No. 23-719

In the Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

NORMA ANDERSON, ET AL.,

Respondents.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF OF *AMICI CURIAE* PROFESSORS CAROL ANDERSON AND IAN FARRELL IN SUPPORT OF THE ANDERSON RESPONDENTS

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INTEREST OF THE AMICI CURIAE[1]

Amici are scholars in African American Studies and Constitutional Law, as well as advocates for racial justice, who have an interest in countering efforts to equate the January 6, 2021 insurrection with legitimate First Amendment-protected protests, including the largely peaceful, lawful protests and demonstrations in support of civil rights and the Black Lives Matter movement. Amici likewise have an interest in correcting mischaracterizations proffered by former President Donald Trump describing this lawsuit seeking to enforce the Fourteenth Amendment Disqualification Clause as voter disenfranchisement. Voter disenfranchisement fundamentally undermines our democracy—frequently and persistently by suppressing the votes of Black voters and other voters of color. It cannot legitimately be equated with the lawful application of the Constitution's qualifications to hold office—in particular, a qualification necessary to safeguard our democracy.

Carol Anderson is the Robert W. Woodruff Professor of African American Studies at Emory University. She has authored numerous books and articles on race in the United States, including ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY (2018) and THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA (2021). She has been

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[1] Under this Court's Rule 37.6, counsel for amici curiae certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than amici curiae or its counsel has made a monetary contribution to the preparation or submission of this brief.

elected into the Society of American Historians, named a W.E.B. Du Bois Fellow of the American Academy of Political and Social Sciences, and selected into the American Academy of Arts and Sciences. Dr. Anderson has served on working groups dealing with race, minority rights, and criminal justice at Stanford's Center for Applied Science and Behavioral Studies, the Aspen Institute, and the United Nations.

Ian Farrell is an Associate Professor at the University of Denver Sturm College of Law. He is a scholar of criminal law and procedure, constitutional law, and the philosophy of law, and authored multiple articles on issues relevant to racial justice.

ARGUMENT

I. DISQUALIFYING TRUMP UNDER SECTION THREE OF THE FOURTEENTH AMENDMENT IS NOT "ANTIDEMOCRATIC."

In his opening statement at trial, former President Trump's attorney argued that this lawsuit brought by a group of Republican and unaffiliated voters is "antidemocratic" and seeks to deny "the right for the people of Colorado to vote for someone for office" and "the right of Donald J. Trump to be able to run for office." (Oct. 30, 2023 Tr. at 36, 56, 60). Similarly, the Colorado Republican Party argued in its Petition for Writ of Certiorari (No. 23-696) that the Colorado Supreme Court disregarded "the First Amendment right of political parties to select the candidates of their choice and a usurpation of the rights of the people to choose their elected officials." (Petition at 6). But, as

the Colorado Supreme Court correctly held, Trump's promotion, incitement, encouragement, and support of the January 6 insurrection renders him constitutionally unqualified to run for the Presidency. Under our Constitution, voters and political parties simply do not have a "right" to vote for or nominate a constitutionally-unqualified candidate. Trump has repeatedly argued that his popularity should prevent his disqualification under Section Three, but our nation's founders were quite clear that popularity does not supersede the Constitution's mandates. Popular or not, no candidate is above the law.

In *Greene v. Raffensberger*, 599 F.Supp.3d 1283, 1317 (N.D. Ga. 2022), the court recognized that our "federal appellate courts have held that states have the power to exclude from the ballot constitutionally unqualified or ineligible candidates." The court continued as follows:

> Plaintiff's counsel also suggested at oral argument that the challenge proceeding [under Section 3 of the Fourteenth Amendment] could infringe upon the rights of Plaintiff's supporters to cast their votes for Plaintiff as the candidate of their choice . . . Plaintiff's voters still would not have a First Amendment right to vote for a disqualified candidate . . . "The right to vote does not include the right to vote in any manner, or the right to vote for a specific individual" . . . *see Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998) (finding that "[a] voter has no right to vote for a specific candidate").

Id. at 1309 n. 18. *See also NAACP v. Jones*, 131 F.3d 1317, 1324 (9th Cir. 1997) ("Candidates do not have a

fundamental right to run for public office"); *Thournir v. Meyer*, 909 F.2d 408, 412 (10th Cir. 1990) ("Candidacy itself is not a fundamental [constitutional] right which is comparable to the right to vote; therefore, burdens inflicted upon candidates are not to be measured by the same yardstick applied to burdens affecting voters.").

In *New Mexico ex rel. White*, the court squarely rejected a disenfranchisement argument made by the county commissioner it removed from office (Couy Griffin) pursuant to Section Three of the Fourteenth Amendment because of his participation in the January 6 insurrection:

> Section Three affects the qualified right to run for political office – a right that has always been limited by qualifications such as age, citizenship, and residency. *See Thournir v. Meyer*, 909 F.2d 408, 412 (10th Cir. 1990) ("Candidacy itself is not a fundamental right . . . "); *Griffin [v. White]*, 2022 WL 2315980, at *12 [D.N.M. June 28, 2022] ("Section Three of the Fourteenth Amendment narrows the First Amendment right to run for office.").

New Mexico ex rel. White, No. D-101-cv-2022-00473, 2022 N.M. Dist. LEXIS 1, at *65 (1st Dist. Santa Fe Co., N. Mex. Sept. 6, 2022). Likewise, as then-Judge Gorsuch wrote for the Tenth Circuit, a "state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan v. Colorado*, 495 F. App'x. 947, 948 (10th Cir. 2012).

The court in the New Mexico disqualification case pointed out the "irony" of the commissioner's argument that the court should defer to the will of the voters who elected him to office, inasmuch as he participated in an insurrection whose goal "was to set aside the results of a free, fair and lawful election by a majority of the people of the entire country." 2022 N.M. Dist. LEXIS 1, at *6. *See also id.* at *69-70 ("he overlooks that his own insurrectionary conduct on January 6 sought to subvert the results of a free and fair election, which would have disenfranchised millions of voters"); Brief NAACP New Mexico State Conference and NAACP Otero County Branch as Amicus Curiae Supporting Plaintiffs, New Mexico ex rel. White, 2022 N.M. Dist. LEXIS 1, at *13 ("Throughout its 113-year existence, one of the NAACP's core missions has been to protect minorities' right to vote and to combat voter disenfranchisement and suppression. Thus, the NAACP is acutely aware of what constitutes voter disenfranchisement, which bears no resemblance to what is at issue here.").

The argument by Trump and his amici curiae that this lawsuit is "antidemocratic" is even more ironic and less persuasive, as he bears by far the most responsibility for attempting to *subvert* democracy on January 6. As emphasized by a recent law review article by two conservative law professors:

> Importantly, it is also wrong to shrink from applying Section Three on grounds of "democracy," whether on the premise that Section Three should be ignored or narrowly construed because it limits who voters may choose, or on the premise that only the voters should enforce Section Three. It is true, as

> we have said, that limiting democratic choice is not something to be done lightly, but it is something the Constitution does, and for serious reasons. The Constitution cannot be overruled or disregarded by ordinary election results. (And we note that there is particular irony in invoking democracy to shrink from applying Section Three to the insurrectionists of 2020-21, who refused to abide by election results and instead sought to overthrow them).

William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. at p. 125 (forthcoming 2024) (hereinafter "Baude and Paulsen").[2]

In stark contrast, Trump engaged in flagrantly antidemocratic behavior when he unlawfully sought to overturn the results of the 2020 Presidential election with false claims of voter fraud, which targeted cities and counties with large numbers of Black and Brown voters, including Philadelphia, Detroit, Milwaukee, Fulton County, Georgia, Maricopa County, Arizona, and Clark County, Nevada. *See Verified Petition, Anderson v. Griswold*, No. 2023-CV-32577 (Dist. Ct. of Denver Colo., filed Sept. 6, 2023) at 17, 94. As set forth in the testimony of the President of the NAACP Legal Defense and Educational Fund to the House of Representatives' January 6 Committee:

> [T]he backlash to historic 2020 voter turnout among people of color has been swift and severe. As with past reactions to racial progress the post-2020 backlash has featured both violence and legal regression – in this case in

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2 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751

> the form of efforts to restrict the franchise. Based on the false narrative of voter fraud, this violence and votes backlash began with campaign operatives questioning vote totals in Black and Brown communities. It continued through a violent insurrection at the U.S. Capitol focused on invalidating the election results and thus the political power exercised by the Black and Brown communities and accelerated through both successful efforts to erect barriers to the ballot and a regressive redistricting cycle that severely constricts the ability of voters of color to assert their full strength at the polls.

Statement of Janai Nelson, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc., Submitted to the United States House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol, at pp. 12, 14 (May 3, 2022).

Similarly, the NAACP and others filed a lawsuit against Trump alleging violations of the Voting Rights Act and Ku Klux Klan Act (18 U.S.C. § 241) based on his efforts to disenfranchise Black voters with false allegations of voter fraud:

> [Trump] sought to overturn the result of the election by disenfranchising voters, in particular voters of color in several major metropolitan areas. Former President Trump and the Trump Campaign did this by attempting to slow and stop vote counting efforts in tightly contested states; by pressuring state and local election officials not to certify election results, as required by law, or to take other

> measures to overturn the will of the voters; by raising baseless challenges to the validity of ballots; and, on January 6, 2021, by inciting followers to use violence and the threat of violence in and around the United States Capitol building to disrupt the Congress' certification of the states' electoral votes.

Michigan Welfare Rights Organization, et al. v. Trump, No. 20-cv-3388 at Doc. No. 60 ¶¶ 1, 3 (D.D.C.).

The Special Counsel's federal indictment of Trump in the District of the District of Columbia specifically alleges a violation of the Ku Klux Klan Act, which was enacted shortly after the Civil War to protect newly-freed Blacks from political violence, intimidation, and "conspiracies against civil rights." Indeed, the indictment alleges that Trump made knowingly false claims of voter fraud in Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin. *See United States v. Trump*, No. 23-cr-257 (D.D.C.) at Doc. No. 1 ¶¶ 14-52, 129-130. Similarly, the indictment of Trump in Georgia alleges that he made knowingly false claims of voter fraud in Fulton County, and that his co-conspirators harassed and intimidated a Black election worker named Ruby Freeman and falsely accused her of committing election fraud. *State of Georgia v. Donald Trump, et al.*, No. 23SC188947 (Fulton Co. Superior Court).

Both Trump's argument that enforcing the Constitution is antidemocratic and his attempts to disenfranchise voters attack our system of constitutional government.

As former six-term U.S. Congressman from Colorado, chair of the board of Office of Congressional Ethics, and legal scholar David Skaggs wrote:

> The antidemocratic lament goes to the essence of our system of constitutional government as a democratic republic. The Constitution is replete with provisions that constrain democratic majoritarianism. We may not always like them, but they are there.[3]

The Constitution constrains democratic majoritarianism in many specific ways, including through the Bill of Rights, the Electoral College, Senate representation, and age and citizenship requirements for Representatives, Senators, and Presidents; and it also contains provisions that may limit our choices in order to protect our constitutional republic, including by prohibiting those who have insurrected against it, after swearing to support it, from holding power again.

While barring a leading presidential candidate from the ballot based on their disqualification under the Fourteenth Amendment must never be taken lightly, the Constitution compels this result in response to Trump's antidemocratic insurrection against our constitutional order.

II. THE COLORADO SUPREME COURT CORRECTLY HELD THAT TRUMP'S INCITEMENT OF THE INSURRECTION WAS NOT PROTECTED UNDER THE FIRST AMENDMENT.

Based on the trial court's factual findings, the Colorado Supreme Court correctly held that Trump is barred by the Disqualification Clause in Section Three

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[3] *See*, David Skaggs, *The legal case for Trump's disqualification is clear*, THE HILL, Jan. 8, 2024, https://thehill.com/opinion/judiciary/4392204-the-legal-case-for-trumps-disqualification-is-clear/

of the Fourteenth Amendment to the Constitution from holding public office because he "incited and encouraged the use of violence and lawless action to disrupt the peaceful transfer of power." (Op. at 127).

The Colorado Supreme Court also correctly ruled that Trump "intended that his speech would result in the use of violence or lawless action on January 6 to prevent the peaceful transfer of power" and that "Trump's calls for imminent lawlessness and violence during his speech were likely to incite such imminent lawlessness and violence." *Id.* at 130, 132. The conclusions of the Colorado Supreme Court are consistent with *Thompson v. Trump*, 590 F.Supp.3d 46 (D.D.C. 2022), *aff'd sub nom Blassingame v. Trump*, 87 F.4th 1 (D.C. Cir. 2023), where the court carefully analyzed whether Trump's January 6 rally speech was protected under the First Amendment, as he had argued, or fell within the incitement exception to the First Amendment adopted in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

After setting forth the various inflammatory statements made by Trump in his January 6 rally speech and the context in which they were made, the court concluded that they "are plausibly words of incitement not protected by the First Amendment. It is plausible that those words were implicitly 'directed to inciting or producing imminent lawless action and [were] likely to produce such action." 590 F.Supp.3d at 115, *quoting Brandenburg*, 395 U.S. at 447. The court found that Trump had made "an implicit call for imminent violence or lawlessness. He called for thousands 'to fight like hell' immediately before directing an unpermitted march to the Capitol, where the targets of their ire were at work, knowing that

militia groups and others among the crowd were prone to violence." *Id*. at 117.

Indeed, the *Final Report of the U.S. House Select Committee to Investigate the January 6th Attack on the United States Capitol* expressly found that President Trump knew elements of the crowd that day were armed, angry, and directing their ire at Vice President Pence. H. Rep. 117-663, 117th Cong., 2d Sess., at 8, (Dec. 22, 2022), 69, 88–89. Trump indicated Vice President "deserves it," and exacerbated that violence in a tweet at 2:24 p.m. when he knew violence was already underway. *Id*. at 88–89, 100-01.

For purposes of disqualification from public office under Section Three of the Fourteenth Amendment, which was not at issue in the *Thompson v. Trump* case, it matters not whether Trump's speech at the January 6 rally fell within the incitement exception to the First Amendment set forth in *Brandenburg*. As explained in the previously cited Baude and Paulsen law review article:

> [T]he *Brandenburg* question is beside the point. Section Three of the Fourteenth Amendment does not enact the legal standard of *Brandenburg v. Ohio*. It enacts the standard of having "engage[d] in insurrection," or given "aid or comfort" to those doing so, and qualifies, modifies, or simply satisfies the First Amendment to the extent of any conflict between these constitutional principles. First Amendment or no, the speech was part of Trump's participation in and support for the insurrection.

Baude and Paulsen at p. 120.

These conservative constitutional law scholars concluded that because Section Three of the Fourteenth Amendment was ratified 77 years after the First Amendment, Section Three must take precedence:

> *[T]o the extent of any inconsistency between them, Section Three overrides, supersedes, or satisfies the free speech principles reflected in the First Amendment*. That is: Whatever the correct meaning of Section Three as applied to conspiracies, attempts, incitements, and advocacy that meet the description of "engag[ing] in insurrection or rebellion" or of giving of "aid or comfort" to enemies of the constitutional government of the United States, the constitutional meaning of Section Three of the Fourteenth Amendment modifies or qualifies what otherwise might have been thought the dictates of the First Amendment.

Id. at pp. 52-53 (emphasis in original).

As he does before this Court, Trump's brief in the Colorado Supreme Court argued that there was no insurrection on January 6 and the district court's "overbroad" definition of insurrection would encompass "[a]ny generic riot or violent protest" that "hindered the execution of a function under the Constitution." (Trump Br. at 41). The Colorado Supreme Court, however, had "little difficulty concluding that substantial evidence in the record" supported that, "[u]nder any viable definition," the "events of January 6 constituted an insurrection." (Op. at 100, 102-3).

In truth, numerous courts have had no trouble recognizing the obvious distinction between riots or

violent protests, on the one hand, and the insurrectionists' unprecedented assault on the Capitol on January 6, 2021 when electoral votes were being counted. As explained by one court:

> What happened on that day [January 6] was nothing less than the attempt of a violent mob to prevent the orderly and peaceful certification of an election as part of the transition of power from one administration to the next . . . That mob was trying to overthrow the government . . . That was no mere protest.

U.S. v. Mazzocco, No. 21-cr-54, ECF No. 32 at 24 (D.D.C. Oct. 4, 2021) (emphasis added).

Similarly, in *New Mexico ex rel. White, supra*, the court held that "the January 6 attack on the United States Capitol and the surrounding planning, mobilization, and incitement constituted an 'insurrection' within the meaning of Section Three of the Fourteenth Amendment." 2022 N.M. Dist. LEXIS 1, at *49. It stated as follows:

> [E]ach branch of the federal government has referred to the January 6 Attack as an "insurrection" and the participants as "insurrectionists," including bipartisan majorities of both chambers of Congress, more than a dozen federal courts, President Biden, and the Department of Justice under former President Trump. Former President Trump's own impeachment defense lawyers acknowledged "everyone agrees" there was "a violent insurrection of the Capitol" on January 6. 167 Cong. Rec. S729 (Feb. 13, 2021).

Id. at *53-54.

Many other courts have likewise recognized that the conduct at the Capitol on January 6 constituted an "insurrection." *See, e.g.*, *United States v. Munchel*, 991 F.3d 1273, 1285 (D.C. Cir. 2021) (characterizing events of January 6 as an "insurrection"); *U.S. v. Krauss*, No. 23-cr-34, 2023 U.S. Dist. LEXIS 201271, at *1 (D.D.C. Nov. 9, 2023) ("Krauss was part of the mob that stormed the Capital during the insurrection on January 6, 2021"); *U.S. v. Grider*, 617 F.Supp.3d 42, 46 (D.D.C. 2022) ("This criminal case is one of several hundred arising from the insurrection at the United States Capitol on January 6, 2021").[4]

In *New Mexico ex rel. White*, even though Griffin did not enter the Capitol building, "did not personally engage in violence," was not charged with the crime of insurrection under 18 U.S.C. § 2383, and was acquitted of engaging in disorderly conduct on January 6, the court nevertheless held that "[o]ne need not personally commit acts of violence to 'engage in' insurrection . . . Engagement thus can include non-violent overt acts or words in furtherance of the insurrection." 2022 N.M. Dist. LEXIS 1, at *67. In words that apply equally to Trump's engagement in the insurrection, the court

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[4] *See also* Pub. Law. 117-32 (Aug. 5, 2021), 135 Stat. 322, section 1(1) ("On January 6, 2021, a mob of *insurrectionists* forced its way into the U.S. Capitol building and congressional office buildings and engaged in acts of vandalism, looting, and violently attacked Capitol Police officers.") (emphasis added). Also, a majority of both the House of Representatives and Senate approved an article of impeachment charging Trump with "incitement of insurrection." H. Res. 24 (117th Cong., 1st Sess.); 167 Cong. Rec. H165, H191 (Jan. 13, 2021); 167 Cong. Rec. S733 (Feb. 13, 2021).

stated that "Griffin voluntarily aided the insurrectionists' cause by helping to mobilize and incite thousands across the country to join the mob in Washington, D.C. on January 6;" "[t]he pre-January 6 mob mobilization and incitement efforts by Mr. Griffin and others helped make the insurrection possible;" "Griffin's actions normalized and incited violence;" "[a]fter the attack, Mr. Griffin took to social media to justify and normalize the violence;" Griffin "repeatedly aligned himself with the insurrectionists;" and "Griffin's encouragement and normalization of other insurrectionists' violent activities were additional overt acts in support of the insurrection." *Id.* at *56, 59-61.

In sum, "[p]olitical violence predictably occurred at the Capitol on January 6 and Griffin helped make that happen." *Id.* No one "helped make that happen" more than Trump—still President at the time—who not only "engaged" in the insurrection, but was its "central cause," and "[n]one of the events of January 6th would have happened without him." *Final Report of the U.S. House Select Committee to Investigate the January 6th Attack on the United States Capitol*, H. Rep. 117-663, 117th Cong., 2d Sess., at 8 (Dec. 22, 2022).[5] *See also id.* at 690 (recommending enforcement of Section Three of the Fourteenth Amendment against public officials who engaged in the January 6th insurrection).

[5] https://perma.cc/CZ82-EHJR

III. COURTS HAVE FLATLY REJECTED EFFORTS TO COMPARE THE INSURRECTIONISTS' CONDUCT ON JANUARY 6 TO BLACK LIVES MATTER PROTESTS.

Trump's Petition for a Writ of Certiorari nonetheless argues that the events of January 6, 2021 did not constitute an insurrection. Instead, he contends that "the United States has a long history of political protests that have turned violent," and points to the protests in Portland, Oregon in the summer of 2020 after the killing of George Floyd as an example. (Petition at 27). Similarly, during the trial, several of Trump's witnesses explicitly drew the same comparison. (*See* Nov. 2, 2023 Tr. at 31, 142, 199-201, 244-45, 312). For instance, Congressman Ken Buck testified as follows:

> During the summer of 2020 there were riots. And the rioters had attempted to break through the barricades [at the Capitol] . . . And the goal was to breach the Capitol at that point.

(Nov. 2, 2023 Tr. at 199-200).

This same false analogy to the protests after the killing of George Floyd was drawn in the amici curiae briefs filed by Hon. Peter Meijer and Landmark Legal Foundation, as well as the Republican National Committee and National Republican Congressional Committee (collectively "RNC") and by the States of Indiana, West Virginia and 25 other states in support of Trump's Petition for Certiorari. *See* Hon. Peter Meijer Amicus Brief at p. 23; Landmark Legal Amicus Brief at pp. 5-12; RNC Amici Brief at p. 11 and notes 3 and 4; States' Amici Brief at 15-16.

These comparisons are completely inapt. As correctly recognized by the New Mexico court in removing

Commissioner Griffin pursuant to the disqualification clause, "courts have uniformly rejected arguments by Mr. Griffin and other insurrectionists that their conduct on January 6 was constitutionally-protected protest activity . . . Courts have likewise rejected January 6 insurrectionists' attempts to compare their conduct to that of Black Lives Matter protesters." *New Mexico ex rel. White*, 2022 N.M. Dist. LEXIS 1, at *66.

For example, in rejecting an insurrectionist's argument at his sentencing hearing that his January 6 conduct was not different from Black Lives Matter protestors, one court found:

> [T]hat comparison makes little sense to me . . . [T]he goal of a lot of the protests in 2020 were to hold police accountable and politicians accountable for police brutality and murder, in George Floyd's case; and it was to improve our political system. What happened on January 6th is in a totally different category. That protest was to stop the government from functioning at all, to stop our democratic process — and it worked, at least for a period of time. They are not comparable.

U.S. v. Croy, No. 21-cr-162, ECF No. 63 at pp. 57-58 (D.D.C. Nov. 5, 2021) (emphasis added).

Similarly, another court found:

> Now, there are some people who have compared the riots of January 6 with other protests that took place throughout the country over the past year and who have suggested that the Capitol rioters are somehow being treated unfairly. I flatly disagree.
>
> People gathered all over the country last year to protest the violent murder by the police of an unarmed man. Some of those protesters became violent. But to compare the actions of people protesting, mostly peacefully, for civil rights, to those of a violent mob seeking to overthrow the lawfully elected government is a false equivalency and ignores a very real danger that the January 6 riot posed to the foundation of our democracy.

U.S. v. Mazzocco, ECF No. 32 at pp. 25-26 (emphasis added). *See also U.S. v. Jackson*, No. 22-cr-00230-RC-1, ECF No. 40 at pp. 20-22 (D.D.C. Sept. 26, 2022) (rejecting defendant's effort to compare January 6 insurrection to Black Lives Matters protests, the court stated that "One involved the attempt to delay or subvert the peaceful transfer of power. The other did not.").

Yet another judge has rejected a January 6th defendant's argument that he was "the victim of selective prosecution" because he was treated more harshly than protesters in Portland, Oregon who were protesting against police brutality in the Summer of 2020, finding that:

> [T]here are obvious differences between those, like Miller, who stormed the Capitol on January 6, 2021, and those who rioted in

> the streets of Portland in the summer of 2020. The Portland rioters' conduct, while obviously serious, did not target a proceeding prescribed by the Constitution and established to ensure a peaceful transition of power . . . The circumstances between the riots in Portland and the uprising in the Nation's capital differ in kind and degree.

U.S. v. Miller, No. 21-cr-119, ECF No. 67 at p. 3 (D.D.C. Dec. 21, 2021). *Accord United States v. Judd*, 579 F.Supp.3d 1, 7-8 (D.D.C. 2021) ("January 6 rioters sought to tear down our system of government" and "endangered hundreds of federal officials in the Capitol complex. Members of Congress cowered under chairs while staffers blockaded themselves in offices, fearing physical attacks from the rioters . . . The action in Portland, though destructive and ominous, caused no similar threat to civilians.").

Also significant here is *U.S. v. Little*, 590 F.Supp.3d 340 (D.D.C. 2022), where the Court found that a sentence of 60 days imprisonment was warranted for a defendant's "participation in the unsuccessful insurrection at the United States Capitol on January 6, 2021" and noted that the defendant "continued to deflect responsibility for the violence onto Antifa [and] Black Lives Matter . . . " *Id*. at 342, 344. The Court stressed:

> [C]ontrary to his Facebook post and the statements he made to the FBI, the riot was not "patriotic" or a legitimate "protest" . . . [I]t was an insurrection aimed at halting the functioning of our government.

Id. at 344

The violent January 6 insurrection resulted in a lockdown of the Capitol complex, an evacuation of the Vice President and congressional leaders, an interruption of official House and Senate proceedings, and multiple deaths and injuries. As described in a United States Government Accountability Report:

> Over the course of about 7 hours, more than 2,000 protestors entered the U.S. Capitol on January 6, disrupting the peaceful transfer of power and threatening the safety of the Vice President and members of Congress. The attack resulted in assaults on at least 174 police officers, including 114 Capitol Police and 60 D.C. Metropolitan Police Department officers. These events led to at least seven deaths and caused about $2.7 billion in estimated costs.[6]

By contrast, the numerous demonstrations and protests after the May 25, 2020 police killing of George Floyd were overwhelmingly peaceful. The Washington Post examined 7,305 protests and found that police were injured in only 1% of the protests, and only 3.7% of the protests involved property damage or vandalism.[7]

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[6] GAO, *Report to Congressional Requesters, Capitol Attack: Federal Agencies Identified Some Threats, but Did not Fully Process and Share Information Prior to January 6, 2021* (GAO-23-106625) (Feb. 2023) ("GAO Report")), at 1. https://www.gao.gov/assets/gao-23-106625.pdf

[7] Erica Chenoweth et al., *This Summers Black Lives Matter Protesters Were Overwhelming Peaceful Our Research Finds*, WASHINGTON POST (October 16, 2020) https://www.washingtonpost.com/politics/2020/10/16/this-summers-blacklives-matter-protesters-were-overwhelming-peaceful-our-research-finds/. Another report found that only 7% of the 8,700 protests that occurred between

The effort by the former President and the RNC amici to equate the insurrection on January 6 with protests by civil rights supporters is both unfounded and morally offensive. Indeed, the mob that Trump incited to travel to Washington and commit insurrection included scores of neo-Nazis who attacked and spewed racist insults at Black police officers defending the Capitol and even paraded a Confederate flag inside the Capitol – something never achieved during the Civil War.[8]

Janai Nelson, who is the President and Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc., submitted written testimony to the House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol, and stated:

> [I]t is essential to the security and endurance of our democracy that this committee understand the January 6th attack in its full context: as a manifestation of broad white

May 26, 2020 – July 31, 2020 involved violence, "and in most cases the acts were perpetrated by individuals or small groups that infiltrated the larger protests." *Report on the 2020 Protests and Civil Unrest,* Major Cities Chiefs Association, Intelligence Commanders Group (October 2020) at p. 1. https://majorcitieschiefs.com/wp-content/uploads/2021/01/MCCA-Report-on-the-2020-Protest-and-Civil-Unrest.pdf

[8] Reuters, *Capitol cop recalls racist abuse on Jan. 6* (July 27, 2021) https://www.yahoo.com/video/capitol-cop-recalls-racist-abuse-160719054.html; Daniel Barnes, *Man who carried a Confederate flag in the Capitol on Jan. 6 is sentenced to 3 years*, NBC NEWS (February 9, 2023), https://www.nbcnews.com/politics/justice-department/kevin-seefried-confederate-flag-capitol-jan-6-sentenced-rcna69784

supremacist backlash against robust democratic participation by people of color. This backlash has been fueled in part by the false narrative that rampant voter fraud occurred in communities of color and also by a deep-seated fear that the changing racial and ethnic demographics in the United States and the increasing racial and ethnic diversity of the electorate threaten the existing power structure premised on white supremacy.

* * *

After challenging election results in communities of color, the next step in the violence and votes backlash was the January 6th Insurrection – just one day after Black voters asserted their power in Georgia [in the January 5, 2021 Senate run-off election won by Senator Raphael Warnock]. The violent attack on the Capitol on January 6th was a brazen, virulent, and deadly manifestation of the concerted effort to undermine our democracy, to overthrow the government, and to negate the votes cast by our communities.

* * *

This attempt to thwart the peaceful transfer of power – the very hallmark of a functioning democracy – was the natural conclusion of years of rhetoric inciting and condoning racism and white supremacy, expanding the proliferation of conspiracy theories, and flouting the rule of law. More specifically, it was the direct result of false rhetoric regarding stolen elections that tapped into existing

racial anxiety.

Nelson Testimony at pp. 2, 14, 15.[9]

This attempted comparison between the January 6th insurrection and any recent protests—whether they turned violent or not, whether it be Black Lives Matter or Back the Blue, or white nationalists—is simply a fallacy. Professors Baude and Paulsen's law review article rejected the effort to analogize the insurrection to the protests after the killing of George Floyd: "What about other disruptive, disorderly, even violent protests during the same year? For instance, the many such events that erupted during the summer of 2020 in the wake of the police killing of George Floyd? So far as we can tell, none of these were covered by Section Three. Of course mere protest is not insurrection. Some of these protests devolved into riots, but even a riot is not necessarily an insurrection." Baude & Paulsen, at p. 114 note 412 (emphasis added). Indeed, a riot not aimed at interfering with the peaceful transfer of governmental power, is just a riot.

Equating protests and riots with insurrections, or falsely framing the Constitution's qualifications to run for President as "disenfranchisement," fundamentally misstates the nature of the question presented. The Constitution protects every citizen's right to vote. It does not provide or ensure that citizens have a right to pick candidates who are lawfully disqualified by

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9 *Statement of Janai Nelson, President and Director-Counsel NAACP Legal Defense and Educational Fund, Inc.,* Submitted to the US House of Representatives (May 3, 2022), https://www.naacpldf.org/wp-content/uploads/NAACP-LDF-Statement-for-Select-Committee-to-investigate-January-6-Attack-on-the-Capitol-FINAL-05.03.2022.pdf

virtue of conduct that renders them unfit to hold the office of the president under the Constitution.

CONCLUSION

For the reasons set forth above, the Court should affirm the decision of the Colorado Supreme Court.

Respectfully submitted,

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