STATE OF MICHIGAN

IN THE COURT OF CLAIMS

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

Plaintiffs,

-vs-

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

Defendant,

and

DONALD J. TRUMP,

Proposed-Intervenor.

/

PROPOSED-INTERVENOR'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

FILE NO.: 23-000137-MZ

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INTRODUCTION

For the past several years, whether Donald J. Trump is suited to hold the Presidency has been the defining political controversy of our national life. Plaintiffs now ask a state court to terminate further discourse and decide this question of nationwide importance without regard for America's voters and their elected representatives. This request is manifestly inappropriate. Both the federal Constitution and Michigan law place the resolution of this nonjusticiable political question where it belongs: the democratic process, in the hands of either Congress or the people of the United States. This Court may not use Section Three of the Fourteenth Amendment ("Section Three") to enjoin the Secretary of State of Michigan ("Sec. of State") from placing President Trump on the primary and general election ballots in the state.

The Complaint's many factual inaccuracies, gaps, and distortions largely fall under one overarching theme: Plaintiffs have no evidence that President Trump intended or supported any violent or unlawful activity seeking to overthrow the government of the United States, either on January 6th or at any other time. On topic after topic, Plaintiffs seek to make up for the conspicuous absence of evidence by relying on innuendo, insinuation, and disdain for President Trump to win the day. Those are arguments for the American voters, not for this Honorable Court.

This Court should dismiss the Complaint for numerous reasons:

- First, this case presents a nonjusticiable political question that is constitutionally committed to Congress.
- Second, Plaintiffs lack standing and/or a writ of mandamus is improper.
- Third, Congressional action is required to enforce Section Three because it is not self-executing when used to prohibit a candidate from standing for election.
- Fourth, neither Plaintiffs nor the Sec. of State has the authority to enforce Section Three as Plaintiff desires.
- Fifth, the United States Constitution and Congress solely govern presidential qualifications.
- Sixth, the prohibitions of Section Three do not even apply to President Trump.
- Seventh, the conduct as alleged in the Complaint is not covered by Section Three.

For these reasons, this Court should dismiss the Complaint's claims as meritless, and remit Plaintiffs' arguments to the political processes ordained by the Constitution.

STATEMENT OF FACTS

As to Plaintiffs, Defendant, and Donald J. Trump, no facts have been properly pleaded. The only "facts" alleged in Plaintiffs' Complaint are a mere recitation of news articles and political events.

STANDARD OF REVIEW

"Summary disposition is appropriate under MCR 2.116(C)(4) when the trial court 'lacks jurisdiction of the subject matter.'" *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 155; 756 NW2d 483 (2008). "When determining if the trial court has subject-matter jurisdiction, [the] Court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence. *Durcon Co v Detroit Edison Co*, 250 Mich App 553, 556; 655 NW2d 304 (2002).

For a motion brought pursuant to MCR 2.116(C)(8), this Honorable Court should review the pleadings to test the legal sufficiency of Plaintiffs' claim. *Spiek v Department of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The motion should be granted if the claim is so clearly unenforceable that no factual development could justify Plaintiff's claim for relief. *Id.*

A motion brought under MCR 2.116(C)(10) tests the factual support for a plaintiffs' claim. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "The purpose of MCR 2.116(C)(10) is to 'avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law.'" *Kern v Kern-Koskela*, 320 Mich App 212, 223; 905 NW2d 453 (2017); *Maiden v Rozwood*, 461 Mich 109, 120-121; 596 NW2d 817 (1999). "Opinions, conclusory denials, unsworn averments and inadmissible hearsay do not satisfy the court rule; disputed fact (or lack of it) must be established by admissible evidence." *SSC Associates Limited Partnership v General Retirement System of City of Detroit*, 192 Mich App 360; 180 NW2d 275, 277 (1991).

ARGUMENT

I. Plaintiff's claims raise a nonjusticiable political question because a presidential candidate's qualifications are reserved for Congress and the voters to decide.

Federal and state courts presented with similar cases challenging the qualifications of presidential candidates have overwhelmingly held that they present nonjusticiable political questions the Constitution reserves for Congress and the voters. This Honorable Court should do likewise.

Political questions are nonjusticiable and therefore not cases or controversies. *Massachusetts v EPA*, 549 US 497, 516 (2007). The United States Supreme Court set out broad categories that should be considered nonjusticiable political questions in *Baker v Carr*, 369 US 186, 217 (1962):

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding 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; [and 6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

For its part, Michigan has also adopted a version of the political question doctrine applicable when the courts of this state must determine whether to decide questions of state law that may have been entrusted to coordinate branches of state government. *Makowski v Governor*, 299 Mich App 166, 829 NW2d 291 (2012). In approaching those questions, the courts of this State have generally considered the *Baker* factors, albeit taking into account the greater jurisdiction granted trial courts in this State as compared to their federal counterparts. *Id*. at 173. Here, the U.S. Constitution reserves exclusively to the United States Congress the power under Section Three to determine whether a person may take office.

Plaintiffs ask this Court to strip Congress of its power to make that determination, including waiver of disqualification by a two-thirds vote, and to empower the Sec. of State with duties she does not have. Federal and state courts have overwhelmingly ruled that challenges to the qualifications of presidential candidates are non-justiciable, taking into account considerations of comity and the deference due federal law under the Constitution's Supremacy Clause.

For example, numerous courts held that similar challenges to the qualifications of presidential candidates Barack Obama and John McCain presented nonjusticiable political questions. To wit, the Third Circuit held that a challenge to the qualifications of then-candidate Obama (based on his nationality) was a political question not within the province of the judiciary. *See Berg v Obama*, 586 F3d 234, 238 (3rd Cir 2009).

Multiple district courts reached the same conclusion. In *Grinols v Electoral College*, No. 2:12–cv–02997–MCE–DAD, 2013 WL 2294885, at *5-7 (ED Cal, May 23, 2013), the Court dismissed a challenge to President Obama's qualifications for office.[1] There, the Court held 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." *Id.* at *6. Likewise, in *Taitz v Democrat Party of Mississippi*, No 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *16 (SD Miss, Mar 31, 2015), the Court noted that the presidential electoral and qualification process "are entrusted to the care of the United States Congress, not this court" and that the plaintiffs' disqualification claims were therefore nonjusticiable.

In *Robinson v Bowen*, 567 F Supp 2d 1144 (ND Cal, 2008), the Court dismissed a case brought before the 2008 election seeking to remove Senator McCain from the ballot. After first holding that the plaintiff lacked standing, the Court rejected an attempt to fix that standing defect by adding Alan Keyes—a competing candidate—as a plaintiff, holding that it would be futile because:

> It is clear that mechanisms exist under the Twelfth Amendment and 3 U.S.C. § 15 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. Arguments concerning qualifications or lack thereof can be laid before the voting public before the election and, once the election is over, can be raised as objections as the electoral votes are counted in Congress. The members of the Senate and the House of Representatives are well qualified to adjudicate any objections to ballots for

[1] Although the *Grinols* plaintiff sought the removal of a sitting president rather than a presidential candidate, the court had previously refused to grant a temporary restraining order to prevent President Obama's re-election on political question grounds. *Grinols v Electoral Coll*, No 12-CV-02997-MCE-DAD, 2013 WL 211135, at *4 (ED Cal, Jan. 16, 2013).

> allegedly unqualified candidates. 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.

Id. at 1147.

Moreover, the Sec. of State has no authority to pre-judge a candidate's qualifications for office and strike a candidate from the ballot. The Sec. of State is required to issue a "list of the individuals generally advocated by the national news media to be potential candidates" for each major political party's nomination by 4:00 p.m. on November 10, 2023. *See* MCL 168.614a(1). Thereafter, the state chairperson of each major political party must file a "list of individuals whom they consider to be potential presidential candidates for that political party" with the Sec. of State no later than 4:00 p.m. on November 14, 2023. *See* MCL 168.614a(2). All names of the candidates will then be placed on the presidential primary ballot unless a candidate withdraws. MCL 168.615a.

As Plaintiffs concede in Paragraph 311 of their Complaint, the Sec. of State herself has admitted that she does not have the authority to refuse to place President Trump on or strike President Trump from the ballot.

Even if express authority to pre-judge qualifications and strike a candidate from the ballot existed, the exercise of that authority would violate separation of powers:[2]

[2] "Furthermore, in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus, in a Presidential election a state's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, a state has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the state's boundaries." *Anderson v Celebrezze*, 460 US 780, 794-95 (1983).

> If a state court were to involve itself in the eligibility of a candidate to hold the office of President, a determination reserved for the Electoral College and Congress, it may involve itself in national political matters for which it is institutionally ill-suited and interfere with the constitutional authority of the Electoral College and Congress.

Strunk v New York State Bd. Of Elections, No 6500/11, 2012 WL 1205117, *12 (Sup Ct Kings County NY, Apr 11, 2012). The California Court of Appeals' language in *Keyes v Bowen*, 189 CalApp4th 647, 660 (2010), is also instructive:

> 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.

Id.; *accord, e.g., Jordan v Secretary of State Sam Reed,* No. 12-2-01763-5, 2012 WL 4739216, at *1 (Wash Super, Aug 29, 2012) ("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 US Constitution.")

If this court were to determine that President Trump had been involved in insurrection and that he could not be on the ballot, that decision would prevent Congress from fulfilling its constitutional obligations that occur when a presidential candidate is elected who is not qualified. The Constitution expressly provides that:

> 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.

US Const, Am XX. Were it to enter the requested injunction or declaratory judgment preventing President Trump from appearing on the ballot, this Honorable Court would be interfering with this mechanism, responsibility for the operation of which the Constitution vests in Congress—and *only* in Congress. This case therefore presents a nonjusticiable political question.

II. Plaintiffs lack standing.

Plaintiffs lack standing to bring these lawsuits. The Michigan Supreme Court held:

> Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, **that will be detrimentally affected in a manner different from the citizenry at large** . . .

Lansing Schs Educ Ass'n v Lansing Bd of Educ, 487 Mich 349, 372; 792 NW2d 686, 700 (2010) (emphasis added).

Federal courts have widely held that individual voters lack standing to challenge the qualifications of presidential candidates.[3] In affirming the dismissal of a claim challenging President Obama's qualifications for office, the Third Circuit held that "a candidate's

[3] *See, e.g.*, *Hollander v. McCain*, 566 F.Supp.2d 63, 71 (D.N.H. 2008), *Cohen v. Obama*, 2008 WL 5191864, *1 (D.D.C., Dec. 11, 2008); *Berg v. Obama*, 586 F.3d 234, 239 (3d Cir. 2009); *Barnett v. Obama*, No. SACV09-0082 DOC(ANX), 2009 WL 3861788 (C.D. Cal. Oct. 29, 2009) at *8, *order clarified*, No. SA CV 09-0082 DOC, 2009 WL 8557250 (C.D. Cal. Dec. 16, 2009), and *aff'd sub nom. Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011); *Kerchner v. Obama*, 612 F.3d 204, 207 (3d Cir. 2010); *Drake v. Obama*, 664 F.3d 774, 781-782 (9th Cir. 2011); *Sibley v. Obama*, 866 F.Supp.2d 17, 20 (D.D.C. 2012); *Grinols v. Electoral Coll.*, No. 2:12-CV-02997-MCE, 2013 WL 2294885, at *10 (E.D. Cal. May 23, 2013), *aff'd*, 622 F. App'x 624 (9th Cir. 2015); and *Taitz v. Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *20 (S.D. Miss. Mar. 31, 2015); *Const. Ass'n Inc. by Rombach v. Harris*, No. 20-CV-2379, 2021 WL 4442870, at *2 (S.D. Cal. Sept. 28, 2021), *aff'd*, No. 21-56287, 2023 WL 418639 (9th Cir. Jan. 26, 2023); *Booth v. Cruz*, No. 15-CV-518, 2016 WL 403153, at *2 (D.N.H. Jan. 20, 2016), *report and recommendation adopted*, 2016 WL 409698 (D.N.H. Feb. 2, 2016); *Fischer v. Cruz*, No. 16-CV-1224, 2016 WL 1383493, at *2 (E.D.N.Y. Apr. 7, 2016).

ineligibility . . . does not result in an injury in fact to voters." *Berg v Obama*, 586 F.3d 234, 239 (3d Cir. 2009).

Plaintiffs make no allegation as to how they would be "detrimentally affected in a manner different from the citizenry at large" if Donald J. Trump is on the ballot. Further, they completely fail to allege how Plaintiffs, specifically, have been injured in any way. How could they? Plaintiffs merely plead that they are voters and intend to vote in the next primary and election, a statement that could apply to any eligible voter in the United States. This is not sufficient to establish standing.

Michigan recognizes a narrow exception to the general standing requirements that only applies to actions for a writ of mandamus regarding election laws. The Court of Appeals recently held:

> Michigan jurisprudence recognizes the special nature of election cases and the standing of ordinary citizens to enforce the law in election cases. "[I]n the absence of a statute to the contrary, ... a private person ... may enforce by mandamus a public right or duty relating to elections without showing a special interest distinct from the interest of the public."

Burton-Harris v Wayne Cnty Clerk, 337 Mich App 215, 225; 976 NW2d 30 (2021) (internal citation omitted). "Mandamus is the appropriate remedy for a party seeking to compel action by election officials." *Attorney Gen v Bd of State Canvassers*, 318 Mich App 242, 248; 896 NW2d 485 (2016).

The LaBrant (et al) Plaintiffs have not made any claim for mandamus and have instead only requested declaratory and injunctive relief, which are not exceptions to the general standing doctrine. Thus, they have no claim to this narrow exception and their complaint must be dismissed on its face.

While the Davis Plaintiff does raise mandamus, his claim also fails. A plaintiff seeking a writ of mandamus has the burden of establishing four requirements:

> (1) the party seeking the writ has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform the act requested, (3) the act is ministerial, that is, it does not involve discretion or judgment, and (4) no other legal or equitable remedy exists that might achieve the same result.

Burton-Harris, 337 Mich App at 228.

First, none of the Plaintiffs have a "clear legal right" to the performance of Section Three of the Fourteenth Amendment because it is not self-executing as outlined below. When a "constitutional provision is not self-executing," Plaintiffs "have no right to mandamus." *Muskegon Cnty v State*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket No. 360007); slip op at 6.

Second, the Secretary of State has no legal duty to be the arbiter, enforcer, or adjudicator of Section Three as outlined below. Moreover, the Michigan Supreme Court held that when constitutional provisions "contemplate[] legislative action," they "may not be enforced by mandamus." *Bd of Educ of Detroit v Elliott*, 319 Mich 436, 443; 29 NW2d 902 (1947). In this case, it is the sole duty of Congress to adjudicate Section Three. Thus, mandamus is not available to Plaintiffs.

Third, removing Donald J. Trump from the ballot is not a ministerial act. "A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Burton-Harris*, 337 Mich App at 228. Plaintiffs' entire case is based upon a request to have the Sec. of State review statements, publications, news reports, debates, law review articles, and allegations of insurrection and apply this review to contested facts to make multiple determinations, including whether an "insurrection" occurred and, if so, whether President Trump "engaged" in it. Each requires an exceptional degree of "discretion or judgment" and would place the entire adjudication of Section Three and its implementation into the hands of a single elected official. These are the antithesis of "ministerial" determinations.

Since Donald J. Trump has never engaged in any actual acts of insurrection or rebellion, Plaintiffs' entire request is that the Sec. of State review a smorgasbord of statements and speeches from Donald J. Trump and construe them to somehow collectively equate to an "insurrection." Plaintiffs' request is the exact opposite of ministerial.

Fourth, Plaintiffs do have another remedy: petition Congress. As outlined below, it is solely Congress that has the authority to make a determination under Section Three, not each state's Sec. of State. The proper means for Plaintiffs to "achieve the same result" would be for them to request, through their elected representatives, that Congress adjudicate Section Three as it relates to Donald J. Trump.

Plaintiffs fail all four elements of the mandamus test.[4] In summary, Plaintiffs have suffered no injury, they have not demonstrated that they will suffer any injury that is different from the "citizenry at large," and they have failed to demonstrate that they meet the mandamus elements. Plaintiffs' lawsuits must therefore be dismissed.

III. The Complaint further fails because the Fourteenth Amendment is not self-executing and nothing has occurred to disqualify President Trump.

Even if this case did not pose a political question (it does) and if Plaintiffs had standing (they do not), it would still not succeed on the merits. Section Three is not self-executing, and, therefore, it cannot support a cause of action absent an authorizing statute. *See, e.g. Rosberg v Johnson*, No. 8:22CV384, 2023 WL 3600895, at *3 (D. Neb. May 23, 2023); *Secor v Oklahoma*, No. 16-CV-85-JED-PJC, 2016 WL 6156316, at *4 (N.D. OK Oct. 21, 2016). Section Five of the Fourteenth Amendment expressly states that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5; *See also*

[4] Thus, even if the LaBrant Plaintiffs were permitted to amend their Complaint to add a request for mandamus, such a request would be futile.

Hansen v Finchem, No. CV-22-0099-AP/EL, 2022 WL 1468157, at *1 (Ariz, May 9, 2022) ("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*, *e.g., Ownbey v Morgan*, 256 US 94, 112 (1921) ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy.").

A recent article by scholars Joshua Blackman and Seth Barrett Tillman summarizes the question of whether Section Three is self-executing as follows:

> In our American constitutional tradition there are two distinct senses of self-execution. First, as a shield—or a defense. And second, as a sword—or a theory of liability or cause of action supporting affirmative relief. The former is customarily asserted as a defense in an action brought by others; the latter is asserted offensively by an applicant seeking affirmative relief.
>
> For example, when the government sues or prosecutes a person, the defendant can argue that the Constitution prohibits the government's action. In other words, the Constitution is raised defensively. In this first sense, the Constitution does not require any further legislation or action by Congress. In these circumstances, the Constitution is, as Baude and Paulsen write, self-executing.
>
> In the second sense, the Constitution is used offensively–as a cause of action supporting affirmative relief. For example, a person goes to court, and sues the government or its officers for damages in relation to a breach of contract or in response to a constitutional tort committed by government actors. As a general matter, to sue the federal government or its officers, a private individual litigant must invoke a federal statutory cause of action. It is not enough to merely allege some unconstitutional state action in the abstract. Section 1983, including its statutory antecedents, *i.e*., Second Enforcement Act a/k/a Ku Klux Klan Act of 1871, is the primary modern statute that private individuals use to vindicate constitutional rights when suing state government officers.
>
> Constitutional provisions are not automatically self-executing when used offensively by an applicant seeking affirmative relief. Nor is there any presumption that constitutional provisions are self-executing.[5]

[5] Blackman and Tillman, *Sweeping and Forcing the President Into Section 3: A Response to William Baude and Michael Stokes Paulsen*, at 12, last viewed October 10, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4568771 (emphasis in original; internal footnote omitted).

Blackman and Tillman's article proceeds to analyze the question in depth and concludes that Section Three is not self-executing. Importantly, Blackman and Tillman's article has substantially refuted the Baude and Paulsen article cited by the Complaint. The strength of their arguments has caused Baude and Paulsen to substantially modify their own analysis. And Stephen Calabresi, a well-respected constitutional scholar and dean of the Northwestern University Law School, fully reversed his earlier agreement with Baude and Paulsen and has now concluded that Section Three does not prevent President Trump from serving as President.[6]

Ample precedent supports Blackman and Tillman's conclusion, as has been shown not only by Blackman and Tillman, but also by Kurt Lash, the leading scholarly authority on the Reconstruction Amendments, in his recent article.[7] During the debates on Section Three, Congressman Thaddeus Stevens twice argued that this section needed enabling legislation. On May 10, 1866 he argued that "if this amendment prevails, you must legislate to carry out many parts of it. . . . It 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 a right to do."[8] On June 13, 1866, as the final speaker before the question was called, Congressman Stevens concluded his arguments to support Section Three by passionately arguing "let us no longer delay; take what we can get now, and hope for better things in further legislation; in enabling acts or other provisions. I now, sir, ask for the question."[9]

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[6] Prof. Steven G. Calabresi, Donald Trump Should be on the Ballot and Should Lose, https://reason.com/volokh/2023/09/16/steve-calabresi-donald-trump-should-be-on- the-ballot-and-should-lose/, last visited Sept. 29, 2023; *see also* Steven Calabresi, President Trump Can Not be Disqualified, Wall Street Journal, September 12, 2023.

[7] *See* Kurt Lash, The Meaning and Ambiguity of Section Three of the Fourteenth Amendment (Oct. 3, 2023), p. 37-43, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591838.

[8] Cong. Globe, 39th Cong. 1st Sess., at 2544.

[9] Cong. Globe, 39th Cong. 1st Sess., at 3149.

During the ratification debates, on January 30, 1867, Thomas Chalfant spoke in opposition to the Fourteenth Amendment. One concern he had was that as the Amendment was written, Congress was the only tribunal that was permitted to judge whether someone had "given aid and comfort to the enemy during the rebellion."[10] This was unthinkable to Chalfant since the current makeup of Congress was extremely hostile towards Southern leaders.[11] Chalfant argued that the only way rebel leaders would have a fair trial would be if "under the fifth section of this amendment . . . by appropriate legislation, for enforcing this amendment . . . . I can conceive of nothing, unless it be some act authorizing the appointment of a commission to prescribe qualifications and investigate claims of all candidates and candidates for office. This would be one way."[12]

One year after ratification, Chief Justice Salmon P. Chase of the Supreme Court of the United States ruled that Section Three was not self-executing and that it could only be enforced through specific procedures prescribed by Congress or the United States Constitution. *In re Griffin*, 11 F Cas 7 (CCVa 1869). Chief Justice Chase reasoned that a different conclusion would have created an immediate and intractable national crisis. In response to this ruling, Congress almost immediately enacted legislation suggested by the Chief Justice.

In 1870, in response to Chief Justice Chase's ruling, Congress passed a law, entitled the "Enforcement Act," which allowed *federal* district attorneys (but not *state* election officials) authority to enforce Section Three. The Enforcement Act allowed U.S. district attorneys to seek writs of *quo warranto* from federal courts to remove from office people who were disqualified by Section Three and further provided for separate criminal trials of people who took office in

[10] *See fn*. 3; *see also*, Hon. Thos. Chalfant, member from Columbia County, in the House, January 30, 1867, on Senate Bill No. 3, in the Appendix to the Daily Legislative Record Containing the Debates on the Several Important Bills Before the Legislature of 1867 (George Bergner, ed.) (Harrisburg 1867).
[11] *See* fn. 5 at 43.
[12] *Id*. at 43-44.

violation of Section Three. Federal prosecutors immediately started exercising *quo warranto* authority, bringing charges against many rebel leaders.

These actions waned after a few years,[13] and the Amnesty Act of 1898 completely removed all Section Three disabilities incurred to that date. In 1925, the Enforcement Act was repealed entirely. (By then, nearly every participant in the Civil War had passed away.) A century later, in 2021, legislation was introduced in Congress to create a cause of action to remove individuals from office who were engaged in insurrection or rebellion, but that bill died in Congress.[14] Thus, there is no private right of action that allows individuals such as Plaintiff to enforce Section Three against President Trump.

Congressman Stevens's concluding remarks on the floor of Congress before passage of Section Three, Mr. Chalfant's arguments during the ratification of the Fourteenth Amendment, Chief Justice Chase's order, and the subsequent legislative history demonstrate that Section Three is not self-executing unless Congress takes action to make it so. Section Three does not give individual secretaries of state, state or federal courts, or individual plaintiffs the authority to remove a presidential candidate from the ballot.

Nor could it be otherwise. A successful challenge would create a patchwork of 51 state (and district) election laws and potentially conflicting orders and rulings that would contradict established precedent, constitutional tradition, and common sense. Given the structure of our presidential elections, under Plaintiffs' theory a single state's courts or election officials—whether acting in good faith or for partisan ends—would effectively be able to decide a national election no matter how out of step they were with the rest of the nation and its voters. This is the exact

[13] *See* Amnesty Act of 1872 (removing most disqualifications in the manner provided by Section Three); Pres. Grant Proclamation 208 (suspending *quo warranto* prosecutions).
[14] *See* H.R. 1405, 117th Cong. 2021.

crisis Chief Justice Chase feared and it is precisely why this question is reserved for a single, uniform, national decision by Congress.

IV. Fourteenth Amendment considerations.

States are preempted from creating additional qualifications for federal office. The Constitution lists the qualifications to be President. The Fourteenth Amendment prohibits individuals from *holding* offices under the United States; it does not prohibit them from being elected. States have not been delegated authority to create qualifications to run for President of the United States. Thus, Petitioners' requested relief is preempted.

Electing the President of the United States is a federal function. It arises under the Constitution as a consequence of the creation of the national government. "As Justice Story recognized, 'the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them . . . . No state can say that it has reserved, what it never possessed." *US Term Limits, Inc v Thornton*, 514 US 779, 802 (1995) (citation omitted). Thus, states cannot exercise any power over federal elections unless they are delegated such powers by the Constitution. If this were not so, it would lead to the absurd result where each state could add their own set of required qualifications in order to run for President. *But see id*. at 805 (states do not have authority to add their own qualifications for federal office). Moreover, if a state does not possess the authority to alter presidential qualifications, it logically follows that each state does not have any right to adjudicate presidential qualifications. Instead, the proper place to adjudicate presidential qualifications is in Congress. This is consistent with courts' determinations, in the context of a political question analysis (addressed above), that the Constitution assigned to Congress the responsibility of determining whether a person is qualified to serve as President of the United States.

While states are delegated some power to impose procedural requirements, such as requiring candidates to "muster a preliminary showing of support" before appearing on the ballot, they cannot add new substantive requirements. *Schaefer v Townsend*, 215 F3d 1031, 1038 (9th Cir 2000). States may not circumvent this limit by seeking to recast substantive restrictions as procedural ballot access conditions. *See US Term Limits*, 514 US at 829-835; *Schaefer*, 215 F3d at 1037-1039.

Yet, that is precisely what Plaintiffs seek to have this Honorable Court do in this case. Plaintiffs want this Honorable Court to direct the state to exclude President Trump from the ballot based on a purported violation of Section Three of the 14th Amendment. But doing so would require the state to adjudicate qualifications for President of the United States that are not in the Constitution.

To see why this is, it is necessary to examine the text of the 14th amendment. The 14th Amendment does *not* prohibit individuals from being on the ballot for an office under the United States, being nominated for such office, or being elected to such office. It prohibits them from *holding* such office. US Const, am 14, § 3. This distinction matters because it speaks directly to *when* the requirements of Section Three are operative.

This distinction makes sense because even if there is a "disability" under section 3, it may be lifted by a two-thirds vote of each House. *Id*. Thus, even if someone is unquestionably disqualified under Section Three, they may still appear on the ballot and be elected by the people. Whether they are able to "hold" the office depends on whether Congress "remove[s] such disability." *See generally Smith v Moore*, 90 Ind 294, 303 (1883) (describing the distinction between restrictions on being *elected* versus *holding* an office, and noting "[u]nder [section 3] . . . it has been the constant practice of the Congress of the United States since the Rebellion, to admit

persons to seats in that body who were ineligible at the date of the election, but whose disabilities had been subsequently removed."); *Privett v Bickford*, 26 Kan 52, 58 (1881) (analogizing to section 3 and concluding that voters can vote for an ineligible candidate who can only take office once his disability is legally removed); *Sublett v Bedwell*, 47 Miss 266, 274 (1872) ("The practical interpretation put upon [Section Three] has been, that it is a personal disability to 'hold office,' and if that be removed before the term begins, the election is made good, and the person may take the office.").

The Ninth Circuit's opinion in *Schaefer* further illustrates why this is important. In *Schaefer*, the court evaluated a California law that required candidates for Congress to satisfy a residency requirement at the time he or she filed his or her nomination papers. As in this case, California's law sought to implement a constitutional requirement, the requirement that a member of the House of Representatives be an inhabitant of the state in which he shall be chosen.[15] Nevertheless, the court determined that California's law was unconstitutional because it added qualifications that are not found in the Constitution. Timing was critical in reaching this conclusion. The Constitution provides that an individual must be an inhabitant of the state "when elected." *Id*. "When elected" is not "when nominated" because nonresident candidates could move into the State and "inhabit" it in the period between nomination and election. *Schaefer*, 215 F3d at 1037.

As explained above, the manner of counting electoral college votes is dictated by federal statute and the United States Constitution. *See e.g.*, 3 USC § 15. Further, "mechanisms exist under the Twelfth Amendment and 3 USC § 15 for any challenge to any candidate to be ventilated when electoral votes are counted," and that "the Twentieth Amendment provides guidance regarding

[15] US Const, art I, § 2, cl. 2.

how to proceed if a president-elect shall have failed to qualify." *Bowen*, 567 F Supp at 1146-47. Because federal constitutional and statutory law already governs presidential qualifications, federal law must reign supreme. Additionally, states may not add additional requirements for federal office beyond those listed in the Constitution, including eligibility requirements. *US Term Limits,* 514 US at 805. There is no precedent permitting a lone state to adjudicate a presidential candidate's qualifications. Such a dispute must be addressed in Congress. Therefore, Plaintiffs' claims must be dismissed.

V. The prohibitions of Section Three do not even apply to President Trump.

The plain text of Section Three identifies to whom it applies. Section Three states as follows:

> 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)

The phrase "Officers of the United States" does not include the President. *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(1) NYU JL & LIBERTY 1 (2021). Shortly after ratification of Section Three:

> In 1876, the House of Representatives impeached Secretary of War William Belknap. During the trial, Senator Newton Booth from California observed, "the President is not an officer of the United States." Instead, Booth stated, the President is "part of the Government." Two years later, David McKnight wrote an influential treatise on the American electoral system. He reached a similar conclusion. McKnight wrote that "[i]t is obvious that . . . the President is not regarded as 'an officer of, or under, the United States,' but as one branch of 'the Government.'

Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President Into Section 3*, 28(2) TEX REV L & POL 112 (forthcoming circa Mar. 2024) (quoting David A. McKnight, The Electoral System of the United States: A Critical and Historical Exposition of its Fundamental Principles in the Constitution, and the of the Acts and Proceedings of Congress Enforcing it, 346 (Philadelphia, J.B. Lippincott & Co. 1878)).

Recent precedent supports this history. Interpreting the Appointments Clause, the Supreme Court observed that "[t]he people do not vote for the 'Officers of the United States." *Free Enterprise Fund v Public Company Accounting Oversight Board*, 561 US 477, 497-98 (2010) (quoting US Const, art II, § 2, cl 2). As noted by the Supreme Court in 2020, "Article II distinguishes between two kinds of officers—principal officers (who must be appointed by the President with the advice and consent of the Senate) and inferior officers (whose appointment Congress may vest in the President, courts, or heads of Departments)." *Seila Law LLC v. CFPB*, 140 S Ct 2183, 2199 n. 3 (2020). Neither category includes the President.

Three provisions in the U.S. Constitution show that the President is not "an officer of the United States":

> First, presidents fall under the scope of the Impeachment Clause precisely because there is express language in the clause providing for presidential impeachments; the Impeachment Clause does not rely on general "office"- or "officer"-language to make presidents impeachable. We think this is the common convention with regard to drafting constitutional provisions. When a proscription is meant to control elected positions, those positions are expressly named, as opposed to relying on general "office"- and "officer"-language. Congress does not hide the Commander in Chief in mouseholes or even foxholes. For example, in 1969, future-Chief Justice William H. Rehnquist, then an Executive Branch attorney, addressed this sort of clear-statement principle. Statutes that refer to "officers of the United States," he wrote, generally "are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive." Five years later, future-Justice Antonin Scalia, then also an Executive Branch attorney, reached a similar conclusion with regard to the Constitution's "office"-language. These Executive Branch precedents would counsel against deeming the President an "officer of the United States."

> Second, as to the Appointments Clause, which uses "Officers of the United States"-language, Presidents do not appoint themselves or their successors. The Supreme Court hears a never-ending stream of cases that ask if a particular position is a principal or inferior officer of the United States—even though the Appointments Clause does not even distinguish between those two types of positions. Where has the Court ever suggested that the President falls in the ambit of the Appointments Clause's "Officers of the United States"-language? . . .
>
> And, finally, as to the Commissions Clause, which also uses "Officers of the United States"-language, Presidents do not commission themselves, their vice presidents, their successor presidents, or successor vice presidents.

Sweeping and Forcing the President Into Section 3, *supra* at 106-07.

And finally, the structure of Section Three itself shows that it does not apply to the office of the President.

> The second clause does not expressly list several categories of positions: *e.g.*, presidential electors, appointed officers of state legislatures, members of state constitutional conventions, and state militia officers. The first clause does not expressly list several categories of positions: *e.g.*, members of the state legislatures, and members of state constitutional conventions. Neither list expressly mentions the President and Vice President.

Id. at 115.

Moreover, Section Three applies only to those who have "previously taken an oath . . . to *support* the Constitution of the United States." US Const, am XIV, § 3. (emphasis added). Certain members of the federal and state governments take such an oath:

> 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* . . . .

US Const, art VI, cl 3 (emphasis added). But the President of the United States does not. The presidential oath instead reads:

> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:– I do solemnly swear (or affirm) that I will faithfully execute the

> Office of President of the United States, and *will to the best of my Ability, preserve, protect and defend the Constitution of the United States*.

US Const, art II, § 1, cl. 8 (emphasis added).

The difference between the oath to *support* the constitution (per Article VI) and the oath to *preserve, protect and defend* the constitution (per Article II) is a significant one. It establishes that the drafters of the Fourteenth Amendment did not understand the President to be an Officer of the United States. And taking an oath to support the Constitution further limits the class of people to whom Section Three applies. President Trump is not one of those people to whom Section Three applies.

Section Three's drafting is no accident, but rather rooted in the Framers' robust debate and careful wordsmithing. When Congress was debating the wording of Section Three, there was no individual who had *only* taken the Article II oath.[16] The words that both the Framers and the drafters of the Fourteenth Amendment chose must be given their proper meaning. *Martin v Hunter's Lessee*, 14 US 304, 334 (1816) ("From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental."). When drafting the Impeachment Clause, the Framers initially referred to the President, Vice President, and "other civil officers of the U.S." *See* 2 The Records of the Federal Convention of 1787, at 545 and 552 (Farrand ed., 1911). But upon further deliberation, the Framers changed the Impeachment Clause to remove the word "other." *Id.* at 600. This change shows that the Framers understood that the President was not one of the "other" officers of the United States—instead, the President is *outside* the category of "officers of the United States," and, therefore, falls outside the ambit of Section Three.

V. The prohibitions of Section Three do not even apply to the conduct as alleged in the Complaint.

[16] *See*, Lash, The Meaning and Ambiguity of Section Three of the Fourteenth Amendment, p. 4.

The Complaint rests on misinterpreting Section Three to say what it does not. Plaintiffs, over dozens of pages and hundreds of paragraphs of salacious distraction, allege that President Trump "'engaged in insurrection or rebellion against the same, or [gave] aid or comfort to the enemies thereof' within the meaning of section 3 of the Fourteenth Amendment**."** [Complaint at ¶¶305; *see also* 285-309.] But Plaintiffs fail to plausibly allege that President Trump did either of those things.

A. The January 6th riot does not constitute an "insurrection" under Section Three.

Section Three speaks in terms of "insurrection" and "rebellion"—and these terms were not pulled out of thin air. Congress modeled Section Three partly on the original Constitution's Treason Clause, and partly on the Second Confiscation Act (enacted in 1862). The Confiscation Act punished anyone who "shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States … or give aid or comfort thereto." 12 Stat. 589, 627 (1862); *see* 18 USC § 2383. Section Three similarly covers "insurrection or rebellion." US Const, am XIV, § 3. But unlike the Confiscation Act, Congress excluded from Section Three any penalty for inciting, assisting, or giving aid to insurrection. Section Three only penalizes those who "engaged" in it. *Id.*

Congress discussed the meaning of "insurrection" and "rebellion" at length in debates. Congress confirmed that insurrection and rebellion describe two types of treason—not lesser crimes. *See* 37 Cong. Globe 2d Session, 2173, 2189, 2190-91, 2164-2167 (1862). After ratification, Congress reinforced these same conclusions when debating enforcement of Section Three. 41 Cong Globe 2d Session, 5445-46 (1870). The Congress that had just drafted Section Three believed that someone committed "insurrection" or "rebellion" if he led uniformed troops in battle against the United States, but not if he or she merely voted to support secession with violent force,

recruited for the Confederacy, provided wartime aid, or held offices in the rebel government. The drafters chose words that encompassed at least the main actors in that act of treason, but no more. They were not trying to legislate with an eye toward political riots. In the aftermath of the Civil War, these were imminently important distinctions.

One year after the Confiscation Act became law, Chief Justice Chase held that the Act prohibits only conduct that "amount[s] to treason within the meaning of the Constitution," not any lesser offense. *United States v Greathouse*, 26 F Cas 18, 21 (CCND Cal 1863). Not just any form of treason would do: the Act only covered treason that "consist[ed] in engaging in or assisting a rebellion or insurrection." *Id.* Writing in the same case, a second judge confirmed and clarified that, for these purposes, "engaging in a rebellion and giving it aid and comfort[] amounts to a levying of war," and that insurrection and treason involve "different penalt[ies]" but are "substantially the same." *Id.* at 25.

Dictionaries of the time confirm this understanding. John Bouvier's 1868 legal dictionary defined "insurrection" as a "rebellion of citizens or subjects of a country against its government," and "rebellion" as "taking up arms traitorously against the government." *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* (Philadelphia, GW Childs, 12th ed, rev and enl 1868).

So "insurrection," as understood at the time of the passage of the Fourteenth Amendment, meant the taking up of arms and waging war upon the United States. At the time of Section Three's enactment, the United States had undergone a horrific civil war in which over 600,000 combatants died, and the very survival of the nation was in doubt. As shown by the omission of the word "incitement" in Section Three, Congress did not intend that provision to encompass those who

merely encouraged an insurrection, but instead limited its breadth to those who actively participated in one.

Plaintiffs' entire case is based upon President Trump's alleged nexus to an "insurrection," but Plaintiff is short on any facts to show that the January 6th riots constituted one. *See Greathouse*, 26 F Cas at 21 and 25. Not one of the 1,000+ people charged in connection with the riot has so far even been charged—much less convicted—under 18 USC § 2383. *See United States v. Griffith*, 2023 WL 2043223, *6 n. 5 (D DC, Feb 16, 2023) (finding that "no defendant has been charged with [18 USC § 2383]); Alan Feuer, *More Than 1,000 People Have Been Charged in Connection with the Jan. 6 Attack*, New York Times (Aug 1, 2023).

Further, the Senate found President Trump not guilty of impeachment charges of insurrection brought by the 117th Congress. *See* Impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors, H 24, 117th Cong (2021).[17] No court in the United States has found President Trump guilty under 18 USC § 2383. Not a single prosecutor has even filed an indictment against President Trump for an alleged rebellion or insurrection.

B. Mere words do not constitute "engaging" in insurrection.

Even so, Plaintiffs fail to establish that President Trump "engaged" in insurrection. Plaintiffs' core allegations fall well short. As explained above, the framers of the Fourteenth Amendment made a deliberate choice that Section Three should cover only actual "engage[ment] in" insurrection or rebellion (or assisting a foreign power), not advocating rebellion or insurrection. Mere words, unaccompanied by actions or legal effect, cannot meet that standard. That is especially the case here because President Trump's words and speeches cannot qualify as

[17] The Senate's not guilty vote can be found at https://www.senate.gov/legislative /LIS/roll_call_votes/vote1171/vote_117_1_00059.htm (last visited on October 6, 2023).

incitement under established First Amendment principles. *See Brandenburg v Ohio*, 395 US 444 (1969).

The same representatives who voted for the Fourteenth Amendment understood that, under its terms, even strident and explicit antebellum advocacy for a future rebellion was not "engaging in insurrection" or providing "aid or comfort to the enem[y]." In 1870—just two years after the Fourteenth Amendment was ratified—Congress considered whether Section Three disqualified a Representative-elect from Kentucky when, before the Civil War began, he had voted in the Kentucky legislature in favor of a resolution to "resist [any] invasion of the soil of the South at all hazards." 41 Cong Globe, 2d Session, 5443 (1870). The House found that this was not disqualifying. *Id.* at 5447. Similarly, in 1870 the House also considered the qualifications of a Representative-elect from Virginia who, before the Civil War, had voted in the Virginia House of Delegates for a resolution that Virginia should "unite" with "the slaveholding states" if "efforts to reconcile" with the North should fail, and stated in debate that Virginia should "if necessary, fight," but who after Virginia's actual secession "had been an outspoken Union man." *Hinds' Precedents of the House of Representatives of the United States*, 477 (1907). The House found that this did not disqualify him under Section Three. *Id.* at 477-78. By contrast, the House *did* disqualify a candidate who "had acted as colonel in the rebel army" and "as governor of the rebel State of North Carolina." *Id.* at 481, 486. It is also important to note that it was Congress who made all of these determinations, not a state court. Plaintiffs' allegations fall well-short of how Congress has understood and applied Section Three in practice.

C. Not only does "inciting" fall well short of "engaging," but Plaintiffs allegations also fall short of "inciting."

"[T]he free discussion of governmental affairs of course includes discussions of candidates, structures and forms of government, the manner in which government is operated, and

all such matters relating to political processes." *Mills v Alabama*, 384 US 214, 218-19 (1966). "Indeed, the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v San Francisco City Democratic Cent Comm*, 489 US 214, 223 (1989). There is no exception to this rule for allegedly disloyal speech. The Supreme Court considered the Georgia legislature's refusal to seat an elected candidate, on the ground that his strident criticisms of the Vietnam War "gave aid and comfort to the enemies of the United States" and were inconsistent with an oath to support the Constitution. *Bond v Floyd,* 385 US 116, 118-23 (1966). The Court held that the candidate's speech was protected by the First Amendment and could not be grounds for disqualification. *Id.* at 133-37.

Thus, "dissenting political speech" remains "within the First Amendment's core," even where it is alleged to be "mere advocacy of illegal acts" or "advocacy of force or lawbreaking." *Counterman v Colorado*, 143 S Ct 2106, 2115, 2118 (2023). The Constitution values and protects such speech unless it qualifies as "advocacy of the use of force or law violation" that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg,* 395 US at 447.

Under the *Brandenburg* test, Trump's comments did not come close to "incitement," let alone "engagement" in an insurrection. As the Sixth Circuit recognized in analyzing President Trump's public speech, "the fact that audience members reacted by using force does not transform Trump's protected speech into unprotected speech. Thus, where "Trump's speech . . . did not include a single word encouraging violence . . . the fact that audience members reacted by using force does not transform" it into incitement. *Nwanguma v Trump*, 903 F3d 604, 610 (6th Cir 2018). And as a D.C. Circuit judge remarked at argument last year, "you just print out the speech . . . and read the words . . . it doesn't look like it would satisfy the [*Brandenburg*] standard." Tr of

Argument at 64:5-7 (Katsas, J.), *Blassingame v Trump*, No 22-5069 (DC Cir, Dec 7, 2022). After all, the Supreme Court, for instance, has concluded that a call to "take the f[***]ing streets later" does not meet the standard. *Hess v Indiana*, 414 US 105, 107 (1973); *accord Nwanguma*, 903 F3d at 611-12 (responding to a political protestor by repeatedly telling a crowd to "get 'em out of here" but "don't hurt 'em" was not incitement).

President Trump's explicit instructions called for protesting "peacefully and patriotically,"[18] to "support our Capitol Police and law enforcement,"[19] to "[s]tay peaceful,"[20] and to "remain peaceful."[21] President Trump's calls for peace and patriotism notwithstanding, the courts have made clear that angry rhetoric falls far short of an implicit call for lawbreaking. None of President Trump's speeches that took place before January 6 can possibly meet *Brandenberg's* imminence requirement. It is utterly impossible to regard statements like "stand back and standby" as advocacy of immediate illegal conduct. [Complaint at ¶ 41.] "[A] state cannot constitutionally sanction advocacy of illegal action at some indefinite future time." *McCoy v Stewart*, 282 F3d 626, 631 (9th Cir 2002) (cleaned up).

Finally, and again as explained above, none of Plaintiffs' allegations plausibly suggest that President Trump intended any acts of violence. Both his language and his actions show the contrary. He intended to inspire a protest to contest an election outcome. That is not insurrectionary or unlawful in any way. In fact, although the President expressly called for a walk down Pennsylvania Avenue "after" his speech, the Complaint affirmatively alleges that the attack on the

[18] Donald Trump Speech "Save America" Rally Transcript January 6, REV (Jan. 6, 2021) available at https://bit.ly/3GheZid; Brian Naylor, Read Trump's Jan. 6 Speech, A Key Part Of Impeachment Trial, NPR (Feb. 10, 2021), https://n.pr/3G1K2ON.
[19] https://twitter.com/realDonaldTrump/status/1346904110969315332.
[20] *Id*.
[21] https://twitter.com/realDonaldTrump/status/1346912780700577792.

Capitol began before the speech ended—indeed, that television broadcasts had cut away from the President's speech to cover the violence. (Complaint at ¶¶ 169, 205.)

Nor do President Trump's comments during a debate months before January 6. On September 29, 2020, an hour into President Trump's debate with then-candidate Biden, the following exchange occurred:

> [Moderator Chris] WALLACE [to President Trump]: You have repeatedly criticized the Vice-President for not specifically calling out Antifa and other left-wing extremist groups. But are you willing, to-night, to condemn white supremacists and militia groups and to say that they need to stand down and not add to the violence in a number of these cities as we saw in Kenosha, and as we've seen in Port-land.
> TRUMP: Sure, I'm willing to do that.
> WALLACE: Are you prepared specifically to do it. Well go ahead, sir.
> TRUMP: I would say almost everything I see is from the left-wing not from the right wing.
> WALLACE: So what are you, what are you saying?
> TRUMP: I'm willing to do anything. I want to see peace.
> WALLACE: Well, do it, sir.
> [Vice President] BIDEN: Say it. Do it. Say it.
> TRUMP: You want to call them? What do you want to call them? Give me a name, give me a name, go ahead who would you like me to condemn.
> WALLACE: White supremacists and racists.
> BIDEN: Proud Boys.
> WALLACE: White supremacists and white militias.
> BIDEN: Proud Boys.
> TRUMP: Proud Boys, stand back and stand by. But I'll tell you what, I'll tell you what: somebody's got to do something about Antifa and the left because this is not a right wing problem this is a left-wing. This is a left-wing problem.[22]

[22] *September 29, 2020 Debate Transcript*, The Commission on Presidential Debates, *available at* https://www.debates.org/voter-education/debate-transcripts/sep-tember-29-2020-debate-transcript/.

As this context reveals, the "stand back and stand by" remark unambiguously referred to then-recent unrest in cities like Kenosha, Wisconsin and Portland, Oregon. Immediately before that remark, President Trump expressly agreed that his supporters "should not add to the violence in . . . these cities," and emphasized that he would "do anything" in order "to see peace." And immediately after the remark, President Trump reiterated that the violence was a "problem." His "stand back" statement emphasized that his supporters were not the ones who should "do something" about the problem. This cannot plausibly be interpreted as an endorsement of those groups, let alone of their future actions in response to an election that had not yet happened.

Were that not enough, other facts omitted by Plaintiffs conclusively demonstrate that President Trump's "stand back and stand by" remark was condemning and not supporting illegal activity. The very next day, September 30, President Trump emphasized to a reporter that although he was not familiar with the Proud Boys, "***they have to stand down and let law enforcement do their work*** . . . . [W]hoever they are, they have to stand down. Let law enforcement do their work."[23] When asked again, he reiterated, "Look, law enforcement will do their work. They're gonna stand down. ***They have to stand down. Everybody***. . . . Whatever group you're talking about."[24]

Plaintiffs' attempt to cast an off-the-cuff remark made in the second-half of a two-hour debate well before the General Election and the events of January 6th as a rallying cry is beyond absurd. As the full context clearly shows, the alleged recipient of the remarks was selected not by

[23] *See* Video recording of President Trump's September 30, 2020, remarks available at https://youtu.be/Q8oyhvcOHk0?si=Hp6D0iJytKyUMdnM; *see also* September 30, 2020, Remarks by President Trump Before Marine One Departure (emphasis added), *available at* https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-marine-one-departure-093020/.

[24] *Id*.

the then-Commander-in-Chief, but rather by candidate-Biden and moderator Chris Wallace. And the content itself was chosen not by the President, but—again—by Biden and Wallace.

D. "Aid or comfort to the Enem[y]" under Section Three requires assistance to a foreign power.

Section Three does not incorporate the Confiscation Act's criminalization of giving "aid or comfort" to a "rebellion or insurrection." *See supra* at 11-12. Instead, Section Three harkens back to the Treason Clause, which defines treason as "adhering to [the United States'] Enemies, giving them Aid and Comfort." US Const, Art III, § 3, cl.1.

The "enemies" prong of the Treason Clause almost exactly replicated a British statute defining treason. *See* 4 Blackstone, Commentaries on the Laws of England 82 (1769). But "enemies" referred only to "the subjects of foreign powers with whom we are at open war," not to "fellow subjects." *Id.* at 82-83. Blackstone was emphatic that "an enemy" was "always the subject of some foreign prince, and one who owes no allegiance to the crown of England." *Id.*

This was also the American view. Four years after the Constitution was ratified, Justice Wilson explained that "enemies" are "the citizens or subjects of foreign princes or states, with whom the United States are at open war." 2 *Collected Works of James Wilson* 1355 (1791). The 1910 version of *Black's Law Dictionary* agrees, defining "enemy" as "either the nation which is at war with another, or a citizen or subject of such nation." *Enemy*, Black's Law Dictionary (2d. Ed. 1910). At the outset of the Civil War, the Supreme Court recognized that the Confederate states should be "treated as enemies," under a similar definition of that word, because of their "claim[] to be acknowledged by the world as a sovereign state," and because the Confederacy claimed to be a *de facto* a foreign power that had "made war on" the United States. *The Prize Cases*, 67 US 635, 673-74 (1862). Section Three, enacted a few years later in response to the Civil War, referred

to support for the Confederacy as "aid and comfort to . . . enemies," and treated "enemies" as foreign powers in a state of war with the United States.

On top of that, "aid and comfort to the enem[y]" involves only assisting a foreign government (or its citizens or subjects) in making war against the United States. Plaintiffs do not, and cannot, allege that the January 6 attack involved any foreign power, or that the attackers constituted any sort of *de facto* foreign government.

CONCLUSION

For the reasons stated above, Proposed-Intervenor, Donald J. Trump, Inc., respectfully requests that Plaintiffs' Complaint be dismissed with prejudice.

Respectfully submitted,

KALLMAN LEGAL GROUP, PLLC

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