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October 27, 2023
OFFICE OF APPELLATE COURTS

STATE OF MINNESOTA
IN SUPREME COURT
A23-1354

Joan Growe, et al.,

Petitioners,

v.

Steve Simon, Minnesota Secretary of State, et al.

Respondents.

DONALD J. TRUMP'S RESPONSE TO PETITION CHALLENGING HIS PLACEMENT ON 2024 PRIMARY AND GENERAL ELECTION BALLOTS

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. Petitioners now ask this Court to terminate further discourse and decide this quintessential national question without regard for America's voters and their elected representatives. This request is manifestly inappropriate. Both the federal Constitution and Minnesota law place the resolution of this political issue where it belongs: the democratic process, in the hands of either Congress or the people of the United States.

There are several legal reasons why the Petition can and should be dismissed on its face. The Court already has identified some of those issues: this case

is not justiciable under Minn. Stat. 204B.44 or under federal law; Section Three of the Fourteenth Amendment is neither self-executing nor enforceable under Section 204B.44; and Section Three does not apply to the President or the Presidency in any event. We will identify some of those issues below, but, since the Court has ordered separate briefing on them, we will not fully argue those issues here. Instead, as directed by the Court, this response to the petition will focus on identifying factual disputes.

The Petition's many factual inaccuracies, gaps, and distortions come mostly under one overarching theme: Petitioners 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 6 or at any other time. On topic after topic, Petitioners 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 Court.

This pattern of omissions and mischaracterized facts falls into three broad topics. First, Petitioners observe that after the 2021 elections, President Trump made various statements and took various legal actions questioning the fairness or accuracy of the announced results. But he is hardly the first politician to do that—and Petitioners identify no facts that could convert this political controversy into an insurrection against the government.

Second, before any violence occurred on January 6, President Trump gave a speech that called for his supporters to protest "peacefully," and that clearly contemplated that Congress would perform its duty of certifying the election results. Again, Petitioners identify no facts that could convert this speech into an

insurrection. There is nothing to indicate that President Trump knew or intended that the speech would be followed by an unlawful riot, let alone anything worse. Yet the Constitution demands at least such a showing.

Third, while rioters were in the Capitol on January 6, President Trump repeatedly and publicly urged them to be "peaceful" and to "go home." Petitioners identify no fact that could remotely suggest that this course of conduct amounted to "engaging in insurrection." Watching some of a riot on television, and then asking that it end, simply is not and could not amount to engaging in insurrection.

For these reasons, and the others explained below, the Court should dismiss the Petition's claims as meritless, and remit Petitioners' arguments to the political processes ordained by the Constitution.

THRESHOLD LEGAL ISSUES

The Court has directed separate briefing on legal issues such as justiciability and the construction of Section Three of the Fourteenth Amendment. This Response therefore will not discuss those issues in depth. Suffice it to say that the Petition suffers from a number of facial deficiencies, including at least the following:

- The Petition is not justiciable under Minn. Stat. 404B.44 because Congress has preempted the field of resolving disputes over the eligibility of Presidential candidates.

- The Petition is not justiciable under Section 404B.44 because the statute does not permit removing candidates from the ballot based upon eligibility requirements for federal office, or eligibility requirements that can be satisfied before the candidate takes office.

- The Petition presents a nonjusticiable political question or a question that this Court should not answer under established principles of judicial restraint.

- Section Three of the 14th Amendment is not self-executing and is enforceable exclusively through procedures prescribed by Congress.
- The Section Three does not operate to preclude a person from being President, and does not apply to a person who has previously taken an oath only as President.
- The U.S. Senate has already expressly determined the question presented by the Petition, voting not to bar President Trump from future office, and that determination is controlling here.
- "Engag[ing] in insurrection or rebellion" or "giv[ing] aid or comfort to the enemies" of the United States, as those phrases are used in Section Three, do not remotely embrace the kinds of speech and actions that Petitioners allege President Trump engaged in.

FACTS

Pursuant to Minn. Stat. 240B.44, a petitioner who seeks to remove a candidate's name from the ballot bears a heavy burden of proving the candidate's ineligibility. *Monaghen v. Simon,* 888 N.W.2d 324, 331 (Minn. 2016); *Moe v. Alsop*, 180 N.W. 255, 260 (Minn. 1970). Petitioners here have failed even to allege facts that could do that.

The Petition misstates the facts of the case in two primary ways. On the one hand, Petitioners distort the meaning of the public words and actions of President Trump and others—occasionally by falsely describing the words or actions themselves, but most commonly by omitting or mischaracterizing crucial contextual facts. On the other hand, and more importantly, the Petition is full of disputed, scandalous, and often completely unsupported statements regarding the private actions, intentions, and state of mind of President Trump and others.

A. President Trump's Questioning The Fairness Or Accuracy Of The Election Returns Is Not Remotely "Insurrection"

The Petition first notes that President Trump argued that the announced result of the 2020 election was not correct or accurate. It is hardly unprecedented for a politician to contest an election's outcome or question its correctness. What would be unprecedented would be for a court to hold that a candidate who fails in an election challenge has thereby engaged in insurrection. In other words: it is true that President Trump made statements and took actions contesting the result of the election. What is utterly untrue is that this was part of, or intended to be part of, any sort of attempt to overthrow or rebel against the United States government. Petitioners offer no such facts because this did not occur.

As is widely known, after now-President Biden was announced as the winner of the 2020 election, President Trump made a series of public statements, and took a series of public actions, questioning and challenging the fairness and correctness of that outcome, and arguing in favor of different remedial actions. In particular, President Trump argued that Vice President Pence had authority under the Constitution to take certain actions that would result in President Trump being certified as the winner of the election. These arguments and efforts were unsuccessful, and now-President Biden was certified the winner. Although President Trump continued to disagree with that result, he promptly promised—and delivered—an "orderly transition" of power to President Biden.[1]

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[1] *See* Statement of President Donald Trump, https://x.com/DanScavino/status/1347103015493361664?s=20; *see also Trump agrees to 'orderly transition' of power*, Politico, Jan. 7, 2021, *available at* https://www.politico.com/news/2021/01/07/trump-transition-of-power-455721#:~:text=%E2%80%9CEven%20though%20I%20totally%20disagree,Trump%20said%20in%20a%20statement.

As this Court is well aware, disputes over the outcomes of elections are not new in our democracy—nor would it be possible to avoid all such disputes. Even after the decision-making process is finished and a new official takes office, it is not unusual for the other candidate to continue saying that she or he should have been determined to be the winner.[2] Every such dispute necessarily involves a winner and a loser. To be sure, most such disputes are contentious, and some can be downright harmful. But it is not in our constitutional tradition to treat the losers of those disputes as insurrectionists.

Those background principles illuminate the errors of the Petition. The Petition notes that President Trump expressed serious concerns regarding fraud or irregularities in the election. And it notes that President Trump advanced ultimately unsuccessful legal and political arguments in the course of contesting the election results. These reproductions of public statements and actions are generally correct, although its attribution of motives and characterizations of behind-the-scenes actions are often false or at best groundless and misleading.[3] But the salient point here is that the Petition provides no facts to support its insinuations that President Trump was supporting or attempting some kind of

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[2] *See*, *e.g.*, *Why Stacey Abrams is Still Saying She Won*, N.Y. Times Magazine (Apr. 28, 2019, https://www.nytimes.com/interactive/2019/04/28/magazine/stacey-abrams-election-georgia.html; *Hillary Clinton Maintains 2016 Election 'Was Not On the Level'*, Yahoo! News (Oct. 9, 2020), https://news.yahoo.com/hillary-clinton-maintains-2016-election-160716779.html.

[3] For instance, the Petition accuses President Trump of running "a 'fake elector' scheme." (*Id.* ¶ 81.) Plaintiffs cite no source for the quotation marks around the words "fake elector," which apparently come from an activist organization. In any event, the Petition appears to acknowledge that the so-called "scheme" was part of President Trump's ultimately unsuccessful argument about the Vice President's constitutional authority.

forcible seizure of power. (*See* Ptn. Hdg. II.A, ¶44.) To the contrary, the Petition omits crucial, public facts that make clear the President ***was not*** doing so.

Start with the Petition's allegations about President Trump's "stand back and stand by" remark. On September 29, 2020, an hour into President Trump's debate with then-candidate Biden, the following exchange occurred:

> [Moderator Mike] 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, tonight, 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 Portland.
>
> 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.[4]

As this omitted 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 happened yet.[5]

Were that not enough, other facts omitted by Petitioners 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

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

[5] Petitioners' allegation that one third party's tweet misinterpreted the President's remark to mean the opposite of what it said (Ptn. ¶ 45.b) is not relevant. Petitioners identify no facts suggesting that the President knew about this misinterpretation, let alone supported it. And neither law nor logic allows the reaction of one listener to define the intent of any speaker, much less a participant in a Presidential debate.

their work."[6] 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." (*Id.*)

Worse yet is Petitioners' attempt to generate a sinister inference out of President Trump's supposed willingness to "declare victory before all ballots were counted" "if it looked as if he was ahead." (Ptn.¶ 47, *see id.* ¶ 46.) Petitioners omit facts that everyone knows—or at least that everyone knew until recently: virtually ***every single President*** in modern history has declared victory based on projected results "before all ballots were counted."[7] In every election, many States continue counting mail-in ballots until weeks after Election Day. *See Bost v. Illinois State Bd. of Elections*, No. 22-cv-02754, 2023 WL 4817073, at *11 (N.D. Ill. July 26, 2023) (collecting state statutes and noting that "[m]any states have post-Election Day absentee ballot receipt deadlines"). Even ballots cast in person on Election Day often are counted after the day itself.[8] That has not prevented election-night (or sometimes election-week) victory speeches from becoming a routine part of our politics.

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[6] *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/.

[7] For example, CBS News announced that Ronald Reagan had been reelected in 1984 after the polls closed in the Midwest, but before polls had closed in Mountain and Pacific time zone states. *See* https://www.youtube.com/watch?v=K0_sYOgJzfE at 1:27 (Dan Rather reporting). And the Court is, no doubt, familiar with the famous "DEWEY DEFEATS TRUMAN" headline from the *Chicago Daily Tribune*. *See* https://www.trumanlibraryinstitute.org/dewey-defeats-truman/.

[8] *See e.g.*, "Canvass, Certification and Contested Election Deadlines and Voter Intent Laws," National Conference of State Legislators, available at: https://www.ncsl.org/elections-and-campaigns/canvass-certification-and-contested-electio

Next, Petitioners make a series of allegations that, in total, show that some people in the Trump Administration disagreed with the President about the effects of fraud or irregularities on the election or about the legal arguments he made in response, or spoke to the President about what would or would not be proper actions to take based on those concerns. (Ptn. ¶¶ 53-56, 62-77, 83-88.) While President Trump does not dispute those general facts, he does not concede that the Petition—or the hearsay sources it cites—accurately characterizes what any particular person believed or told him. (In this regard, it is perhaps representative of the Petition's hyperbole that it describes instructions from the President as an attempt to "coerce … federal officials" in the performance of their jobs. (Ptn. ¶78.) Most importantly, the Petition provides no facts to suggest that President Trump agreed with any of these people or statements.

To sum up: there have been many contested election outcomes in American history. Every one of them involved a candidate whose arguments were not successful. But losing an argument about an election simply is not the same as engaging in an insurrection. The Petition's attempt here to bridge that gap with wild inferences and innuendo falls flat.

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n-deadlines-and-voter-intent-laws (noting that "after Election Day, ballot counting comes first," and "[o]nce regular ballots are accounted for, local election officials process provisional ballots--ballots cast in-person when there was doubt about the voter's identity or eligibility to vote.").

B. President Trump's January 6 Speech Instructing Supporters To Protest "Peacefully" Was Not An Insurrection.

1. President Trump Specifically Instructed "Peaceful[]"Conduct, Not Violence.

Petitioners' pleading-by-innuendo reaches its highest pitch in their attempt to describe President Trump's involvement in and intentions for the January 6 protest itself. Once again, the facts show that Petitioners' claims are groundless. During his speech on January 6, President Trump gave very specific instructions to the assembled crowd. Those instructions expressly called for protestors to act "peacefully," they included no call for violence, and they plainly contemplated that Congress would complete its work certifying the election. The core of President Trump's speech—which Petitioners do not recount—was as follows:

> [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. We have come to demand that **Congress do the right thing and only count the electors who have been lawfully slated**, lawfully slated. I know that everyone here will soon be marching over to the Capitol building **to peacefully and patriotically make your voices heard.**

At the very conclusion of the speech, President Trump repeated his instruction that the crowd *advocate* for Congressional action, not stop it:

> [W]e're going to walk down Pennsylvania Avenue. I love Pennsylvania Avenue. And we're going to the Capitol, and we're going to try and give—the Democrats are hopeless, they never vote for anything, not even one vote—but **we're going to try and give our Republicans,** the weak ones because the strong ones don't need any of our help, we're going to try and give them **the kind of pride and boldness that**

they need to take back our country. So let's walk down Pennsylvania Avenue.[9]

In stark contrast, although President Trump's speech included sharp criticisms of and demands to stop what he believed to be serious misconduct, it included no instructions for violence of any kind. Over and over in his speech—starting from the very beginning—President Trump used the word "fight" in a way that was clearly metaphorical. He stated, for instance, that he was grateful to the 76-year-old Rudy Giuliani because "he fights." Referring to politicians, the President exhorted the crowd to "get your people to fight" or else "primary them." He encouraged "Republicans" to stop "fighting like a boxer with his hands tied behind his back." Criticizing the media, the President said "it used to be that they'd argue with me …. Now what they do is they go silent …. You don't fight with them anymore." And near the end of the speech, he stated that "our fight against the big donors, big media, big tech, and others is just getting started."

In fact, although the President expressly called for a walk down Pennsylvania Avenue "after" his speech, the Petition affirmatively alleges that the attack on the Capitol *before* the speech ended—indeed, that television broadcasts had cut away from the President's speech to cover the violence. (*Id.* ¶¶ 174, 202.)

[9] 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.

2. Nothing Shows that the President Intended or Supported Violence.

Against this, the Petition alleges almost nothing other than guilt by association. The Petition notes that President Trump encouraged his supporters to attend the January 6 event. (Ptn. ¶97.) Although President Trump does not dispute he spoke at the event, he does not concede the Petition's unsupported characterizations of the details of that involvement. (*See id.* ¶¶106-10.) In particular, President Trump adamantly disputes the Petition's unsupported allegation that he wanted the planned protest to "force" Congress to do anything (¶107), other than through the same kind of political pressure that is common to any raucous but peaceful protest. The House Report cited by the Petition on this point says nothing to suggest the contrary.

Notably, Petitioners omit that, on January 3, President Trump instructed Department of Defense officials to make security arrangements to ensure that a large crowd could gather safely three days later, and was reassured that the arrangements would be made.[10] Instead, Petitioners simply allege details of what extremists did before or during the January 6 protests, while alleging nothing to show that President Trump supported or intended it—or, most often, had any awareness of it at all. The Petition does this repeatedly:

- The Petition refers vaguely to descriptions of the planned protest by "Trump and extremists." (*Id.* ¶110.) President Trump has no information as to how unidentified "extremists" described the protest.

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[10] *Gen. Kellogg: Trump did request Nat'l Guard troops on Jan. 6th; asks Congress to release his testimony*, American Military News (Aug. 5, 2022), https://americanmilitarynews.com/2022/08/gen-kellogg-trump-did-request-natl-guard-troops-on-jan-6th-asks-congress-to-release-his-testimony/.

- The Petition alleges at length how various people planned and executed crimes that were committed at the Capitol on that day. (*Id.* ¶¶ 99-101.) But President Trump has no information as to the details of this planning, and the Petition alleges nothing to suggest that he supported it in any way.
- The Petition alleges that some people in the very large crowd at the January 6 protest began advocating for an attack on the Capitol. (*Id.* ¶¶ 158, 163.) But the Petition alleges nothing to suggest that any of this took place near enough to the President for him to hear or understand it. Indeed, the lone video cited by the Petition shows only scattered shouts in a remote portion of the crowd that was watching the speech on a distant video screen—and those shouts ended abruptly when the President called for the crowd to act "peacefully and patriotically."[11] President Trump does not dispute the general fact that some of the perpetrators of the attack on the Capitol may have advocated for their eventual actions during his speech. But he adamantly disputes any allegation that he knew of or supported such advocacy.
- Similarly, the Petition indicates that some of the January 6 perpetrators discussed the potential for violence online in the days before the protest, and brought weapons to the vicinity of the protest. (*Id.* ¶¶ 122-128, 134, 146-47, 154.) President Trump does not dispute that general fact, nor that he was generally aware that any enormous crowd gathered for a lawful, angry protest poses security issues. But again, President Trump adamantly disputes that he intended or supported any violence.

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[11] On this point, paragraph 159 of the Petition cites to a broken weblink. It appears that the video referred to can be found at https://vimeo.com/504444733, with the relevant clip appearing from 2:15 to 2:39.

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In sum, President Trump gave a fiery speech to a crowd upset about the election. That is not engaging in insurrection.

President Trump explicitly instructed the crowd to behave "peacefully" in advocating for specific Congressional action. That *certainly* is not engaging in insurrection. The crimes that were committed later on January 6 were deplorable. But there are no facts or evidence showing that the President intended or supported those crimes.

C. President Trump's Requests That The Rioters Be "Peaceful" And "Go Home" Were Not An Insurrection.

While the Capitol attack was going on, President Trump repeatedly and clearly called for it to end. Nine minutes after the House of Representatives recessed due to the violence (and 35 minutes after the Senate recessed), President Trump tweeted that protesters should "support our Capitol Police and Law Enforcement" and "Stay peaceful!"[12] From that moment on, the President's public statements were exclusively calls for peace and an end to the riot. 35 minutes after that, the President tweeted again "asking for everyone at the U.S. Capitol to remain peaceful" and to "respect the Law and our great men and women in Blue," and calling for "No violence!"[13] Not long after that, the President summoned videography personnel to the back lawn of the White House and recorded several takes of a minute-long video addressing the Capitol riot. About three hours after

[12] @realDonaldTrump, TWITTER, (Jan. 6, 2021, 2:38pm), https://twitter.com/realDonaldTrump/status/1346904110969315332.

[13] @realDonaldTrump, TWITTER (Jan. 6, 2021, 3:13pm), https://twitter.com/realDonaldTrump/status/1346912780700577792.

the House had adjourned, the President released the video, repeating his position that the announced election result was wrong but stating:

> [Y]ou have to go home now. We have to have peace. We have to have law and order, we have to respect our great people in law and order. We don't want anybody hurt…. This was a fraudulent election, but we can't play into the hands of these people. We have to have peace. So go home…. I know how you feel. But go home, and go home in peace.[14]

Later that evening, the President again tweeted that the rioters should "[g]o home with love & in peace." (Ptn. ¶237.) About two hours after this tweet, Congress reconvened to certify now-President Biden as the winner of the election. (*Id.* ¶238.)

The Petition disputes none of this. It criticizes President Trump for watching news reports about the violence and not condemning it sooner or in more emphatic terms. Petitioners also point out that, shortly before the House of Representatives recessed to evacuate, President Trump tweeted criticism of Vice President Pence and asked Representatives by phone about the election certification process. (*Id.* ¶¶ 205, 212-13.)

Whether this Court, in hindsight, views President Trump's response to the events of January 6 as ideal is not determinative of any question before the Court. Rather, the question is whether his response amounted to engaging in insurrection. There are no facts to suggest that. President Trump's conduct during the Capitol attack amounted to (1) watching news coverage on television, and (2) pivoting from non-violent criticism of Congress to calling for peace and an end to the riot.

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[14] *President Trump Video Statement on Capitol Protesters*, https://www.c-span.org/video/?507774-1/president-trump-video-statement-capitol-protesters. A transcript of President Trump's remarks can be found at: https://www.presidency.ucsb.edu/documents/videotaped-remarks-during-the-insurrection-the-united-states-capitol.

Like any citizen, Petitioners are free to criticize those actions. But they are not insurrection.

D. Additional Facts.

President Trump was impeached by the 117th Congress for incitement of insurrection and was found not guilty of those charges by the Senate. *See* H. 24, 117th Cong. (2021). No prosecutor has indicted him for insurrection or rebellion. In fact, in none of the 1,000-plus cases involving January 6th defendants has anyone been charged with that crime. President Trump's upcoming brief on the legal construction of Section Three will discuss these issues further.

ARGUMENT

The primary purpose of this Response is to set forth the lack of any factual basis for finding that President Trump engaged in conduct that could qualify as "insurrection" or "aid and comfort to the enem[y]" under Section Three of the 14th Amendment. That factual issue, however, is clearer when accompanied by some discussion of the legal definitions of those terms. The Court has directed separate briefing on "the legal construction of Section Three," Order of Sept. 20 at ¶ 3, so a full discussion of these issues can wait for that brief. Here, we set forth only the basics.

I. "Insurrection Or Rebellion" Under Section Three Requires Treasonous Warmaking.

Section Three was modeled partly on the original Constitution's Treason Clause, and partly on the Second Confiscation Act, which Congress had enacted in 1862. Section 2 of 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 U.S.C. § 2383. Section Three, ratified six years later with the rest of the Fourteenth Amendment, similarly covers "insurrection or rebellion." Unlike the Confiscation Act, however, Section Three omits any penalty for 'incit[ing] or "assist[ing]" an insurrection, and penalizes only actually "engag[ing] in" insurrection.

The year after the Confiscation Act became law, Justice Field—an appointee of President Lincoln—construed these terms and held 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 (C.C.N.D. Cal. 1863). Indeed, Justice Field[15] concluded that not just any form of treason would do: he construed the Section 2 of the Act to cover only treason that "consist[ed] in engaging in or assisting a rebellion or insurrection." *Id.* In the same case, another 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 (Hoffman, J.).

Contemporary dictionaries confirmed this definition. 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."[16]

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[15] The previously-filed version of this Response incorrectly identified the author of *Greathouse* as Chief Justice Chase.

[16] *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, G.W. Childs, 12th ed., rev. and enl. 1868).

Congress's immediate post-ratification consideration of Section Three itself reflects the same understanding. In 1870—just two years after the Fourteenth Amendment was ratified—Congress considered whether a Representative-elect from Kentucky was disqualified by Section Three 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 at 5443. 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 was not disqualifying 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.

II. "Aid Or Comfort To The Enem[y]" Under Section Three Requires Assistance To A Foreign Power.

The fifth clause of Section Three disqualifies those who have "given aid or comfort to the enemies" of the "United States" or the "Constitution." In this regard, Section Three was not modeled on the Confiscation Act, which criminalized giving "aid or comfort" to a "rebellion or insurrection." Instead, Section Three replicates the language of the original Constitution's Treason Clause, Article III, Section Three, which defines treason as "adhering to [the United States'] Enemies,

giving them Aid and Comfort."

It was well known that 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," as used in that statute, 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*.

Blackstone's view was also the American view. Four years after the original 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." At the outset of the Civil War, the Supreme Court had 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 (although the United States did not recognize that claim) the Confederacy was *de facto* a foreign power that had "made war on" the United States. *See The Prize Cases*, 67 U.S. 635, 673-74 (1862). So, it made sense for Section Three, enacted in response to the Civil War, to refer to support for the Confederacy as "aid and comfort to … enemies," defined as foreign powers in a state of war with the United States.

III. These Definitions Make Crystal Clear That President Trump's Alleged Conduct Does Not Come Within Section Three.

These definitions make it even more obvious that President Trump's conduct before and on January 6, 2021 did not come within Section Three. The same Representatives who voted for the Fourteenth Amendment understood that, under its terms, even strident and explicit pre-Civil-War advocacy for a future rebellion was not "engaging in insurrection" or providing "aid or comfort to the enem[y]." By the same token, subtle or implicit advocacy for a future riot at (or even attack on) the Capitol could not qualify under Section Three, even if President Trump had in fact engaged in such advocacy.

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. Petitioners do not and could not allege that the January 6 attack involved any foreign power, or that the attackers constituted any sort of *de facto* foreign government.

IV. First Amendment Principles Confirm And Reinforce That Conclusion.

The deficiencies in Petitioners' showing are even more obvious when their claims are considered through the prism of the First Amendment, which requires an extraordinary showing before attaching legal punishments to political speech. 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. It is not clear that mere words, unaccompanied by actions or legal effect, could ever meet that standard. But surely mere words cannot meet the Section Three standard unless they could, at minimum, qualify as incitement to violence under

established First Amendment principles. Under those principles, Petitioners cannot show that President Trump's advocacy here was illegitimate.

A. Punishing Speech As Incitement Requires Meeting A High Standard.

At the core of our constitutional order lies "the free discussion of governmental affairs. This 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 U.S. 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 Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989). There is no exception to this rule for allegedly disloyal speech. In *Bond v. Floyd*, the U.S. 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. 385 U.S. 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 "mere 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 v. Ohio*, 395 U.S. 444, 447 (1969). Just this year, the Supreme Court

underscored that incitement requires "specific intent … equivalent to purpose or knowledge" *Counterman*, 143 S. Ct. at 2118. The Sixth Circuit has formulated these elements most succinctly: "The *Brandenburg* test precludes speech from being sanctioned as incitement to riot unless (1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech." *Nwanguma v. Trump*, 903 F.3d 604, 609 (6th Cir. 2018) (citation omitted).

Finally, as the Sixth Circuit recognized in analyzing other speech by President Trump, "the hostile reaction of a crowd does not transform protected speech into incitement." *Id.* at 610 (cleaned up). Thus, where "Trump's speech … did not include a single word encourage violence … the fact that audience members reacted by using force does not transform" it into incitement. *Id.*

B. Petitioners Here Have Not Alleged Speech That Qualifies As Incitement.

Here, the facts alleged by the Petition do not meet this high standard. 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." *Blassingame v. Trump*, No. 22-5069 (D.C. Cir. Dec. 7, 2022), Argument Transcr. At 64:5-7 (Katsas, J.).

First, as explained above, none of President Trump's statements implicitly or explicitly advocate illegal conduct at all. President Trump's only explicit instructions called for protesting "peacefully and patriotically." *See id.* at 74:21-25 (Rogers, J.) ("[T]he President didn't say break in, didn't say assault members of Congress, assault Capitol Police, or anything like that.") And the courts have made

clear that angry rhetoric falls far short of an implicit call for lawbreaking. 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 U.S. 105, 107 (1973); *accord Nwanguma*, 903 F.3d 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 words were considerably less inflammatory than that.

Second, none of President Trump's speech that the Petition alleges before January 6 can possibly meet the imminence requirement. It is utterly impossible to regard statements like "stand back and stand by" as advocacy of immediate illegal conduct. As the Ninth Circuit concluded from *Hess*, "a state cannot constitutionally sanction advocacy of illegal action at some indefinite future time." *McCoy v. Stewart*, 282 F.3d 626, 631 (9th Cir. 2002) (cleaned up).

Finally, and again as explained above, there is no evidence 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.

RESPONSE TO PETITIONERS' SUGGESTION OF DISCOVERY

In a letter accompanying the Petition, Petitioners assert that they will "need to engage in discovery" and suggest a scheduling conference. (Sept. 12, 2023 Letter of David Zoll at 3.) The Court need not consider this request because the Petition is facially deficient, as described above, and should be dismissed as a matter of law. If the Court determines that factual development is necessary, however, it should deny Petitioners' suggestion to conduct discovery. It does not appear that

this Court has ever authorized discovery in a Section 204.B.44 proceeding, and it should not take this unprecedented step in this case.

I. Discovery In This Court Would Be Unprecedented And Unauthorized Under 204B.44.

Section 204B.44 and its predecessors have been on the books in Minnesota since the 19th century, *see Winget v. Holm*, 244 N.W. 331, 332 (Minn. 1932)—that is, since well before the courts offered any generalized discovery mechanisms at all. Although discovery has of course become available in the district courts since that time, to this day, the appellate courts rarely if ever order parties before them to turn over factual materials to each other, and have no general rules or practices for doing so. In fact, undersigned counsel have been unable to locate any instance in which this Court has authorized generalized discovery in any original-jurisdiction 204B.44 proceeding.[17] To the contrary, 204B.44 petitions have historically been filed in this Court only *after* the parties have engaged in extensive private fact-finding efforts. *E.g., Monaghen v. Simon,* 888 N.W.2d 324, 328 (Minn. 2016). When 204B.44 proceedings involves disputes of fact, the Court customarily "appoint[s] a referee to take and report evidence." *E.g., Parsons v. Hickey,* 201 N.W2d 739, 740 (1972). But never, to our knowledge, has the appointment authorized the referee to require discovery.

In that light, there is nothing to suggest that 204B.44's authorization for original-jurisdiction petitions requires, or even allows, parties to invoke this Court's

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[17] At least one decision of the Court affirmatively suggests that 204B.44 does not authorize discovery. The petitioner in *Clark v. Ritchie* filed a 204B.44 petition, but requested to "us[e] the trial procedures found in the mandamus statutes" and sought discovery. 787 N.W.2d 142, 145 n.2, 150 n.9 (Minn. 2010). The Court found mandamus procedures to be unavailable and denied discovery. *Id.*

authority to demand discovery of each other. To the contrary, 204B.44 spells out rather specific procedures, including for factual development. The statute requires that, "the court shall immediately set a time for a hearing" on such a petition. It specifies that, where "a candidate's eligibility to hold office" is at issue, the hearing may include testimony and "evidence of the candidate's eligibility." And it instructs the court to reach a decision "as soon as possible after the hearing." Dramatically departing from normal practice in the appellate courts by allowing cumbersome and time-consuming discovery would be inconsistent with this statutory scheme.

The statute's broader context only confirms that it should not be read to authorize discovery. Most factual disputes in original-jurisdiction 204B.44 proceedings are related to whether a candidate for office lives within the district that he or she seeks to represent. These disputes have to be resolved by considering the details of candidates' personal activities and day-to-day lives in their homes. *See, e.g., Fischer v. Simon,* 980 N.W.2d 142, 143-44 (Minn. 2022); *Monaghen*, 888 N.W. at 326-28, 323-33. Such consideration is necessary when petitioners come to court with evidence that a candidate does not live where he or she claims to live. But matters would be dramatically different—for the worse—if petitioners could simply ***allege*** that and then demand discovery about where a candidate eats, relaxes, and sleeps on a daily basis. The Court should not be eager to interpret the statute to allow that.

II. In Any Event, Discovery Is Inappropriate Here.

Regardless of whether discovery is ever permitted in an original-jurisdiction 204B.44 proceeding, it is especially inappropriate here. Challenges to the eligibility

of Presidential or Vice Presidential candidates pose difficulties that are not present in any other similar case. Unlike every other office that appears on a Minnesota ballot, these are nationwide offices, and candidates for them normally neither live nor claim to live in Minnesota. Unlike any other eligibility litigation, then, challenges to the qualifications of candidates for these offices are not likely to involve much (if any) pertinent evidence within Minnesota. Even assuming that the Court had the power to authorize such discovery, it should be reluctant to do so in the absence of a pressing need for it.

And this case presents no need for it at all, let alone a pressing one. The facts at issue are matters of public record, and President Trump's actions on and before January 6 have already been subject to intense and nationwide scrutiny. Petitioners have not identified any particular additional evidence they require, nor alleged the existence of some secret facts that have not already been uncovered in those proceedings. So, discovery here would serve no apparent purpose, other than creating a political spectacle and burdening President Trump and his campaign.

CONCLUSION

For the reasons stated herein, Donald J. Trump respectfully requests that this Court dismiss Petitioners' claims and deny them any requested relief.

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