STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

Plaintiffs-Appellants,

Case No. 368628
Court of Claims No. 23-000137-MZ

v

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

Defendant-Appellee.,

DONALD J. TRUMP

Intervening Appellee.

BRIEF *AMICUS CURIAE* OF LANDMARK LEGAL FOUNDATION IN SUPPORT OF INTERVENING APPELLEE

DEREK S. WILCZYNSKI (P57079)
BLANCO WILCZYNSKI, PLLC
2095 East Big Beaver Road, Suite 400
Troy, MI 48083
(248) 519-9000
dsw@blancopc.com

MICHAEL J. O'NEILL
(pro hac vice forthcoming)
mike@landmarklegal.org
Landmark Legal Foundation
19415 Deerfield Ave., Ste. 312
Leesburg, VA 20176
703-554-6100

Attorneys for Landmark Legal Foundation

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Authority

Other Authorities

STATEMENT OF QUESTION PRESENTED

Does Section 3 of the 14th Amendment of the United States Constitution preclude former President Donald Trump from appearing on the ballot for the office of President of the United States?

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Landmark Legal Foundation (Landmark) is a national non-profit public interest law firm with its principal place of business in Kansas City, Missouri which is committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution, and defending individual rights and responsibilities. Specializing in constitutional history and litigation, Landmark submits this brief in support of Intervenor-Appellee.

Landmark has filed briefs as amicus curiae advancing a constitutionalist position in *Brnovich v Democratic National Committee* (US Supreme Court), *Looper v Raimondo* (US Supreme Court), *Moore v United States* (US Supreme Court), *West Virginia v EPA* (US Supreme Court), and *Biden v Louisiana* (CA 5).

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs-Appellants urge the adoption of a broad standard of insurrection: the occupation of a government building and the prevention of officials from conducting government business. But that standard would encompass common political activism and civil disobedience, like occupying congressional offices, federal courts, and state capitols. Not only would many prominent political figures be covered by this standard,

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

but those who only provided verbal encouragement could be treated as inciters of insurrection. Empowering state officials to make these determinations would allow partisan actors to declare their political opponents constitutionally disqualified from office. Members of Congress who disrupt votes by pulling fire alarms will be ineligible to serve. And Senators who give vitriolic speeches on the steps of the U.S. Supreme Court could be forced from office. A ruling from this Court finding ineligible an individual who is now leading all polls as the presidential nominee for the Republican Party would disenfranchise millions of individuals who would vote for him and trigger chaos. Opening this Pandora's box means Vice President Kamala Harris, Senator Chuck Schumer, Congressman Jamaal Bowman have all committed insurrection and should immediately vacate their offices.

Plaintiffs-Appellants are not seeking a simple remedy. They are asking this Court to take action that will deprive the people of Michigan the opportunity nominate a former president to serve as his political party's presidential nominee. They argue that Section Three of the Fourteenth Amendment provides authority. They are incorrect for two reasons. First, Plaintiffs-Appellants are barred from seeking redress under Section Three of the Fourteenth Amendment because this section is not self-executing, and Congress has not enacted legislation providing a private cause of action. The text, history, and structure of the Amendment– as well as controlling precedent – all support this conclusion.

Second, the conclusory statements presented in Plaintiffs-Appellants' Complaint do not, by any evidentiary standard, establish that Donald Trump incited others to engage in rebellion or insurrection. In short, their allegations do not establish that Donald Trump's actual speech and words uttered on January 6th fall outside the constitutional

protections of the First Amendment. At no point on January 6, 2021, or in the days before it, did then-President Trump expressly advocate for insurrection, violence, or lawlessness.

The Court of Appeals should therefore affirm the lower court's decision dismissing claims brought by Plaintiffs-Appellants.

ARGUMENT

I. PLAINTIFFS-APPELLANTS' BROAD STANDARD WOULD ENABLE PARTISAN OFFICIALS TO DISQUALIFY THEIR POLITICAL OPPONENTS AS INSURRECTIONISTS.

Plaintiffs-Appellants state that individuals who occupied the Capitol on January 6, 2021, "defied the authority of the United Sates by *seizing the U.S. Capitol and preventing Congress from fulfilling its duty* to certify the results of a presidential election." Plaintiffs-Appellants' Emergency Application for Leave to Appeal Before Decision by the Court of Appeals at 10 (emphasis added) (hereinafter "Pl-Aps' Br"). They continue, "[t]hough the success was short-lived, the insurrectionists claim distinctions that past insurrections cannot: their violent seizure of the Capitol obstructed an essential constitutional procedure (citations omitted)." *Id*.

According to them, these actions amount to an insurrection triggering Section Three's disqualification provisions. Plaintiffs-Appellants further contend that former President Donald Trump's actions and words incited individuals to engage in insurrection thereby rendering him ineligible to serve as President. Under this broad interpretation of Section Three, an insurrection has occurred under the Fourteenth Amendment when: (1) the U.S. Capitol is seized and (2) Congress is prevented from fulfilling its constitutional duties. *Id*. Further, under their theory, any support uttered by public officials that could be linked to inciting this conduct is enough to disqualify those officials from serving in the federal government.

Accepting this standard would result in chaos. Multiple incidents that have occurred as recently as November of this year could plausibly be labeled an insurrection (or incitement to insurrection) under Plaintiffs-Appellants broad interpretation.

These include:

1. Representative Bowman pulls a fire alarm before a vote.

On September 30, 2021, Congressman Jamaal Bowman pulled a fire alarm on Capitol Hill as Congress worked to approve a stopgap spending bill to avoid a government shutdown. Representative Bowman claimed he believed pulling the alarm might open a door in the Cannon Office Building and pled guilty to a misdemeanor offense on October 25, 2021. See Kaniska Singh, *US Representative Bowman pleads guilty to triggering fire alarm at Capitol,* Reuters, Oct 26, 2023, https://www.reuters.com/world/us/us-representative-bowman-pleads-guilty-triggering-fire-alarm-capitol-2023-10-26/ (Dec 4, 2023).

Video captures Congressman Bowman at 12:05 pm trying an exit, before walking up to the alarm and activating it, before trying other doors. He stated he was not trying to disrupt congressional proceedings. At the time, however, his party was attempting to stall a vote on a stopgap bill proposed by the opposition party to buy time to read it. *Id.* Congressman Bowman's office originally sent a memo to members of his party on how to defend him for pulling the alarm, saying they should tell the opposition to "instead focus their energy on the Nazi members of their party before anything else." Sara Dorn, *Rep. Bowman Backtracks After Office Slams GOP 'Nazis' In Memo Defending Fire Alarm Pull*, Forbes, Oct 2, 2023, https://www.forbes.com/sites/saradorn/2023/10/02/rep-bowman-backtracks-after-office-slams-gop-nazis-in-memo-defending-accidental-fire-alarm-pull/?sh=a0ea1426b6e4 (Dec 4, 2023).

2. Senator Schumer warns individual justices on the steps of the U.S. Supreme Court.

On March 4, 2020, Senator Chuck Schumer made the following statement in a pro-abortion speech outside the Supreme Court: "Republican legislatures are waging a war on women, all women…I want to tell you [Justice] Gorsuch, I want to tell you [Justice] Kavanaugh. You have released the whirlwind, and you will pay the price. You won't know what hit you if you go forward with these awful decisions." Katherine Fung, *Schumer Telling Brett Kavanaugh He'll 'Pay the Price' for Roe Resurfaces*, Newsweek, June 8, 2022, https://www.newsweek.com/chuck-schumer-brett-kavanaugh-roe-v-wade-pay-price-comment-1713964 (Dec 4, 2023). Chief Justice Roberts criticized the statements as "dangerous" and "inappropriate." Schumer in turn issued a statement criticizing the Chief Justice for playing into "right wing" hysteria about his comments. He also later claimed his statements were referring to consequences for Republicans if these justices made these decisions. Pete Williams, *In rare rebuke, Chief Justice Roberts slams Schumer for 'threatening' comments*, NBC News, March 4, 2020, https://www.nbcnews.com/politics/supreme-court/rare-rebuke-chief-justice-roberts-slams-schumer-threatening-comments-n1150036 (Dec 4, 2023).

On June 8, 2022, U.S. Marshals detained an armed individual near the home of Justice Kavanaugh. This individual allegedly informed investigators "that he'd decided to target Kavanaugh because he was angry about the possibility that the Supreme Court will overturn *Roe v Wade*…" Rebecca Shabad, *Man with a gun outside Kavanaugh's home told 911, 'I need psychiatric help'*, NBC News, June 9, 2022, https://www.nbcnews.com/politics/supreme-court/man-gun-kavanaughs-home-told-911-need-psychiatric-help-rcna32871 (Dec 3, 2023).

3. Congresswoman Rashida Talib urges on Pro-Palestinian protestors who later disrupted Congress and injured police.

Three times in the last 60 days pro-Palestinian protestors have been involved in illegal activity that could be labeled insurrection under Plaintiffs-Appellants' theory. First, on October 18, 2023, Pro-Palestinian protestors from Jewish Voice for Peace marched on the U.S. Capitol and engaged in a sit-in in the Rotunda, demanding a ceasefire in the Israel-Hamas war. While at first peaceful, the event turned violent, and several demonstrators were arrested for assaulting police officers. Congresswoman Rashida Talib spoke to the crowd before the event, stating, "I think the White House and everyone thinks we're just gonna sit back and let this just continue to happen. No!" Ryan King, *Chaos erupts as pro-Palestinian protesters demand ceasefire at the Capitol; at least 3 allegedly assault cops*, NY Post, Oct 18, 2023, https://nypost.com/2023/10/18/chaos-erupts-as-pro-palestinian-protesters-take-to-the-capitol-at-least-three-arrested/ (Dec 4, 2023).

Second, on November 6, 2023, pro-Palestinian demonstrators marched in Washington D.C., before vandalizing statues and property around the city. They also vandalized the front gates of the White House, and videos have circulated of Palestinian protestors scaling the fence of the White House. See American *Military News, Videos: White House vandalized by left-wing protesters*, Nov 6, 2023, https://americanmilitarynews.com/2023/11/videos-white-house-vandalized-by-left-wing-protesters/ (Dec 4, 2023).

Finally, on November 15, 2023, 150 Pro-Palestinian protestors clashed with U.S. Capitol Police outside of Democrat National Committee headquarters. Lawmakers and staff were evacuated from the headquarters and the Capitol was placed on lockdown. Six

U.S. Capitol Police officers were injured, and one protestor was arrested for assault. One unnamed Democrat lawmaker stated it "scared me more than January 6." Congressman Brad Sherman tweeted after the fact "Thankful to the police officers who stopped them and for helping me and my colleagues get out safely." Andrew Solender, *House offices locked down as lawmakers are evacuated from DNC protest*, Axios, Nov 16, 2023, https://www.axios.com/2023/11/16/dnc-lawmakers-evacuated-house-offices-lockdown-israel-hamas-war-protest (Dec 4, 2026).

4. Vice President Harris supports Black Lives Matter (BLM) protests.

In June 2020, then-Senator Kamala Harris, during an interview discussing the BLM protests occurring, stated, "it's not just a moment, it's a movement." She continued, "[t]hey're not gonna stop, and everyone, beware…they're not gonna stop before election day in November and they're not gonna stop after election day…they're not gonna let up and they should not, and we should not." Kamala Harris, *Late Show with Stephen Colbert*, June 18, 2020, https://www.youtube.com/watch?v=NTg1ynIPGls (Dec 4, 2023).

Over the course of the summer of 2020, BLM protestors destroyed millions of dollars' worth of property across the country. On May 30, 2020, five BLM protestors damaged a federal courthouse in Las Vegas, Nevada, and threatened to attack a federal law enforcement officer. David Ferrara, *5 charged with damaging federal buildings during BLM protest*, Las Vegas Review-Journal, Sept 17, 2020, https://www.reviewjournal.com/crime/courts/5-charged-with-damaging-federal-buildings-during-blm-protest-2123868/ (Dec 4, 2023). In July 2020, BLM protestors barricaded law-enforcement inside a federal courthouse in Portland and attempted to

burn down the building, chanting "Feds go home." Lia Eustachewich, *Portland protesters barricade courthouse with federal officers inside, then try to set it on fire*, NY Post, July 22, 2020, https://nypost.com/2020/07/22/portland-protesters-barricade-courthouse-with-federal-officers-inside/ (Dec 4, 2023).

Then-Senator Harris did not offer a condemnation of violent riots and protests until the end of August 2020, stating "It's no wonder people are taking to the streets, and I support them. We must always defend peaceful protest and peaceful protestors. We should not confuse them with those looting and committing acts of violence, including the shooter who was arrested for murder." Reuters, *Fact check: Kamala Harris said she supports protests, not 'riots', in Late Show clip*, Oct 29, 2020, https://www.reuters.com/article/uk-factcheck-kamala-harris-late-show-rio-idUSKBN27E34P/ (Dec 4, 2023).

5. Protestors interfere with Kavanaugh confirmation proceedings.

Several times during the confirmation process for U.S. Supreme Court Justice Brett Kavanaugh, protestors engaged in activity interrupting or interfering with government processes. When Senator Jeff Flake announced he would vote for Kavanaugh, several protestors prevented him from moving in an elevator and yelled in his face. YouTube, *Sen. Jeff Flake confronted by protesters over Kavanaugh vote*, Sept 28, 2018, https://www.youtube.com/watch?v=3GnSn21ykWs (Dec 4, 2023).

On October 4, 2018, protestors took over the Hart Senate Office Building, chanting for Kavanaugh to be blocked from confirmation. MSNBC Tweet, *Anti-Kavanaugh protesters take over the Hart Senate Office Bldg. atrium on Capitol Hill*, Sept 28, 2018, https://twitter.com/MSNBC/status/1047935416182235136 (Dec 4, 2023).

On October 6, 2018, protestors crossed police lines at the Capitol and the Supreme Court, proceeding to yell and pound on the doors of the latter. Police arrested hundreds of protestors for "crowding, obstructing, or incommoding." Some protesters entered the Senate galley and began to yell during the final confirmation vote, halting proceedings. Kylee Griswold, *8 Times Left-Wing Protesters Broke Into Government Buildings And Assaulted Democracy*, The Federalist, Jan 7, 2022, https://thefederalist.com/2022/01/07/8-times-left-wing-protesters-broke-into-government-buildings-and-assaulted-democracy/ (Dec 4, 2023).

These are just several events that have occurred in the recent past. Under Plaintiffs-Appellants' theory, private parties could sue to force state courts to declare the individuals who engaged conduct described and the elected officials whose speeches could be linked to that conduct as ineligible to serve under Section Three. Adopting this interpretation would invite partisan actors to treat their political opponents as constitutionally disqualified and would bring chaos to the electoral system.

II. THERE IS NO PRIVATE CAUSE OF ACTION TO ENFORCE THE DISQUALIFICATION CLAUSE.

Plaintiffs-Appellants are barred from seeking relief because Section Three is not self-executing and does not provide a private cause of action to support their claims. The text and structure of the Amendment as well as case law and tradition all support this conclusion.

Section Five provides the first evidence that Section Three is not self-executing. It provides, "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." US Const Am XIV, § 5. Congress – not the individual states – has authority to enact legislation to enforce the terms of the Fourteenth Amendment. The

text of the Amendment itself suggests the drafters intended Congress to pass laws that would provide the authority for those seeking to enforce its provisions.

At the time of its drafting, Representative Thaddeus Stevens (a member of the Amendment's drafting committee) noted that Congress would have to pass enabling legislation since the Joint Committee's draft of Section Three "will not execute itself." Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, N 29, 2023, https://ssrn.com/abstract=4591838 (Dec 4, 2023) (quoting Globe, 39th Cong, 1st Sess, at 2544). Further, "Once Congress had finalized the language of Section Three, Stevens again noted the need for Congress to pass enabling legislation." *Id*. (citing Globe, 39th Cong., 1st Sess, at 3148).

Next, Chief Justice Salmon P. Chase's ruling in *Griffin's Case*, 11 F Cas 7 (CCD Va 1869), is directly on point. Rendered within a year of Section Three's ratification, Chase held that Section Three is not self-executing and that a party could only seek relief provided a federal statute had authorized it. He stated, "Taking the third section then, in its completeness with this final clause, it seems to put beyond reasonable question the conclusion that the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, *and to be made operative in other cases by the legislations of congress in its ordinary course*." *Id*. at 26 (emphasis added).

Efforts to treat *Griffin's Case* as bad law fall short. It was recognized as guiding precedent for decades. Professor Seth Barret Tillman has explained that, in the years subsequent to Chief Justice Chase's ruling, the was "no hint that any court thought [it] was anything but settled law." Brief for *Amicus Curiae* Professor Seth Barrett Tillman in Support of Intervenor-Appellant/Cross Appellee, *Anderson v Griswold* (2023) (Colo S Ct

No 2023SA300). Years later, *Griffin's Case* continued to be cited "favorably, on-point, and as good law ." *Id*. See, for example, *Ex parte Ward*, 173 US 452, 545-455 (1899).

Consistent with this interpretation, Congress enacted laws to enforce provisions of Section Three. Shortly after ratification, Congress enacted legislation enforcing the Disqualification Clause when it passed the Enforcement Act of 1870 which provided, in relevant part:

> "…whenever any person shall hold office, except as a member of Congress or of some State legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United States, it shall be the duty of the district attorney of the United States for the district in which such persons shall hold office, as aforesaid, to proceed against such person by writ of *quo warranto*…"

Ch 114, 16 Stat 140, 143 (1870). This established a *quo warranto* action to be brought by federal authorities in federal courts to remove officials from office. As noted by Professors Blackmun and Tillman, "Congress could have responded to *Griffin's Case* by enacting a statute saying that Section Three was self-executing. And Congress could have given the States a role in these or analogous removal or election processes." Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28(2) Tex Rev L & Pol 73 (forth circa Mar 2024), https://ssrn.com/abstract=4568771 (Dec 3, 2023). They continue, "But instead, Section 14 expressly delegates Section 3-enforcement to a federal prosecutor – and critically, only the federal courts (and not state courts) play a role in that process." *Id*.

The Enforcement Act also criminalized actions that would render someone ineligible under Section Three:

> "…any person who shall hereafter knowingly accept or hold any office under the United States, or any State to which he is ineligible under the third section of the fourteenth article of amendment of the Constitution of the

> United States, or shall attempt to hold or exercise the duties of any such office, shall be deemed guilty of a misdemeanor against the United States…"

Ch. 114, 16 Stat. 140 (1870). And indeed, cases were brought shortly after passage of the Act. See *United States v Powell*, 27 F Cas 605 (CCD NC 1871).

Passage of the Enforcement Act clarifies Congress had concluded that Section Three was not self-executing and that additional laws needed to be passed to enforce its provisions.

Current congressional practice supports the idea that Section Three is not self-executing. House Resolution 1405 was introduced in the 117th Congress on February 26, 2021. Its purpose is "[t]o provide a cause of action to remove and bar from holding office certain individuals who engage in insurrection or rebellion against the United States." HR 1405, 117th Cong (2021). Like the Enforcement Act of 1870, this legislation proposes that "The Attorney General of the United States may bring a civil action for declaratory judgment and relief…" The action would be brought in federal court requiring clear and convincing evidence. *Id*. Though not enacted, such actions support arguments consistent with the plain meaning of Section 5 – that actions to enforce Section Three's provisions must be authorized by Congress.

Along these lines, Congress has enacted a criminal statute that prohibits rebellion or insurrection. 18 USC § 2383. As noted by at least one court, this "demonstrates an intention that only the government, and not private citizens, must be the party initiating the action." *Hansen v Finchem*, 2022 Ariz Super LEXIS 5, 10 (Case No. 2022-004321).

Construing Section Three as self-executing also contradicts the intent and purpose of the Fourteenth Amendment as a tool to increase federal power. In short, concluding that a *private party* could bring a cause of action in *state court* means state actors would

wield tremendous power. This interpretation would "transform Section Three into a states'-rights superpower." Brief of *Amici Curiae* Republican National Committee, National Republican Senatorial Committee, and National Republican Congressional Committee in Support of Intervenor-Appellant/Cross Appellee at 5, *Anderson v Griswold*, (2023) (Colo S Ct No 202SA300). Unfortunately, state courts (who today may otherwise be well-situated to hear these cases) would have "the power to decide the most sensitive political questions about loyalty and legitimacy, and then decide on that basis who may stand for election to the most important position in the national government." *Id*. Plaintiffs-Appellants' argument flouts the purpose of the Reconstruction Amendments as they "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome v United Sates*, 446 U.S. 156, 179 (1980).

The text, case law, tradition and recent practice all support the argument that Section Three is not self-executing. To sustain a private claim, there needs to be a specific law empowering a party to bring the cause of action. The argument that Section Three alone provides a private cause of action in state court is a bridge too far and would invite political chaos. Hundreds, if not thousands, of individual cases could be brought in every county alleging a given individual is ineligible. And these courts would – under Plaintiffs-Appellants theory – have jurisdiction to decide them.

Finally, an argument can be made that even Section One of the Fourteenth Amendment is not self-executing in all cases. Some scholars contend that Section One is self-executing only to the extent that parties are seeking to assert its provisions as a set of defenses in court. See Blackman & Tillman, *Sweeping and Forcing the President into Section 3*, 28(2) Tex Rev L & Pol at 42. This limitation also undercuts claims by Plaintiff-Appellants that Section Three is self-executing.

Supporters of the argument that Section One *is* self-executing rely, in part, on *Ex parte Young*, 209 US 123 (1908). According to them, "the Supreme Court concluded [in *Ex parte Young*] that the presence of constitutional claims under Sec. 1 of the Fourteenth Amendment, when coupled with federal question jurisdiction, was enough all by itself to support a federal court's entertaining a 'positive' constitutional challenge to Minnesota's confiscatory rates." Mark Brown, *Trump and Section 3 of the Fourteenth Amendment: An Exploration of Constitutional Eligibility*, Jurist, Oct. 12, 2023, https://www.jurist.org/features/2023/10/12/trump-and-section-3-of-the-fourteenth-amendment-an-exploration-of-constitutional-eligibility/ (Dec 3, 2023). They note that in *Ex parte Young*, "No statutory vehicle, like section 1983, was discussed. None was needed." *Id.*

Ex parte Young's application, however, is limited to times when private parties who act in compliance with federal law use it "as a *shield* against the enforcement of contrary (and thus preempted) state laws." *Mich Corr Org v Mich Dep't of Corr*, 774 F3d 895, 906 (6 CA 2014). As noted by the 6th Circuit, this position aligns with the U.S. Supreme Court's action in *Sandoval and Brunner v Ohio Republican Party*, 555 U.S. 5 (2008), where the Court rejected plaintiff's lawsuits because no private cause of action supported it. In *Sandoval and Brunner*, a private party (the Ohio Republican Party) sued the Ohio Secretary of State seeking to compel the Secretary to enforce provisions of the Help America Vote Act. *Id.* A state officer suing in his official capacity and seeking prospective injunctive relief was not enough to trigger *Ex parte Young* – an underlying statute was still needed to provide a private cause of action. *Mich Corr Org*, 774 F3d at 906.

While not dispositive, this analysis at least raises a question about whether Section One is self-executing in all cases. Further reinforcing this argument is the simple fact that Congress has repeatedly acted to ensure a private cause of action under Section One. See 42 USC § 1983 which establishes a private cause of action "to enforce provisions of the Fourteenth Amendment…" *Scheuer v Rhodes*, 416 US 232, 243 (1974) (quoting *Monroe v Pape*, 365 US 167, 171-172 (1961)).

III. THEN-PRESIDENT TRUMP DID NOT INCITE JANUARY 6TH PROTESTORS TO ENGAGE IN INSURRECTION.

Then-President Trump's words and actions on January 6, 2021, do not rise to the level of incitement to engage in insurrection because, on their face, his words did not advocate imminent violence. The Court should reject efforts to reduce the rigorous and applicable standard established by the U.S. Supreme Court in *Brandenberg v Ohio*, 395 U.S. 444 (1969).

Brandenburg applies because Section Three's consequences are punitive. Chief Justice Chase noted as much in *Griffin's Case*, stating that Section Three was the "only punitive section" of the Fourteenth Amendment. 11 F Cas at 25. Further, *Brandenburg's* standard applies because the conduct allegedly giving rise to Plaintiffs-Appellants' claims depend on a public speech given by then-President Trump on January 6, 2021, and public communications made by the President in the days before that speech.

Under the *Brandenburg* test, speech can be punished only if three factors are met. The speech must (1) "[advocate] the use of force or of law violation," (2) is "directed to inciting or producing imminent lawless action," and (3) is "likely to incite or produce such action." *Brandenberg*, 395 US at 447. Establishing that the speaker's words advocated the use of actual force or of law is thus necessary to establish the words fall outside the

protections of the First Amendment. Incitement or likelihood are not enough to "forfeit the First Amendment's protections." *Nwanguma v Trump*, 903 F3d 604, 611 (CA 6, 2018).

Then-President Trump's speech on the Ellipse falls short of actual incitement to insurrection. At no point did he call for any laws to be broken. At no point did he encourage violence. In arguments last year, a federal circuit judge in Washington D.C. stated, "you just print out [Trump's January 6, 2021] 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 CA Dec 7, 2022). Another judge remarked, "the President didn't say break in, didn't say assault members of Congress, assault Capitol Police, on anything like that." *Blassingame*, No. 22-5069, Argument Tr. at 74:21-25 (Rogers, J.).

In fact, former President Trump sent tweets on the afternoon of January 6, 2021, encouraging protestors on Capitol Hill to "remain peaceful" and "stay peaceful" and asking the mob to not hurt law enforcement. Jenni Fink, *Jan. 6 Capitol Riot Timeline: From Trump's First Tweet, Speech to Biden's Certification*, Newsweek, Jan. 6, 2022, https://www.newsweek.com/jan-6-capitol-riot-timeline-trumps-first-tweet-speech-bidens-certification-1665436 (Dec 4, 2023). He also directed protestors to "support our Capitol Police." *Id*. Later, he released a video calling on his supporters "to go home now" and "go home in peace." *Id*.

The actual language used by Trump on January 6, 2021, does not rise to the level of language the U.S. Supreme Court already considered protected in other cases. For example, in concluding that a speech featuring the words "we're gonna break your damn neck" did go beyond the First Amendment's protections, the Court concluded that

"[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases." *NAACP v Claiborne Hardware Co.*, 458 US 886, 902, 928 (1982). It continued, "[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. *Id.* at 928.

Nothing former President Trump said on that day or in released communications leading up to that day amounts to actual advocacy under *Brandenberg*.

CONCLUSION

For these reasons, this Court should uphold the Court of Claims denial of Plaintiffs-Appellants' requested relief.

Respectfully submitted,

/s/Derek S. Wilczynski
Derek Wilczynski
Blanco Wilczynki, PLLC
2095 E. Big Beaver Road
Suite 400
Troy, Michigan 48083
248-519-9000

Michael J. O'Neill (pro hac vice forthcoming)
mike@landmarklegal.org
Landmark Legal Foundation
19415 Deerfield Ave., Ste. 312
Leesburg, VA 20176
703-554-6100

PROOF OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the Court of Appeals for Michigan by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

/s/ Derek Wilczynski
Counsel for *Amicus Curiae*
Derek Wilczynski
Blanco Wilczynski, PLLC
2095 E. Big Beaver Road
Suite 400
Troy, Michigan 48083
248-519-9000

Dated: December 6, 2023