy assessment during the time … was that it was a totally peaceful protest.").

88. Mr. Griffin's testimony with respect to his characterization of the events at the United States Capitol, on January 6 and his witnessing any violence that day has evolved, over time in this litigation and is fundamentally inconsistent.

89. At his deposition, Mr. Griffin, characterized the events at the Capitol on January 6 while he was there only as "peaceful" and denied seeing any violence, even in the face of video evidence to the contrary. PX 250 at 146:10-13 (Griffin Dep.) ("I wanted to be in D.C. for a peaceful protest, which it was."); *id.* 181:6-13 ("[I]t's all peaceful … Q. You're saying you see this as a peaceful event? A. Absolutely, it was."); *id.* 185:18-24 ("I thought it was all just part of a celebration,"); *id.* 186:5-8 ("Because we were peacefully protesting."); *id.* 187:5-16 ("fljn my area, it was always peaceful… Q. … [W]hat you see is a peaceful protest? A. Absolutely."); *id.* 189:6-8 ("It looks consistently peaceful … I don't see anything violent. I don't see anything aggressive.").

***14** 90. In his (unsworn) answers to written discovery, Mr. Griffin changed his story and stated that "[a]t the time I did not know there had been any violence. Now seeing the documented evidence I would admit that there was violence. I did not know that at the time though," PX 143 at 4 (Response to Request for Admission 101); *see also id.* (Response to Request for Admission 103) (similar).

91. At trial, Mr. Griffin's testimony was inconsistent. At times he testified that "where I was, it… was peaceful. Everywhere where I was, all around, me in my direct vicinity, was peaceful." 8/15/22 Tr. 82:24-83:4, Later, he testified that he had seen "chaos" but it was in the distance. *Id.* 83:7-11. After repeatedly being confronted with his acknowledgements at the time that he had seen violence, Mr. Griffin conceded he had witnessed violence and force but stated he did not participate in the violence, *id.* 83:18-19, 87:22-88:9; or blamed the violence on "Antifa," *id.* 94:15-23; or sought to minimize the violence, *id.* 95:3-10 (comparing violent mob pushing into the tunnel to a happy crowd after a. basketball victory); or characterized his statements as "emotionally driven," *id.* 103:23-25, or manifestations of "frustrations," *id.* 104:20-22.

92. Similarly, Mr. Griffin's prior videotaped statements and other evidence contradict his trial testimony that he did not knowingly breach and remain within restricted Capitol grounds on January 6. *Compare* PX 40 (Griffin admitting he saw and ignored signage warning he was entering a restricted area); PX 152 (similar); PX 159 (similar); PX. 26 (Griffin at the Capitol covering his mouth and stating "I love the smell of napalm in the air," seemingly referencing tear gas and pepper spray in the air); 8/15/22 Tr. 167:15-168:6 (Hodges) (describing law enforcement's use of loudspeakers and chemical irritants to disperse the crowd), *with* 8/15/22 Tr. Tr. 87:7-10 (Griffin) ("There was nobody telling us to leave. There was no signage telling us we couldn't be there. There was no loud speaker telling [us] to vacate the area. Nothing of the sort.").

93. The Court does not find credible Mr. Griffin's claim that he thought a security barricade the mob used as a makeshift ladder to climb over a wall was, in his words, "steps." 8/15/22 Tr. 86:23-87:7; *see* PX 25 (video of Mr. Griffin climbing up security barricade).

94. Nor does the Court find credible Mr. Griffin's attempts to characterize violent and inflammatory statements he made in January 2021—in which he repeatedly referred to an impending "war" in Washington, D.C. on January 6 that "we cannot lose"—as referring only to peaceful political activity. *See, e.g.*, 8/15/22 Tr. 69:13-21, 74:10-75:12, 76:10-82:19, 99:25-100:19 (Griffin.). At the time Mr. Griffin made these statements, he did not clarify he was referring only to lawful activity, and the language and context of his statements strongly indicates his intent was to mobilize a violent mob for the events of January 6. *See id.* The Court finds that Mr. Griffin's after-the-fact characterizations of his prior statements were self-serving and not credible.

95. Mr. Griffin's trial testimony also referenced a number of January 6 conspiracy theories that he failed to substantiate with credible evidence. *E.g.*, 8/15/22 Tr. 94:19-23 (Griffin) ("I saw a guy that was dressed [as] Antifa hit a window … and I saw him immediately get stopped, by what looked like a Trump supporter."); *id.* 104:3-5 ("It's not any secret that, there was FBI informants that were involved in January 6th. … like Ray Epps ...."); *id.* 42:18-25 (describing a purported video showing a "Capitol Police officer taking down, the barricades" and "waving people in").

CONCLUSIONS OF LAW

I. Legal Framework.

A. New Mexico's *Quo Warranto* Statute.

***15** 1. A *quo warranto* action may be brought against a person who "unlawfully holdfs] … any public office" in the State, NMSA 1.978, § 44-3-4(A), or "any public officer, civil or military, [who] shall have done or suffered an act which, by the provisions of law, shall work a forfeiture of his office," *id.* § 44-3-4(B).

2. "[W]hen the office usurped pertains to a county," any "private person" has standing to bring a *quo warranto* action "on his own complaint," and need not first file a complaint with the Attorney General or a district attorney. NMSA 1978, § 44-3-4; *State ex rel. Martinez v. Padilia*, 1980-NMSC-064, ¶ 8, 94 MM. 431, 434.

3. Any private citizen of New Mexico has standing to bring a *quo warranto* action and need not demonstrate any direct injury traceable to the defendant. *See Martinez*, 1980-NMSC-064, ¶ 8 (permitting *quo warranto* suit by two private persons without addressing any injury to them); *Clark v. Mitchell*, 2016-NMSC-005, ¶ 8, 363 P.3d 1213, 1216 (stating private persons may bring a *quo warranto* action against state official upon refusal of district attorney without discussing standing). This reflects the breadth of standing doctrine in New Mexico courts, where standing "is not derived from the state constitution," is "not jurisdictional," and can be freely conferred by statute. *Gandydancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶ 7, 453 P.3d 434, 437 (internal quotation marks omitted).

4. If the defendant is "adjudged guilty of usurping or intruding into or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that such, defendant be excluded from such office, franchise or privilege." NMSA 1978, § 44-3-14.

5. "One of the primary purposes *of quo warranto* is to ascertain whether one is constitutionally authorized to hold the office he claims, whether by election or appointment, and [courts] must liberally interpret the quo warranto statutes to effectuate that purpose." *Clark*, 2016-NMSC-005, ¶ 8.

6. The *quo warranto* statute authorizes courts to make a "judicial finding" that an official has engaged in conduct resulting in their "forfeiture" of office due to constitutional disqualification. *Martinez*, 1980-NMSC-G64, ¶¶ 5-6. No prior criminal conviction is necessary if the constitutional qualification at issue does not require one. *See id.*

B. Section Three of the Fourteenth Amendment.

7. Section Three of the Fourteenth Amendment provides:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection

> or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. Const. amend. XIV, § 3.

8. Section Three thus disqualifies any person from being a "Senator or Representative in Congress, or elector of President and Vice-President, or hold[ing] any office, civil or military, under the United States, or under any State" if that person took an "oath … to support the Constitution of the United States" as an "executive or judicial officer of any State," and then "engaged in insurrection … against" the Constitution, unless Congress "remove[s] such disability" by a two-thirds vote.

***16** 9. State courts have adjudicated Section Three challenges through *quo warranto* or similar state-law proceedings. *See, e.g., Louisiana ex rel. Sandlin v. Watkins*, 21 La. Ann. 631 (La. 1869) (*quo warranto*); *Worthy v. Barrett*, 63 N.C. 199, 205 (1869) (mandamus); *In re Tate*, 63 N.C. 308, 309 (1869) (same).

10, Section Three imposes a qualification for public office, much like an age or residency requirement. It is not a criminal penalty, and neither the courts nor Congress have ever required a prior criminal conviction for a person to be disqualified under Section Three. *See infra* Concl. of Law ¶¶ 61-64. Section Three is thus akin to New Mexico constitutional disqualifications that do not require a prior criminal conviction. *See Martinez*, 1980-NMSC-064, ¶ 5.

II. Mr. Griffin is Disqualified from Public Office Usader Section Three of the Fourteenth Amendment.

11. Based on the trial evidence and argument, the Court concludes that (1) Mr. Griffin took an "oath … to support the Constitution of the United States" as an "executive … officer of a[] State," (2) the January 6 Attack and surrounding planning, mobilization, and incitement were an "insurrection" against the Constitution of the United States, and (3) Mr. Griffin "engaged in" that insurrection.

12. The Court therefore concludes that, effective January 6, 2021, Mr. Griffin became disqualified under Section Three of the Fourteenth Amendment from serving as a "Senator or Representative in Congress, or elector of President and Vice-President, or hold[ing] any office, civil or military, under the United States, or under any State," including his current office as an Otero County Commissioner.

A. Mr. Griffin Took an Oath as a State Officer to Support the Constititution of the United States.

13. Section Three applies to county officials required by state law to take an oath to support the Constitution of the United States. *See Worthy*, 63 N.C. at 202-04 (county official was subject to disqualification because state law required him to take the oath), *In re Tate*, 63 N.C. at 309 (disqualifying county official); *United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D.N.C. 1871) (finding that county official who took the oath was subject to disqualification and that Section Three is "broad enough to embrace every officer in the state"); *Op. of Att'y Gen. Stanbery under the Reconstruction Laws*, at 16 (Wash. Gov't Print. Off. June 12, 1867), https://perma.cc/U4C3-4T8D (concluding that "county officers" who are "required to take … the oath to support the Constitution, of the United States" are "subject to disqualification"); 8/16/22 Tr. 17:2—-18:6 (Graber) (describing "broad consensus" among knowledgeable nineteenth-century people that Section 'Three applies to county officials).

14. New Mexico constitutional and statutory law required Mr. Griffin to take an oath to support the Constitution of the United States before assuming office as an Otero County Commissioner. *See* N.M. Const. art. XX, § 1; NMSA 1978, 10-1-13(B).

15. Mr. Griffin took that oath on December 28, 2018. Findings of Fact ¶ 8.

16. Because state law required Mr. Griffin to take an oath to support the Constitution as a county official and he did so, the Court concludes he is subject to disqualification under Section Three.

***17** 17. The Court further concludes that Otero County Commissioners are "executive officers" of the State within the meaning of Section Three. Mr. Griffin testified that as a county commissioner he performs "executive functions," including on spending, personnel, and election matters. Findings of Fact ¶ 6: *see also* Br. of *Amicus Curiae* Common Cause at 2-6 (explaining why county commissioners qualify as "executive officers" under New Mexico law). And knowledgeable nineteenth-century Americans, including Section Three's drafters, would have considered New Mexico county commissioners "executive officers" since their offices are created by state constitutional and statutory law, the state constitution refers to them as "officers," they perform traditional executive functions, and they exercise discretionary authority. 8/16/22 Tr. 18:16-20:23 (Graber). It follows that Mr. Griffin took an "oath … to support the Constitution of the United States" as an "executive … officer of [a] State." *See* U.S. Const. amend. XIV. § 3.

B. The January 6 Attack and Surrounding Events Were an "Insurrection" Against the Constitution of the United States.

1. Definition of "Insurrection"

18. The term "insurrection," as understood by knowledgeable nineteenth-century Americans and Section Three's framers, referred to an (1) assemblage of persons, (2) acting to prevent the execution of one or more federal laws, (3) for a public purpose, (4) through the use of violence, force, or intimidation, by numbers. 8/16/22 Tr. 26:1-5 (Graber); *see also, e.g.*. *Case of Fries*, 9 F. Cas. 924 (C.C.D. Pa. 1800) (Chase, J.); John Catron, Robert W. Wells & Samuel Treat, *Charge to the Grand Jury By the Court, July 10, 1861* (St. Louis: Democratic Book and Job Office, 1861) ("*Charge to the Grand Jury*, July 1861"); "Insurrection," *Webster's Dictionary* (1828), https//perma.ce/9YPA-XN8J.

19. Judges, members of Congress, presidents, and legal experts from the era described as insurrections events such as the Whiskey Insurrection (1794) and Fries' Insurrection (1.799), which involved efforts to resist the federal government's right to impose or collect certain taxes. 8/16/22 Tr. 22:23-23:3, 26:7—10 (Graber). This reflected the common understanding that an insurrection need not rise to the level of trying to overthrow the government or secede from the Union; resisting the government's authority to execute a single law sufficed. *Id.* 24:2-8, 30:24— 31:5.

20. Section Three's framers and nineteenth-century Americans did not understand an. insurrection to require actual violence; intimidation by numbers sufficed. 8/16/22 Tr. 27:18-28:2 (Graber); *Charge to the Grand Jury*, July 1861. Thus, Fries' Insurrection was considered, an insurrection even though there was only intimidation and not actual violence. A tax collector fled when marched upon by angry Pennsylvania farmers, but "there was no evidence that anyone fired a shot, anyone threw a stone, anyone threw a punch." 8/16/22 Tr. 27:15-28:2 (Graber).

21. Nor did the nineteenth-century definition of insurrection depend on the truth or morality of the insurrectionists' cause: an uprising could be an insurrection even if the participants sincerely believed their cause was just. 8/16/22 Tr. 29:11-22 (Graber). Efforts to rescue fugitive slaves were considered insurrections even though many believed the Fugitive Slave Act of 1850 was unconstitutional and freeing slaves was a moral obligation. *Id.* 29:11-22. That participants "firmly belie ve[d]" they "were acting for the good of [their] country" was "not a defense to insurrection," but rather was proof they were acting for an insurrectionary "public purpose." *Id.* 29:11-22, 53:1-7.

2. The January 6 Attack and Surrounding Events Meet the Definition of an "Insurrection."

22. The Court concludes that the January 6, 2021 attack on the United States Capitol and the surrounding planning, mobilization, and incitement constituted an "insurrection" within the meaning of Section Three of the Fourteenth Amendment.

***18** 23. The transfer of presidential power is governed by the Twelfth and Twentieth Amendments and the Electoral Count Act, among other laws. The Twelfth Amendment requires electors to meet after the election in their respective states to cast their votes, which are then transmitted to Congress to be "open[ed]" by the Vice President (in his capacity as the President of the Senate) and "counted" in a joint congressional session. U.S. Const. amend. XII. The Electoral Count Act establishes procedures for electoral votes to be opened and counted on the sixth day of January following any presidential election in a joint session of Congress, in which the Vice President "shall be the[] presiding officer." 3 U.S.C. § 15. The Twentieth Amendment provides that a President's term "shall end at noon on the 20th day of January" and "the term[] of [his or her] successor[] shall then begin." U.S. Const. amend. XX, § 1.

24. The January 6 Attack followed a weeks-long campaign to stop—through extra-legal means-—certification of the 2020 presidential election and the transfer of power as mandated by federal law. Findings of Fact ¶¶ 12, 14-16. Participants in these efforts did not hide their objective: they called their movement "Stop the Steal" based on the false premise that the 2020 election was stolen and that, the lawful transfer of power needed to be stopped. *Id.* ¶ 15.

25. The Stop the Steal movement successfully mobilized and incited thousands of people from across the country to form a violent mob in Washington, D.C. to intimidate Vice President Pence and Congress so that they would not certify the 2020 presidential election and thus block the lawful transfer of power. Findings of Fact ¶¶ 16, 38.

26. The mob that arrived at the Capitol on January 6 was an assemblage of persons who engaged in violence, force, and intimidation by numbers. The mob numbered at minimum in the thousands. Many came prepared for violence in full tactical gear. They used a variety of weapons, brutally attacked and injured more than, one hundred police officers, sought to intimidate the Vice President and Congress, and called for the murder of elected officials, including the Vice President. Findings of Fact ¶¶ 38, 40-43.

27. The mob was unified by the common public purpose of opposing the execution of federal law—namely, the Twelfth and Twentieth Amendments and the Electoral Count Act. Through their chants, flags, banners, and clothing, the mob made clear they came to the Capitol to stop Vice President Pence and Congress from carrying out their constitutional duties to certify the election by force and intimidation. Findings of Fact ¶ 46. That some of the January 6 attackers may have believed that the 2020 presidential election was stolen does not negate their insurrectionary purpose. 8/16/2.2 Tr. 35:4-6 (Graber).

28. The mob ultimately achieved what even the Confederates never did during the Civil War: they breached the Capitol building and seized the Capitol grounds, forcing the Vice President and Congress to halt their constitutional duties and flee to more secure locations. Findings of Fact ¶¶ 47, 49.

29. The mob succeeded in delaying the constitutionally-mandated counting of electoral votes by several hours and, for the first time in our Nation's history, disrupted the peaceful transfer of presidential power. Findings of Fact ¶ 49. To clear the mob and regain control of the Capitol, the Capitol Police called in more than 2,000 reinforcements from 19 agencies. *Id.* ¶ 48. Officers used chemical spray and munitions, flash bangs, tactical teams with firearms, riot shields, and batons to fight back the mob. *Id.* Even with this significant show of force, the Capitol grounds were not deemed secure and the congressional proceedings did not resume until 8:00 p.m. *Id.* ¶49. It was not until 3:42 a.m. on January 7 that Congress completed its business and certified the election. *Id.*

***19** 30. After January 6, there was a continuing effort to violently prevent Biden from taking office on January 20 as required by the Twentieth Amendment. Findings of Fact ¶ 51. The threat subsided only after the government deployed nearly two and a half times the number of National Guardsmen that would normally attend a presidential inauguration. *Id.*

31. Knowledgeable nineteenth-century Americans including Section Three's framers would have regarded the events of January 6, and the surrounding planning, mobilization and incitement, as an insurrection. 8/16/22 Tr. 43:2-15 (Graber) ("We saw an assemblage, acting in concert, chanting 'hang Mike Pence' in concert, attacking police officers in concert. We saw that they

were there to prevent the execution of those laws that would have certified that Joe Biden won the Presidential election. We saw that they were there was because they believed in the public purpose, that the election had been fraudulent, had been stolen, … And we saw … substantial violence, force and intimidation."),

32, Reinforcing the evidence presented at trial, each branch of the federal government has referred to the January 6 Attack as an "insurrection" and the participants as "insurrectionists," including bipartisan majorities of both chambers of Congress, [2] more than a dozen federal courts, [3] President Biden, [4] and the Department of Justice under former President Trump, [5] Former President Trump's own impeachment defense lawyers acknowledged "everyone agrees" there was "a violent insurrection of the Capitol" on, January 6, 167 Cong. Rec. 5717, 5733 (Feb. 13, 2021).

C. Mr. Griffin "Engaged in" the Insurrection.

33. The case law holds that a person "engage[s]" in an insurrection within the meaning of Section Three by "[v]oluntarily aiding the [insurrection], by personal service, or by contributions, other than charitable, of anything that [is] useful or necessary" to the insurrectionists' cause. *Worthy*, 63 N.C. at 203; *see also Powell*, 27 F. Cas. at 607 (defining "engage" as a "a voluntary effort to assist the Insurrection … and. to bring it to a successful termination" from the insurrectionists' perspective).

***20** 34. Consistent with this case law, knowledgeable nineteenth-century Americans understood that a person "engaged in" insurrection whenever they were "leagued" with insurrectionists.....either by acting in concert with others knowing that the group intended to achieve its purpose in part by violence, force, or intimidation by numbers, or by performing an "overt act" knowing that act would "aid or support" the insurrection. 8/16/22 Tr. 43:22-44:22 (Graber). Under the nineteenth-century understanding, "there [were] no accessories" in an insurrection; rather, "[e]verybody … involved" was a "principal actor." *Id.* 15:8-10,

35. One need not personally commit acts of violence to "engag[e] in" insurrection. *See Powell*, 27 F. Cas. at 607 (defendant "engaged in" rebellion if he voluntarily provided a substitute to avoid serving in Confederate Army); *Worthy*, 63 N.C. at 203 (individual "engaged in" rebellion by holding office of county sheriff under the Confederacy); 8/16/22 Tr. 52:10-19 (Graber). Engagement thus can include non-violent overt acts or words in furtherance of the insurrection. *See* May 2022 *Greene* Decision at 14; 8/16/22 Tr. 135:13-24 (Kleinfeld) (explaining "there are a lot of roles in an insurrection,"" some of which do not involve violence).

36. Under the nineteenth-century understanding, "an overt act is not measured by how much it contributes" to the insurrection; in the context of a violent insurrection such as the January 6 Attack, just "[o]ne more person closer to the Capitol" or "one more voice" encouraging violence would be "one more person" engaged in the insurrection, 8/16/22 Tr. 51:17-52:9 (Graber).

37. Applying these principles, the Court concludes that Mr. Griffin "engaged in" the January 6 insurrection.

38. Ahead of the January 6 Attack, Mr. Griffin voluntarily aided the insurrectionists' cause by helping to mobilize and incite thousands across the country to join the mob in Washington, D.C. on January 6 to intimidate and threaten Vice President Pence and Congress so they would not certify the election. Prop. Findings of Fact ¶¶ 16, 19-35. Griffin was a featured speaker on a multi-city bus tour organized by a leading Stop the Steal rally organizer, during which Mr. Griffin urged crowds to join the "war" and "battle" in "the streets" of Washington, D.C. on January 6 to stop certification of the election and the peaceful transfer of power. *Id.* ¶¶ 23-24, 28, The mob's size was their "greatest weapon" and what enabled them to achieve the level of success that they did on. January 6. *Id.* ¶ 44. The pre-January 6 mob mobilization and incitement efforts by Mr. Griffin and others helped make the insurrection possible.

39. Mr. Griffin further aided the insurrection when he joined and incited the mob that attacked and seized the Capitol grounds on January 6, Griffin illegally breached the Capitol grounds and remained there between at least 2:31 p.m. to 4:48 p.m.....…the

height of the attack. Prop. Findings of Fact ¶¶ 54-55. He knowingly crossed multiple layers of security barricades and helped insurrectionists do the same, ultimately ascending all the way to the inaugural stage on the Capitol's West Terrace, Findings of Fact ¶¶ 55-59, 69. He remained there, and incited the mob, even after seeing members of the mob a short distance away attack police officers and violently try to break into the Capitol building. Findings of Fact ¶¶ 60-63, 65-67. And he remained even after law enforcement ordered the mob to disperse and deployed tear gas, pepper spray, and chemical munitions to make them do so. Findings of Fact ¶¶ 56, 59, The Court finds that Mr. Griffin knew he should not have been at the Capitol, but that he stayed in support of the insurrection.

***21** 40. The Court concludes that Mr. Griffin's crossing of barricades to approach the Capitol were overt acts in support of the insurrection, as Griffin's presence closer to the Capitol building increased the insurrectionists' intimidation by numbers. Mr. Griffin's marching with the mob all the way to the inaugural stage, knowing the mob's insurrectionary purpose, likewise constitutes an overt act. The Court's conclusions are consistent with how knowledgeable nineteenth-century Americans would view Mr. Griffin's actions. 8/16/22 Tr. 51:3-21 (Graber).

41. Mr. Griffin aided the insurrection even though he did not personally engage in violence. By joining the mob and trespassing on restricted Capitol grounds, Mr. Griffin contributed to delaying Congress's election-certification proceedings. The constitutionally-mandated proceedings could not resume until *all* members of the mob, including Mr. Griffin, were removed from the restricted area. Findings of Fact ¶¶ 47, 49. The presence of Mr. Griffin and other purportedly non-violent members of the mob also contributed to law enforcement being overwhelmed. Findings of Fact ¶¶ 44-45.

42. Mr. Griffin also Incited, encouraged, and helped normalize the violence on January 6. He joined insurrectionists in chanting "Heave! Ho!" as they synchronized their movement to crush Officer Hodges and other police officers in the West Terrace tunnel to break into the Capitol. Findings of Fact ¶ 65, He filmed a speech for social media promoting the attack as it was ongoing, threatening "this is what you're going to get, and you're going to get more of it." *Id.* ¶ 60, He fist-bumped insurrectionists and chanted "this is our house!" and "we could all be armed" as he approached the West Terrace. *Id.* ¶ 57. And he minimized concerns about the ongoing violence raised by those around him, stating "sometimes these soils of things need to happen in order to send a signal that we're going to quit putting up with their bull crap, you know?" *Id.* ¶ 64. Eyewitness testimony confirms that Mr. Griffin's boisterous, attention-seeking behavior had the effect of energizing the insurrectionist mob. *Id.* ¶ 62.

43. The Court concludes that Mr. Griffin's encouragement and normalization of other insurrectionists' violent activities were additional overt acts in support of the insurrection. *See* 8/16/22 Tr. 52:3-9 (Graber) ("[L]egally knowledgeable people of the Nineteenth Century said one more voice is one more person who is involved in the insurrection.").

44. Mr. Griffin also repeatedly aligned himself with the insurrectionists. In videos recorded before, during, and after the January 6 Attack, Griffin used the first-person plural to describe how "we" could not permit Joe Biden to steal the 2020 presidential election, "we" took over the Capitol grounds because it was "our" house, and "we" shouted "Heave! Ho!" in support of attackers breaking into the Capitol building. Findings of Fact ¶¶ 27-34, 57, 65-67. Mr. Griffin knew the individuals he was acting in concert with during the January 6 Attack were engaged in violence and force to stop certification of the election, and he proudly associated himself with them. *Id.; see also* 8/16/22 Tr. 46:1-48:20 (Graber).

45. After the attack, Mr. Griffin took to social media to justify and normalize the violence he acknowledged witnessing on January 6. Consistent with the insurrectionists' post-January 6 focus on the presidential inauguration, *see* Findings of Fact ¶ 51, Mr. Griffin, vowed a more brutal attack to prevent Biden from taking office on January 20, when he threatened there would be "blood running out" of the Capitol building, *id.* ¶ 67. Mr. Griffin later conveyed specific plans to attend Biden's inauguration with firearms. *Id.* ¶ 69.

***22** 46. Nineteenth-century Americans would have regarded Mr. Griffin as being "leagued" with the January 6 insurrectionists because he acted in concert with those insurrectionists and committed several overt acts supporting the insurrection. *See* 8/16/22 Tr. 44:23-53:22 (Graber).

47. Mr. Griffin's actions normalized and incited violence. 8/16/22 Tr. 99:15-21, 101:16-103:19, 135:13-136:1 (Kleinfeld). By calling on "men" to join him in "battle," telling crowds they were in the midst of a "war," dehumanizing the opposition as "wicked" and "vile," warning that "losing [was] not an option," and associating as an elected official with "violent specialist" groups, Griffin lowered inhibitions of others to engage in violence. *Id.* 108:14-109:12, 113:11-17, 114:12-115:3, 115:11-18 (explaining that placing violence in a sanctioned context, like war, and dehumanizing people are means of lowering inhibitions to violence). And by using language that goes outside of democratic norms, like urging supporters take to "the streets" rather than the "ballot box," Mr. Griffin suggested that the use of violence to prevent the transfer of presidential power was legitimate. *Id.* 113:11-17. Political violence predictably occurred at the Capitol on January 6 and Griffin helped make that happen. *Id.* 99:24-100:2.

D. Mr. Griffin Became Constitutionally Disqualified from Any Federal or State Office, Including His Current Office, Effective January 6, 2021.

48. For the foregoing reasons, the Court concludes Mr. Griffin is constitutionally disqualified from, serving as a "Senator or Representative in Congress, or elector of President and Vice-President," or from "hold[ing] any office, civil or military, under the United States, or under any State." U.S. Const. amend, XIV, § 3.

49. The Court further concludes that Mr. Griffin's current office of Otero County Commissioner qualifies as "any office … under a[] State" from which Mr. Griffin is now disqualified. Section Three's list of offices from which one is disqualified ("Senator or Representative in Congress, or elector of President and Vice-President, or … any office, civil or military, under the United States, or under any State") is facially broader than, the offices eligible for disqualification ("member of Congress," "an officer of the United States," or "a member of any State legislature, or as an executive or judicial officer of any State"). Because the Otero County Commission falls into Section Three's narrower list of disqualification-eligible offices, *see* Prop. Concl. of Law ¶¶ 13—1.7, it follows that it is also an office from which Mr. Griffin is now disqualified, *see* *Powell*, 27 F. Cas. at 607 (Section Three is "broad enough to embrace every officer in the state").

50. Under the *quo warranto* statute, the "effective date" of a disqualified official's forfeiture of office is the date on which the disqualifying condition occurred. *See* *State ex rel. King v. Sloan*, 2011-NMSC-020, ¶¶ 13-14, 149 N.M. 620, 623-24 (official's "forfeiture of… office" was "automatic" upon, occurrence of constitutionally-disqualifying condition and the Court's the *quo warranto* judgment "simply operated to enforce that which had already occurred"). For Mr. Griffin, that date was January 6, 2021.

51. The Court concludes that Mr. Griffin became constitutionally disqualified from federal and state office and forfeited his current office as an Otero County Commissioner effective January 6, 2021.

III. Mr. Griffin's Defenses Are Meritless.

***23** 52. The Court concludes that none of the defenses Mr. Griffin raised before this Court have merit.

53. While the Court "regard[s] pleadings from *pro se* litigants" such as Mr. Griffin "with a tolerant eye," a "*pro se* litigant is not entitled to special privileges because of *his pro se* status." *Bruce v. Lester*, 1999-NMCA-051, ¶ 4, 127 N.M. 301, 302, Rather, a *pro se* litigant "is held to the same standard of conduct and compliance with court rules, procedures, and orders as are members of the bar." *Newsome v. Farer*, 1985-NMSC-096, ¶ 18, 103 N.M. 415, 419.

54. Accordingly, the Court need not consider defenses Mr. Griffin asserted in the related federal proceedings but failed to raise in this Court, as those arguments are deemed forfeited. And while the Court must "review the arguments of self-represented

litigants to the best of its ability," it "cannot respond to unintelligible arguments" raised by Mr. Griffin. *Brooks v. Brooks*, 2015 WL 4366711, at *1 (NM. June 30, 2015) (unpublished) (citing *Clayton v. Trotter*, 1990-NMCA-078, ¶¶ 16-17, 110 N.M. 369).

A. Mr. Griffin's First Amendment Defease Fails.

55. Mr. Griffin has claimed that disqualifying him under Section Three of the Fourteenth Amendment would violate his First Amendment rights. *See, e.g.*, 8/15/22 Tr. 10:8-10; 104:9-15. Whether construed as asserting his First Amendment right to run for political office, his right to freedom of speech, or his right to the free exercise of religion, Mr. Griffin's argument fails.

56. Despite Mr. Griffin's objections to his own words being used against him in this case, "[t]he First Amendment… does not prohibit the evidentiary use of speech." *Wise. v. Mitchell* 508 U.S. 476, 489 (1993).

57. Mr. Griffin also overlooks that Section Three of the Fourteenth Amendment is just as much apart of the Constitution as the First Amendment. Griffin's "unconstitutional constitutional amendment" theory has never succeeded in American courts and was specifically rejected by Section Three's drafters. *See* Br. of *Amici Curiae* Floyd Abrams *et al.* at 8-13 (Aug. 1, 2022).

58. Even if a constitutional amendment could somehow be deemed unconstitutional as Mr. Griffin claims, Section Three poses no genuine threat to First Amendment rights; the two provisions can and must be harmonized. *See* Br. *of Amici Curiae* Floyd Abrams *et al.* at 13-28. Section Three affects the qualified right to run for political office—a right that has always been limited by qualifications such as age, citizenship, and residency. *See Thournir v. Meyer*, 909 F.2d 408, 412 (10th Cir. 1990) ("Candidacy itself is not a fundamental right...."); *Griffin*, 2022 WL 2315980, at *12 ("Section Three of the Fourteenth Amendment narrows the First Amendment right to run for office ...."). Moreover, Section Three serves compelling interests in "protecting the integrity and practical functioning of the political process" by excluding candidates due to their disloyalty to the Constitution. *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.); *see Sandlin*, 21 La. Ann. at 632 (recognizing "the State has obviously a great interest" in enforcing Section Three "and a clear right to do" so).

***24** 59. Nor can Mr. Griffin's free speech or free exercise rights immunize him from disqualification, even if his insurrectionary activities are entangled with speech and prayer. "[F]reedom of speech and of religion do not extend so far as to bar prosecution of one who uses a public speech or a religious ministry to commit crimes" or other illegal conduct. *United States v. Rahman*, 189 F.3d 88, 116-17 (2d Cir. 1999). Rather, Mr. Griffin could be held to violate even a statute pursuant to traditional First Amendment exceptions, such as speech integral to illegal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 62 (2006); true threats, *Virginia v. Black*, 538 U.S. 343, 359-60 (2003); and incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Here, Mr. Griffin is accused of violating the Fourteenth Amendment, which, as noted, must be "be read together and harmonized" with the First Amendment, *State v. Sandoval*, 1980-NMSC-139, ¶ 8, 95 N.M. 254, 257, to ensure Section Three is not rendered "without effect," *Marbury v. Madison*, 5 U.S. 137, 174 (1803).

60. Moreover, courts have uniformly rejected arguments by Mr. Griffin and other insurrectionists that their conduct on January 6 was constitutionally-protected protest activity. *See* Br. *ofAmici Curiae* NAACP New Mexico Conference and NAACP Otero County Branch at 3-8 (Aug. 23, 2022) (compiling cases). Courts have likewise rejected January 6 insurrectionists' attempts to compare their conduct to that of Black Lives Matters protesters. *See id.* at 8-11; *see also* 8/16/22 Tr. 161:12-18, 163:21-164:7, 148:3-5 (Kleinfeld) (explaining that while some Black Lives Matter protests "caused a lot of property damage," January 6 was an unprecedented use of "violence and intimidation" to "affect the orderly transition of power" as mandated by federal law).

B. Mr. Griffin Can Be Disqualified Under Section Three Regardless of Whether He Has Been Convicted of Any Crime.

61. Mr. Griffin has also argued he cannot be disqualified under Section Three because he was acquitted of disorderly conduct under 18 U.S.C. § 1752(a)(2) and has not been charged with the crime of insurrection under 18 U.S.C. § 2483. *See* 8/15/2 Tr.

10:4-6; 8/16/22 Tr. 146:3 0-13, 146:25-147:16, But Mr. Griffin is conflating a Section Three disqualification suit with a criminal prosecution. *See* 8/15/22 Tr. 105:19-21 ("THE COURT: Just to clarify, this isn't a criminal proceeding. It's a civil proceeding. So you mentioned criminal conduct before. That's not this trial,").

62. Section Three imposes a qualification for public office, much like an age or residency requirement; it is not a criminal penalty. *See* *Sandlin*, 21 La. Ann. at 632-33 (Section Three suit was brought "not to inflict punishment or to impose penalties or disabilities," but "to inquire legally into [defendant's] right to hold … office"); Cong. Globe, 39th Cong., 1st Sess. 2918 (1865-66) (Section Three is "not … penal in its character, it is precautionary").

63. Nor is a criminal conviction (for any offense) a prerequisite for disqualification. Indeed, neither the courts nor Congress have ever required a criminal conviction for a person to be disqualified under Section Three. *See, e.g.,* *Sandlin*, 21 La. Ann. 631; *Worthy*, 63 N.C. 199: *In re Tale*, 63 N.C. 309: May 2022 *Greene* Decision at 13.

64. Nor is Mr. Griffin's acquittal for disorderly conduct legally relevant here. Unlike 18 U.S.C. § 1752(a)(2), Section Three does not require proof that Mr. Griffin engaged in "disorderly or disruptive conduct." Instead, Griffin is disqualified under Section Three if he "[vjoluntarily aid[ed] the [insurrection], by persona! service, or by contributions, other than charitable, of anything that [is] useful or necessary" to the insurrectionists' cause.'" or if he otherwise "leagued" with insurrectionists. Concl. of Law ¶¶ 33-34. The judge in Mr. Griffin's criminal case had no occasion to apply this standard. The quantum of proof also differs significantly: to secure a § 1752 conviction, the United States had to prove each element beyond a reasonable doubt. In this civil action, the standard of proof is, at most, preponderance of the evidence. Finally, Plaintiffs presented substantial evidence at this trial that the federal government may not have presented at Mr. Griffin's criminal trial, making the conclusions at the criminal trial inapplicable to the evidence in this case.

C. Mr. Griffin's Other Arguments Are Similarly Meritless.

***25** 65. At trial, Mr. Griffin incorrectly claimed an insurrection must involve a "collaborated effort to overthrow the government" and "replace" it. *E.g.*, 8/15/22 Tr. 41:10-12. He cited no authority supporting that, definition and, as outlined *supra*, it is refuted by historical evidence. Prop. Concl. of Law ¶ 18-19. Not even the Civil War—the event that precipitated the Fourteenth Amendment—would meet Griffin's definition of insurrection. 8/16/22 Tr. 55:1-10 (Graber).

66. Mr. Griffin also suggested he cannot be removed through a. *quo warranto* suit because a recall effort against, him failed. 8/16/222 Tr. 186:23-188:5. The case law forecloses this argument. *See* *Martinez*, 1980-NMSC-064, ¶ 6 (affirming *quo warranto* judgment and rejecting argument that recall election was the "exclusive means" for removing disqualified officials).

67. The Court also rejects Mr. Griffin's argument that his removal and disqualification pursuant to the Constitution of the United States would "subvert the will of the people." 8/15/22 Tr. 11:1. Mr. Griffin disregards that the Constitution fceJ/reftects the will of the people and is "the supreme Law of the Land." U.S. Const. art. VI, cl. 2; *see also* N.M. Const. art, II, § 1. And he overlooks that his own insurrectionary conduct on January 6 sought to subvert the results of a free and fair election, which would have disenfranchised millions of voters. *See* Br. *oZAmici Curiae* NAACP New Mexico Conference and NAACP Otero County Branch at 13-IS (refuting Griffin's "disenfranchisement" argument).

ORDER GRANTING *QUO WARRANTO* RELIEF

For the reasons stated in these Findings of Fact and Conclusions of Law, the Court ORDERS, ADJUDGES, and DECREES as follows:

1. Defendant Couy Griffin is disqualified under Section Three of the Fourteenth Amendment to the Constitution of the United States because (1) he took an oath to support the Constitution of the United States as an "executive … officer of any State," (2)

the January 6, 2021 attack on the United States Capitol and surrounding planning, mobilization, and incitement were an "insurrection" against the Constitution of the United States, and (3) Defendant "engaged in" that insurrection after taking his oath.

2. Due to his disqualification under Section Three of the Fourteenth Amendment, Defendant is constitutionally ineligible and. barred for life from serving as a "Senator or Representative in Congress, or elector of President and Vice-President," or from "holdjing] any office, civil or military, under the United States, or under any State," including his current office as an Otero County Commissioner.

3. Defendant became constitutionally disqualified from the federal and state positions specified above in Paragraph 2 and forfeited his current office as an Otero County Commissioner effective January 6, 2021.

4. Defendant shall be removed from his position as an Otero County Commissioner effective immediately.

5. Defendant is permanently enjoined and prohibited from performing any official acts in his purported capacity as an Otero County Commissioner or on behalf of the 'Board of County Commissioners of Otero County,

6. Defendant is permanently enjoined and prohibited from seeking or holding any federal or state position specified above in Paragraph 2,

Francis J. Mathew

District Court Judge

xc: Counsel, e-served

Couy Griffin

Footnotes

1 Citations to the trial transcript will identify the date, page, and line number of the cited transcript followed by a parenthetical identifying the testifying witness, where applicable.

2 *Kg*, 167 Cong. Rec. H191 (daily ed. Jan. 13, 2021); 167 Cong. Rec. S733 (daily ed. Feb. 33, 2021); H. Res. 503, 117th Cong., 1st Sess. (2021); S. 35, 117th Cong. (2021); H.R, 3325, 117th Cong. (2021).

3 *E.g., United States v. Munchel*, 993 F.3d 1273, 1281 (D.C. Cir. 2021); *United States v. DeGrave*, 539 F, Supp. 3d 184 (D.D.C. 2021); *Noem v. Haaland*, 542 F. Supp. 3d 898, 906 (D.S.D. 2021); *Alsaada v. City of Columbus*, 536 F. Supp. 3d 216, 274 (S.D. Ohio), *modified in nonrelevant part by* 2021 WL 3375834 (2021); *United States v. Brogan*, 2023 WL 2313008, at *2 (E.D.N. Y. June 7, 2021); *United States v. Brockhoff*, 2022 WL 715223, at *1 (D.D.C. Mar. 10, 2022); *Urdted States v. Hunt*, 573 F. Supp. 3d 779, 807 (E.D.N.Y. 2021); *United States v. Puma*, 2022 WL 823079, at *2 (D.D.C. Mar. 19, 2022); *O'Rourke v. Dominion Voting Sys. Inc.*, 552 F. Supp. 3d 3168, 1199 (D. Colo.), *modified in nonrelevant part by* 2021 WL 5548129, at *2 (D. Colo. 2021); *United States v. Randolph*, 536 F. Supp. 3d 328, 132 (E.D. Ky. 2021); *United States v. Little*, 2022 WL 768685, at *2 (D.D.C. Mar. 14, 2022); *O'Handley v. Padilla*, 2022 WL 93625, at *5 (N.D. Cal. Jan. 10, 2022); *Amalgamated Transit Union Local 85 v. Port Auth. of Allegheny Cnty.*, 2021 WL 719671, at *2 (W.D. Pa. Feb. 24, 2021).

4 *E.g.*, Statement By President Joe Biden On the Six-month Anniversary of the January 6th Insurrection On the Capitol (July 6, 2021), https://perma.ce/VS89-CC3B.

5 Gov't Br. in Supp, of Det. at 1, *United States v Chamley.* No. 21-cr-00003, ECF No. 5 (D. Ariz. Jan. 14, 2021).

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