

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

JOINT APPENDIX VOL. I OF IV (JA1-JA554)

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Central Committee

Petition for Writ of Certiorari Filed: Jan. 3, 2024

Certiorari Granted: Jan. 5, 2024

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OF DENVER, STATE OF COLORADO**
Norma Anderson et al. v. Jena Griswold et al.
Case No. 2023CV32577

Date Filed	Docket Description
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9/6/2023	Motion for an Expedited Case Management Conference
9/7/2023	Notice of Removal to United States District Court for the District of Colorado w/attached
9/7/2023	Copy of Notice of Removal (US District Court-District of Colorado) (Exhibit A to Notice of Removal to United States District Court for the District of Colorado)
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9/22/2023	Exhibit B – Motion to Remand
9/22/2023	Motion to Dismiss Intervenor’s Count 1 under Rule 12(b)(1)
9/29/2023	Exhibit to Petitioners’ Opposition to Respondent Trump’s Special Anti-SLAPP Motion to Dismiss – Exhibit sent to Record Dept 10/3/2023
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- 9/29/2023 Exhibits 26-47 to Petitioners' Response to Respondent Trump's Special Anti-SLAPP Motion to Dismiss(suppressed per court order dated 10/4/2023)
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- 9/29/2023 Exhibit 54 part 3 to Petitioners' Response to Respondent Trump's Special Anti-SLAPP Motion to Dismiss(suppressed per court order dated 10/4/2023)
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- 10/17/2023 President Donald J. Trump’s Motion in Limine to Object to and Exclude Petitioners’ Proposed Expert (w/attach)(Suppressed pursuant to court order dated 10/4/23)
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- 10/24/2023 (Courtesy Copy) Petitioners Opposition to Respondent Trumps Anti-SLAPP Motion to Dismiss with Exhibits 1-72 (Part 14) (Redacted)
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(Suppressed per court order dtd
10/4/23)

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- 11/8/2023 Petitioners' Notice of Filing Offered but
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**RELEVANT DOCKET ENTREES FROM THE
SUPREME COURT, STATE OF COLORADO**
Norma Anderson et al. v. Jena Griswold et al.
Case No. 2023SA3000

Date Filed	Docket Description
11/20/2023	Application for Review and Adjudication
11/20/2023	Final Order, Nov. 17, 2023
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11/28/2023	Attachment No. 2 – Response
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11/28/2023	Attachment No. 10 – Trial Exhibit 1031
11/28/2023	Attachment No. 11 – Trail Exhibit 78
11/28/2023	Secretary of State’s Motion for Leave to File Answer Brief
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12/01/2023	Petitioners’ Exhibits AI Part 2 of 7
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12/01/2023	Petitioners' Admitted Trial Exhibits Part 3 of 4 – Exhibits 78-148
12/01/2023	Petitioners' Admitted Trial Exhibits Part 4 of 4 – Exhibits 148-265
12/01/2023	Answer Brief
12/01/2023	Exhibit Index
12/01/2023	Exhibit 1 – Transcript
12/01/2023	Exhibit 2 – Order Denying Jurisdiction
12/01/2023	Exhibit 3 – District Court's order
12/01/2023	Exhibit 4 – Petition for Review
12/01/2023	Exhibit 5 – Order Declining Jurisdiction
12/01/2023	Excerpt from Exhibits J-M, AC-AH, AJ to Petitioners' Opening and Reply/Answer Brief (for readability)

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12/04/2023	President Trump's Reply Brief in Support of His Opening Brief
12/04/2023	Intervenor-Appellee/Cross-Appellant, Donald J. Trump's Index of Attachments to His Reply Brief
12/04/2023	Attachment 1 – Order
12/04/2023	Attachment 2 – Petition for Rule to Show Cause Pursuant to C.A.R. 21
12/08/2023	Notice of Supplemental Authority
12/15/2023	Notice of Supplemental Authority
12/15/2023	Supplemental Authority
12/19/2023	Opinion

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DISTRICT COURT
DENVER COUNTY COLORADO
1437 Bannock Street
Denver, CO 80202

Case No. 2023CV032577 Division/Room 209

NORMA ANDERSON, et al.,
Petitioners,
v.
JENA GRISWOLD, et al.,
Respondents.

For Petitioners:
Martha Tierney, Esq.
Eric Olson, Esq.
Sean Grimsley, Esq.
Isabel Broer, Esq.
Jason Murra, Esq.
Mario Nicolais, Esq.

For Respondent Griswold:
Michael Kotlarczyk, Esq.

For Respondent Trump:
Scott Gessler, Esq.
Justin North, Esq.
Geoffrey Blue, Esq.

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For Intervenor:
Michael Melito, Esq.
Robert Kitsmiller, Esq.

The matter came on for hearing on September 18, 2023, before the HONORABLE SARAH B. WALLACE, Judge of the Denver County District Court, and the following proceedings were had.

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PROCEEDINGS

(Participants appear in person and via Webex)

THE COURT: Good morning. We are here on Case Number 2023CV32577, Norma Anderson, et al. v. Jena Griswold, et al.

Before we get started, because there's a fairly significant presence on the Webex, I want to remind everyone that unless they — unless you've been granted expanded media coverage, you may not record this proceeding in any fashion. And the only entities that have received — who have asked for expanded media coverage is CNN and Lawfare. I granted Lawfare access about half hour ago. But in the future, the rules require at least 24 hours notice prior to having a request even considered.

So we are here on two items, I think. The first is a motion to intervene and the second is the Plaintiffs' request for an expedited case management conference. Why don't we first talk about the motion to intervene. It's my understanding — well, actually, let's step back. Let's have entries of appearance, please.

MS. TIERNEY: Good morning, Your Honor. Martha Tierney with the law firm Tierney Lawrence Stiles on behalf of the Petitioners. Also with me at counsel table are

Eric Olson and Sean Grimsley from the law firm Olson Grimsley Kawanabe Hinchcliff and Murray. We will be speaking for the Petitioners

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today. Also in the courtroom with us are Isabel Broer and Jason Murray from the Olson Grimley firm, and Mario Nicolais from KBN Law.

THE COURT: Great.

MR. GESSLER: Good morning, Your Honor. Do you prefer me to go to the podium to address you or —

THE COURT: We really don't care so long as it gets picked up by the recording system. So the key is just speaking into the microphone.

MR. GESSLER: I can — I think I can manage that, Your Honor. My name is Scott Gessler and with me today is Justin North, and then Mr. Geoff Blue on Webex. We represent one of the Respondents, Donald Trump.

THE COURT: Great.

MR. KOTLARCZYK: Good morning, Your Honor. Mike Kotlarczyk from the Colorado Department of Law on behalf of the Colorado Secretary of State, Jena Griswold.

THE COURT: And can you just say your name again slowly so I hopefully don't mispronounce it?

MR. KOTLARCZYK: Yes, Your Honor. Kotlarczyk.

THE COURT: Kotlarczyk?

MR. KOTLARCZYK: Yes.

THE COURT: Okay.

MR. MELITO: Good morning, Your Honor.

THE COURT: Why don't you go over to the

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microphone since —

MR. MELITO: Good morning, Your Honor. Michael Melito, Melito Law, joined by Bob Kitsmiller from Podoll

and Podoll. And then appearing on Webex is co-counsel, pending pro hac, Ben Sisney and Nate Moelker from the American Center for Law and Justice. And we represent the Intervenor.

THE COURT: Okay. And I don't think there's been any pro hac requests made to date.

MR. MELITO: It's pending, Your Honor, and we're going to be filing with the Supreme Court and then that'll be sent down to you, I understand.

THE COURT: Okay.

MR. MELITO: Thank you.

THE COURT: So back to the substance. Am I correct that the Plaintiffs do not object, the motion to intervene?

UNIDENTIFIED VOICE: That is correct, Your Honor. We will be opposing some of the claims, in fact, all of the claims in the petition, but not the motion to intervene.

THE COURT: Okay. And how — and I — and, Mr. Gessler, how about former President Trump?

MR. GESSLER: I'll just step up over here, Your Honor. No, we do not oppose.

THE COURT: Okay. And I received the notice filed, Mr. Kotlarczyk, by Griswold. So, I mean, it's my view

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that I always have the ability to, you know, do things to cause efficiency and I'm going to do that regardless. So to the extent parties are aligned, I'm not going to, you know, let everybody double up so we hear everything twice. And I certainly do agree with you that the — that former President Trump and the Colorado Republican Party are aligned in this case. I think he's probably the de facto head of the National Republican Party. So I'm going to grant the motion to intervene, but we will be working towards avoiding duplication, and in some case, potentially,

briefing, because, you know, I don't want to read everything twice as well.

MR. GESSLER: Understood, Your Honor. Thank you.

THE COURT: Okay. So what I really originally called this hearing for was, is I was getting repeated requests for an expedited case management conference. And, you know, in a normal case, we don't do that until after the Defendants have had a chance to respond to the complaint and any motions to dismiss have been ruled on. So I was hoping to hear from the Plaintiffs on why we should be having a case management conference when we haven't had any response from the Defendants. And then, of course, I'll hear from the Defendants and the Intervenors on that issue as well.

MS. TIERNEY: Thank you, Your Honor. I'm happy to address that issue.

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So the reason for the request for an expedited process is because this case arises under the Election Code, in particular Section 1-4-1201 et. seq., in specific, 1-4-1204. And the process for challenging the qualifications of a presidential primary candidate are laid out in section 1-4-1204(4).

And that process requires that a verified petition be made in writing filed with the district court in accordance with Section 1-1-113, which is the regular procedure for filing claims in an election case in — under the Election Code, and those claims have to be filed no later than five days after the filing deadline for candidates. There is not an earlier time bind — time bound. And then a hearing must be held within five days after that challenge is filed under that statute.

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At the hearing, the Court hears challenges — hears the challenges and assesses the validity of all alleged improprieties, and the Petitioners must sustain the challenge by a preponderance of evidence.

That process is expedited for a reason because of the election calendar, which dictates when things have to be done in an election year. And that calendar has a number of deadlines upcoming, but the most important one is January 5th, 2024, which is the last date to certify candidate names to the primary ballot.

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Thereafter — so as we lead up to that date, any time before December 11th, which is the deadline for primary candidates to submit a statement of intent, they can start submitting those — that statement of intent now. They can — the political party can submit its statement of a bonafide candidate now. So the Secretary is going to be faced with taking action or she is about to take action that we believe will amount to a breach. So she will be committing a breach or neglect of duty under 1-1-113.

So this case — — also importantly, we know that this case is of a national importance and is likely to see appellate review, not only to the Colorado Supreme Court under the 1-1-113 process, but also possibly to the U.S. Supreme Court. And if we are going to get through all of those appeals by the deadline to certify ballots on January 5th, we believe we need to start this process now.

Because the statute calls for an expedited process to have a hearing within five days, we've — we're — as you know, we filed this case on September 6th, it was removed to federal court, we're back down. We understand that the case is very complex. There are lots of issues, there's lots of parties, lots of lawyers, most importantly, and — but we

— nonetheless, the statute calls for an extraordinarily expedited process in this — in these kinds of cases.

And so we believe that not only do — would we

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seek an expedited case management conference, but we would seek an expedited process to hold a hearing at which the Court can hear evidence about the alleged improprieties and issue findings of fact that then can be reviewed if the appellate courts deem that that's what they would like to hear.

I did just want to make one distinction between 1-5 — 1-4-501, which is the statute — and if it would help, Your Honor, I have printed out the relevant statutes that we're going to be talking about today, and I have copies for everyone.

THE COURT: Sure.

MS. TIERNEY: Might I approach?

THE COURT: Yeah, that's fine.

MS. TIERNEY: So in that packet, Your Honor, we've got the — what we believe are the relevant statutes for — possibly for today, which include 1-1-113, which I've just been referencing, where — which talks about how the secretary — how a claim can be brought when the secretary is about to — has committed or is about to commit a breach or neglect of duty, and, of course, 1-4-1204(4), which lays out this expedited process that we've been talking about here.

I did just want to distinguish the process in 1-4-1204 from the process laid out in 1-4-501, which is also in your packet, because I anticipate we're going to be hearing about that here. And 1-4-1201, et seq. was citizen initiated

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in 2017. That sets up a separate process for presidential primaries and presidential primary candidates and how

you challenge those candidates. 1-4-501 is the process that is used for all other state and — you know, candidates that are running under the Colorado Election Code.

The difference in those two statutes in terms of when the challenge must be brought is what I want to bring to your attention. In 1-4-501, the language states that qualifications of any candidate may be challenged by an eligible elector who lives in the district for which the candidate seeks office within five days after the designated election official's statement is issued that certifies the candidate to the ballot.

THE COURT: So —

MS. TIERNEY: So that language cabins the timeframe in which you can bring that challenge, within those five days. Contrast that with 1-4-1204(4), which doesn't create a time bar at the front. It just says that challenges to the listing of any candidate on the presidential primary ballot must be made in writing and filed with the district court in accordance with Section 1-1-113 no later than five days after the filing deadline for candidates. That's in 1204(4).

So we believe that this case is ripe to be heard and that an expedited process is required by the statute, and

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we'd like to move forward with scheduling that process as soon as possible.

THE COURT: Okay. Mr. Gessler?

MR. GESSLER: Thank you, Your Honor. As a prefatory (sic) comment, I think on behalf of Donald Trump, we want this case to move with a sense of purpose, but there is no statutory basis or proper basis for the hair on fire five-day approach. And let me explain how that is.

So with respect to the complaint here, this complaint was brought under three bases for the complaint; Section

113, Section 1204, and then the Declaratory Judgment Act, both the rule and the statute. Let me fur – the timeframes are contained, at least the ones the Petitioners are relying on, are contained in the statutory claims, 113 and 1204.

This is a 14th Amendment case. I think it's pretty clear from the pleadings, from the substantial analysis, the gravamen of the complaint, is that the claim is that Donald Trump is barred by the 14th Amendment. With respect to 113, this — and this is — sort of provides foreshadowing or a hint of things to come for our motions, upcoming motions to dismiss, but I think they're relevant now.

The Colorado Supreme Court on two occasions recently has been — made it very clear that constitutional claims may not be litigated in a 113 proceeding or under 113

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procedures. This isn't, you know, weaving together a web of arguments and inferences, it's just black letter case law in Colorado. And I would direct the Court's attention to *Frazier v. Williams*, that's a Colorado Supreme Court case, 401 P.3d 541. That was decided in 2017.

In that instance, Frazier was a U.S. Senate candidate and barred from the ballot based on a district court. He had raised constitutional claims. After that case was resolved, then there was a separate Supreme Court proceeding, the one I just mentioned, which said very clearly that you can't bring in 1983 in the underlying constitutional claims as part of a 113 proceeding.

And the reason why is 113 moves too fast. It's very, very quick, constitutional claims need greater consideration, and that the 113 is a procedural vehicle that only allows violations of the Election Code, not violations of the U.S. Constitution. So that's *Frazier v. Williams*.

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One year later, petitioned another ballot access contest for another federal candidate. This was Congressman Doug Lamborn at the time, and that's Kuhn v. Williams, spelled K-u-h-n, 218 CO 30-M, that's the more modern citation, but that case reiterated the — it cited Frazier and reiterated it, and I'll just quote paragraph 55.

It says, finally, to the extent the Lamborn Campaign challenges the constitutionality of the circulator

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residency requirement in section 1-4-905, it says, this court lacks jurisdiction to address such arguments in a Section 113 proceeding, it cited to Frazier, and says, holding that – and it described Frazier saying, holding that this Court has — this Court has jurisdiction to consider only claims of breach of neglect or — of duty or other wrongful act under the Colorado Election Code, and that was emphasized, when a petition is brought through a Section 113 proceeding. Therefore, we express no opinion on this issue, the this being the constitutional claim.

So Kuhn was very clear, you do not litigate constitutional claims under a 113 proceeding. We will be moving to dismiss under 113 under directly controlling Supreme Court precedent. But my point for purposes of this conversation is that the expedited procedures of 113 do not apply and cannot apply to a constitutional claim.

Now, let me turn to 1204. 1204, there's also not a statutory basis, regardless of 1-4-501, that's not at issue in this case. What really is at issue is the 1204.

In 1204, there's a couple deficiencies, and again, this is a precursor to our motion to dismiss, but for purposes of the hair on fire filing, it says no later than 60 days — this is in subsection (1) — the Secretary of State shall certify

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the names. In other words, it is certification that triggers a cause of action under 1204, and that makes

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sense.

Unless there's a certification, unless someone is certified for the ballot, there is no cause of action. There is no basis for this. And that's the purpose behind the five-day hair on fire deadline. The belief is that once you have certification, you're bumping up against a deadline for printing ballots and whatnot, and so the case needs to move very quickly. That's the basis.

So in other words, 1204 doesn't even apply until there's a certification. And I'm sure the Intervenors will represent, because I've spoken to them, that there's not a single Republican presidential candidate who has gone toward — to the party to ask for a certification as a bonafide candidate, let alone anyone who has actually submitted a statement of intent to the Secretary of State. So none of that — none of that has happened. And, of course, the presumption is that Donald Trump will be filing a statement of intent in Colorado, but that hasn't happened yet.

I would also point out that within 1-4-1204, there is no basis for challenging a candidacy under the 14th Amendment. I'm sure you will hear in the briefings that there's debate as to whether or not a state can actually do that, but for purposes of 1204, Colorado has not done it. You can sort of look through it in vain to find anything. And the closest that comes is section (b) where it says a presidential

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candidate has to be a bonafide candidate as determined by the state party. So it's the state party that has that

authority or that state law delegates that authority to, to say is a bonafide candidate.

My purpose in raising these points now, and we'll further elucidate them in a motion to dismiss, is that there is no basis for the hair on fire five-day — no statutory basis at all for the five-day hearing. And then 1204, of course, refers to the procedures of 113. That's internally consistent, but 1204 suffers from the same infirmities pointed out by *Frazier v. Williams* and *Kuhn v. Williams*, in that you don't have constitutional litigation, specially this type of constitutional litigation where it's a case of first impression in many ways that has nationwide significance, in a five-day timeframe. So the 113 and the 1204 proceedings simply do not apply.

Now, I understand that the Petitioners have claimed that Donald Trump is a candidate for purposes of Colorado law, and to be frank, that just doesn't have merit. To be a candidate, okay, I mean, there's — do you even want me to go there?

THE COURT: Well, I don't want to argue the whole case.

MR. GESSLER: I understand, but let me just —

THE COURT: In the question of whether —

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MR. GESSLER: Okay.

THE COURT: — there should be — we should be starting to kind of plan the process of the case.

MR. GESSLER: Fair enough. Let me point out just a few other things then. Let's talk about timeline. Okay?

THE COURT: And so before we — before you, because I want you to address this before you stop, I don't — it's not my impression at least that the Plaintiffs are asking for a five-day hearing. If that were the case, they would have called my chambers and said, set the hearing.

They seem – I believe they seem to want to kind of set out a timeline to get a resolution so that they can go — one party or the other can go to the Colorado Supreme Court if necessary, and potentially the United States Supreme Court.

And so — and I — and one of the things I want to hear from them is, like, what it — what does that timeline look like for you because I don't think it's five days. And what I'd like to hear from you, at least in part, is if we assume we're not doing the five-day timeline —

MR. GESSLER: What are we doing?

THE COURT: Or — yeah, what are we doing.

MR. GESSLER: Yeah.

THE COURT: And maybe, you know, I mean, I think under your theory, it is a five-day timeline because

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essentially I assume to some extent you're saying that I'm going to have to wait till former President Trump asks to be on the ballot and then we have five days — they challenge, five days later we have a hearing, and everything has to happen between December 11th and January 5th?

MR. GESSLER: Not necessarily, Your Honor. Under the statutory claims, yes. But remember, there's a declaratory judgment claim as well which tees up the 14th Amendment directly. So that — and we'll be filing motions to dismiss on that. And despite your desire not to read duplicate things, you're still going to have to read a lot, I think.

THE COURT: Yeah.

MR. GESSLER: But there's still the declaratory judgment action, so. Now, we don't want to wait and put this in — stay this until, you know, mid-December and then run around with our hair on fire, so.

THE COURT: Okay.

MR. GESSLER: So yeah, I mean, we should brief the 14th Amendment issues and their applicability, and we're happy to file the motions to dismiss with respect to the statutory claims. Let me just tell you sort of on a broad level what our goals are.

THE COURT: Okay.

MR. GESSLER: Okay. And we want to be able to have fulsome briefings for a motion to dismiss. Okay? We want [p.18]

to be able to test the sufficiency of this because we do think there's going to be some problems with it. We file — we plan on filing two motions to dismiss; one, your normal motion to dismiss, and then a anti-SLAPP special motion to dismiss because we believe there's very strong First Amendment issues here as well. And there's an entire line of cases, *Brandenburg v. Ohio*, that talks about speech that incites types of behavior and types of speech that doesn't. So there's a pretty thorough body of case law that talks about that line. It does not appear in the — in the complaint, in the petition here, but we want an opportunity to do that. Okay.

The next thing we want is to understand what the evidence is that's going to be relevant because sort of saying things like insurrection, rebellion or, you know, comfort and aid to enemies of — I think they've characterized enemies of the constitution, are somewhat inchoate, and we want to obtain some greater level of precision on that. It's very difficult for us to contest, with well over 400, almost 500 allegations, it's almost like seeing a big pile of hay and trying to figure out which pieces are relevant. So we want some clarity on that, and we want to understand what the evidence is.

In our conferral, the Petitioners have said they expect to have three days of direct testimony, including several experts. So obviously we don't know what those are yet, and we want to find that out, too. So we want to be able

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to do sort of these thorough briefings, we want to know what we're facing, and we want to have an opportunity to contend with that.

With respect to the deadline, yes, January 5th is the deadline for certification. I would — we actually have — that's about three and a half months. And I know Mr. Kotlarczyk is going to grit his teeth when I say this, but we do have more time than that as well. And I would refer the Court to, again, *Frazier v Williams*. Okay?

In this case, it was a trial court case, and that's 2016CV31574. And what happened there is the Secretary of State issued a statement of insufficiency to Mr. Frazier one day before certifica — the certification deadline. So that really was hair on fire. And we went through that and Frazier lost in district court. But nonetheless, the district court stayed the certification deadline so that a Supreme Court appeal could be heard.

And then the Secretary of State agreed to put Frazier's name on the ballot, even though he was not qualified under the district court ruling, with the proviso that if Frazier did not prevail on appeal, the votes cast for him would not be counted. And then — so that's what the — sort of what the resolution was there. Then it went through about a three-week appellate process in the Colorado Supreme Court. Frazier did prevail and so votes for him were

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counted. But in that instance, the — just to sort of the timeline, and I'm happy to provide supplemental if — you

know, you don't have to weed through all the specific pleadings — but basically the statement of sufficiency was issued on April 28th, for a sense of timeframe, the certification deadline was April 29th. The Supreme — the stay — the Secretary of State ultimately agreed on — I'm sorry, Secretary of State agreed on I think it was like the 9th of May to print ballots with Frazier's name on it pending the resolution of the appeal, and the appeal and then the remand to district court was finally resolved on May 25th, so almost a month after certification deadline. I'm not advocating this type of approach, but I'm also informing the Court how things have worked and can work in reality.

I'd like to just point out two other things. Right now the Secretary of State has not taken a position on whether they support the Petitioners or are going to defend and align themselves with the Respondents or if they're going to sit on the sidelines. I have seen cases where Mr. Kotlarczyk sits in the jury box and cheers the Court to move efficiently so there's adequate time for the Secretary of State. I've seen the Secretary of State when they defend the process. I've never seen the Secretary of State align themselves with Petitioners, but there's a possibility that will happen in this case.

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If I were betting, I'd likely think that it will happen because in the days immediately following the — following this complaint, on national media the Secretary of State essentially parroted or repeated the exact same claims the Petitioners made and basically made the same claims herself, so they very well may align themselves with Petitioners. And if that's the case, we're going to have to consider that, and that throws I think a wrench in the process that historically I've never seen before. So

we'd have to figure that out once the secretary decides how they're going to align themselves. My understanding is they're planning on doing it towards the middle of this week.

One other sort of pseudo-wrench in the gears is right now, we found out on Friday that in fact there was a federal case filed in Colorado District Court challenging Trump's — President Trump's qualifications under the 14th Amendment. That was filed in federal court on August 16th, preceding this case. And then there was an amended complaint filed on September 8th. We've not entered an appearance on that. We're still sort of evaluating it. But along those lines, there are at last count 30 cases nationwide that have been filed on this exact issue, mostly in federal court. And so we may be ultimately seeking consolidation through multidistrict litigation or some other procedural vehicle to try and create some sense of efficiency.

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I would note that along those lines, and I'm sure you did, too, learn about this in law school, *forum non conveniens*. I've never once made this argument in my entire career, but we are looking at an event that occurred, you know, almost two years ago, 2,000 miles away, that is wholly outside the Court's subpoena powers, this Court's, and our ability to obtain witnesses and, you know, compel witnesses and evidence in this case. And that's another wrench and that bears with a multi-district litigation.

I'm hopeful we will have answers in a – you know, be able to approach this Court and say, this is the position we are taking nationwide and this is how we view this case as well, within a week. That's my hope.

One last thing is I've been informed that the National Republican Party is interested in intervening in this case. I say interested, apparently they're having an executive committee meeting today because they don't have authority to intervene absent that. So we will know within a couple days as to whether they plan on intervening. And I think the basis for their intervention is that this process is a presidential primary preference poll for delegates to the national convention.

And then there's a whole line of cases, *Wisconsin ex rel. LaFollette* from the Supreme Court, which basically says the national party has control over its

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delegates and the states are limited in their ability to do that with a private party. So it's a big onion with a lot of layers. We obviously want to be able to brief those layers and present argument to this Court, test the sufficiency, and — of — and then, of course, understand just exactly what we're facing.

We believe we have a good three and a half months and perhaps more if necessary, and that includes appellate process, which we're comfortable with. I do believe that — you know, 113 is a discretionary review by the Colorado Supreme Court. We don't think that applies, but I do believe that the Colorado Supreme Court would look at this essentially under the same standards as a C.A.R. 21. That's discretionary, too, and I have no doubt that the Supreme Court Justices may have heard of this case and are looking at it, as are many.

So we're prepared for this and — but we just want the opportunity to have a fair defense and move forward. So we do believe that a sense of purpose is warranted, but not quite the five-day sense of hair on fire.

THE COURT: Okay. So I'm going to ask the same thing of Ms. Tierney. What do you want to get out of this status conference? I mean, I'm going to order expedited briefing on your motions to dismiss, but it doesn't sound like you're opposed to kind of having some sort of parallel moving forward, or are you wanting a ruling on your motions to dismiss

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before anything else happens?

MR. GESSLER: We very strongly want a ruling on the motions to dismiss before going forward with any evidence. Now, one of the motions to dismiss will be an anti-SLAPP motion. That procedure calls for the Plaintiffs putting on evidence on an affidavit format so the Court can at least test their theories against the First Amendment. That may be a way to sort of resolve this and help us understand exactly what we're looking at.

But yeah, we think — our position is that this is — the case frankly should fail under both statutory claims, pretty — in short order, that there is not a basis under the 14th Amendment. There's going to be standing issues because they did confess that they don't have a particularized or concrete injury here. So we are going to want that resolution, and that itself may wind up being an appealable issue prior to the — prior to evidence. And so, we very strongly would like a ruling on the motion to dismiss before — our two motions to dismiss before going forward with evidence in any manner whatsoever.

THE COURT: Ms. Tierney?

MS. TIERNEY: Thank you, Your Honor.

THE COURT: And I'm going to let the other folks weigh in. I just — at this point, I'm still not quite sure what the Plaintiffs are hoping to have me do.

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MS. TIERNEY: Thank you, Your Honor. Let me try to explain that better. What we would like to see happen is for this matter to proceed more along the lines of how 1-1-113 cases normally proceed, or in the alternative, like a preliminary injunction, because in that way it all moves forward at the same time, arguments all get decided as the Court hears the case. If we end up with motions to dismiss and interlocutory appeals, there is no way we're going to be able to get this case done by the deadlines.

And I will just say one thing about Mr. Gessler's comment about extending the deadline beyond January 5th. While it's true, it has been done occasionally, UOCAVA ballots, which are the ballots that go out to overseas military voters, go out on January 20th. And if those ballots go out with an ineligible candidate on them, we're going to disenfranchise a whole, whole bunch of people. So it would definitely be the — and before the, those ballots can go out, which is a federal deadline, the ballots have to be laid out and printed, and so whether we have time beyond January 5th, it might be a couple of days at most, I think, what we're looking at for an extension there.

THE COURT: Yeah.

MS. TIERNEY: So we really believe that having a full — while motions to dismiss are fine if Your Honor wants to go that way, we don't think they're necessary here. They

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are never, almost never done in a 1-1-113 action because they're so expedited. And if — when they are done, they're filed and then they're — the response is argued orally at the hearing. We believe that the case should

proceed and all rulings done at once so that we don't end up in an interlocutory appeal situation and run out of time.

THE COURT: So your view is we have a hearing and the defense is that they would — or the motions to dismiss would all be ruled on at this hearing?

MS. TIERNEY: That's correct, Your Honor. And that — we don't —

THE COURT: But —

MS. TIERNEY: Sorry.

THE COURT: — part of their hearing — part of their motion to dismiss, as I understand it, is going to be ripeness and — you know, if it's not ripe, I'm not sure that you kind of kick into the expedited proceeding. No?

MS. TIERNEY: You are correct. We're pretty confident that we can defeat that argument based on the fact that President Trump, former President Trump has announced his candidacy, is out campaigning, has raised money in Colorado so that he is a candidate under any definition of the word, and that the different language in 1204 dictates that we can bring that case now, not wait.

THE COURT: As I understood it, the kind of —

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the crucial language was the about, right? Isn't it whether she's about to do —

MS. TIERNEY: About to do.

THE COURT: — about to do something?

MS. TIERNEY: And because there's no front-end deadline to when that can happen, Your Honor can — and we can present evidence on this, but in 2020, President Trump filed his affidavit in October. Candidates don't wait until December 11 — 10th to do that. So, yes, we believe that we need to present all the evidence at one time and that Your Honor rule at one time so that we don't end up in interlocutory appeals.

And let me say one thing about the SLAPP, the anti-SLAPP argument. That is not a proceeding under 1-1-113, and that shouldn't have to be heard at the same time as the 1204 claim. Despite Mr. Gessler's argument that our — we've brought a claim under the 14th Amendment, we haven't brought a claim under the 14th Amendment. We've brought a claim under 1204 that he's not eligible to be placed on the ballot.

THE COURT: Yeah.

MS. TIERNEY: So —

THE COURT: So in your perfect world, we would set a hearing when?

MS. TIERNEY: In October. We'd like to be done with district court by the end of October so we have November and December to get through the appellate process.

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THE COURT: Okay. Mr. Gessler, in your perfect world, when would this hearing be?

MR. GESSLER: Probably towards the end of November. Look, I understand that there's time for the appellate process, but the *Frazier v. Williams*, because that's fresh in my mind, that was entirely — that entire appeal was done in 15 days. And to say that we have to steamroller through a case for 104-page — my apologies, Your Honor — to steamroll a case with a 104-page complaint with almost 500 allegations, with no testing of the complaint on a constitutional issue that has never been decided on its merits in any court in the country and has not even been considered by any court for almost a hundred years, for over a hundred years, since the attorney generals in the — as late as 1922 were able to disqualify candidates, is I would submit just utterly outrageous and unfair as well.

The appellate process can move quickly. It has moved quickly. The tail should not be wagging the dog here. The — this complaint, the sufficiency should be tested. And I know Ms. Tierney said under any definition Mr. Trump's a candidate, so I'm going to go there. And Mr. North has reminded me not to let my face get all red on this issue because I have —

THE COURT: It's already red.

MR. GESSLER: It's always red. It drives me
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nuts, Your Honor.

Look, there's three forms of candidate. There's sort of the colloquial sense. I self-identify as a candidate. I'm like, hey, I'm a candidate, I'm running, I'm going out talking to people. That's a colloquial term. Then you have candidate for campaign finance terms under law. In other words, the candidate, the self-identify has to do something that triggers a law. And there's two forms of triggering a law. One is the campaign finance world and one is the ballot access world.

The Plaintiffs — or the Petitioners have repeatedly referred to the Colorado Constitution, Article 28, Section 2, Subsection 2, the definition of a candidate. And they said, well, he's — Trump's a candidate under the Colorado Constitution. And they said because a candidate — candidate is when they, you know, they announce and take an action. Well, that's Colorado Campaign Finance Law and it ignores two sentences prior in which the Colorado Constitution says a candidate for state or local office.

That makes sense. That's Colorado campaign finance law as compared to federal campaign finance law. The two are different bodies of law, and Trump is a candidate under federal campaign finance law. He is not a candidate in Colorado for purposes of ballot access. That's 1204. And

you don't become a candidate for 1204 to trigger all of this stuff

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until the Secretary of State certifies you as a candidate. That's a slightly different framework than some of these other approaches, and that's what triggers the 1204 five-day review.

So, no, Trump is not a candidate under any sense. He's not taken any action here in Colorado for ballot access. So he's simply not a candidate.

THE COURT: Okay.

MR. GESSLER: But we would like — if there's a hearing, we'd like to see it towards the end of November. The Plaintiffs — or the Petitioners have said they have three days of direct testimony, so they've obviously got their evidence lined up. That may change. I don't — I'm not —

THE COURT: So that —

MR. GESSLER: — here to hold them to it.

THE COURT: — was my other question is how long a hearing are we scheduling?

MR. GESSLER: And we have no idea what our evidence would be. Again, we're laboring under more than a difficulty when we don't have any service of process, and any witness is 2,000 miles away and they've made allegations over the span of five or six years, events that we're supposed to parse and try and figure out what's relevant and what's not over 500, almost 500 allegations. So we can't answer that question right now. But it seems as though they have an answer

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including experts. And frankly, we're going to challenge experts, because that's opinion testimony that's oftentimes based on hearsay and I'm not quite sure —

well, we'll see. We'll see how they endorse their experts, but we need time for that process as well. Thank you, Your Honor.

THE COURT: Okay. So it sounds like we're talking about at least a five-day hearing. Mr. Kotlarczyk?

MR. KOTLARCZYK: Thank you, Your Honor. Let me start with —

THE COURT: And sorry to interrupt you, but I doubt I — you know, I know everybody has a lot of opinions on the kind of overall arguments in the case, but I would at this point like to, you know, kind of stay focused on, like, how is this case proceeding —

MR. KOTLARCZYK: Absolutely.

THE COURT: — because I see my job as to get this case to the next step, whether it's dismissal or the Colorado Supreme Court.

MR. KOTLARCZYK: And that's exactly where — that's what I want to confine my comments to this morning, Your Honor. Let me start with the suggestion that there's some give in that January 5th date. It is a very hard deadline established by statute. I have January 18th as the UOCAVA

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deadline, which is the deadline by which, under federal law, the State of Colorado will be out of compliance with federal law if we have not sent ballots to military and overseas voters. And that is not just hit Control-P on a screen, there is an elaborate process with laying out and preparing a ballot. So that January 5th deadline is a very important deadline in the view of the Secretary of State.

In terms of the procedure pre-January 5th, we — we litigate 113 actions all the time, often with some of the characters in this room, some of the individuals in this room. There is almost never, in fact never that I can recall,

motions practice in a 113. That doesn't mean there aren't arguments raised that go to dismissal. Those can be raised in any manner of — in any manner for — including in pre-hearing briefing. And we would suggest, and I think that the timeline I heard from Plaintiffs would allow for pre-hearing briefing to be filed by all the parties if there's a hearing in October.

I think any arguments that our co-Respondent wanted to make with respect to dismissal could be handled in pre-hearing briefing, and if the Court was persuaded by those arguments could dismiss prior to the hearing. But the idea of there being a separate round of motion to dismiss briefing in a 113 prior to the actual merits being considered in a 113 is not a process we're familiar with.

And we, frankly, you know, we — and we're
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usually here in even-numbered years, but we're here multiple times a year in — on 113 actions. And when there is the opportunity for briefing for a hearing, we almost uniformly request it. Sometimes, to use Mr. Gessler's phrase, we're in a hair-on-fire situation and there's no time for pre-hearing briefing. I don't think that's the situation. I think there is time for pre-hearing briefing. And I think any arguments that go to dismissal of the 113 action could be raised and addressed in that pre-hearing briefing.

So that would be our suggestion, Your Honor, in terms of a process from here, that the parties raise and address any of those preliminary matters combined with any other arguments they have to include in that — those pre-hearing briefings. Unless you have any other questions, Your Honor, that's how we typically see these 113s proceeding and how we think would be most efficient for this to advance as well.

THE COURT: Okay.

MR. MELITO: Your Honor, I'll be mindful of the Court's caution about not duplicating. So with that, I can say that our client is not in conflict with anything that Mr. Gessler has said so far. We agree with his case law analysis on Frazier and Kuhn. And then lastly, I would just point out that 1204(1)(b) is a statutory right that's oriented towards the benefit of the party. I think that's important to

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consider.

As far as the Court's request for logistical input, we would certainly have our own motions to dismiss, and we believe at this time the claims are not yet ripe because we don't have a candidate that's been designated, and of course he's likewise not been — or any person has likewise not been certified under the statute. So, I'll end there, Your Honor.

MS. TIERNEY: Your Honor, might I add one thing?

THE COURT: Sure. Sure, sure.

MS. TIERNEY: Thank you.

I did just want to very briefly respond to the candidate argument so that Your Honor isn't left with a — any confusion about the Petitioners' position on that. So while the constitutional definition does refer to state or local candidates, it's important to note that 1201, et seq. incorporates Part 9 of Article 4, and in Part 9, they adopt the candidate definition from the Constitution. So — and 1204 uses the term candidate at least four times. So what — and it doesn't define candidate.

So if you read all of those things together, the adoption of — the referral to Part 9, which has the definition of candidate adopting the constitutional definition, that term has to mean something in the context of a presidential

candidate. And since that provision uses that term over and over and over again, adopt — and refers to Part 9 for a

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candidate's petitioning, we believe that it — the statute has extended that definition to include a presidential candidate.

THE COURT: Okay.

MS. TIERNEY: I'll sit down in just one second. I also just want to note the argument about that there is a complaint with 500 different allegations and that they haven't had time to respond, there's been numerous press reports, and I'll point to an April 14th article from the Washington Post — April 18th article from the Washington Post where the Trump Campaign says, yes, we're preparing to respond to all of these Section 3 of the 14th Amendment challenges. We're working hard to respond to these or preparing to respond to these.

So to the extent that there's a suggestion that they've just learned about this on September 6th, we just want to point Your Honor in that direction. Thank you.

THE COURT: So I guess I — I guess — does anybody have — so what I hear the Plaintiffs saying is — and Mr. Kotlarczyk, just deal with everything at this hearing that we're going to have. And what I hear Mr. Gessler saying is you need to rule on the motions to dismiss before we could possibly have a hearing. But there's certainly the ability for those to go in tandem in the sense that there's no reason not to schedule the hearing while the Court's considering motions to dismiss.

And as I said, I see my job is, at least in

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part, you know, getting this to the Colorado Supreme Court, assuming that it proceeds forward. And I feel as

though I think I need to get them a ruling by Thanksgiving, and I'm not going to rule from the bench on a case like this.

So I think that what we will do is we — and I'm just, you know, looking at my trial calendar, which of course doesn't include any weeks in which I don't have a trial. But I think the thing to do is we're going to set a week-long hearing for November 6th. I'm going to ask when is — when would a response otherwise be due in this case? Does anybody know based on —

MR. KOTLARCZYK: Well, Your —

THE COURT: — based on service?

MR. GESSLER: Under 113, Your Honor, it's ambiguous. Oftentimes, 113 cases don't even receive an answer.

THE COURT: Okay.

MR. GESSLER: If you're operating under that framework. Here's what we'd like. We'd like two weeks to file a full motion to dismiss, Your Honor.

THE COURT: Well, it strikes me that you're pretty far along on your motion to dismiss because you've been citing all sorts of case law to me as to — none of which I've written down because I want to see the arguments in writing. So I —

MR. GESSLER: So may I —

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THE COURT: Go ahead.

MR. GESSLER: — say one thing? I can give you a partial motion to dismiss by the end of this week based on what I've told you. So I'll tell you just how we look at it. There's three categories of motion to dismiss. One is a statutory claim under 113. One is a 1204. We think those are — we can dispose of those pretty quickly.

THE COURT: When you say dispose of, you mean file?

MR. GESSLER: I can get you something by the end of the week.

THE COURT: Okay.

MR. GESSLER: With respect to the declare — request for declaratory relief, we can file a partial motion to dismiss on that by the end of the week as well. Petitioners have already said they don't have a concrete and particularized claim for Article 3 standing, and the federal court and Colorado courts file the same standards with respect to this. We can give — we can get you something pretty quick on that. That's the first category.

The second category is the anti-SLAPP motion. That shouldn't take us very long as well. I can't promise we'll get it done by the end of the week, but I can look at that a little bit more today and give you a better sense, certainly within two weeks.

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The third category is the stuff every law professor seems to hold forth on and write an article about in a national publication. And there's a lot there, you know, is Trump an officer of the United States? What is the definition of insurrection? Who — you know, is the 14th Amendment self-executing?

THE COURT: But to me that all seems like something appropriate for the hearing itself.

MR. GESSLER: I'd submit, no, it's not. I would submit that this is — if a statute is not self — if a constitutional provision is not self-executing, then the Court is without jurisdiction to even hold a hearing. So I would submit otherwise, but we can get that stuff done in two weeks. So I can get you a partial motion to dismiss by

the end of the week, and I can get you more fulsome one in two weeks.

THE COURT: Let's do this. File — you're going to file a motion to dismiss on everything except for the third category by Friday, and the Plaintiffs will respond — well, Ms. Tierney, how long do you think you need?

MS. TIERNEY: Your Honor, we can respond in a week.

THE COURT: Okay. And then the Defendants have a week to reply. I'd like you —

MR. GESSLER: That works fine, Your Honor.

THE COURT: I'd like you to coordinate your

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filings with the Intervenors, please, and not do separate ones unless the Intervenors are moving on some separate issue that you're not moving on.

MR. GESSLER: That sounds fine, Your Honor.

THE COURT: And I don't know what you're going to do, Mr. —

MR. KOTLARCZYK: Briefly on that point, Your Honor, as Mr. Gessler said, there is not a process for a response or an answer in a 113 since they're summary proceedings. So it's not our intention at this time to be filing anything in terms of a motion to dismiss or answer.

THE COURT: Okay.

MR. KOTLARCZYK: I just don't want the Court to be surprised if — and I certainly don't want the first answer we file on a 113 to be to a 500-paragraph complaint. So I just don't want the Court to be surprised if, you know, time elapses —

THE COURT: Yeah.

MR. KOTLARCZYK: — and there's no motion to dismiss or other pleading under Rule 8 that's been

submitted by the Secretary of State. It's our position that those aren't required in 113s.

THE COURT: No, and that's fine. And to the extent that the Secretary of State wants to chime in on the motion to dismiss in a way that is different than the

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Plaintiffs, she's welcome to do so.

MR. KOTLARCZYK: Thank you, Your Honor.

MR. GESSLER: And, Your Honor, we have no objection to the Secretary of State not filing an answer.

THE COURT: Yeah. So then the question is, you know, some sort of pre-hearing schedule in terms of disclosures both of witnesses, exhibits, expert disclosures since it sounds like you're planning on having them. And, you know, I would love for the parties to meet and confer and try to come up with a schedule now that you have a hearing date. So why don't we do this? Why don't you try to come up with a schedule that people can live with and

—

(Court and staff confer briefly)

THE COURT: Sorry. Colin is reminding me that the courts are closed on the 10th for Veteran's Day, so it's not a full week. So let's go back to the drawing board on that. Let's do it the — I'm going to vacate my two-week trial that is starting on October 30th. So we'll start on the 30th and that way if it needs to go into the following week, we will. And on the motions to dismiss, my expectation is your last one will just trail a week behind.

MR. GESSLER: That's fine, Your Honor.

THE COURT: And my expectation is that I will rule on what I think needs to be ruled on prior to a hearing. But to the extent that when I read the motions, I think that

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the Petitioners are — have the right view of it, and that it all should be decided at one time, then I'll decide it all at one time. So does that make sense? So to some extent, to the extent I don't think it needs to be ruled prior to the hearing, it'll, you know, be essentially kind of pre-hearing briefing.

MR. GESSLER: That's fine, Your Honor.

THE COURT: Okay. So in — so please meet and confer, and come up with essentially a trial management order that will include when you're going to exchange things, when you're going to provide things to me. That should include exhibit lists, witness lists, Rule 702 motions. I don't know if you're hoping to have some sort of — you know, if you want depositions. Whatever people want, they should try to come to an agreement, and if they can't come to an agreement, then we will have a hearing on — and I want to do this quickly because I want you to know what is and isn't going to happen.

So we'll have a hearing on Friday to — where I'll decide whatever it is the parties can't decide as to what's going to happen between now and October 30th.

MR. GESSLER: This coming Friday?

THE COURT: Yeah. And we can do that either live or over Webex, just let me know how you want to proceed. And that should also include like, you know, pre-hearing submissions, when they would be submitted to the extent people want to do that, et cetera.

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MR. MELITO: And, Your Honor, this is rewinding a little bit, but we can coordinate with Mr. Gessler, but I'd ask for the unique motions that don't get covered by whatever joint submission you come up with, I'd ask for an extra week.

THE COURT: You're not going to be on the transcript. Sorry.

MR. MELITO: No problem, Your Honor. Sorry about that. I thought I was louder than I was. Your Honor, we can coordinate with Mr. Gessler as it relates to the particular set of motions that he plans on filing so the Court doesn't get duplicate submissions. But I'd ask for an additional one week for any unique motions that the party intends on filing. It will allow us to examine what was said to the Court and then springboard from there if we need anything extra.

THE COURT: I am not following what it is you're asking for. Unique motions in what sense?

MR. MELITO: Sure. Your Honor, you had asked Mr. Gessler to coordinate with the Intervenor —

THE COURT: Yeah.

MR. MELITO: — and we can do that.

THE COURT: Uh-huh.

MR. MELITO: But we might wind up with some motions that are different from what Mr. Gessler comes up with. In the event we think of unique areas to address with the Court, we'd like one more week to address those.

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THE COURT: Those will be at — those — that will be due on the second deadline. So the two-week, not this coming Friday —

MR. MELITO: Yes, Your Honor.

THE COURT: — but the Friday following.

MR. MELITO: Thank you, Your Honor.

THE COURT: And then all briefing is going to be a week, a week.

MR. MELITO: Yes, Your Honor.

THE COURT: A week for a response, a week for a reply.

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MR. MELITO: Thank you, Your Honor.

THE COURT: Anything else we need to talk about today?

MS. TIERNEY: Thank you, Your Honor. What time would you like us to appear —

THE COURT: Oh —

MS. TIERNEY: — on Friday?

THE COURT: — sorry. 9:00 a.m. And just email us whether people are going to be coming in person or they're going to be just participating by Webex. Prefer in person, but I know it's on short notice with no conferral on whether it actually works for other people than me.

Anything else that we need to address?

MR. GESSLER: Not from us, Your Honor. Thank [p.44]

you.

MS. TIERNEY: Nothing else, Your Honor.

MR. KOTLARCZYK: No. Thank you, Your Honor.

THE COURT: Okay. I guess we should talk page limitations on the motion to dismiss, especially given that you're doing three of them.

MR. MELITO: Can I have word limitations instead of page limitations, Your Honor? I tend to produce a fair amount of white space for readability, and I can shrink font if you want, but I'd rather have a word limit.

THE COURT: I don't have a specific word count in mind so — and, you know, I got my glasses, so why don't -- you know, just follow the Colorado Rules of Civil Procedure in terms of font, et cetera, and let's keep it to 20, 20, and 10; 20 for the motion, 20 for the response, and 10 pages for any reply.

MR. GESSLER: Your Honor, may I ask your indulgence? To write what we need with my solemn oath that I shan't waste your time in reading surplusage. I

understand that's an unusual request, but this is an unusual case with a lot to it, and I will work — I will — I promise you, I will endeavor to be concise.

THE COURT: Okay. I am going to allow you this first time, but if I —

MR. GESSLER: We'll see how my credibility holds [p.45] up, huh?

THE COURT: Yeah, if I —

MR. GESSLER: Fair enough, Your Honor.

THE COURT: — disagree with — yeah, there's just only so much I can do in a day, so.

MR. GESSLER: No, I appreciate it. I respect your position and I understand where you're coming from. And I — you know, many people have been reputed to say, I'm sorry, I didn't have enough time to write a short letter. Mark Twain comes to mind. We will endeavor to give you good, concise writing.

THE COURT: And so I will extend the same indulgence to the Plaintiffs, at least on this first round of motions to dismiss.

MS. TIERNEY: And I just want to clarify, Your Honor, was it per motion or those are the page limits for all motions, like aggregately?

THE COURT: No, that was per motion, but he's asked to proceed in good faith that he's not going to over-write, which I'm going to allow for one time. It's a one-strike rule. If it is over the top, then we're going to go back to the page limitations.

MS. TIERNEY: Okay. So just so I'm clear, Your Honor, the — no page limitations on any motion, response, or reply?

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THE COURT: Yeah. Let's see what happens.

MS. TIERNEY: Okay. And I had one more bit of housekeeping. We are considering filing a motion to dismiss on one of the Intervenor claims. And if we decide to do that, we would also file it by this Friday.

THE COURT: Okay.

MS. TIERNEY: Thank you.

THE COURT: And, well, I guess the other question I have then is, like, if — is that something that falls out — outside the scope of the kind of 113, no — normally people don't respond, et cetera? So do I need to rule on that so that you answer so that it becomes at issue, et cetera? I'm going to be honest that I — because I didn't even know until this morning whether the intervention was going to be consented to that I have not studied the petition.

UNIDENTIFIED VOICE: Your Honor, since I was handling the motion to intervene, there are three claims in the motion — in the Intervenors' petition, the first of which is a First Amendment claim, a straight-up First Amendment claim, not a 113 claim. And we would — we are considering moving to dismiss that claim. But we would request the same courtesy that Secretary of State received, that we not be required to otherwise answer the claims in the Intervenor petition.

THE COURT: And Mr. — and do the Intervenor's have any objection to that?

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MR. MELITO: Your Honor, not at this time. I may have to file something with the Court. I've just got to think through that a little bit more.

THE COURT: Okay. I think that, and given the expedited proceedings, that that makes sense, so I'm going to allow that. But if you — you know, decide that I

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made a horrible mistake, you should feel free to file something very, very short to that extent. And we can also talk about it on Friday if necessary.

With that, we are going to go off the record on 2023CV32577, and we will be reconvening hopefully to sanction an agreed pretrial schedule. But if not, I will rule on whatever disagreements exist at that point.

MR. GESSLER: Thank you, Your Honor.

(Proceedings concluded at 11:15 a.m.)

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DISTRICT COURT
DENVER COUNTY
COLORADO
1437 Bannock Street
Denver, CO 80202

Case No. 2023CV032577 Division/Room 209

NORMA ANDERSON, et al.,
Petitioners,

v.

JENA GRISWOLD, et al.,
Respondents.

For Petitioners:

Eric Olson, Esq.

Sean Grimsley, Esq.

Martha Tierney, Esq.

Mario Nicolais, Esq.

For Respondent Griswold:

Michael Kotlarczyk, Esq.

For Respondent Trump:

Scott Gessler, Esq.

Justin North, Esq.

Geoffrey Blue, Esq.

For Intervenor:

Michael Melito, Esq.

Robert Kitsmiller, Esq.

The matter came on for hearing on September 22,
2023, before the HONORABLE SARAH B. WALLACE,

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Judge of the Denver County District Court, and the following proceedings were had.

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P R O C E E D I N G S

(Participants appear in person and via Webex)

THE COURT: Let me just turn on the Webex. Everybody can be seated. We're on the record, 2023CV32577, Norma Anderson, et al. v. Jena Griswold, et al. May I have entries of appearance starting with the Plaintiffs?

MR. OLSON: Good morning, Your Honor. Eric Olson, Sean Grimsley, Martha Tierney, Mario Nicolais on behalf of Petitioners.

MR. GESSLER: Good morning, Your Honor. Scott Gessler, and with me are members of my law firm, Geoff Blue and Justin North. We're here on behalf of the Respondent, President Trump.

MR. KOTLARCZYK: Good morning, Your Honor. Michael Kotlarczyk from the Colorado Department of Law here on behalf of Respondent, Secretary of State, Jena Griswold.

MR. MELITO: Good morning, Your Honor. Michael Melito, Melito Law, and Bob Kitsmiller, Podoll and Podoll.

THE COURT: Great. Thank you.

MR. MELITO: On behalf of the Intervenor.

THE COURT: Yep. So we're here just to discuss next steps really. Before we do that, I wanted to ask the parties if they had an opinion on — we've been having — getting a lot of expanded media requests. By the statute, they need to serve the parties so that you have a chance to object.

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Nobody's objected thus far to any of them. One of the media entities has asked if they can just have a — if they can just have all the — do all the proceedings versus every time having to ask for a new one, which would certainly relieve some of the burden on the Court of having to track them and then do them individually.

Does — do any of the parties have an objection to that?

MR. OLSON: Your Honor, Eric Olson for Petitioners. Our only — so no general objection. Our only concern is, as we've flagged in the paper, sort of the identity of the witnesses becoming public. And so we don't anticipate that happening today, but there may be steps in the future where we may ask for portions of the proceeding not to be disclosed if we're talking about witness identity, depending on the protective order and how we handle that issue today or going forward.

THE COURT: Okay. And would that likely be at the hearing scheduled in October?

MR. OLSON: So at the hearing scheduled in October, we expect that to be public, but we also expect there to be a robust understanding of everyone involved as to making sure that the witnesses don't face harassment or intimidation. But we're not going to seek to close the hearing in October.

THE COURT: Okay.

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MR. OLSON: It's more if there are any preliminary matters before disclosure deadlines, we want to make sure that we're doing all we can to ensure that there's a full and fair opportunity for both sides to present evidence here.

THE COURT: Okay.

MR. GESSLER: Your Honor, as a general matter, we don't object. If something develops where we do have an objection, we'll immediately inform the Court.

MR. KOTLARCZYK: Same on behalf of Secretary of State, Your Honor. If any specific circumstances arose, we would voice our objection, but no general objection.

MR. MELITO: Same for the Intervenor, Your Honor.

THE COURT: Okay. Well, I'll think about it. And the bigger burden, frankly, is in each hearing it's that each individual one that comes in, so.

And then you mentioned a protective order. Should we start there?

MR. OLSON: Your Honor, whatever you want — you want — Mr. Grimsley is going to handle the protective order issues. I do think we've narrowed the disputes quite a bit on some of the logistics. So maybe we can start there and then —

THE COURT: Okay.

MR. OLSON: — go to protective orders if you'd
[p.6]

prefer. But really, whatever's most convenient for you.

THE COURT: No, that's totally fine. And I have some notes of things that I wanted to talk about if you didn't bring them up, so.

MR. OLSON: Okay. Well, I think on the — just the logistics, the deadlines, I think we have a few small differences. We talked this morning again. I think, I'm not sure that President Trump is in full agreement with these, but I think our — hearing all the sides, we would propose — there's a dispute over whether we produce our witness list, exhibit list now or very soon. And we think it should be very soon because we're still confirming availability. It'll be helpful to have input on whether remote testimony is an option for this as we deal with witness lists.

But on the general matters, I think we are in agreement that we, in response to their request, have agreed rather than do simultaneous disclosures, we'll stage disclosures where we go first and they go second.

THE COURT: Okay.

MR. OLSON: And so on fact witnesses, looking at the parties' submissions and what we would propose is, you know, keep our date of October 6th. I know they want it now, but we would agree to their date of October 16th for them to disclose witnesses. And then we would like to keep our date of October 25th for any rebuttal witnesses to be disclosed.

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They want the right to take depositions. We and the Secretary don't think that's appropriate in a 1-113 proceeding, so that's an open question. On experts, we proposed Wednesday to disclose them with the subject matters; we'll do that on Monday. And then I think we're in agreement on the rest of the dates.

THE COURT: Like when you say on Monday, this coming Monday?

MR. OLSON: Yes, yes.

THE COURT: You'll tell them —

MR. OLSON: The name of our experts and their bullet points, subject matter of their testimony, which is — and then I think we have agreement on reports being due October 6th, and any — from us, and any reports from them being due October 27th.

THE COURT: Okay. And then — and you were proposing that they tell you the name of any experts they plan on using on the 27th of —

MR. OLSON: On the — I'm sorry, on the 13th is when we propose that they would propose the name.

THE COURT: Oh, okay. So you would do it this Monday?

MR. OLSON: Correct.

THE COURT: But they would have till the 13th?

MR. OLSON: Correct.

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THE COURT: Okay.

MR. OLSON: And then they want depositions. We don't think depositions are appropriate, so that's something we need to address. And then on exhibits, we'll — seeing their proposal and talking this morning, we'll agree to stage exhibits. We have proposed simultaneous exhibits, but we would propose — we'll disclose our exhibits to them on October 6th. They proposed giving us their exhibits on October 16th, which is fine with us, and then we have a supplemental and objections to each other by the 23rd, which is fine with us.

THE COURT: Okay.

MR. OLSON: So I think, assuming those dates or something very close to that are okay with Respondents, that leaves us — so there's two questions to quarrel about. One is whether our disclosures are now or very soon for fact witnesses, and then whether there's depositions of our witnesses.

We — as the Secretary makes clear, we believe that in these 1-113 proceedings, no depositions are necessary, particularly where we've agreed to provide extensive expert reports that meet the requirements of the rule, of the standard rule. So happy to talk more about it, but our position is we — with the disclosures that we've agreed to, no additional depositions or discovery is needed. And then, candidly, on when we disclose the fact

[p.9]

witnesses, we're still working out availability. And we also want to make sure, again, that there's no effort to harass or intimidate to prevent them from testifying, and so we think delaying the disclosure, nonetheless keeping in mind Mr. Gessler's opportunity to prepare his case, we think October 6th balances those well. Particularly, we'll have a better sense of any protective order in place at that time.

So happy to answer any questions, but I think those are the issues that remain in dispute. And given the productive dialogue that we've had, we think that our proposal does a good job of meeting all the needs. But happy to answer any questions Your Honor, has.

THE COURT: Well, if we step back for a second, and maybe you've discussed this, but how is all of this going to play in with the SLAPP motion that they say that they're going to file? Have — I mean, it seems to me like there's two options on the SLAPP. One is that you respond — obviously you're going to respond one way or the other, but that you respond and I — it presumably has a bunch of affidavits or something that establishes what you think your prima facie case is. And then I rule on the SLAPP motion, hopefully before October 30th.

But the other option is that I rule on the SLAPP motion essentially after you put on your evidence on October 30th and they have a chance to cross-examine the people, et

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cetera. And it's almost like, kind of like a directed verdict, that they're making under SLAPP.

And the reason I ask that is if I have to rule on the motions, then you may — that may affect all of these dates in terms of your burden on making a prima facie case.

MR. OLSON: Well, given the —

THE COURT: And — of admissible evidence, which

—
MR. OLSON: Right.

THE COURT: — you know, of course complicates everything.

MR. OLSON: Yeah. So two responses, Your Honor. First, we think that the second proposal would work well given that — I don't have the exact date in mind for the SLAPP motion, but it's not that different between our response date and the 30th. And so we think that would work well and would agree to it. And if there's sort of earlier proceedings, to answer your question about sort of discovery and protective order, we would just ask that if the disclosure deadline falls before whatever deadline we have for fact witness disclosure, that we would just have that under seal so just the Court would have that information and it wouldn't be disclosed to the public.

But we think combining those proceedings in one hearing is an effective and efficient way to address these [p.11]

issues. We haven't seen the SLAPP motion, but I think we have a good sense of what it's going to say. And I think having the hearing serve that purpose, too, would work well.

THE COURT: So am I correct in remembering, Mr. Gessler, the SLAPP motion you are filing today, correct?

MR. GESSLER: That is correct, Your Honor.

THE COURT: Okay. So that will be fully briefed by the 6th or the 13th? Today is the 22nd. So you file it today, the Plaintiffs are going to respond on the 29th, and you're going to reply on the 6th. MR. OLSON: Yep.

THE COURT: So that will be fully briefed by the 6th. Okay. Well, and when you say additional proceedings,

you're thinking of an evidentiary hearing on the SLAPP motion?

MR. OLSON: Well, I guess what I was saying was the hearing on the 30th could address —

THE COURT: Right. MR. OLSON: — the same question that is going to be presented in the SLAPP motion.

THE COURT: Right. MR. OLSON: And so —

THE COURT: No, I mean, that was — yeah, and from my perspective, and I'm obviously going to get input from [p.12]

Defendants. From my perspective, if we're going to have an evidentiary hearing on the SLAPP, it would certainly be much more efficient to do it in the manner in which I said, which is, you know, they put on their case and then I say before the Defendants even put on their case, have they made a prima facie case enabling you to proceed under SLAPP — after SLAPP.

Having two evidentiary hearings where you put on your evid — you put on your prima facie case — and I don't think that the rules require — I think it can be done on the papers.

MR. OLSON: Uh-huh.

THE COURT: So it sounds like your preference would be to do it on the first few days of the October 30th hearing.

MR. OLSON: Well, I think it — the evidence is one in the same.

THE COURT: Yeah, exactly. That's why —

MR. OLSON: So I think you — it wouldn't — we wouldn't have a couple days for SLAPP and then turn to the merits. It would be here's our case, and you would say, after our —

THE COURT: Yeah.

MR. OLSON: — case is done, you know, yes, you've met the SLAPP standards or not. And then they get to put on their case.

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THE COURT: Yeah, yep. Okay. So why don't I get a response from the Defendants both on the SLAPP issue and the proposals made by Mr. Olson?

MR. GESSLER: Thank you, Your Honor. Let me first talk about the timing issues. So I understand that both the Petitioners and the Secretary talk about how depositions are not appropriate for 113 proceeding. I'd like to sort of make a few responses to that.

One is the only reason this is at the moment considered a 113 proceeding is because the Petitioner said so. It has not been tested by a motion to dismiss. And we sort of prefaced some of that, and that will be filed today. But, I mean, when you look — in addition, when you look at the language of 113, it's an action against a public official. And what's going on here is 113 is being used against a private individual, President Trump, to remove him from the ballot, basically extinguish a constitutional right to run for office.

And so the presumption that this is properly a 113 we submit is invalid, but we don't think that the Court should operate from that presumption to begin with, but rather operate from the presumption that the normal orderly flow of litigation should apply. Now, I say the normal ordinary flow, obviously not the ordinary deadlines.

And so what — our framework is we don't have much time here, and obviously expressed some frustration at the

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last hearing on the hearing dates. But in light of the exceptionally compressed timeframe, the large complaint,

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the serious issues at stake, our approach is and remains this should be treated as analogous to a Rule 26(a) disclosures. We just — we want to see what is against us, people who have knowledge, documents that are being used.

And Mr. Olson and I had a conversation, and I don't mean to use this against him, he's been an absolute pleasure to litigate, but I said, you know, I mean, are we talking 10 documents or a thousand documents, and right now the universe that they're considering is around 200. And, of course, one of the counsel teased me that if they had said 10, I would say those are the most important documents in the world.

But regardless, we want to be able to see that and because we have to prepare a case and we're not quite sure what we're facing. And so that's from a practical standpoint, the Petitioners have represented to this Court and to the public and obviously to us, that they were ready to litigate this case within five days of filing. So they've identified their witnesses, or certainly people who have information. They've identified their experts and have identified them for a while.

Our understanding is, you know, they said that they warned President Trump that this case would be filed a [p.15]

year ago, so the corollary of that is they've had a year to prepare this case and have knowledge of this. And so we're asking for sort of immediate production of information so that we can prepare our case.

We would not characterize October 6th for production of fact witnesses as very soon or even soon in light of the compressed timeframes. With respect to the experts, all right, so they're saying they'll give it to me in three days. I'll accept that. I won't dispute that, because that's pretty

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prompt. We'd like the fact witnesses as well and the evidence that may be arrayed against us.

With respect to exhibits, and I would like to maybe — and Mr. Olson and I talked about this, and I had a incorrect thought in my mind. When he suggested production of exhibits, you know, around the 6th and 16th, I would actually suggest the 23rd of October and because exhibits are different than the actual documents that a party has that are available. So my belief is that the parties should sort of exchange documents that they have available certainly by those deadlines, but then give us a little bit of time to determine which of those documents are actually going to be exhibits.

I think that's a way to sort of give us a little more time in this case, which is of paramount importance, without creating unfair surprise. So that's just a bit of a nuance. But as far as those deadlines for us to produce any

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documents that we know of that we may use, I don't have a problem with that deadline. That's the —

THE COURT: And what are you thinking about when you're talking about depositions?

MR. GESSLER: So here's what I'm thinking about depositions. We — well, experts in particular, you know, they rely — it's an opinion they're giving. We want to know what they're going to say, the basis for what they're going to say. And I understand expert reports are nice, but we also know that they're a highly stylized document that goes through multiple layers of review to, you know, be very careful in what is said. And so depositions I think are very important for that, for us to be able to challenge that as well and know what they're going to say.

But with respect to fact witnesses, I certainly want the availability. Now look, if a fact witness is simply going to

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say, you know, President Trump sent out a mean tweet on such and such a date and I read it and — I'm not looking to depose that person. But if there's a substantial testimony from a fact witness, we do want to be able to question them.

You know, as far as the propriety in a 113 proceeding, I will back up. The only reason this is a 113 proceeding is because the Petitioners say so, and the presumption should be the orderly process.

Secondly, depositions are a matter of

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practicality, not doctrine. I've been in 113 proceedings where we've done depositions. Last summer, I did six in a 113 proceeding, but — as a matter of practicality. That was in Durango.

I see Mr. Kotlarczyk looking at me quizzically like, I missed one? Yeah, that was actually a Durango School District, did not involve the Secretary of State. And while I'm respectful of the Secretary's institutional knowledge as far as their representation of the history of 113, I will certainly match mine personally against the sec — anyone in that Secretary of State's office, and there have been instances of depositions. And frankly, oftentimes what happens is that the attorneys will talk to one another and instead of doing depositions, they'll say, hey, just interview my witness. Let's get on the phone, ask them any question you want, and we go forward for the exchange of information.

I've done that as well. In fact, in Kuhn, that happened as well, that type of exchange of information, the case that I had cited. In Frazier, we spent probably three and a half hours hammering out a set of stipulated facts. And I believe the Secretary did in fact have a conversation with one of my witnesses — I was — I litigated the Frazier

case — just informally. So it wasn't a deposition, but the same thing, without a bunch of objections and not under oath.

So it's really a matter of practicality and
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fairness, not a matter of doctrine here.

And so we're prepared to — I can't say I'll get any more gray hair, but perhaps my partner's prepared to get gray hair, with the stress of doing this in a very compressed timeframe, but we will do it because this is very important and these are constitutional issues and constitutional rights that we're litigating here. And that fairness is appropriate, particularly in light of the size of the complaint.

We've received an entire haystack of allegations as it were, and we're trying to find out which pieces of hay are going to be relevant or critical. This isn't like a 30- or 40-allegation complaint where you know very precisely exactly what the contours of the factual testimony and allegations are going to be. Here, it's very large and very amorphous.

So we're very insistent upon being able to take depositions of experts, and we're very insistent on being able to take depositions of witnesses that are going to provide substantial testimony. Now, are there any witnesses like that? We don't know. Are they all like that? We don't know. We haven't seen any of them, and we have no idea what's coming our way with respect to witnesses. So we at least want to be able to look at that.

And again, I can promise Mr. Olson and the Court that we're not looking to engage in frivolous depositions. We understand time and money are both at a premium here, and we

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want to move this efficiently, particularly in light of this impending — maybe impending isn't the right word — hearing as soon as October 30th. So that's our view with respect to the timelines and with respect to the — with respect to the depositions.

Again, we're not looking to create any form of ambush. And in fact, I had proposed and I'm thankful that Mr. Olson accepted the thought of sort of sequential production of witnesses, because we're not exactly sure what we're going to use as witnesses, and we won't be sure until we can even understand what their witnesses are going to say.

And so we don't want to create surprise. If they want to add another rebuttal witness or two or three or however many they feel is appropriate, we don't want to terminate that right either. So we're looking for orderly process, we can fully understand these allegations against us, and immediate production of witnesses, which from a practical standpoint is — well, is practical. It's not — it's something that these Petitioners have said that they've had available in their representations for weeks now. Not a lot of weeks, but two weeks I think, maybe two and a half according to my calculations.

Would you like me to address anything else with respect to witnesses and depositions, Your Honor?

THE COURT: No, thank you.

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MR. GESSLER: Okay.

With respect to the SLAPP motion, our understanding of the procedures for the SLAPP motion, and I may defer to Mr. Blue if I'm pinned to the wall with questions I can't yet answer, but — as he moves in his seat. We file a motion, and that will be filed today. They

file a response in which they include affidavits and exhibits as they see fit to make out their prima facie reasonableness of their case. We file a reply. At that point, the Court has a hearing and that hearing is essentially oral argument. It's not actually production and examination of witnesses.

So from a practical standpoint, that can be done very efficiently and well in advance of the hearing. And we do — you know, we believe our SLAPP motion is meritorious. Every single action or inaction that is alleged against President Trump is based on his speech. And so we are — and that clearly squares up First Amendment speech rights. So from a practical standpoint, we think it's very possible.

To the extent that the Court wants more than affidavits, we think that the deposition schedule could solve that as well, and then we could have a oral argument as appropriate shortly — as part of that process. So there's — the SLAPP — anti-SLAPP is a, we submit, and we will submit it today, a very meritorious motion. And we believe it's a winner, and it should be properly litigated, I recognize along

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the compressed timeframe, but according to the terms of the statute.

THE COURT: And just remind me, does the SLAPP statute mandate a hearing or is that you just saying that that's how it usually proceeds? I mean, I agree, they usually have oral argument, but I just can't remember whether it's required.

MR. GESSLER: I'm going to hand it over to my co-counsel, Mr. Blue.

THE COURT: Okay.

MR. BLUE: So, Your Honor, the anti-SLAPP mo — statute does provide for a hearing, I want to say 28 days, I'm looking for the actual citation in it. Thank you. So yeah, 28 days after service of the motion is when the hearing is supposed to be. And in — and that's in Section (5) of the statute. The motion must be scheduled for a hearing not more than 28 days after the service of the motion, unless the docket conditions of the Court require a later hearing.

Of course, if you say that, that's the docket of the Court, not the status of the case, because I'm assuming that you're going to hear that the docket of the Court should push this back to the 30th. But according to this, it says 28 days.

The other thing to note is Section (3)(b) of the statute says, that in making its determination, the Court shall

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consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based. So that makes the hearing purely one of oral argument. It doesn't allow witness testimony. And that's why there's a difference between what this hearing is and what the hearing that you've scheduled for the 30th is, Your Honor.

MR. GESSLER: Can I answer any further questions?

THE COURT: No, no, that's super helpful. I am just turning to the statute. Completely in the wrong place. And I'm sorry, 13-21-1101(b) — what was the citation again?

MR. BLUE: Your Honor, the statute is 13-20-1101, Section (5) is the one that talks about the hearing.

THE COURT: Oh, I see, yeah. Okay.

MR. BLUE: And Section (3)(b) is the that talks about how the Court makes its determination.

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THE COURT: Okay. So if we need to have a hearing and — so let's start with the SLAPP motion. It's going to be fully briefed on the 6th of October. If we're going to — since it's going to have a — since as the Defendants point out, it has to be based on the affidavits, I think that probably the most expeditious way to deal with, you know, kind of this admissibility of evidence issue is for, in the papers themselves, for the Plaintiff to note, you know, why

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the evidence is admissible, whether that be in the text of the response or in some sort of addendum or whatever.

And then in the reply, you're going to have to say why you don't think it's admissible so that when I'm considering the affidavits, I can make a preliminary determination of the admissibility. So that's just a pleading issue.

If we're going to have oral argument, and it sounds like the statute provides for that, and thank you for pointing that out, I don't really want to take up time on the 30th with oral argument because I think that should be an evidentiary hearing. And as if — and, you know, if Mr. Gessler is right and you can't make your prima facie case, then we may not need the October 30th hearing. So let's — I'm just looking at my trial calendar. I went like — I went most of the summer without a trial, and I have literally a trial every single week through November still on the books, if not multiple ones.

UNIDENTIFIED VOICE: Sort of like the practice of law as well.

THE COURT: Yeah. So let's — are folks available on October 13th in the afternoon — at that point, the jury should be deliberating — for that oral argument?

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MR. OLSON: So we're confirming availability. Two of our team isn't available. We're seeing whether we can [p.24]

put a team together to argue on the 13th, so —

THE COURT: Okay.

MR. OLSON: — give us a minute.

THE COURT: Okay. (Pause)

MR. OLSON: Your Honor, we can do it on the afternoon of the 13th.

THE COURT: Okay.

MR. GESSLER: That will work.

THE COURT: Okay. And Mr. Kotlarczyk?

MR. KOTLARCZYK: No objection from the Secretary.

THE COURT: Okay. So we will set it for 1:30 to 3:30 on the 13th.

MR. KITS MILLER: Your Honor, can I just interrupt just for a moment? This is Mr. Kitsmiller for the Intervenors.

THE COURT: You need to speak into the microphone if we want it on the record.

MR. KITS MILLER: Okay. Your Honor, we intend to file a motion to dismiss, and while we're in general agreement with Counsel for former President Trump on the procedural mechanisms, I — we think that it makes sense to have a ruling on the motions to dismiss before this hearing on October 30th. We think there are good grounds for it, they're not

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complicated, and, you know, we'd like to have a hearing on that before we have a full-blown evidentiary hearing. And maybe we can take some of this up on the hearing on the SLAPP motion at the same time. I'm sure the issues overlap and it may be worthwhile to do that before this

hearing, before the parties spend tremendous amounts of money and time to go to a hearing that may just be a waste of time.

THE COURT: Okay. Well, once we get past the SLAPP, if we get past the SLAPP, you'll know it's not a waste of time because the Court will have just said that there's a reasonable probability of success on the merits. And the Court only has so many hours in the day. I don't generally do oral arguments on motions to dismiss, they're decided on the papers, and this will be the same. Whether or not that happens before the October 30th hearing or the motions to dismiss are decided and the ultimate ruling is, you know, largely going to depend on how much paper I receive. And my court docket, which as I said, I literally have a trial every single week between now and October 30th and have had to clear about six trials so that I could have this one and have time to rule hopefully, as I said, before Thanksgiving. But — and in terms of the complexity, I'm a little skeptical that it's not complex, but I haven't seen the motions to dismiss yet. So I will do everything that I can. It would

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certainly be my hope to rule on motions to dismiss before the hearing, but whether that happens I am — I'm not going to make promises.

I made the mistake of saying that I hope to have the ruling before Thanksgiving. And now, you know, CNN has told me that I will have it done by Thanksgiving. So I'm not going to make that mistake again.

MR. KITSMILLER: Thank you, Your Honor. Honor.

MR. GESSLER: If I — I feel your pain, Your Honor. At least CNN isn't a court order. How's that?

Just for the Court's information, so we'll be filing, again, and I — you may know this already, but I'm — our

two motions today. One is the statute and sort of standing procedural motion on the declaratory judgment, as well as the SLAPP.

THE COURT: Uh-huh.

MR. GESSLER: Both of those will be fully briefed by October 6th.

THE COURT: Yep.

MR. GESSLER: And then of course, next week we're filing what I would sort of call some of the federal doctrines for dismissal on the 13th, next Friday. We will be filing our reply so it'll be fully briefed on the 13th, the day of the SLAPP motion.

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THE COURT: Uh-huh.

MR. GESSLER: So for what that's worth, we obviously appreciate prompt rulings from the Court, but we also understand the volume of work this whole thing presents, so.

THE COURT: Yep. Okay. So in terms of the dates that you talked about, and when you talk about the disclosure of fact witnesses, is this like, in your view, kind of like a Rule 26 type of disclosure or is this the fact witnesses that you plan on having at the hearing?

MR. GESSLER: Are you — which one of us are you addressing, Your Honor?

THE COURT: Either because you both talked about it, so.

MR. GESSLER: So from our position we're looking at analogous to a Rule 26(a) disclosure.

THE COURT: Okay.

MR. GESSLER: Okay.

THE COURT: And then in your view, you should have that, and then — which would be the greater universe of witnesses and what they may or may not talk about. And

then a subsequent this is who's actually going to show up at trial?

MR. GESSLER: Correct, Your Honor. And the subsequent this is who's going to show up at trial, I mean, we're fine pushing that back a bit later. I understand that, you know, when you litigate, you're trying to make strategic

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decisions as to who's going to do what, so I'm not looking to lock that in very early, but I want to know the universe of evidence arrayed against us so we can begin working on that.

THE COURT: Okay. But Rule 26 goes both ways, so are you prepared to give them the universe of witnesses and what they may testify about as well?

MR. GESSLER: The answer is absolutely yes.

THE COURT: Okay.

MR. GESSLER: But to share my pain with you, I don't know who they are, or may be right now, we just don't know. We are scrambling —

THE COURT: Well —

MR. GESSLER: — to work on that.

THE COURT: — you've read the complaint and it's incredibly detailed.

MR. GESSLER: Uh-huh.

THE COURT: And I understand that, you know, your point is, you know, you've got 104 pages, which of this are you actually going to be able to present? But you can look at that 104 pages and you should have a pretty good idea of how you're going to — who you might use to counter it.

MR. GESSLER: We don't.

THE COURT: Well, okay.

MR. GESSLER: Look, Your Honor, I mean, I'll be frank with you. Every person that we even may approach or —

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with respect to the events of January 6th won't talk. I mean, they're all afraid, and I think with some justification, that they're going to have the FBI knocking on their door the next day, if they haven't already. Furthermore, our ability to compel cooperation is non-existent for people outside the state of Colorado. And sort of still trying to grapple with the contours of a — what a factual hearing looks like is frankly, very difficult.

And I do not relish the thought of standing in front of you saying, I don't have witnesses yet. I really don't like being in this position, but it is where I am right now. I have promised, and I'm — again, it's sort of like trust my word, and I understand the challenges in modern litigation with that, but I've assured Mr. Olson that as soon as I find someone or we find people who — that we're talking to in a substantive manner, I'll present that information and hand that over to Mr. Olson. But at the moment I don't have that information for him.

THE COURT: Okay. So this is what I'm going to do. Both parties are going to do Rule 26 disclosures of witnesses.

MR. OLSON: Could I actually be heard on this, Your Honor —

THE COURT: Okay. Sure.

MR. OLSON: — because I think if you read Rule

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26, then every witness in the January 6th committee is someone with knowledge of relevant facts. And so Rule 26 disclosures are a — for the reason that Mr. Gessler identified, are sort of a very blunt and inefficient tool for

what the question is, which is how are we going to put on our case in this courtroom? And we're going to answer that question in part when we file the response to our SLAPP motion because we have to under the rules.

THE COURT: Right.

MR. OLSON: There's going to be affidavits. And then what's relevant to Mr. Gessler is not, you know, who know — you know, all the people are at the Capitol or all the people that the January 6 report identified as having information, it's who we're going to call in this courtroom. And so we proposed very clearly in the case management order that the witness list will be will call and may call folks, not folks with relevant information, because again, that's thousands of people. And all we're — you know, if it's Rule 26 disclosure, it's going to be, you know, here's a link to the January 6th report, and that's not going to help

—
THE COURT: No.

MR. OLSON: — any of us.

THE COURT: No. MR. OLSON: So we would — we want the focus on

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will call and may call, which is why we've made the proposals as we did. And again, this is a 1-113 proceeding and those rules don't apply — Rule 26 doesn't apply to those proceedings. So we think the witness disclosure issue should be one just of will and may call on the dates that we suggest.

THE COURT: Okay. And I always hesitate about the will and may call, because, you know, if you have four people on your will call and 25 on your may call, it's not super helpful, but okay. So this is — I'll strike the Rule 26 because I get what you're saying. And unfortunately, I think what Mr. Gessler is going to do is his Rule 26 is

going to have nobody on it, or everybody in the world as well.

So the Plaintiffs, you're filing the response to the SLAPP motion on 9 —

MR. OLSON: September 29th.

THE COURT: On the same day, let's give your witness list, please. And the Plaintiffs can have until — I mean the Defendants will have until October 9th to give their response, ones — their witness list. And then both parties will have until the 23rd to add any additional ones — add any additional ones and have an order of proof of, you know, who's actually going to come to trial. The 23rd is a week before or so. I would hope at that point you'd know.

There was a question about remote testimony. Remote testimony is absolutely fine on all parts.

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In terms of depositions, I'm going to — I am going to enforce the disclosure requirements incredibly tightly. So when you are preparing your witness and you ask a question, you should also be prepared — if Mr. Olson is putting on the witness and Mr. Gessler objects outside the scope of the report, Mr. Olson should be prepared to show me the paragraph in the report where it is.

And if he — then if the witness then starts talking about the basis is, you know, some conversation he had or whatever the basis is, you know, Mr. Olson should be prepared to show me where that is in the report. So the answer to the expert depositions is we're not going to have them because the reports are going to be completely fulsome and there's not going to be anything allowed in the testimony that can't be found in the report.

That's how I think that the rules were meant to be applied, and I know that most judges don't apply them like

JA95

that. And people are, well, he said it in the deposition. Well, that's not really what the report — that's not really what it was supposed to be about. The reports are supposed to give you what you need, and so there aren't going to be expert depositions. And I will not allow testimony that's not contained in the report or opinions or the basis for them that's not in the report.

In terms of fact depositions, I frankly don't

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understand like really what you're asking because, like you, I have no idea who these witnesses are going to be, et cetera. So I'm going to tell both sides that you need to not only list the witnesses, but the subject matters of their testimony in enough detail so that Mr. Gessler can come to me and say, hey, I really need the deposition of this person because we've never heard of them, we don't know how they would possibly know something about this subject, et cetera. But absent that situation, I just don't think there's really time for depositions. So I'm not ruling out depositions because I just don't know what we're talking about.

If somebody's going to testify who you don't basically know what their testimony is going to be, then I'll probably allow some limited depositions. But until you get the list and the subject matters, I don't know how we could possibly talk about that. So once you get the list, if you think that you, after conferring with the Plaintiffs, the Defendants think that they need depositions or vice versa, you should call my chambers and we'll set up a discovery dispute hearing over Webex to decide the deposition situation.

The other deadlines for the names of the experts on the 25th and the subject matter, I assume you're going to say this is a constitutional historian or whatever, and the

same on October 13th for the Defendants, and then the reports on October 6th and October 27th, is fine.

[p.34]

The exhibits that — and the exhibits I take will be the universe of documents you might use, for the Plaintiffs on October 6th, the Defendants October 16th. And then what was the deadline of October 23rd that you were proposing? Is that the, like, this is what we're actually going to use at trial list?

MR. OLSON: Yes.

THE COURT: Okay.

MR. OLSON: Sort of resolved objections, narrowed objections, and have the sort of final list ready to go.

THE COURT: Okay. And that will be both sides doing that on October 23rd?

MR. OLSON: Yes.

THE COURT: Okay. That's — that works great. If you — what would be easiest for the Court, I don't want duplicative exhibits. So if you're both going to use, you know, the same exhibit, please have a stipulated list of exhibits, and then the Plaintiffs' and the Defendants' not-stipulated exhibit exhibits on October 23rd.

MR. GESSLER: Thank you, Your Honor. If I may make a suggestion and one request. A suggestion, just very simple for the exhibits, can we just use a sequential numbering system?

THE COURT: Yeah.

[p.35]

MR. GESSLER: The As and double As and number ones and 8s —

THE COURT: PPP.

MR. GESSLER: Yeah. They drive me nuts. Just 1 through whatever, if we can do that, and I'll work with Mr. Olson on that. And then with respect to production of

documents, I'm going to request that we receive those from the Petitioners this Monday along with witnesses because we have the same sort of concerns as to what those documents are or may be. And again, some of them may just be pretty straightforward where there's not going to be much of a dispute. But some could be much different, and we have no idea right now.

THE COURT: You mean — not this Monday, but you mean on September 29th when you get the witness list?

MR. GESSLER: I'm — that's correct, Your Honor.

THE COURT: What do you — is that possible, Mr. Olson?

MR. OLSON: So the question is, I'm sorry, are — the exhibits themselves? I thought we were producing those on the 6th.

THE COURT: Yeah, I mean, that's what I just said.

MR. OLSON: Yeah.

THE COURT: I think he's asking to move that up. Is that correct, Mr. Gessler?

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MR. GESSLER: Yes.

MR. OLSON: So —

THE COURT: There could be two ways to do this. One, could be these are generally the — well, you said that the original exhibit list was kind of the greater universe that you would then narrow down and you want to do it on the 6th. I think he wants it on the 29th at the same time as he gets his witness list.

MR. OLSON: And I guess my response is some of those exhibits will be in the SLAPP motion, right? So there will be — the core exhibits will be provided on the 29th. And we're still working through who will sponsor what exhibit, et cetera. So it would be a burden on us to produce everything on the 29th in addition to the SLAPP

motion. But I think to Mr. Gessler's core concern, which is what is our case and how will we prove it, he will have a lot of that information on the 29th.

THE COURT: Yeah, and I agree. So we're — we'll just stick with the dates that I just stated for the exhibits. But going now to the motions to dismiss and the affidavits and the — presumably the exhibits that are going to be attached to them, if the parties would be willing to provide the Court with one courtesy copy of the briefing with the exhibits, that would be very helpful to me.

UNIDENTIFIED VOICE: I'm sorry, what?

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THE COURT: So like a binder. MR. OLSON: Yeah. How would you like —

UNIDENTIFIED VOICE: Oh, hard copy?

MR. OLSON: — do you like a three-ring binder or wire-bound? What's your preference and how do you want it?

THE COURT: I don't care, just as long as I don't have to make my staff make the copies.

MR. OLSON: Okay. And is one copy enough?

THE COURT: Yes, just one.

MR. OLSON: Okay.

MR. GESSLER: And, Your Honor, how would you like video evidence? As there will be, I think substantial video evidence in this case. For purpose —

THE COURT: On a flash drive. And when you — if you — you're going to have to deal with the clerk's office in submitting that anyway. I think usually what they do is they have you deliver a flash drive or something.

So let's talk about, since we're all here, about — kind of about the hearing itself and any kind of pretrial briefing, et cetera. Mr. Gessler told me, but the Plaintiffs never told me at the last hearing, that you have — that

the Plaintiffs have three days of evidence. Is that — the three days of evidence, and I know you don't know who's going to be able to come or not come, but does the three days of evidence include projected cross-examination, or is it three days of

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just your witnesses, or do you want to modify that number at all?

MR. OLSON: The three days includes sort of reasonable direct and cross-examination. It does not include, you know, hijacking a witness for some totally unrelated purpose, so.

THE COURT: Okay. So with that being said, I think that we may very well be able to get finished in five days. I was a little bit worried that three days didn't include any cross-examination whatsoever. I am going to, given the type of case and there's so many parties, I am going to keep time for how long people have with the witnesses and, you know, just to make sure that everybody gets their fair opportunity to present their case.

I don't know what I'm going to do with Secretary Griswold in terms of how she fits into the splitting of the time, because at this point it's very unclear to me what role she plans to take in this case at all. If she, as Mr. Gessler posited, you know, is completely aligned with the Plaintiffs, then her time might count against them. If she just doesn't do much, then she might get 10 or 20 percent of the time. We'll figure that out once we know what her position is in this case, which I assume at some point's going to surface itself.

MR. KOTLARCZYK: And, Your Honor, just further on that, I think when we see witness and exhibit lists and we

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know the universe of what the case is going to look like, that would inform our position as well.

THE COURT: Yeah. Do you have something, Mr. Gessler?

MR. GESSLER: Just one comment, Your Honor, for what it's worth. I don't think I have ever been in one of these types of election contests where the parties or the judge correctly estimated the amount of time it's going to take. I mean, and I'm not trying to be the turd in the punch bowl, as it were, but these things always wind up, you know, when they're on a fast track going to like 7:00 at night. If it's a one day trial that we expect — if we expect it to be a half-day trial, they go till 7:00 or 8:00 at night. And so I'm just saying we would all love to do this in five days.

THE COURT: Yep. I've cleared my calendar the following week, so.

MR. GESSLER: Okay. Thank you, Your Honor.

THE COURT: And I am more than happy to, you know, go long days and it's obviously easier without a jury. So, you know, don't make a lot of plans for 6:00 on the week of October 30th.

MR. GESSLER: That's fair, Your Honor.

THE COURT: And — except on Halloween, yeah. We're not going to go past 5:00 on Halloween.

MR. GESSLER: I actually appreciate that deeply.

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That's very important to my kids, so thank you.

THE COURT: I don't personally have kids who still trick or treat, but I live in a neighborhood where I give away around 30 pounds of candy. So there's — I've got a civic duty to be there.

JA101

So let's talk about pretrial briefing. I — given the motion to dismiss, including the SLAPP briefing, I don't really — and the volume that I'm already going to have to deal with, I don't really think that pretrial briefing is super — going to be super helpful in this matter. I just don't know that I'll have time really to do anything with it. But what I am going to want, and I think you want to be cognizant of it as you're preparing, is I'm going to want findings of facts — proposed findings of facts and conclusions of law, and I'm going to want them quickly. So, you know, you should not be waking up on the 4th of November and being — you know, started those.

So I'm going to — assuming that the hearing actually ends on the 3rd of November, I'm going to need the findings of facts, conclusions of law by the 8th of November. And you should also assume that that day may not change if we have to go into the next week to finish up the hearing.

Which goes — gets to the court reporter. Strong preference to have a court reporter, I think especially if you're planning on this may go on appeal. You know, an

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expedited transcript with our FTR system is not expedited. It's two weeks. And in a five day trial, I would be — really doubt that they would be able to get it done in two weeks. So hopefully you'll have a court reporter. If you don't have a court reporter, the findings and facts and conclusions of law are going to have to say, this person said this on either the morning or afternoon session of the day and — or, you know, the afternoon, first or second afternoon session of the given day. So they'll have to be pretty specific as to when the testimony was elicited.

In terms of motions in limine, why don't the, why don't both Mr. Olson and Mr. Gessler speak as to how —

whether we need them, given that we're going to have the SLAPP hearing and you're going to put your prima facie case on. What I want to avoid is spending a lot of the hearing having huge evidentiary issues that could have been flagged and could have been dealt with in advance. But at the same time, I feel like since I could only consider admission evidence in the SLAPP that I find would be admissible, that maybe a lot of that will be sorted out in advance.

MR. OLSON: So on the evidentiary issues, Your Honor, I think our position is there's going to be, I'm sure, some ones the Court — we all know the Court's going to need to address; for example, you know, what portions of the January 6th report are admissible evidence under Colorado law? And I

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think a short — I would say our preference would be to have sort of one high level, you know, here are some of the key evidentiary issues that will arise. And, you know, we agree it's authentic, but we disagree as to whether it's admissible, et cetera. But not 38 motions in limine on all sorts of different things.

So we would suggest having sort of after conferral, you know, very close to the time of the hearing so we have the exhibit list, what — that we file a sort of a short, high-level primer of the key evidentiary issues rather than a whole bunch of motions in limine.

MR. GESSLER: Your Honor, my suggestion would be let's see what the SLAPP hearing looks like. Let's allow the parties to confer. We've although had sharp disagreements, we've done it in a hopefully amicable way, and we'll both make — endeavor in good faith to provide a procedure that's streamlined, efficient, and effective.

JA103

And then if we have problems, I think we can come to the Court and — or disagreements, I should say, and we can come to the Court and hash those out. But I think we understand we're going to want to tee these up, at least certainly the big issues that we can anticipate, and give you adequate time to consider them. So that's what I would suggest. Just give us a chance to hash it out after January 6th. We'll see — I'm sorry, after the hearing, and we'll see

[p.43]

if we need to go to you.

THE COURT: Okay. I do like the idea of so kind of in lieu of a trial brief, these are the evidentiary issues that still exist post the SLAPP motion — the SLAPP hearing. So why don't we have each side file something on the 20th with the evidentiary issues that they think are important, and then they can kind of respond to the other person's brief on the 27th? Because in all honesty, like at this point, I have no idea if the January 6th report should come in at all, you know, so. But maybe that'll get sorted out in the — in the SLAPP hearing as well.

MR. GESSLER: Your Honor, I would just say we'll try on those dates, but I think our deadline to produce, you know, sort of final witness list and exhibits is the 23rd, so we'll figure it out. That's —

THE COURT: I mean, I'm really hoping that this, these final lists are really going to be like the fine tuning not —

MR. GESSLER: Right. I understand.

THE COURT: — you know — you're not — you shouldn't be finding out about any new stuff on the 23rd or the process isn't going to work. And then 702s?

MR. GESSLER: We fully plan on filing them, Your Honor. I mean, that's — we're — our current posture is

one of great skepticism as to the appropriateness of experts.

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Again, we don't know who they are or what they're going to say. But we anticipate we're going to file those motions, assuming there's more than one expert.

THE COURT: Okay. And you're going to have the expert report on the 6th, but Plaintiffs aren't going to have the expert report until the 27th, which is, you know, five weeks from now.

MR. OLSON: Our suggestion would be, Your Honor, that we can deal with issues of qualifications and competence to testify as part of the bench trial itself, that there's no need to — particularly given that there's no time for us on this schedule to have any briefing on their experts, that we just can raise it at the hearing itself.

THE COURT: I mean, in general, I don't think that courts generally really entertain Rule 702s very seriously in a bench trial because of this idea that the Court can filter through what is relevant, admissible, et cetera. But as I said, I don't want to have a huge sideshow either at the hearing itself and spend, you know, a whole day arguing about whether an expert should be allowed to testify. And of course, I have no idea what type of experts these are. I can tell you that I'm pretty sure that there's some expert testimony that would be helpful to me because I certainly am not a — currently a scholar of, you know, exactly what the 14th Amendment was supposed to mean when it was written.

[p.45]

So let's do this. The Defendants, at least to the extent they're going to file a Rule 702, should do so by the 16th of October. And if the Plaintiffs want to respond in writing, you know, they can do so by the 27th. And

unfortunately, you know, we'll have to deal with yours more on the — at the hearing, the Plaintiffs' at the hearing. But, you know, when you get the names, if it's somebody who you just think, you know, and you know — if you have a basis just based on the name and the subject matters, you know, you're free to file something on the same timeframe as the Plaintiffs. But I will obviously give you — you know, I can't make you file something before you have the report.

So any questions on that, Mr. Gessler?

MR. GESSLER: No, Your Honor.

THE COURT: Okay. Any questions, Mr. Olson?

MR. OLSON: No, Your Honor. Thank you.

THE COURT: Let me see if — oh. I mean, in terms of presentation at the trial and at the SLAPP hearing, you know, just please work together to share any equipment, et cetera. And of course, that screen is definitely available.

MR. OLSON: And, Your Honor, what's your preference in terms of do you like the big screen? Would you like a separate screen at your — at the bench in terms of, you know, have — what's the most help — you're the audience for

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all of us, right, so we want to make sure we —

THE COURT: I love a separate screen, but I don't need it. And if you have a court reporter, realtime is definitely helpful for ruling on objections. MR. OLSON: And to have Your Honor get realtime, do you need a computer, a separate computer, or can you run it on the computer that you have?

THE COURT: Oh, they usually just give me like a iPad.

JA106

MR. OLSON: Okay, great. We can definitely make sure of that. Any other preferences the Court has in terms of technology being used?

THE COURT: No. And I mean, I can also — I definitely have had the exhibits on — in addition on a screen here, but I'm happy to look at the — at that screen. You know, my guess is, is that there'll be people in the audience and so, you know, if that screen is facing me, then nobody else can really follow what's going on.

MR. OLSON: Okay, great. We'll work together and work with your staff to make sure it's functional and not disruptive.

THE COURT: Yeah.

MR. OLSON: Thank you.

THE COURT: Anything else we should address? Oh, this —

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MR. GRIMSLEY: Protective order.

THE COURT: — protective order. So I've heard a reference to a protective order, but no protective order has been filed.

MR. OLSON: Before we do that, one other just quick issue. We've been — had some folks reach out to us who are interested in filing amicus briefs. Should we just tell them sort of the same deadline of whatever brief that there's in the motions to dismiss? So if they're supporting the Secretary — supporting the Respondents, you know, today for some things, but next week for other motions, or would you just like to have just one time where sort of briefs from amicus parties could be submitted and then another time for Respondents?

THE COURT: Do you also — it sounds like the Plaintiffs would be in favor of amicus briefs. Do you — what's your position, Mr. Gessler?

JA107

MR. GESSLER: I think we have to consider that a little bit, Your Honor. I mean, our one concern is there's going to be hundreds and hundreds of pages of people wanting to hold forth and educate the Court on their exceptionally important viewpoints, so that's one. I do know that we — you know, we may want one amicus brief. I mean, we're talking to people who may be experts and — but they may decline and ask to submit amicus briefs instead. So we may want one of someone

[p.48]

we're talking to, but, you know, and I'm fine if they get one or a very limited number, but I don't want to have to spend, while I'm preparing this case, hours and hours responding to thousands of pages of people holding forth on all of the wonderful things they think this Court should know.

THE COURT: I guess my viewpoint is that amicus briefs is really for the appellate courts, and my job is to hear the facts and apply the law, and whatever an amicus brief may or may not say, which largely would either go to public policy or an alternative view, for instance, of what an expert might say is something that the, you know, part — I don't need more experts who aren't actually part of the hearing and the record to be kind of telling me what the right law is or not. So I think given the abbreviated proceedings, that I'm not going to allow amicus briefs, and they can give those to the Colorado Supreme Court. Mr. Gessler, do we have an update on you had mentioned that the Republican National Party may be interested in intervening. Have they decided not to?

MR. GESSLER: That is correct, Your Honor. They have decided not to.

THE COURT: Well, that solves that issue. So let's talk

JA108

MR. GESSLER: I'm here to help you.

THE COURT: Let's start with the — what's the
[p.49]

issue with the protective order? It would seem like it'd be in everybody's interest to have one.

MR. GRIMSLEY: Yes, Your Honor. We have not filed it yet, but we have provided it to all parties. And if I may approach?

THE COURT: Oh, sure.

MR. GRIMSLEY: And there's one correction from what we provided earlier this morning to all the parties. In paragraph five, we referred, in the one we sent this morning, to paragraphs two through four. That should have been paragraphs one through four, so that's now corrected in the protective order.

But what we have in here is a very brief protective order. Nothing here should be controversial at all. And I think Your Honor appreciates that this case is getting a lot of attention, as we've discussed already. And I think Your Honor also appreciates that emotions in this country run high around the subject matter that we're talking about here. And I think Your Honor also appreciates that at least one of the parties has a tendency to tweet or Truth Social quite a bit in which said party says things about courts, witnesses, lawyers, et cetera.

And so we're asking for this protective order in order to ensure that all of the parties in this case, Petitioners, the lawyers, the witnesses, this Court, feel

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comfortable going forward and feel that they are safe and not fearful for their own safety or their family's safety. And so these are just basic admonishments that I think anybody would agree to.

We're not asking for anything extraordinary here. We've not gotten a, I think, a position from the other parties on this, but we think it necessary before we start disclosing the names of witnesses. Obviously, we've already disclosed the names of the Petitioners. They're part of the record at this point. And just to show you how emotions are running hot, the Colorado Republican Party chair, who is now intervening in this case, has called the filing of this suit treasonous behavior. That's just — that's code for the folks coming to court have committed a capital crime.

This type of stuff just doesn't belong out there while this case is pending, and certainly if it rises to the level of something more concerning that reasonably could be viewed as intimidation or harassment, it should be shut down. And so that's all we've asked for in that protective order.

THE COURT: Well, before you get off, Mr. Grimsley, what — the witness lists and et cetera are going to be shared by — are you planning on filing them with the Court or are you all just planning on exchanging them?

MR. GRIMSLEY: We were planning on just exchanging so that we could keep it as lowkey as possible. But one of the

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problems we're going to face is that next Friday we're going to be providing a response to the SLAPP motion, which will, I think by necessity, identify some of our witnesses if we have affidavits and the like. And I was going to ask if we could redact those names, essentially file it under seal. So the Court will have obviously the identities, opposing counsel will have the identities, but it wouldn't be available to the public, at least initially. I'm

JA110

not terribly confident that the identity of our witnesses can be kept quiet very long, but the longer the better.

THE COURT: Okay. Mr. Gessler?

MR. GESSLER: Thank you, Your Honor. I just have a few comments and deep concerns here.

First of all, the orders proposed basically asks parties or demands parties not to behave in a manner that violates current law. And it doesn't — I mean, there are laws in place right now not to tamper with witnesses, not to intimidate witnesses from their testimony. There are harassment laws in place and things along those lines. So it's not asking for anything more or less from a substantive standpoint of the law.

However, it is asking in a few instances areas where we object. And it says that no one can say anything inflammatory. Now look, there's lots of disputes as to what's inflammatory. I appreciate opposing counsel's definition of

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treasonous behavior is a capital offense. Look, I would also note that in part of this case, the Secretary has, after the filing, repeatedly stated that President Trump tried to steal the election. She has parroted the same comments or the — basically the substance of the complaint, that this was an insurrection. She has stated that Republican extremists are inciting violence on a consistent basis, so, I mean, it's coming from those quarters and CREW, the Citizens for Responsibility and Ethics in Washington, that organization has used this as a fundraising tool and sought to obtain as much media attention as possible for their lawsuit. They've described it as their lawsuit, their attorneys are on this case.

So that is definitely coming from other quarters, and to indicate that somehow President Trump is uniquely

JA111

responsible for anything is inappropriate here. So I want to immediately dispel that implication — well, it's not even an implication, the statements from Counsel along those lines.

I do have concerns here. One is, you know, the elasticity of the term inflammatory; secondly, statements about testimony. Look, if witnesses are — you know, stand up and testify, it's difficult to see how if someone critiques or makes a comment about that testimony, and I'm not saying we're planning on it and I'm not even saying my client is planning on

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it, but I am, as lawyers are required to do, look at things in a very thorough light, that's not witness tampering in any way after someone has already testified.

I don't like in paragraph six that they're asking for authority to commit — to impose evidentiary and issue sanctions; in other words, to develop an argument that would prevent us from putting forth a fulsome defense because they believe someone made a mean tweet that inflamed someone else. So — and I thoroughly reject someone saying that these statements are code for others.

And I certainly appreciate someone explaining to me the code among the vast right wing conspiracy, but I don't think it's accurate and I don't think it's proper for the judge — for this Court essentially to sanction the theory that generalized public comment and frankly criticism that's — may or may not come, and again, I don't know, but certainly would likely be far less inflammatory than much of what has already been said. I don't want the Court sanctioning the theory that that is wholly inappropriate.

We do have robust political debate going on here. This — for better or worse, this case has become a national

JA112

focal point because of both the robustness of the claims and the accelerated timeframe. So that's what it is, and that's what the Petitioners have brought into this environment by filing here.

[p.54]

So we don't want the Court to sanction the theory that those comments — that any comments beyond what is currently prohibited by the vast body of law, so we want — to the extent there is a protective order, we want to be treated or we want the implication that Trump, President Trump is being treated fairly in the same way as any other litigant in the country.

If he or counsel here or anyone violates well-established body of law by threatening or intimidating witnesses, they should bear the consequences and that is appropriate. And we certainly welcome those existing protections that have been developed over years.

We don't agree with — and I recognize that this is directed to all parties and so I do recognize that, but we don't agree with sort of these elastic standards of so-called inflammatory nature, which can then be used to reject evidence or preclude us from advancing theories. So there's that deep concern there, Your Honor.

And one last thing. I know we had spoke — Counsel and I had spoken that — that the names of witnesses would be eyes only until after testimony. And frankly, if that's the case, that severely disables our ability to investigate our case, to be able to talk to others and say, this is a witness that has said this, what do you know about them? So like the TV shows where you show up at the door and

[p.55]

say, I want — tell me about this person. I mean, not that anything that dramatic is going to occur, but we want to be able to have those conversations to develop our case.

MR. GRIMSLEY: And, Your Honor, we withdrew that portion —

MR. GESSLER: Okay.

MR. GRIMSLEY: — of the protective order. That's one —

MR. GESSLER: Okay. Just wanted to confirm that. Thank you.

MR. GRIMSLEY: We understand that they will need to go out and talk to witnesses about our witnesses and so attorneys eyes only would not be appropriate. But that's why we're asking for this protective order, given that —

THE COURT: Yeah.

MR. GRIMSLEY: — those names will be shared.

MR. KOTLARCZYK: Thank you, Your Honor. Just briefly, on behalf of the Secretary. The Secretary strongly supports a protective order entering in this case to protect witnesses, largely for the reasons that Mr. Grimsley identified. Don't think the fact that the protective order overlaps with other pre-existing criminal laws and prohibitions I think is material. It does give this Court direct authority to act in an expedited manner should any of the provisions of this term be violated. And given the high heat and risks of

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threats and intimidation that exist in this case, the Secretary would strongly support and does strongly support the entry of a protective order along these lines.

THE COURT: Go ahead.

JA114

MR. GRIMSLEY: And, Your Honor, as Mr. Gessler acknowledged, paragraph six is just restating the inherent authority of this Court —

THE COURT: Yeah.

MR. GRIMSLEY: — to enforce sanctions. It may be odd to say that there would be an adverse inference as a result of some tweet, but if some tweet or statement scared off a witness who was going to provide evidence on something, then we might be coming — or perhaps they would be coming to the Court and asking for an adverse inference or presumption of some sort. But this is just restating what the Court's inherent authority is.

And I don't want to give any more oxygen to some of the threats that have been made. Your Honor, I can hand up the motion that was filed by the Government in Washington, D.C. setting forth numerous statements by certain parties that were intimidating and could very reasonably be seen as harassment. I don't want to give any, as I said, more oxygen to those. But for instance, one of the very first things that President Trump said after Jack Smith brought the case in Washington, D.C. was, you come after me, I come after you.

[p.57]

So it's those types of statements that if we were to make those types of statements or our clients were, they would be wholly inappropriate. I think they're inappropriate for everyone. The protective order applies to everyone.

THE COURT: So I a hundred percent understand everybody's concerns regarding this case and the safety and — for the parties, for the lawyers, and frankly for myself and my staff, based on what we've seen in other cases. And I understand, Mr. Gessler, that all of these — most of these things are not allowed under the law. But I

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also agree that — with Mr. Kotlarczyk that doesn't mean that it doesn't hurt to reiterate the expectations of how parties will conduct themselves during the short course of this case.

So I'm going to enter this protective order. However, in paragraph three, I would like you to strike the descriptions of the type of things that might fall into the category of posing a substantial likelihood of material prejudice to this case. I think that's very fact determinative. So to the extent that anything comes up, I think that's better addressed, you know, in a motion that the protective order has been violated. So if you can just take out the sentence starting with, such statements include.

MR. GRIMSLEY: We'll do that, Your Honor.

THE COURT: And in terms of paragraph six, those [p.58]

are just listing my inherent powers to deal with problems, so I don't see any harm in including them. That doesn't mean that I have any intention whatsoever, certainly at this point, to be preventing anybody from putting on or defending their — this case. It would be an — a measure I would only take under extreme circumstances, such as if a witness who is committed to being a witness then drops out because of feeling scared to do so.

Anything else we need to address?

MR. GRIMSLEY: Nothing else, Your Honor.

MR. GESSLER: Nothing from us, Your Honor.

MR. KOTLARCZYK: Nothing, Your Honor. Thank you.

THE COURT: And in terms of the courtesy copies that I asked for, just the one copy of whatever these motions to dismiss state, I don't — you know, you can — Monday's fine as long as we get it like within 24 hours of

the filing that's — or one business day from the filing, that would be great.

And actually, I'm going to strike that. Mr. Gessler, since you're the moving party, I'm going to ask that you just prepare the submission of a courtesy copy of the full briefing. Does that make sense?

MR. GESSLER: That's fine, Your Honor. Do you want us to give it to you in the — sort of an entire set of briefing once —

[p.59]

THE COURT: At the end.

MR. GESSLER: — with a little bow wrapped on it at the end?

THE COURT: Yeah.

MR. GESSLER: Absolutely. That's no problem.

THE COURT: And just so you know, don't make the Plaintiffs' response like, you know, in blue paper so I can't read it or anything.

MR. GESSLER: Well, we'll put in invisible ink, slowly disappearing ink.

THE COURT: Yeah, so if it's — but it'll all be done on the on the 6th or the 13th. If you could just do it, if you could just give us a copy, one copy the following Monday would be great.

MR. GESSLER: No problem, Your Honor.

THE COURT: If there's nothing else that we need to address, we are going to go off the record. Oh, here, standing up. There's something else to address?

MR. GESSLER: Just housekeeping, Your Honor.

THE COURT: Go to the microphone just so it's on the record.

MR. GESSLER: Certainly. Do you intend to file a minute order containing all of these dates and deadlines?

THE COURT: Yes.

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MR. GESSLER: As you look over to your clerk.

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Thank you. That's helpful. So we sort of have the one document to work off of, and I'm sure we'll check it if we think there's some —

THE COURT: If something's —

MR. GESSLER: — error in there.

THE COURT: — wrong, definitely just file —

MR. GESSLER: Okay.

THE COURT: — this is what we actually agreed on.

MR. GESSLER: Okay. Thank you, Your Honor.

THE COURT: Great. With that we are going to go off the record on 23CV32577.

(Proceedings concluded at 10:30 a.m.)

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DISTRICT COURT
DENVER COUNTY
COLORADO
1437 Bannock Street
Denver, CO 80202

Case No. 2023CV032577 Division/Room 209

NORMA ANDERSON, et al.,
Petitioners,
v.
JENA GRISWOLD, et al.,
Respondents.

For Petitioners:
Eric Olson, Esq.
Sean Grimsley, Esq.
Mario Nicolais, Esq.
Jason Murray, Esq.

For Respondent Griswold:
Michael Kotlarczyk, Esq.

For Respondent Trump:
Scott Gessler, Esq.
Justin North, Esq.
Geoffrey Blue, Esq.

For Intervenor: M
ichael Melito, Esq.
Robert Kitsmiller, Esq.

The matter came on for hearing on October 13,
2023, before the HONORABLE SARAH B. WALLACE,

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Judge of the Denver County District Court, and the following proceedings were had.

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P R O C E E D I N G S

(Participants appear in person and via Webex)

THE COURT: Good afternoon.

MR. GRIMSLEY: Good afternoon.

THE COURT: You may be seated. So I wanted to — well, let's get on the record. We are on the record on Anderson v. Griswold, 2023CV32577. May I have entries of appearances starting with the Petitioners?

MR. GRIMSLEY: Sean Grimsley, Jason Murray, Mario Nicolais, and Eric Olson on behalf of Petitioners.

MR. GESSLER: Good afternoon, Your Honor. Scott Gessler, Geoff Blue, and Justin North on behalf of President Trump.

MR. KOTLARCZYK: Good afternoon, Your Honor. Michael Kotlarczyk from the Office of Attorney General on behalf of the Secretary of State, Jena Griswold.

MR. MELITO: Good afternoon, Your Honor. Michael Melito and Bob Kitsmiller on behalf of the Colorado GOP.

THE COURT: Great. And so everybody's just going to have to either speak really loudly or get in front of the microphone in order to be heard. So I thought we should just take the opportunity to cover a few things since everybody was planning on being here anyway. I currently still have five pending dispositive motions in front of me.

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MR. GESSLER: Only two from us you — I believe, Your Honor.

THE COURT: Only two from you.

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MR. GESSLER: So far.

THE COURT: Two from the Republican Party, and one from the Petitioners. So I am — I'm working on those, but I do think that some of them, the answer's going to be that's exactly what we're going to be addressing at the hearing. But I will get some sort of form of order out before the 30th in which I advise the part — either rule on issues or say I'm going to defer a ruling and wait until we hear the evidence at trial.

Which brings me to the real reason that I thought it might be useful to speak, which is I think it would be useful for the Court to have the parties prepare something in the concept of a pretrial order where they advise the Court what they think the issues that need to be decided are and what they're going to be presenting at the hearing so that if I disagree, I can let you know in advance. And if there are things that I think need to be addressed or I'd like to hear evidence on, that I can give you heads up about that.

I am a little bit worried about — I think under the current schedule, which I'm not going to back out of, I agreed to it, we have a lot that's going to be coming my way literally the Friday before the trial is to start, and there's

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only so many hours in that intervening weekend, including my father-in-law's 80th birthday party. So when would it seem possible to get something like that? And I understand that the parties may not agree, and I also understand that whatever ruling I make on the rest of the dispositive motions will impact that.

But when might you be able to come up with something which at least maybe is the things you agree

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need to be addressed and then the things that maybe you don't agree need to be addressed?

MR. GRIMSLEY: Your Honor, this is Sean Grimsley for the Petitioners. We would like to do whatever Your Honor would like. We could have it that Wednesday, the 25th. We could do it that Monday. How long in advance would Your Honor prefer to have that?

THE COURT: I'd just like to have it long enough that I can review it and give you some notice if I think that there's something that the parties are really planning on that I might find to be interesting. And so as an example, and I'm not sure if in 10 days I'm going to still think the same thing, but — A, because I don't have all the briefing yet, and some of the briefing that I do have, I haven't even read.

But for instance, the Petitioners point to the fact that the Secretary of State previously has in the Hassan case looked to the United States constitutional provisions as

[p.6]

to the qualifications of a president and took the position that Mr. Hassan couldn't be on the ballot. Is that the only time that's ever happened? Does the Secretary of State regularly do that kind of review? That's something that I think would be helpful to have evidence on. Maybe the parties don't, but that's the type of thing, as I've been reading the pleadings, that have been going through my head, which is, you know, what exactly am I going to get to hear evidence on, and is it going to be things that I might find to be useful?

And the Republican Party and Intervenor Trump might say, well, we think that's totally irrelevant, maybe or maybe not, but I'd just kind of like to make sure that we're all kind of heading in the same direction because we have such a limited amount of time. So —

MR. GRIMSLEY: So, Your Honor, it sounds like we would want it far enough in advance to you so that you could get back to us far enough in advance to make sure that we're addressing the questions you have. So I was thinking and just talking with my colleagues that next Friday, I think, would work for us. I don't know if it would work for the other parties.

THE COURT: And is — so next Friday would be —

MR. GRIMSLEY: The 20th. I'm sorry.

THE COURT: Yeah, so it would be the Friday with one week in advance. That to me seems like a good timeframe.

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And obviously, I know it's all moving parts, especially since I've just confessed that I haven't even read all the pleadings that have been filed.

Would that work for your side, Mr. Gessler?

MR. GESSLER: Sure, Your Honor. And let me just add a little bit more, and I've got other stuff to say. But addressing this, what may be helpful would be, you know, if you want to issue a list of questions or thoughts now, because when you said, well, I might want to hear evidence on it, I'm thinking, oh my gosh, I might have to find other witnesses.

So for example, the Hassan case, I mean, I happen to know someone who might have some personal knowledge on that issue. And —

THE COURT: Right. But that — you know, that really — I guess my thought process on that was really, like, is the Secretary of State's office going to make somebody available who might testify as to, you know, what they do when they get these — I know you once were, but you haven't been for a while, so.

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MR. GESSLER: Yeah, and that's all fair. I guess my point is just if you're thinking, I want — I — you know, I'm interested in evidence on this issue or that, if you could tell us sooner than later, I mean, even within the next few days, you know, and maybe, you know, one of us will say, well, we don't think that's relevant, or we do, but we can at

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least —

THE COURT: Yeah.

MR. GESSLER: — maybe mobilize some witnesses or evidence for that.

THE COURT: It —

MR. GESSLER: Or maybe not, I don't know, but —

THE COURT: Yeah, it is a two-way street.

MR. GESSLER: — that would be helpful, yeah. And as far as our — as far as issues, I mean, my sense is, and I will ask for some guidance on this. I mean, my sense is that our third motion to dismiss, the one, as I sort of characterize it, involves federal issues, that may be the one where we have discussions among ourselves where we think there are certain issues; for example, the definition of insurrection or the definition of engage, things along those lines, that may be sort of factual disputes to the extent appropriate. But my sense is some of them may derive from that.

And I think you had indicated at perhaps the last status conference that your inclination was perhaps to take some of those issues under advisement. Don't know if that's still the case, but, you know, that may be sort of fertile grounds for us to have that discussion.

And we had asked and we have pending a motion to respond to the response to that motion this coming

Monday, in part because I like to think we were careful in keeping things

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short. And I teasingly say that the Petitioners wrote almost 15,000 words, which we're fine responding to, but we just need a little bit more time. So I'd certainly ask for that, for clarity here today.

But my sense is, you know, we've had a good relationship and open discussions, and then to the extent the Court can provide guidance sooner than later so that we can prepare this as appropriate.

THE COURT: Yeah. I mean, I have — well, I think what I indicated, and it may be — have been at the very first hearing, was I think that it would be very useful to hear from some constitutional scholars on some of the issues that have been raised. And I have read Intervenor Trump's motion to dismiss the one that you're asking for the extension on, the reply. I have not read the response, but I did note that there was a lot of — a fair amount of citations to Law Review articles which I don't think are going to be admissible.

So, you know, I stand on I think it would be helpful to, when we're trying to decide what was what engagement in 18 — I'm going to probably get the date wrong, but 1860 or whenever it was, you know, I do think that that's something that having expert testimony on would be helpful, because I don't know that it means the same thing today — it means the same thing that Webster says it means today that it meant back then. So that's, you know, another example.

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So I will endeavor to, you know, maybe put out an order of some things that I think would be helpful, but I think it would be great if by next Friday the parties can

provide a list of where they're heading on this. I mean, you — at this point in time, I'm assuming that, you know, you know the issues better than I do.

MR. GESSLER: Perhaps.

THE COURT: I plan to get up —

MR. GESSLER: We'll find out.

THE COURT: I plan to get up to speed, but I've had a few other things going on. So how about you make either whatever you can stipulate to as to issues and then whatever you don't stipulate to. And I'm not going to say, well, you didn't — I — it would just — I just — I really don't want the time that we have to be wasted. So I'm not trying to bind people, I'm just trying to make sure that we're kind of flowing in the same direction and that we don't have, you know, some expert fly in for a day of testimony about a subject that I don't really even understand why we're hearing about. And this is totally hypothetical.

MR. GESSLER: That's fine. Your Honor, I guess I would view it as, I mean, sort of an ongoing conversation to try and narrow and create some trial efficiencies, and we're certainly open to that.

THE COURT: Okay. Great. Anything from the [p.11]

Secretary of State?

MR. KOTLARCZYK: Thank you, Your Honor. The only thing I would add, I think the order Your Honor just mentioned would be very helpful. I think I've said before that we don't have any intention to make an affirmative evidentiary presentation, but if there are witnesses that the Court feels would be beneficial to the Court resolving many of the novel issues that are presented by this case that are within the Secretary of State's Office, you know,

we would love to know that ahead of time and we'll do everything we can to be of use to the Court.

THE COURT: Well, yeah. And, I mean, as you know, the — you know, one of the main arguments of the Republican Party and of Intervenor Trump is that what's being asked to do is, you know, totally afield from anything that the Secretary of State's Office does. So I do think it would be helpful to know historically what it does. You know, when my 17-year-old son asks to have his name put on the ballot, does the Secretary of State not feel it has any obligation to make sure that he meets the age requirements in the Constitution?

MR. KOTLARCZYK: Right. Understood, Your Honor. I think there's a — certainly an element of this that's a legal question, and then I understand Your Honor wants some evidentiary presentation on —

THE COURT: Yeah.

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MR. KOTLARCZYK: — historical practice and —

THE COURT: So I'm hoping that you'll — the Secretary of State, at least in that sense, will work with the Petitioners on some of those issues.

MR. KOTLARCZYK: We'll — we will work — and the 20th date to work with all the parties on a pretrial order should be fine for us, Your Honor.

THE COURT: Great.

MR. KOTLARCZYK: Thank you.

THE COURT: Anything from the Republican Party?

MR. MELITO: No, Your Honor. We just appreciate you getting the rulings out in advance of the hearing. Thank you.

THE COURT: Yeah, and I'm hopefully going to get some more out.

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So on the hearing itself, I take it that Intervenor Trump got my ruling that I really don't want to hear about evidence that was presented — I don't want to hear the evidentiary objections to the evidence that was put into the anti-SLAPP motion, so you know it's coming your way, I don't want to have the briefing done on that on the 27th. And so are you planning on responding to their evidentiary kind of submissions by the close of today?

MR. GESSLER: No, we're not, Your Honor. Our interpretation was that with the anti-SLAPP going away, the

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obligation to object to that also went away. Now, frankly, there were certain items in that that are not, from what we saw, part of the evidentiary exhibits. But we do plan on objecting to a number of things on the evidentiary object — exhibits. And my read was if it wasn't handled in the anti-SLAPP motion, it would be handled — our objections were due on the 20th, I believe. And that's what we're anticipating.

THE COURT: Okay. So the reason that I asked for — you can stand or you can sit, but I always feel like people look uncomfortable.

MR. GESSLER: I'll stand up here so we can —

THE COURT: — leaning over that table.

MR. GESSLER: — have a conversation. That's fine.

THE COURT: So the reason that I asked the Petitioners when they presented the evidence in the anti-SLAPP motion to say how — why they thought it was admissible and — was because had I gotten to the merits of the anti-SLAPP motion, I would have had to rule on the admissibility. That was one reason, but the second reason was presumably a fair amount of the evidence in the anti-SLAPP motion is going to be the evidence at the trial. And

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requiring the — both intervenors to respond to that offer of why it was admissibility — it was admissible, would then prevent me on

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the 27th of October of having, you know, every single issue of what are pretty complex admissibility questions before me.

So when I issued the order on I think Wednesday, saying, hey, I read your brief and you didn't do what I asked you to do, which was say why you thought the evidence attached to the SLAPP motion was admissible or not admissible, it was because to the extent it's going to be offered at trial, I want to know the issues so I can start thinking about them.

Now, if there are things that they attach to the — and so that's why I issued the order, and that's why I had the expectation that your client was going to respond to that. So I didn't — in my view, the issue didn't go away with the SLAPP motion because there's still all these outstanding evidentiary issues. And if you make them on the 20th and Petitioners respond on the 27th, we're going to have a lot of time spent — wasted time spent where I'm hearing things for the first time because there's only so many hours in a weekend.

So if there are issues, for instance, of — just picking one out of the top of my head, you know, they gave their evidentiary basis for why the House Report was admissible. If they've listed the House Report on their list of exhibits, which it sounds like you have, I want to know if you're going to object, and if not, why, so I can start having people look into it. And I want that as soon as possible.

MR. GESSLER: Okay. What deadline would you

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give us?

THE COURT: Well, the deadline was today. But I understand if you haven't — if you, as of yesterday or late — I guess late Wednesday, thought that it was no longer necessary, how about close of business on Monday?

MR. GESSLER: Could we do Tuesday, Your Honor?

THE COURT: Sure. On your request for the extension on the what I will call the 14th Amendment motion, you may have till Monday.

MR. GESSLER: Thank you, Your Honor.

THE COURT: But I was struck by the irony that — given I'm the one with what will be a total of six dispositive motions to rule on, but that being said, I haven't even read everything that's in front of me now, so you can have the extra time. MR. GESSLER: Thank you, Your Honor.

THE COURT: So does that make sense to you?

MR. GESSLER: Yep, that makes absolute sense, Your Honor.

THE COURT: Okay. So I want the motions in limine to be limited to things that you already don't know about because of the anti-SLAPP response.

MR. GESSLER: We will keep our motions well under 15,000 words, Your Honor.

THE COURT: Okay.

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MR. GESSLER: And we will work to be concise.

THE COURT: Okay. Anything else?

MR. GESSLER: Sure. Just a few things, Your Honor.

MR. GRIMSLEY: On this issue, may I just be heard briefly?

THE COURT: Sure, sure.

MR. GRIMSLEY: I hesitate to ask this, but in the event there are issues that come up in their response, can

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we get some sort of short reply to you by Friday of next week?

THE COURT: Sure.

MR. GRIMSLEY: Thank you, Your Honor.

THE COURT: And I appreciated the brevity of what they put in their appendix.

MR. GESSLER: Okay.

THE COURT: Go ahead.

MR. GESSLER: Is that a hint, Your Honor? We will work to be brief as well.

Just one thing from us, and I hate bringing this up, but I'm going to. So for our anti-SLAPP motion, when we brought that, obviously the Court here dismissed that on what we would sort of describe as sort of procedural grounds, that it's inappropriate for the 113 and based on the public policy aspects of this case. We do want to make sure that we properly bring before the Court and tee up the Brandenburg standards on

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the First Amendment versus the Fourteenth Amendment. The way we had teed those up obviously was in the anti-SLAPP motion.

Now, what we are going to be filing today is another motion to dismiss, but it's essentially going to be almost word for word the same as our First Amendment arguments in the special motion to dismiss so that the merits are properly teed up before this Court.

THE COURT: Okay.

MR. GESSLER: The second thing we're going to be filing, and we had hoped to get this stuff done before this conference so that you would have it to at least look at, but so our apologies on that, we are going to be moving to realign the Secretary of State with the Petitioners. So that motion will be coming; that will be opposed. Okay?

JA131

And then lastly, and this is — I don't want to call this a placeholder because it is a meaningful motion, but I don't anticipate the Court will rule on this anytime soon, but we are going to be requesting attorney's fees for the complaint brought by — or the petition brought by the Petitioners. That won't be based on the Fourteenth Amendment aspects of this case, but rather the declaratory judgment, as well as the 113/1204 proceedings.

I under — I doubt that the Court will direct its attention to that anytime soon, and we're not asking for that, but we are at least going to get this in before the Court

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so it's part of the record. So those three will be coming your way, Your Honor.

THE COURT: Okay. Well, so let's take them one by one.

The Brandenburg issue, can that not — I mean, if you need to do a motion to dismiss, that's fine. But, you know, it's kind of then, you know, starts a whole new briefing which I'm not sure is necessary to preserve the issue, one.

The second one was the realignment. To what end? Like, what is the need to realign?

MR. GESSLER: The evidence — when you look at the

—

THE COURT: And I'm not saying that that may be that the Secretary of State isn't more properly aligned with them. I'm just wondering, you know, what the need is for that.

MR. GESSLER: Right. I think there's two, Your Honor. When you look at sort of the evidentiary order of proof and presentation, you know, we think that the — you know, both from her public statements and positions

that she's taken in this case, that the Secretary is aligned with the Petitioners, particularly because at this point the Secretary's unwilling to put President Trump, certify him on the ballot absent an order from this Court when she herself has admitted that there's no explicit authority to prohibit her from doing that or to enable her to refuse to certify. So that's for the merits.

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From the practical, to directly answer your question, you know, hostile parties with respect to cross-examination and direct examination, to the extent there's witnesses propounded by the Petitioner, we want to ensure that the Secretary's going to be doing direct examination because they're sympathetic witnesses. And likewise, that — it may also have implications with respect to the posture on appeal, depending or assuming this is appealed. So there are, we believe, some very practical concerns there as well.

THE COURT: So, okay. Well, I guess I see the Secretary of State's position a little bit differently. I think her position is she is going to put him on the ballot, that she would appreciate direction, absent direction from the Court to not put him on the ballot. But, you know, that's neither here or there. I assume that the Secretary of State will, if she opposes the realignment, will let me know why. And I will put that in on one of the things to rule on before the —

MR. GESSLER: She —

THE COURT: — hearing.

MR. GESSLER: Yeah, and she has indicated her opposition, and obviously we appreciate the opportunity to make our case on this issue.

THE COURT: Yep. I will tell you that the last, at least last thing on my list, but it sounds like you may have

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other things on your list. Then on the third thing with the attorney's fees, why can that not wait until after the hearing when you actually know what your attorney's fees are?

MR. GESSLER: I guess with respect to Count 1, it could. But certainly with respect to Count 2, we think it's appropriate to do it now since the Petitioners have — I won't say formally moved to dismiss, but they've certainly indicated they're —

THE COURT: They —

MR. GESSLER: — abandoning that claim.

THE COURT: They, at our request, filed a motion —

MR. GESSLER: Oh, they did?

THE COURT: — or stipulation —

MR. GESSLER: Okay.

THE COURT: — of dismissal.

MR. GESSLER: Okay. So we think that one's certainly ripe now. I'm not asking this Court to rule on this stuff before the hearing to be frank, Your Honor. We — we're not asking for that. But we just — we do want to get it in to make sure it's part of the record.

THE COURT: Okay. Well, I'm not going to require anybody to respond before the hearing either, nor do you, I think really want to reply before the hearing.

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MR. GESSLER: No. And that's why I'm just putting this out here for you.

THE COURT: Okay.

MR. GESSLER: I'm not — we're not trying to gum up with works procedurally. We just want to make sure we present our case in a robust fashion and in the record before the Court.

THE COURT: Okay. Well, why don't we just say if you're going to file the — a motion for attorney's fees, that the response will be due — I mean, once I make my ruling, you're likely then going to be running off to the Supreme Court, so it's not going to be a particularly good time. So when would you — when would the Petitioners like to respond or what's your view on this? To me it seems premature, but I can't stop somebody from filing something.

MR. GRIMSLEY: Maybe November 15th, Your Honor.

THE COURT: Sure. Okay.

MR. GRIMSLEY: And just to be clear, we don't — if we have a motion for attorney's fees, we don't have to file it now. We can wait until after everything.

THE COURT: No. Yeah, I think it's premature, so.

MR. GESSLER: That's all we have, Your Honor.

THE COURT: Okay. Before I finish, the one thing that I had on my list was we're going to have 35 hours of [p.22]

hearing time. I'm going to split it 50/50 between the Petitioners and the Defendants. But I'm going to — I don't think it sounds like the Secretary is planning on putting on a case, but to the extent, for instance, that she calls somebody from her office, et cetera, to testify, that will be counted towards the Petitioners. So each side will have 17 and a half hours to do with whatever they want, whether it's argument or evidence.

MR. GRIMSLEY: And cross-examination will count against the cross-examining party, correct?

THE COURT: Correct, yep. And, oh, I know; the other thing I wanted to talk about is this issue of the 48-hour requirement. I am a little bit worried about it, you know, so one thought that I had was to have essentially a

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closing argument on like the 15th of November to — and then get a ruling out within 48 hours of the closing argument in an effort to abide by the statute. So I guess I'd be interested in whomever thought — thinks it's waivable, why they think it's waivable. And I assume that the — I assume it's the Defendants' position or the Intervenor's position that it's not applicable because 113 isn't applicable at all.

MR. GESSLER: That is correct, Your Honor.

THE COURT: Okay. So I assume it's the Petitioners who think that I can waive it.

MR. GRIMSLEY: Your Honor, we believe, and we [p.23]

haven't done extensive research on this I admit, but we believe we have not seen that as a jurisdictional requirement, and so we believe it can be waived by the parties. I think the Secretary of State is of the same view. And we understand that 48 hours is a lot to ask in a case like this. Your Honor has scheduled this in a way that we think there is enough time to get this done in an orderly fashion before the ballots have to go out. So we wouldn't waive it forever, but willing, certainly, to waive the 48 hours.

THE COURT: Right. And has anybody who does these 113 proceedings with any frequency ever seen it be waived?

MR. KOTLARCZYK: Your Honor, the 48-hour requirement's not in 113. So it — that doesn't apply in your —

THE COURT: Yeah.

MR. KOTLARCZYK: — run-of-the-mill 113.

THE COURT: Right. It's in —

MR. KOTLARCZYK: And —

THE COURT: It's in 1204?

MR. KOTLARCZYK: And this is the very first 1204 action. There's comparable 48-hour requirements in other parts of the Election Code —

THE COURT: Uh-huh.

MR. KOTLARCZYK: — where — there is some older [p.24]

case law showing that the — or holding that those deadlines are not jurisdictional. I don't have those cases right at my fingertips.

THE COURT: Oh, okay.

MR. KOTLARCZYK: But in other provisions of the Election Code that have some of these tight timelines, they have been found to be non-jurisdictional. But again, not exactly in a 113, not exactly in a 1204, but we think that provides ample support for the Court either continuing the closing arguments like Your Honor suggested, or if it closes at the end of the week of the 30th, also just ruling in as timely a fashion as can reasonably be expected in these circumstances.

THE COURT: Yeah. Well, that does give me some solace, and I guess to some extent that ship has sailed in the sense that I did beat the five-day requirement, so.

MR. KOTLARCZYK: I think that's fair, Your Honor.

THE COURT: Okay. So those were the two things that I wanted to address. And I suppose on the closing arguments, you know, we can see how the timing goes at the hearing. And if, you know, people aren't having an oppor — in reality, you know, the findings of facts, conclusions of law are, you know, the most effective closing arguments in terms of assisting the Court, so.

MR. GRIMSLEY: And, Your Honor, I'd agree that I [p.25]

don't think we necessarily need it that week. Having some time, perhaps, between the end of the evidentiary

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presentation and the closing might be helpful for Your Honor, because Your Honor may have questions —

THE COURT: Sure.

MR. GRIMSLEY: — that you'd like answered, and that would give you the opportunity to formulate those, perhaps give it to us in advance, and we could come to the closing argument prepared to address those.

THE COURT: Well, why don't we just — if the parties are willing, why don't we tentatively schedule closing arguments for 3:00 to 5:00 on November 15th?

MR. GRIMSLEY: And Your Honor, I have a few additional issues I wanted to raise. Some of them involve witnesses. I can try not to say names.

THE COURT: Okay.

MR. GRIMSLEY: Although one of them I don't think I can avoid.

THE COURT: Okay.

MR. GRIMSLEY: So I wonder if we — if you're — you'd prefer to close the courtroom or if we just talk in code in that way. But let me start with —

THE COURT: Because we do have —

UNIDENTIFIED VOICE: At this point I'd rather close the court —

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THE COURT: There is media —

UNIDENTIFIED VOICE: — if we're going to talk about any names.

THE COURT: There is media on the Webex, so I think if we wanted to really have something in camera, we'd have to go into chambers. And then you'd get to see my piles of all the dispositive motions.

MR. GRIMSLEY: Well, let — Your Honor, let me address a couple things first —

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THE COURT: Okay. MR. GRIMSLEY: — and I can do it, I think, without the need —

THE COURT: Okay.

MR. GRIMSLEY: — to close the courtroom or go in camera. And I was just going to hand up to you Intervenor Trump's witness list. I'm not going to name any witnesses by name.

THE COURT: Okay.

MR. GRIMSLEY: But you will see there that there are 14 witnesses listed, all may-call.

THE COURT: Okay.

MR. GRIMSLEY: And I know Your Honor expressed some concern about the usefulness of may-call lists.

THE COURT: Uh-huh.

MR. GRIMSLEY: I share that concern. We need to [p.27]

get ready. I'd be very surprised if even half of those people were legitimately possible witnesses, but we'd like some better information if possible.

THE COURT: Well, and I also don't think that this complies with my expectations as to the subjects that they'd be testifying about. It's like in a Rule 26 disclosure when —

UNIDENTIFIED VOICE: Judge, the way you're holding that, the camera —

THE COURT: I'm trying to avoid that. The — you know, it's like a Rule 26 disclosure when you say the person has information related to the case. So I can't remember exactly, did both parties exchange witness lists?

MR. GRIMSLEY: We did, Your Honor. We provided a witness list. I think we have six will-calls and three may-calls.

THE COURT: Okay.

MR. GRIMSLEY: We also, and this is not true of all of the witnesses on that list, but provided declarations from many of those will-call witnesses, I think even one of the may-call witnesses, in support of the anti-SLAPP response. So there's been fairly significant discovery from us on most of the witnesses. And then for the remainder, I think we do describe, I don't have it right in front of me, but the basic subject matter over which they were going to testify.

[p.28]

THE COURT: Okay. And so what are you asking for?

MR. GRIMSLEY: If we could get a better good faith list. I know there's going to be a final witness list and there's a deadline for that in the future, but this is so difficult to decipher that we'd like a narrowed-down or at least a list that identifies will-calls by Monday.

THE COURT: Mr. Gessler?

MR. GESSLER: Your Honor, we can produce will-calls by Monday.

THE COURT: Okay.

MR. GESSLER: And if I may address one thing, and I will be frank with the Court, we have obviously lodged our objections in the past, but I will nonetheless renew our deep sense of frustration for this process here. The Petitioners, as we've said before, have had months. We were notified that they were anticipating this case for a year prior, and we have had weeks to try and obtain witnesses where we have no subpoena powers, where — this is an explosive matter where witnesses are very hesitant to even have their names known due to prosecution. The entire process has been exceptionally difficult and we would submit highly prejudicial to our ability to bring a defense.

JA140

I've approached this in good faith with a can-do attitude in trying to do this, but I will be frank, Your Honor,

[p.29]

you yourself have served as a litigator and I'm sure you can understand the challenges we face in trying to obtain witnesses for an event that happened a year and a half ago, 2000 miles away, with no subpoena powers, where everyone is hesitant to speak. It is exceptionally difficult.

And we are doing our level best here. We're certainly willing to provide as much information as we can about will-call by Monday. I'm not objecting to that. But I do not want implications, and to be frank, that there is any way we have not acted in good faith or done anything less than made Herculean efforts to try and move forward on what is an incredibly compressed timeframe where we've had very little opportunity to prepare a case.

THE COURT: Okay. So let's try to have a will-call, may-call, and I do think they're entitled to a little bit more detail as to what these people may or may not say. And I'm assuming that this is not including expert testimony, that —

MR. GRIMSLEY: That's correct. Our expert disclosures are due today, Your Honor.

THE COURT: Okay. Great. And I guess, also, I assume it goes without saying that we don't have time or really want to have, you know, complete duplication of testimony, because it strikes me that many people on this list probably have very similar, if not the same information.

[p.30]

MR. GESSLER: Your Honor, I think that applies to witnesses numbers 7 through 12, certainly.

JA141

THE COURT: Yep, and 2. And number 2 as well. Right?

MR. GESSLER: Perhaps not, Your Honor.

THE COURT: Okay.

MR. GRIMSLEY: And, Your Honor, that brings me to the second item about witnesses, and this goes to the hearing itself. As Your Honor has noted, it's going to be a very compressed hearing. Even though I think we will have more evidence to put on, we're going to be constrained by 17 hours, but five days for all of us. Given some of the people you see on that witness list, and as you might imagine might be on ours as well, I just wanted to bring up with the Court that the parties be admonished, and we'll commit to this, that we're not going to engage in sideshows on cross-examination.

The cross-examination should be limited to the testimony and evidence that was presented on direct examination. Bias obviously is generally fine on cross-examination, but not sideshows into things that are just meant to embarrass or sensationalize. And that — I assume that would be the Court's policy, but just wanted to make sure that that was the case.

THE COURT: I am not going to — I'm not going to limit cross-examinations necessarily to the directs because

[p.31]

I do want to employ kind of a one-touch rule where everything gets out at one time. But I am going to limit testimony to issues that are relevant in this case. And so

—
MR. GRIMSLEY: And that's fair, Your Honor. I just do worry that there's a real risk of sideshows. And again, we'll commit to not doing that if some of the witnesses on

that list testify, and I assume that Intervenor Trump would have no problem with that as well.

THE COURT: Well, and also, I mean, to some extent, if somebody wants to do a sideshow and they only have 17 hours, you know, that's a little bit kind of their loss, correct?

MR. GRIMSLEY: It is. But as Mr. Gessler points out, it's not so easy to get witnesses to testify in these cases. And so the idea that total sideshows will be permitted just because it runs out the clock could really dampen somebody's enthusiasm for testifying.

THE COURT: Okay. Well, I have no problem letting people know when I don't want to hear something.

MR. GRIMSLEY: Thank you, Your Honor.

Then there's another non-witness issue. It's there's going to be a substantial amount, I think, of nontestimonial evidence if it comes in, like the January 6th report and the findings that we identified in response to the anti-SLAPP motion. I think there will be some videos that show

[p.32]

the party, the Intervenor, actually giving speeches or talking or whatnot. Those will not necessarily come in through a witness, especially if the last issue I have is true.

So the question is what would you like in terms of a procedure for getting that type of evidence to you? I — one way to do it, and I think maybe the most sensible, is that we cite it in our proposed findings of facts, we provide that evidence to Your Honor. Your Honor can look at it, either ask to look at it at the hearing or on a different schedule so that we're not taking up time with lawyers just either reading or showing endless video.

We may want to show some video just for context, and we'll certainly alert Your Honor to it. But in terms of all

the evidence we have, I don't think it would be a good use of time to be presenting it.

MR. GESSLER: May I respond, Your Honor?

THE COURT: Sure.

MR. GESSLER: I'd just say 17 hours is 17 hours. If they want to have witnesses, if they want to have evidence, if they want to have video evidence, that counts towards their 17 hours. If you want us to produce extensive video of testimony or whatever and ask you to look at it outside the trial, I guess we both can play that, take that approach. But we think it's highly inappropriate for them to say we have 17 hours, and then we're going to give you lots of other hours of

[p.33]

evidence to look at in chambers. We think that's inappropriate, Your Honor.

THE COURT: So I agree. I don't want to be handed, you know, 35 videos and asked to watch them back in chambers because, frankly, that won't really let me know what part of them you think is the most important, et cetera. That doesn't mean, however, that you necessarily need to bring in the video through a witness. If, for instance, it is a video of a Trump — an Intervenor Trump speech, you know, that's a statement against interest. It would be admissible, I believe, and can be played without, you know, somebody saying I took the video.

But in terms of like the House Report, I think it would be — I don't want — I'm going to need to be directed to, obviously, what parts of the House Report are — you think are — that I need to look at. And, B, my assumption is, is that, you know, there's going to be different objections to different parts of it, because while the document itself may pass one hearsay exception, there's going to be hearsay within that as well. And so, I mean, I

think we're going to have to, for the part — for the parts of it that you want to admit, are going to have to somehow be presented to me.

MR. GRIMSLEY: And Your Honor, we're not looking to admit the entire report.

THE COURT: Uh-huh.

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MR. GRIMSLEY: I don't know if Your Honor caught onto this. In our response to the anti-SLAPP motion —

THE COURT: You have —

MR. GRIMSLEY: — we submitted a declaration that had as an exhibit certain findings.

THE COURT: Yeah.

MR. GRIMSLEY: And those are the findings upon which we intend to rely. So we've already narrowed the —

THE COURT: Yeah.

MR. GRIMSLEY: — scope pretty significantly. I can't say it's a list of 15, it's a pretty substantial list. But that is the subset of findings that we would like to present. So we can go ahead and do that, but I do think video's a little bit different, and I understand Your Honor's concern there, but giving you those. And they have those now. If they want to raise objections to those as part of the —

THE COURT: Yeah.

MR. GRIMSLEY: — evidentiary objection process, I think that's up to them. But they know what we want present. We're not giving them a total black box here.

THE COURT: Yep. And the trial, I mean, in any — and then this goes a little bit to Mr. Gessler's point. I mean, in a trial to the Court, you always have — I mean, if you admit a contract and no witness speaks about it, and submit it into evidence, and in your findings of facts, you could

[p.35]

point to a provision that you didn't necessarily have testimony on, it's still evidence that's been admitted.

So I do understand that the findings of facts may include some things where there's no testimony, but, you know, the important things should be presented through some sort of witness or shown or, you know, pointed out so that the Court has the opportunity. I mean, I may have questions during trial and if the evidence isn't given to me during trial, I'm going to have trouble answering — asking those questions. Correct?

MR. GRIMSLEY: Absolutely, Your Honor.

THE COURT: So I think it's some sort of hybrid of what you suggest.

MR. GRIMSLEY: And it may be that there are findings that are sufficiently significant or sensible to present in the flow of the trial, and we can just present them and read them if need be, or we can figure out some manner of presentation. On the videos, we'll be ready to present whatever videos. We're just going to chop them up a bit. There will probably be completeness objections. We'll make sure that Your Honor has the full copy of some of these that we use.

THE COURT: Yeah.

MR. GRIMSLEY: But we will not be presenting, you know, 90-minute speeches.

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THE COURT: Thank you.

MR. GRIMSLEY: And the last one is one that Counsel for the Intervenor has asked that we do do in camera because it would require the name of a witness.

THE COURT: Okay. I wish I had known in advance so that, you know —

MR. GRIMSLEY: I'm very sorry, Your Honor.

THE COURT: How many people need to come back into chambers? Can it be limited to one per party?

MR. GESSLER: That's fine with us, Your Honor.

THE COURT: So the four of you?

MR. GRIMSLEY: That's fine, Your Honor.

THE COURT: Great.

(Off record)

MR. GESSLER: Not from us, Your Honor.

MR. KOTLARCZYK: Not for the Secretary, Your Honor. Thank you.

THE COURT: Great.

MR. GRIMSLEY: Your Honor, there are three motions that I think they're planning to file. Two — one we've already decided the attorney's fees we don't need to respond to until later, but we don't have a schedule really for these others.

I was going to suggest, actually, on the First Amendment motion, I agree with you, I don't think we're going

[p.37]

to say waiver because you didn't file the motion to dismiss. I don't think you necessarily have to file it in any event to preserve that. I would suggest to save everyone's time and sanity, that we just kind of convert that part of the briefing on the anti-SLAPP to like a pretrial brief that Your Honor has, rather than submit new papers on that.

MR. GESSLER: Let me consider that, Your Honor.

THE COURT: Okay.

MR. GESSLER: Let me think a little bit about it. And actually, I do have one other thing that my colleague pointed out.

For our motion in limine, our motions in limine, I mean, if there's sort of specific clips, you know, to the

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extent we could get those so we can target our motion, that would be very helpful for videos.

MR. GRIMSLEY: And we have I think on our exhibit list in many cases put both the full and then clips.

MR. GESSLER: Great.

MR. GRIMSLEY: The clips are the ones that we would be intending to play.

MR. GESSLER: Okay.

THE COURT: Okay. And the — and I don't — you know, absent perhaps this issue with the Brandenburg case, I do not want or need trial briefs. I consider the motions to dismiss to be trial briefs.

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MR. GRIMSLEY: Thank you, Your Honor.

MR. GESSLER: I'm trying to think if there's actually anything else we would want to say and I can't right now, Your Honor, so.

THE COURT: I'm so happy to hear that.

MR. GESSLER: But if it comes up, I'll certainly mention it.

MR. GRIMSLEY: And then, Your Honor, finally on the motion to realign, I heard that you were going — the Intervenor was going to file today, I think.

MR. GESSLER: Yes.

MR. GRIMSLEY: When would you like us to respond to that? And I think it would be more the Secretary of State's response, but I think we may weigh in as well.

THE COURT: Well, so Mr. Kotlarczyk, when do you think you can respond?

MR. KOTLARCZYK: I haven't seen it yet, Your Honor, but in keeping with the schedule of the case, a week.

THE COURT: Okay.

MR. KOTLARCZYK: Thank you.

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MR. GRIMSLEY: And that should be fine for us, too.

THE COURT: Okay. Are you going to need to reply, Mr. Gessler?

MR. GESSLER: If I do, we'll do it in a day or
[p.39]

two, Your Honor.

THE COURT: Okay. Great. Did I pronounce your name right, Mr. Kotlarczyk?

MR. KOTLARCZYK: That's it, Your Honor. Thank you.

THE COURT: Okay. I brought it back up on my screen just to make sure that I was at least attempting to say the right name.

MR. KOTLARCZYK: It's a lot of consonants, Your Honor.

THE COURT: Yeah. Anything else?

MR. GRIMSLEY: Nothing from us, Your Honor.

THE COURT: Perfect. We will go off the record on 2023CV32577.

(Proceedings concluded at 2:36 p.m.)

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DISTRICT COURT, CITY AND COUNTY OF
DENVER, COLORADO
1437 Bannock Street
Denver, CO 80203

Case Number 2023CV032577, Division/Courtroom 209

CERTIFIED STENOGRAPHER'S TRIAL
TRANSCRIPT
TRIAL DAY 1: October 30, 2023

NORMA ANDERSON, MICHELLE PRIOLA,
CLAUDINE CMARADA, KRISTA KAUFER,
KATHI WRIGHT, and CHRISTOPHER CASTILIAN,

Petitioners,

v.

JENA GRISWOLD, in her official capacity as Colorado
Secretary of State, and
DONALD J. TRUMP,

Respondents,

and

COLORADO REPUBLICAN STATE CENTRAL
COMMITTEE, and DONALD J. TRUMP,

Intervenors.

The trial in the above-entitled matter, commenced on
Monday, October 30, 2023, at 8:06 a.m., before the
HONORABLE SARAH B. WALLACE, Judge of the
District Court.

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This transcript is a complete transcription of the proceedings that were had in the above-entitled matter on the aforesaid date.

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MORNING SESSION, MONDAY, OCTOBER 30, 2023

WHEREUPON, the court convened at 3 8:06 a.m., and the following proceedings were had:

* * * * *

THE COURT: You may be seated.

Good morning. We are on the record on 2023-CV-32577, Norma Anderson, et al., vs. Jena Griswold and Interveners, Colorado Republican State Central Committee and Donald J. Trump.

Before we start, I just want to cover some preliminary matters. The Court has reviewed the motion to recuse that was filed yesterday, as well as the exhibits.

I do not dispute that in October '22, prior to taking the bench, I apparently made a \$100 contribution to the Colorado Turnout Project. That being said, prior to yesterday, I was not cognizant of this organization or its mission.

It has always been my practice, whether I was entirely successful or not, to make contributions to individuals, not PACs. While I have no specific memory of this contribution, it was my practice and my intention to contribute to an individual candidate, not a PAC.

I can assure all of the litigants in this litigation that prior to the start of this litigation,

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and to this day, I have formed no opinion whether events of January 6th constituted an insurrection or whether Intervenor Trump engaged in an insurrection or, for that matter, any of the issues that need to be cited in this

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hearing. If I did, I would recuse myself. But because I don't, I deny the motion for recusal.

I'm going to start with some ground rules. The petitioners and Secretary Griswold have a combined 18 hours of testimony, evidence, and arguments, and the intervenors have a combined 18 hours. You may use them as you wish, so long as they are productive and respect the decorum of the Court.

As I said in my prior rulings, the parties have very sophisticated lawyers. If the parties think something is relevant, then I will likely allow the subject to be explored. I will not, however, allow this proceeding to turn into a circus.

I also think that it is worth repeating that to the extent we have discussions on the record regarding evidence and whether it should be allowed in, I will count that time against the party who's objecting to the evidence.

Because I am the judge, I may ask questions. Do not infer anything by my questions.

Petitioners, are you planning on making an
[p.11]

opening statement, or do you intend to go straight to the evidence?

MR. GRIMSLEY: Your Honor, we will make an opening statement, and then we have a few preliminary issues as well.

THE COURT: Okay. And Mr. Gessler, are you planning on making an opening statement?

MR. GESSLER: Your Honor, we have a few preliminary issues, and then we'll make our opening statement.

THE COURT: Yeah. I just want to make sure we all understand the schedule. Okay. Whatever the preliminary issues are.

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MR. GRIMSLEY: Thank you, Your Honor. First, the parties have reached some stipulations. We will be filing those with the Court. There are 17 pretty benign, but it should help speed things up and make things more efficient.

THE COURT: Okay.

MR. GRIMSLEY: I can hand up a copy, if you'd like, or if you —

THE COURT: Sure.

Are these factual stipulations?

MR. GRIMSLEY: They are factual stipulations, Your Honor.

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THE COURT: Okay.

MR. GRIMSLEY: The next issue is the rule on witnesses. We would like to invoke the rule on witnesses, meaning that fact witnesses should not be present for testimony in the courtroom. Normally, that would be easy; you just keep people out of the courtroom.

In this case, because it's streaming and people could be watching from other places, we'd ask for an admonition that that not be done and that the parties alert their witnesses to that fact.

THE COURT: Okay. Well, the —

MR. GRIMSLEY: Expert witnesses, though, we would concede, can stay and watch.

THE COURT: Okay. Is that acceptable?

MR. GESSLER: Yeah, that's acceptable. No objection, Your Honor.

THE COURT: Okay. So the Court will enter a sequestration order, and it is incumbent upon the parties to make sure that their witnesses don't walk into the courtroom, but it's also incumbent on the parties to ensure that their witnesses don't log on to WebEx or otherwise

watch the proceedings, either live streamed or after the fact on YouTube, et cetera.

MR. GRIMSLEY: And there's another issue on witnesses I wanted to raise, Your Honor, and this may

[p.13]

actually shorten the hearing.

THE COURT: Okay.

MR. GRIMSLEY: We have two of our witnesses — I'm not going to name names — abruptly decide not to testify last week. They asserted — may I approach?

THE COURT: Sure.

MR. GRIMSLEY: — just so you can just see who they are.

I've highlighted the witness names on the second page. These were two Trump administration officials who were set to testify. One at length. We don't think they're necessary for our case, but wanted to alert the Court that they did very abruptly tell us last week they were not going to testify.

There have been some concerns about safety, but I'll confess, they did not say that was the issue. It's not very clear to us what the issue was.

They had raised the possibility of executive privilege. That seemed odd to us since one of them had submitted a declaration and no objection on privilege had been made. A motion to exclude that witness's testimony had been filed, and no objection based on privilege had been made. So it's a little odd to us, but we at least wanted to alert the Court.

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If we hear anything that gives us greater concern, we will, of course, bring it to the Court right away.

THE COURT: Okay.

MR. GRIMSLEY: On experts. As you know, we did not get expert reports — there was only one — from the respondents until Friday shortly before, I think, midnight. We got a report from a Mr. Delahunty — or Professor Delahunty.

In the normal course, we would have filed a 702 motion to exclude. He claims to be an expert on the Fourteenth Amendment and the history of the Fourteenth Amendment. He's never written on it before. He doesn't cite much in the way of actual history in this discussion of the Fourteenth Amendment.

Given the late nature of today, we can either file a short motion, if you'd like, or simply cross-examine Mr. Delahunty when he testifies. I assume that would be either Wednesday or Thursday.

THE COURT: Okay.

MR. GRIMSLEY: And then there were a few issues on exhibits.

In your order, I think on October 27, you had asked us to explain why Plaintiffs' Exhibit 131 was going to be used. That's the video of both Rudy Giuliani

[p.15]

and John Eastman on the Ellipse on January 6. They gave a speech right before President Trump gave his speech, and they provided the basis for President Trump to say that Vice President Pence had the authority to reject certification of the electors, and President Trump referred to their statements in his speech endorsing them. That was also the speech in which Mr. Giuliani said "trial by combat."

And again, we're not offering those statements or that speech for the truth of the matter asserted, but for the effect on the listeners, the effect on Mr. Trump. And, indeed, we don't agree with most of what they said. We're

offering it really for the untruth 14 of the matter asserted.

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And then there are two others, Plaintiffs' Exhibit 73 and Plaintiffs' Exhibit 126. Those were two videos that the Court excluded in its most recent order, I believe. It was not clear from our submission, and we apologize, that those were both videos that were embedded in tweets that President Trump sent out, so they were retweets from his account.

One of them, "The Fight for Trump," Plaintiffs' 73, was sent out the very same day as the "Will be Wild" tweet on December 19, and so we think it is highly relevant as speech of Mr. Trump. It was

[p.16]

endorsed by him and tweeted out. So we would ask for those to be admitted.

THE COURT: Okay. Any response?

MR. GESSLER: Yes, Your Honor. Thank you.

Before going to a response, for a preliminary matter, would you like us to enter appearances on record?

THE COURT: I was going to — I was planning on doing that before openings, but since — why don't — why don't you — why don't you respond to these things, and we'll have everybody enter their appearances.

MR. GESSLER: And then we'll take a half hour for entry of appearances.

So just — and if I may just talk about some of the preliminary matters we have as well. With respect to the witness withdrawals, we feel the petitioners' pain, and with respect to the exhibits, I mean, we'll maintain our objections.

And I understand the posture of the Court, particularly the objections with respect to Mr. Giuliani's and Mr. Eastman's speech. They're not the ones on trial

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here today. We're talking about whether President Trump engaged in activities, not — not whether they and — they were not President Trump when they made those speeches. So we would maintain those objections.

[p.17]

With respect to 73 and 126, we'll have to take a look at that a little bit closer, Your Honor. I confess that I don't have all 100-and-whatever exhibits fully committed to memory at this point.

With respect to some of our points, just to point out — and I know the Court has been very diligent in producing orders on issues. I think we still have the specific intent motion outstanding as far as that, as well as the First Amendment motion to dismiss. I'm assuming the Court will take those issues under advisement, but I wanted to at least point that out.

We have one witness who has concerns about some of the legal threats that have been levied against him, and so he's asked for an attorney to be present to be prepared to make objections to his testimony if the attorney believes it's inappropriate.

We're asking the Colorado Supreme Court, we will be asking them today, to sort of expedite that process so that he can — the attorney can be admitted pro hac vice, and then once that's done, we'll probably come to you and ask for an oral admission for that attorney.

THE COURT: Is that the person who — who filed the Prok motion on Friday, or is that somebody different?

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MR. GESSLER: It's someone yet new, Your Honor.

THE COURT: Okay.

MR. GESSLER: Yeah, that's someone different, Your Honor. It's a witness of our list; I believe it's the second witness we've listed.

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THE COURT: Okay.

MR. GESSLER: Let me — I don't quite have that order — yes, the second witness that we've listed. THE COURT: My guess on both is, I don't think that we need to intervene to tell the Colorado Supreme Court that the hearing is going on currently. But to the extent they say they won't expedite something without hearing from my chambers, just let us know, and we'll try to take care of that.

MR. GESSLER: Thank you.

And we expect, you know, estimates of time, that he'll go on probably Wednesday or Thursday. So we're hopeful we can get that taken care of.

The other thing, and I know — I believe you addressed this before. Some of our witnesses we may ask to call out of order based on schedule and the vagaries of the case.

I will say, Your Honor, it brought us no joy to file that motion earlier, so I just want to tell

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you where we're coming from on that.

THE COURT: No worries.

MR. GESSLER: And I think from preliminary matters, that's it.

While I'm at the podium, if you'd like me to do entries of appearance for our cast of characters, I'm happy to do that or — or wait.

THE COURT: Are you prepared to enter appearance for at least everybody on President Trump's team?

MR. GESSLER: Yes, ma'am.

THE COURT: Okay. If you can do that, that would be great.

MR. GESSLER: Okay. So for the record, my name is Scott Gessler. I represent President Donald J. Trump, and with me at the head of the table here is our paralegal,

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Ms. Joanna Bila. She keeps the trains running on time. Mr. Jonathan Shaw, who's been admitted pro hac vice. Mr. Geoffrey Blue, a member of my law firm.

In the back row we have Mr. Chris Halbohn. His motion was submitted. He will not be speaking until he's admitted, or perhaps ever. But he represents President Trump as well. Mr. Justin North from our law firm represents President Trump.

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In the back, we have Mr. Mark Meuser representing President Trump, and Mr. Jacob Roth as well.

I don't think I've missed anyone.

THE COURT: Great.

MR. GESSLER: Thank you, Your Honor.

THE COURT: And why don't we just go to the Colorado Republican Party. Could just one person do — enter the appearance for everyone, and I think it's probably best if you go to the podium.

MS. RASKIN: Certainly.

Good morning, Your Honor. I'm Jane Raskin with the American Center for Law and Justice. With me today, also with the ACLJ, is Norman [sic] Moelker and Benjamin Sisney, who's appearing remotely.

Also with us are Michael Melito of Melito Law, and Bob Kitsmiller of Podoll & Podoll.

THE COURT: Great. Thank you.

MS. RASKIN: Thank you.

THE COURT: And for the petitioners?

MR. GRIMSLEY: Thank you, Your Honor.

Sean Grimsley, on behalf of petitioners. With me is Eric Olson, Martha Tierney, at the end of counsel table. We have Nikhel Sus, Mario Nicolais, Jason Murray. And Derek Hehn will be handling technology for us.

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THE COURT: Great.

MR. SULLIVAN: Good morning, Your Honor. Grant Sullivan with the Colorado Attorney General's Office.

With me is Jennifer Sullivan, Deputy Attorney General. We represent Colorado Secretary of State, Jena Griswold.

I did have just one clarifying question on preliminary matters. The Secretary of State is a party to this case. She's also listed on the GOP's witness list. I just wanted to clarify that she's not subject to the sequestration order.

THE COURT: She is not.

MR. SULLIVAN: Thank you.

THE COURT: Parties are not going to be subject to the sequestration order.

MR. SULLIVAN: Thank you, Your Honor.

THE COURT: Are the petitioners ready to begin?

MR. OLSON: Yes, Your Honor.

THE COURT: Great.

As I look around, I think we have more lawyers and police officers than anybody else

MR. GRIMSLEY: Sign of the times.

MR. OLSON: My apologies, Your Honor.

[p.22]

Give me one second to make sure we have the right thing showing in the right way.

Do we need to turn these monitors on? We're seeing it on the — I think we're getting the output. We just need

—
THE COURT: While we do that, just for everybody's edification, if anybody doesn't want to stand at the podium, we do have a microphone that they can use.

MR. OLSON: Thank you, Your Honor.

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Good morning. Six Colorado voters, four Republicans and two independents, brought this case to ensure Colorado has a fair election among eligible candidates.

Trump incited a violent mob to attack our Capitol, to stop the peaceful transfer of power under our Constitution. That mob got within 40 feet of Vice President Pence after they chased him from the Senate Floor. That mob tried to hurt and kill our elected leaders, and we are here because Trump claims, after all that, he has the right to be President again.

But our Constitution, our shared charter of our nation, says he cannot do so. And Colorado law says this Court must ensure that only eligible candidates appear on our ballots.

Now, this case has four basic components:

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Trump took an oath as an officer of the United States; January 6 was an insurrection against the Constitution; Trump engaged in that insurrection; and the Secretary of State enforces constitutional qualifications, and this Court can order her to keep ineligible candidates off the ballot.

Now, turning to the first element, there's no dispute Trump took an oath as President. That's stipulated. I'll address their novel claim that his oath somehow falls outside of the Fourteenth Amendment later.

And what happened on January 6 was an insurrection against the Constitution. That's not in serious dispute. Trump's own impeachment lawyer admitted as much. Many others have found it.

We'll hear today and tomorrow from three people who were there that day. First are two officers, Officer Danny Hodges and Officer Winston Pingeon. They fought the mob, hand-to-hand combat, you'll see.

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We'll also hear from Representative Eric Swalwell, who will explain how that mob disrupted the core constitutional process of the peaceful transfer of power.

We'll also hear from Professor Gerard Magliocca. He is one of the nation's experts on the — Section 3 of the Fourteenth Amendment. He's written

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several peer-reviewed articles on Section 3 and many articles and books on the history of the Fourteenth Amendment. He will explain that when the Fourteenth Amendment was ratified, insurrection against the Constitution referred to any public use or threat of violence by a group to prevent or hinder the execution of the Constitution.

January 6 easily meets that standard. Trump assembled a violent mob that tried to prevent the constitutional transfer of power, and did, in fact, stop that transfer of power for some time.

Now, turning to President Trump's role in all of this, he engaged in this insurrection on January 6. He began by undermining the process for selecting our President in sowing doubts about elections. This early pattern of behavior shows Trump's use of common extremist tactics, using language that played into existing conspiracy theories. He was a leading proponent of the birther myth about President Obama.

He questioned the validity of elections, even the one he won in 2016, claiming he actually got millions more popular votes than he really did. And leading up to the 2020 election, he developed a plan to cast doubt on the results, and after the election, he quickly focused on the January 6 transfer of power to

[p.25]

disrupt the peaceful transfer of power.

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In December, he started laying the groundwork for disrupting the constitutional process on January 6. On December 19, he posted that “There will be a big protest in DC on January 6. Be there. Will be wild.”

A week later, he talked about never giving up: “See everyone in DC on January 6.” “See you in Washington, DC, on January 6. Don’t miss it.”

Again, “See you in DC.”

These tweets continued: “Big protest rally.” “Stop the steal.” We’ll hear about the importance of that language later on.

Again, talking about the 6th, over and over again, here he retweeted a claim that, quote, “The cavalry is coming.”

We’ll hear about Trump’s invocation of military terms to support and rile up his supporters. More admonitions: “Come to DC on January 6th,” over and over and over again. And then on January 6, he reposted his speech.

Now, in addition to this drumbeat of pleas to his supporters to have him come — to have them come to Washington to disrupt the transfer of power on

[p.26]

January 6, he made repeated, deliberate statements to bring a mob primed for violence to DC on January 6.

He refused to criticize the Proud Boys, an important part of the insurrection on January 6th in the presidential debate and, instead, told them to stand back and stand by.

(Video playing.)

MR. OLSON: Leading up to January 6, he praised the Trump Train, which was a group of trucks that intimidated and forced Biden campaign workers on a bus off a highway in Texas. He tweeted, “I love Texas,” with this video.

(Video playing.)

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MR. OLSON: He deliberately praised his supporters that used violent techniques to intimidate political opponents.

Again, leading up to January 6th, he used violent, inflammatory rhetoric. He claimed that if this happened to someone else, they would consider it an act of war and fight to the death.

Right before, January 5, he started — 6th, I'm sorry — he started threatening lawmakers with the crowd he assembled.

On the afternoon of January 5, he said, 'Washington is being inundated with people. Our

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country's had enough. They won't take it anymore.'

And he got even more bold a few minutes later when he said, "I hope the Democrats, and even more importantly, the weak and ineffective RINO section of the Republican Party are looking at the thousands of people pouring into DC. They won't stand for a landslide election victory to be stolen."

And then he identified three Republican leaders by name. He threatened leaders of his own party with the mob he assembled.

Now, you will hear from an expert in political extremism, who will discuss Trump's relationship with violence and political extremism. Professor Peter Simi has studied extremists for his whole career. He's written books, provided testimony at the January 6 Committee's invitation.

And he will explain how communications like we just saw, and additional ones, by President Trump fit into a longstanding call-and-response pattern that he developed with supporters where he instigated violence and praised

those who committed violence against political opponents on his behalf.

Now, turning back to what happened on January 6, once Trump brought the crowd there, he told them to march to the Capitol and fight. Let's look at

[p.28]

two portions of his speech on the Ellipse on January 6.

(Video playing.)

MR. OLSON: Two important features of that speech we just saw: First is his focus of the crowd on the actions of Mike Pence that were shortly to happen in the Senate Chamber; and second, his repeated reference to fight, and urging his supporters to fight.

Now, I'm sure that Trump will claim that because he used the words, quote, "peacefully and patriotically," later in that speech, that he did not, therefore, engage in insurrection.

That claim is wrong at every level. He used "fight" 20 times in that speech, "peaceful" only once. Professor Simi explains how leaders use language like that, like the peacefully comment, to create plausible deniability that is just filter.

Trump well knew how his supporters would respond. He saw what happened when he told the Proud Boys to stand back and stand by and how they treated that as an endorsement. In fact, his use of "peaceful" in the rally and again use in this proceeding highlights that he knew the power of his other words.

If you don't think people are going to engage in violence after what you told them or that your words will provoke violence, you don't need to say "be

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peaceful." They already will be.

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But that speech that we just saw got the crowd worked up and headed to the Capitol. I'll show you a video taken from the top of the Capitol, at 2:23. You can see the time stamp in the upper left.

So after the speech, the crowd followed Trump's orders and marched down to the Capitol. But as you can see from the video, much of the rally, they weren't doing much. They were just standing there. So what did Trump do right after, the minute after this video? He posted a tweet that incited the mob to violence.

Again, channeling on the focus on Mike Pence he used earlier in the day, he described Mike Pence as weak and said he didn't have the courage to do what should have been done to protect our country and our Constitution. "USA demands the truth."

And look what happened. Instantaneously with this tweet, we see people read it in the crowd from bullhorns. They immediately started chanting "Hang Mike Pence," and the violence began in earnest.

(Video playing.)

MR. OLSON: There was no possible innocent explanation for that tweet that set the crowd on fire.

We'll hear later today from

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Officer Hodges. This is his body cam at the exact same time. You can see in the upper right-hand corner, it's :, so within five minutes of Trump's issuing that tweet, this is what he faced.

(Video playing.)

MR. OLSON: So within 30 minutes of the tweet, we see the picture from the same vantage point we saw before. The crowd had overrun the barriers, but this was the back of the crowd. This was a crowd that was not the

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frontline of the attack, of the assault on our constitutional process.

We have video which shows Officer Hodges. Within 30 minutes of the tweet, he had retreated to the tunnel and was trying to defend the tunnel against this mob.

(Video playing.)

MR. OLSON: That is Officer Hodges, who you'll hear from shortly.

This was an insurrection that Trump led. As we've seen, he summoned and organized the mob. He gave the mob a common purpose: Disrupt Mike Pence's certification of the election. He did that by inciting the mob at the Ellipse.

He knew that mob was armed and dangerous. He told the mob to go to the Capitol with him. Once they

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were there and not sufficiently violent, he incited the mob with that 2:24 p.m. tweet and others that followed.

And, importantly, he helped the mob by refusing to mobilize resources to stop the attack. He spent three hours watching it unfold on TV without doing a single thing, even though he was the most powerful person in the world.

Now, what does Trump say in response to this overwhelming evidence? He says a few things. He says: Hey, I said "peacefully" in the speech so I didn't engage in the insurrection.

We already talked about that. That "peacefully" proves his intent.

He then says: I wasn't there. I did not engage in insurrection.

But he did. He kept quiet. He tweeted inflammatory statements that incited the mob and watched the mayhem unfold for three hours, with doing nothing.

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He continued to try to pressure Congress to do the mob's bidding and overturn the election.

And lastly, Trump says: Others failed to protect the Capitol, so it's not my fault there was an insurrection.

He blames others. But it was Trump's dereliction of duty in violation of his oath to preserve,

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protect, and defend the Constitution that caused the constitutional process to stop.

You'll hear from national security expert Bill Banks, who's dedicated his career to the safety of our nation, studying how that works. He wrote a book 6 recently called "Soldiers on the Home Front: The Domestic Role of the American Military." He explains that Trump did not use the available federal resources.

In fact, Trump didn't use the resources he used in response to other threats, like the Black Lives Matter protest at Lafayette Square, where they used tear gas and federal agents to clear the square very violently.

Now, Trump is going to call witnesses, we understand, to say that he tried to put people in place to defend the Capitol before January 6. That is not true. No record exists of him doing that, no indication that he used his vast power as Commander in Chief to do that at all. That is just an invented excuse after the fact with no evidentiary support.

But even that doesn't matter. Trump cannot avoid culpability for engaging insurrection by blaming the victim. Whether or not an insurrection occurred does not turn on how well defended the Capitol was. He ignited the mob, told them to go to the Capitol,

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and inflamed them with his tweet.

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Now, finally, Trump says the law — even if all that's true, the law doesn't apply to him, first because he says he just was using speech. But again, Professor Magliocca explains the history of Section 3 of the Fourteenth Amendment in using robust historical sources; shows that at the time of passage, 1868, engaging in insurrection included words of incitement or specific words of encouragement. That's what Trump did here.

And in any event, it's not just Trump's speech that is at issue. His conduct contributed to the mob's violence. His failure to act when his oath required him to do so led to the insurrection.

Now, Trump brings an expert, Professor Delahunty, but he's no expert at all on the Fourteenth Amendment. Never written a book or peer-reviewed article on this issue; on the Fourteenth Amendment more generally, not performed any original history. There's no record of him studying this before he wrote a short opinion piece two months ago.

Now, Trump next argues that the Fourteenth Amendment doesn't cover the President, that there's an exception because it's a different kind of officer.

Again, Professor Magliocca will explain
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why history contradicts this claim. It's nonsensical to create an exception for the most powerful person in government. And at the time, in 1868, there's widespread understanding that "officer" included the President.

Finally, Trump claims that state courts like this one can't hear these disputes. Now, as we've talked about, he's wrong under Colorado law. *Hanlen v. Gessler* makes clear that the Election Code requires issues regarding a candidate's eligibility to be determined by the courts, which is what we're doing here.

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In addition to this bedrock law, we'll also hear from Hillary Rudy, who's a deputy director in the Secretary of State's elections division. And she will explain the history of Secretary of State enforcement of qualifications and qualification challenges in court.

And I think Your Honor will easily conclude that this action falls well within a long line of cases where Courts decide ballot eligibility requirements.

Now, our Constitution prevents people who betrayed their solemn oath, as Trump did here, from serving in office again. Colorado law gives these voters the rights to make sure their votes will count by coming to this Court and ensuring that only eligible candidates

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appear on our ballots.

Trump engaged in insurrection and, therefore, cannot appear on the ballot. No person, not even the former President, is above the law.

We ask, after this hearing, that this Court find Trump is an ineligible candidate under Colorado law and order the Secretary of State not to place him on the ballot.

Thank you, Your Honor.

MR. GESSLER: Thank you, Your Honor.

So I don't have a highly produced video, but I do have a few words that I think this Court should follow and think about in this case.

The United States is the oldest modern democracy, well over years, far different than any other country in many ways.

And what makes us different is the experiment we launched, which is this thing called elections. We have elections. And that means when it comes to decide as to who should lead our nation, it's the people of the United States of America that get to make those decisions, not six

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voters in Colorado who have picked and chosen who they want to file a lawsuit against.

And this Court should not interfere with

[p.36]

that fundamental value, that rule of democracy. It's the people who get to decide.

And this lawsuit seeks to cancel that principle. This lawsuit is antidemocratic. It looks to extinguish the opportunity, extinguish it, the opportunity, for millions of Coloradans, Colorado Republicans and unaffiliated voters, to be able to choose and vote for the presidential candidate they want.

In fact, the leading Republican presidential candidate, and by many measures, the candidate, you know, most likely to win the presidency, they try — they want to extinguish that opportunity by preventing him from running for office.

It is antidemocratic. This is a case of lawfare that seeks to interfere with the presidential election. We argue here that this, at its basest level, this is election interference.

The petitioners here, the six voters, have appointed themselves private attorney generals that can pick and choose and file lawsuits against whom they seek to disqualify. And they rely on exceptionally weak and, frankly, in some cases fringe legal and logical theories to try and tilt the playing field of this election by wiping out President Trump's ability to run for election well before anyone has an opportunity to vote.

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They're asking today for a number of historical firsts. First, this is the first — they are asking this Court to be the first ever in American history, in American history, to

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disqualify a presidential candidate under Section 3 of the Fourteenth Amendment.

I point — we pointed the Court, I believe, to — or we will, Horace Greeley, who ran in as a Democratic presidential candidate. He had paid for Jefferson Thomas's [sic] bail. He was roundly accused, loudly accused of giving aid and comfort to the enemies of the United States shortly after the Civil War, when he ran.

Lots of debate on that issue. No one ever once thought of trying to disqualify him from voting. They took their arguments to the people for them to make that decision.

Eugene Debs, Socialist Party USA candidate in four elections, in ran from jail. He had been convicted of sedition for giving aid and comfort to enemies during the First World War by trying to stop military recruitment. He was convicted of that. He ran from jail.

He was never disqualified. No attempt was made to disqualify him under the — under Section 3 of

[p.38]

the Fourteenth Amendment.

The case of Eugene Debs is often regarded as a low point in American history, a low point when it comes to First Amendment protections. And for good reason. People should be able to run for office and shouldn't be punished for their speech.

The petitioners ask this Court to be the first state court in American history to disqualify a presidential candidate. They are asking, for the first time in American history, to disqualify any federal candidate — the state court to disqualify any federal candidate.

This is the first time in Colorado history anyone's ever tried to disqualify a presidential candidate under the Fourteenth Amendment.

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Asking the Secretary of State to go back and research a candidate's behavior, that's also a first. Never been asked or demanded before.

Even right now, there are 50 — about 50 cases, either pending or happen, nationwide specifically attacking President Trump. This is not a new tactic. This is the first where a dismissal has not automatically — I shouldn't say automatically — but promptly been granted because of the weakness of so many of these arguments.

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They're asking for the first time that the January 6 Report be treated as evidence in this Court, in a court of law, that politicized hearing. That's what they're asking, that this Court rely upon that as evidence.

And, frankly, they're asking this Court to be the first in the country ever to embrace a number of legal theories that have never been accepted by a court, state or federal. There's a lot of firsts they're trying in this case.

Their legal theories. I mean, we're arguing we shouldn't even be here, and we've argued that multiple times. This is a federal issue, perhaps the most important federal issue we can have. And it's for Congress to set these standards, for Congress to provide guidance, not for the petitioners to come up with theories and try and convince you that they may be right.

We've argued the Fourteenth Amendment's not self-executing and the preemption of political question, and we understand this Court's ruled against us in every instance. But nearly every Court that's ever looked at presidential qualifications — and I'm not just talking about issues involving President Trump —

(Siren interruption.)

THE COURT: You should just expect this to

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be a regular occurrence.

MR. GESSLER: I live in Denver, Your Honor. I understand sirens, unfortunately.

THE COURT: They really like this courtroom, though, because it's right next to Colfax.

MR. GESSLER: So it's not just President Trump.

You may recall that there was a little bit of controversy about President Obama's citizenship, and there was some controversy about Candidate, Senator, and Presidential Candidate McCain's citizenship, and there was controversy about Senator and Presidential Candidate Cruz's citizenship.

And there's one or two instances where those went to trial. But the vast majority of them were properly dismissed. The overwhelming weight of evidence is that this case should not be here.

Now, I want to talk a little bit about some of these specific claims. The claim that there was an insurrection. What constitutes an insurrection really needs to be grounded in historical usage. Because if you don't ground it in historical usage, you're just making it up.

Now, I'm not accusing the Court of making it up. I'm accusing the petitioners of making it up.

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But, look, you will hear from Professor Delahunty that there are lots of definitions of what an insurrection is. It's been going on — that word's been in English usage for a couple hundred years, probably more. I haven't quite looked at the etymology of it. And there are a lot of definitions.

Your Honor, I submit I could construct a legal argument or a law review article defending pretty much any one of those definitions. And when there are

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numerous definitions, that means there's really none. You might as well pick a definition out of the hat. And the petitioners have picked a definition out of the hat that suits them. That's their job, I get it.

But frankly, they're making up the standard so that it fits the facts of January 6, and I'm sure they'll try and come up with an argument that it will just fit to the facts of January 6, and it will never fit any other facts and there can never be any consequences. But the bottom line is, they're making it up, and they're picking a definition out of the hat.

What constitutes an insurrection needs to be grounded in historical usage because that's what the law demands; that's what equality under the law demands; that's what fairness so we understand what the standards are by which we comport our behavior, not post facto

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making it up to try and figure that out.

The term "engage." The term "engage" means to do something. Frankly, no one really knows what that means, but I think we can all agree it means to do something. That's what the word "engage" means. Okay.

There's substantial historical evidence that engage does not mean mere incitement through words. It doesn't mean that.

And frankly, President Trump didn't engage. He didn't carry a pitchfork to the Capitol Grounds, he didn't lead a charge, he didn't get in a fistfight with legislators, he didn't goad President Biden into a — going out back and having a fight. He gave a speech in which he asked people to peacefully and patriotically go to the Capitol to protest.

Now, I understand that there's several experts that are going to testify, and one's going to testify that

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President Trump, he just didn't do enough. He should have done more.

Now, that's a case of Monday morning quarterbacking. But he's saying: You should have done more. You didn't do enough. Should have done more, should have done more stuff earlier.

I can come up with all kinds of theories

[p.43]

this professor will say as to why you should have done enough stuff. And that professor is no doubt a learned man and very thoughtful on this.

But his basic argument, when it comes down to it, is they're claiming President Trump was negligent. Now, we reject that factual claim, of course, and you'll hear that — evidence that that characterization is completely wrong.

But more fundamentally, the entire theory is wrong. The failure to do something is the opposite of the word "engage." It's the opposite of the word "engage." And we'll — and we've argued engage requires specific intent. Someone doesn't just sort of stumble into starting an insurrection. They have to have the intent to do that.

And you'll hear evidence that President Trump took very specific actions to try to prevent violence, to take precautions, that he didn't want there to be violence on January 6.

And on January 6, he called for peace, and he used the word "peace" at least four times in his speech at the Ellipse and two tweets and a video message. So he asked for peace.

Now, the petitioners have played a couple videos.

[p.44]

(Siren interruption.)

THE COURT: The cards are stacked against you, I guess.

JA176

MR. GESSLER: I've been here before, Your Honor.

THE COURT: I promise, it's going to be an equal opportunity problem all week.

MR. GESSLER: I'm assuming your clerks are not timing — taking time against me when the sirens go by. Stop that timer, please.

So my next point is, thank God we have a First Amendment. I'm very thankful for the First Amendment. Spent most of my career defending the First Amendment.

Now, there's a reason it's the First, not 6 the Second, not the Eighth, as I debate with my friends who like the Second Amendment. It's the First Amendment, and it's free speech.

And I referred to Eugene Debs before. Eugene Debs was thrown in jail. He had to run for President from jail because of his speech. And it's properly condemned, that case today. And, in fact, even then, his sentence was commuted very shortly after the election of [sic]. None of President Trump's speech ever

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called for violence. Just the opposite. None of it ever called for insurrection. Did it call for political pressure? Yeah. Did it use a metaphor to fight in the political context? Yes. And I don't think even the petitioners would allege that President Trump, when he says "fight," he wants to get into a fistfight with people, okay?

None of his speech call for the overthrow of government, none of it. Any objective reading, the plain language of a speech, was clearly not directed towards violence.

Now, the petitioners are going to have an expert, an expert on speech, an expert who says right-wing speech.

JA177

He understands what right-wing speech — right-wing extremist speech really means.

And he's basically going to argue when you strip away all of the academic language and you look at what he's saying, he's going to say: Look, President Trump used a bunch of dog whistles. And, of course, a dog whistle is a whistle that has a very high pitch that humans can't hear but dogs can hear. Okay?

And he's going to say President Trump, like, had this sort of dog whistle — I don't know if he'll use the phrase "dog whistle" — but he used a speech that really these far right-wing extremists could

[p.46]

understand and mobilize on; but us mere mortals, well, we don't — we missed it. We didn't understand it, but those folks understood it.

And he's going to say that, normal sort of commonly used English doesn't count because there's this subjective special language out there that is sort of underneath it all that has been unearthed by the sociologist, and only right-wing extremists and people very learned in sociology and right-wing extremism can understand.

And he's going to say that with his expertise, he's been able to decipher what we normal mortals cannot, and his decipherment is going to basically say that President Trump was really ordering people to be violent. Even when he said "peaceful and patriotically" and even when he sent out tweets that said to be peaceful, that's not really what he meant. And those ultra right-wingers knew it, he meant something else.

This turns our American values on their head. It is fundamentally anti-First Amendment. He is saying that when we look at political speech, we don't look at it in an

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objective way. We don't look at the plain meaning of the words. We look at the secret, hidden

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interpretation that no one in this courtroom or — well, I mean, maybe someone in this courtroom besides him can understand. Maybe he thinks I understand it and no one else can. I will submit, I was in Georgia on January 6 helping with an election. But the right-wing can understand it, but no one else.

That is anti-First Amendment. In fact, that has been soundly rejected by our courts, and properly so. We look at what people say as we commonly understand them. And the common understanding of "peacefully and patriotic" means: Don't commit violence, and support your country. That's what it means.

Let's talk about the history and meaning of Section 3. You're going to hear from two professors. You've gotten about 40,000, words of briefing on sort of the meaning of Section 3.

You've rendered an opinion against us, and I understand. That's a conditional opinion. You want more evidence, and you want to hear more argument, and that's what we're providing.

And so I'm going to ask you three things, all right?

First, I'm going to ask you to reconsider your Footnote 5 in your order.

THE COURT: You're going to have to remind

[p.48]

me what that is.

MR. GESSLER: I'm not, Your Honor, because I'm not going to take up the time. But I'm simply going to ask you to reconsider it, okay?

THE COURT: I'll write it down so I can —

MR. GESSLER: Thank you.

JA179

And I think those cases deserve a much closer reading, and I respectfully say I believe that they were improperly mischaracterized, okay? So that's my first request.

My second request is when you look at the experts, and our position — and I think the Court ultimately agrees — is that they are testifying as to what the law is and what the history is.

And Your Honor rightfully recognized that there's other folks out there, so I'm just going to give you a lineup of the other folks.

On one side, the petitioners cite Baude and Paulsen and Graber, three professors: Baude, Paulsen, and Graber.

And on our side, we cite Tillman and Blackman and Lash. And I'd like you to take particular care to look at Lash's, Professor Kurt Lash's articles. And — because he's done a more thorough analysis of the history behind the Fourteenth Amendment and Section 3,

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the Congressional debates and the ratification debates, not just what legislators said, but how it was understood by the public as well.

You're going to get an overview of that, you're going to get argument on that, but I'm going to urge you to take a look at those others closely.

And third, as we've said, we think this is legal argument and not appropriate for Rules of Evidence. It's in. The Court will make good — will provide its analysis.

We have talked to the petitioners about, frankly, including the expert reports, the law professors, as demonstrative exhibits to review. That's fine.

I think what you're going to see is when I had talked about the lack of firsts, there's a reason presidential candidates have not been knocked off, or no one's even

JA180

attempted to, under Section 3 of the Fourteenth Amendment, okay?

There's a reason this is a unique case. There's a reason cases like this have either never been brought or quickly rejected. There's reasons for that. And the reasons are grounded in the text and the language of the Fourteenth Amendment.

You're going to hear about the Secretary's

[p.50]

authority from Mrs. Hilary Rudy. This is sort of an interesting case in the sense that my understanding is, petitioners are calling Ms. Rudy and haven't even spoken to her. And we haven't even spoken to her. So it's going to be an adventure.

But having had some experience in that office, I'm confident you will see that this case is a radical outlier from the Secretary's past practice, in addition, obviously, to the Fourteenth Amendment.

Let's talk a little bit about the evidence before the Court today — or this next week. To be sure, the petitioners have spent about ten months preparing their case. As you have described, we've talked about this as a mantra.

I'll submit volume does not equal quality. A lot of attorneys does not equal a good argument. A lot of stuff in front of the Court does not equal good evidence. The Court shouldn't confuse a vigorous effort with a good argument or with good evidence.

If anything, the fact that they have to put on so much and make one inference and pile one argument on top of another shows the weakness of their case, not strength.

After all the time they have prepared this case, this is what they've got. They've got the

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January 6 Report.

They've got two police officers out of hundreds, perhaps thousands of police officers there. And not commanders, but two police officers.

And they've got three professors. Two law professors testify about the law, and the sociologist to testify about the coded language. That's what they've got. And they've got one House member, I'm sorry, one House member. So that's what they've got.

And at the end of the day, the start of the day, this case is, frankly, about the January 6 Report. This is their effort to get the Court to endorse the January 6 Report. That's what it comes down to.

The video montage with overlaid sound that you saw in this opening argument, that's a pretty good production. And the reason it's a good production is because the January 6 Committee hired a television producer to produce this stuff for prime time TV.

The January 6 Report made findings, and petitioners have asked to introduce of them, many of which this Court has allowed conditionally and allowed argument against.

But this report is poison, and I mean poison very bluntly. It is a one-sided political document of cherry-picked information, no adversarial process, with a preordained conclusion. It omits a

[p.52]

number of other arguments. It ignored other witnesses before it. And it ignores other explanations and causes. 3 It has very much.

Let me ask you, Your Honor, and obviously I'm asking rhetorically. If someone walked into court and said: Hey, here is how this court case is going to work. I, on my side, the prosecutor, I'm going to get all kinds of time, years,

JA182

year and a half, to investigate witnesses, to take statements, to gather evidence, okay?

And people who strongly disagree with my viewpoint, they get no time whatsoever. They don't get to interview any witnesses, they don't get to get any evidence. They get none of that. But I get all of it, I get to do all of that.

And on top of that, you're not going to hear the case. I'm going to choose my own panel. I'm going to choose my own judges. I'm going to choose my Democrats and a couple of Republicans that agree with me. I get to choose them.

And then what I'm going to do is, I'm going to hire a television producer, and I'm going to time this for an election. And I'm going to put all that out there, and I want you to render legal opinions based on the quality of that evidence.

I think you and everyone else would be

[p.53]

rightfully — would be repulsed by that process. But that's what the January 6th process was, and you are going to hear from a Congressman involved in this, just the deficiencies and the problems of that January 6 process.

And so what the petitioners are doing is they're trying to shove this January 6 Report as evidence for this Court. They're asking the Court to endorse that process. They're asking the Court to endorse that one-sided poisonous report.

There is a reason Democrats, for the large part, love that report and cite it. And there is a reason Republicans, for the most part, hate that report and condemn it. And the reason why is that report is a political document, first and foremost.

JA183

This, however, is a court of law. Like you, we, like the petitioners' attorneys have spent the majority, perhaps all of our adult working lives as officers of the court, defending one of the greatest American institutions, one of the greatest world institutions, is fair courts, that conduct themselves according to the rule of evidence, that work hard to come with good decisions. That's what we do. That's what courts do.

That is not what the January 6 Report was.

[p.54]

And we should hold ourselves here to a much higher standard than that poisonous January 6 Report. We should allow in only real evidence that's subject to cross-exam, that is properly authenticated by people who actually have knowledge of that.

That's what this Court should be about, not importing a bunch of stuff from the January 6 Report that really has little, if any, credibility.

You'll also hear from two police officers, and we want to be very respectful of those police officers. But like any human being, they had a very limited viewpoint on what happened on January 6.

And we're going to ask that you limit the testimony to actually what the officers knew, not what they guessed at, not what they surmised, but what they knew and what they saw, their actual experience.

And we'll point out that, frankly, I mean, there's a reason these officers are here, and it's because of their intense dislike for President Trump. You're going to hear from a member of the House of Representatives, and we're going to give you a member of the House of Representatives, too. There you have it, Your Honor.

And then you're going to hear from three experts from the petitioners. Two are going to

[p.55]

testify to what the law is, and then you're going to have the sociologist, and we've already spoken about. That's it. That's their evidence.

At the end of the day, their evidence is the January 6 Report. Everything they bring in is part of the January 6th report. I won't say everything, but the vast majority of it.

Our evidence, I've refrained from naming witnesses. I'll continue to follow that convention. But you're going to hear that President Trump took very specific precautions to prevent violence on that day as President. You're going to hear that the organizers of the rally at the Ellipse took precautions to avoid violence or inflammatory rhetoric.

You're going to hear that the rally at the Ellipse was peaceful, that there was no violence. You didn't have a crowd that was intent on violence before or after President Trump's speech.

You're going to see that President Trump's communications on January 6 called for peace, they called for respect of the police. Certainly two police officers that were involved in violence, you're going to see that from them.

But we also have at least one witness who's going to say: Look, I didn't — I saw very, very

[p.56]

little, I saw a peaceful crowd. Nearly everyone was peaceful.

That's a different perspective. And so it's impossible, we think, to say the mob did this or the mob did that, the mob, the mob. There are a lot of people, with a lot of different actions, a lot of behavior. There was not a mind-meld mob that President Trump supposedly mobilized.

JA185

And then you're going to hear about how the January 6 Report was a completely partisan, unreliable document. This case here is about President Trump's right to run for office.

That right is the flip side of the coin for people to be able to vote for the candidate of their choice. People can't vote without candidates. Candidates aren't really candidates if people can't vote for them. It's the same side of the coin.

And so we've talked about the right for the people of Colorado to vote for someone for office, and that's very closely bound with the right of Donald J. Trump to be able to run for office. And the petitioners seek to deny millions of Coloradans that right, and they seek to deny President Trump his rights.

Now, I understand the posture that this is merely a state disqualification case. And it's not.

[p.57]

This is a Fourteenth Amendment case. And it is dressed up as a state proceeding. 5 percent of the evidence is a Fourteenth Amendment; maybe it's percent. But the overwhelming majority of the evidence in this case is about the Fourteenth Amendment, and the overwhelming argument is about the Fourteenth Amendment. And the consequences are about the Fourteenth Amendment, and it asks the Court to interpret the Fourteenth Amendment. That's what this case is about.

If it looks like a duck, and if it walks like a duck, it quacks like a duck, it's a duck. This is a Fourteenth Amendment case. Okay?

And so I want to bring — it's a constitutional case. It's sort of what we lawyers dream of being able to litigate. We don't dream in law school of litigating a Section 1204

qualifications. We dream of litigating constitutional law. And that's what this is, it's a constitutional case.

And so I'm going to bring you to my last point. January 6th. So I've been — I'm old enough and overweight enough to — I've been litigating election law in the state of Colorado for well over two decades. And this is the third presidential candidate ballot access case I have litigated, and obviously I'm familiar with the law nationwide.

[p.58]

And there is a rule in election law, and that rule is called a rule of democracy. Maybe I'm making it up a little bit, but it's the rule of democracy. And that rule says that when something is close, when there's a unique and strange argument on the other side, okay, where there's a question or an ambiguity or a stretch, the rule of democracy says: We err on the side of letting people vote. That's what the rule says.

Now, we've made preemption arguments, we've argued about holding office, that the Fourteenth Amendment applies to holding office so that Congress has the choice to remove a disqualification, we shouldn't short-circuit that.

We've made arguments about officer of the United States. We've made arguments about engagement and insurrection, First Amendment, all of that stuff. And to date, the Court has either deferred those or oftentimes ruled against us.

But what I'm asking this Court to do is apply a rule of democracy. When something's close or ambiguous or a stretch or an unusual argument, you don't interpret it as a way to cancel the opportunity for people to choose their representatives. You don't interpret it as a way to cancel the ability of millions

[p.59]

of people to be able to vote for the leader of the free world.

What you do is you interpret it to allow people to vote. Because there is no doubt that the six electors don't like President Trump. And I would submit that maybe their attorneys don't like President Trump, and their experts, and I know the police officers don't like President Trump. They don't like President Trump. And they have every right to vote against him.

But there are millions of people in Colorado and across this country who are inspired by President Trump, who view them as — who view him as someone who protects their interests and who are going to — and is going to create a nation, help build a nation that they want to live in and that they want their children to live in. Millions of people look to him for hope and inspiration.

And who are the petitioners to prevent those people from not being able to vote on that? Who are they?

Well, we are arguing that they shouldn't be able to stop those votes. That when millions of people are inspired by a candidate, and millions of people may hate that candidate, what we need to do and what the rule of democracy says and what makes America

[p.60]

great is we get to vote on that person. We don't stifle it, we don't short-circuit it through a court proceeding.

We're confident that that's what the framers thought about when they drafted the Fourteenth Amendment. We're confident that that's historical usage. We're confident that our legal arguments and our evidence are appropriate and carry the day.

And part of the reason we're confident is because those arguments and that evidence fits within the long tradition of American democracy and of American law to

allow an election to go forward rather than short-circuiting it and engaging in what we would consider anti-democratic behavior.

Thank you very much, Your Honor.

THE COURT: Do the intervenors — does the Colorado Republican Party have a statement?

MS. RASKIN: Yes, we do. A brief one, Your Honor.

THE COURT: Okay.

MS. RASKIN: Thankfully. The Colorado Republican Party has intervened here, Your Honor, in order to urge you to vindicate the important and ultimate right of the party to select the candidates whose names will appear on the primary election ballot as Republican nominees for

[p.61]

President of the United States.

As the Supreme Court has recognized, under our political system, a basic function of a political party is to select the candidates to be offered to the voters. Indeed, a party's ability to select its candidates implicates the First Amendment right to association. And Colorado law is entirely consistent with this.

Section 1204 of the Election Code requires the Secretary of State to place on the ballot, quote, "only those candidates who are seeking the nomination of a political party as a bona fide candidate for President of the United States pursuant to political party rules."

As the evidence will show, the rules of the Colorado Republican Party require a bona fide candidate to satisfy three categories of rules.

First, the candidate must comply with the constitutional requirements set forth in Article II, Section 1, Clause 5, namely that the candidate be 35 years of old — 35 years of age, be a natural-born citizen, and have lived here for 14 years.

JA189

Second, the candidate must register his committee with the FEC.

Third, the candidate must demonstrate enthusiasm, viability, seriousness, and competitiveness

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according to certain party-defined standards.

President Trump has satisfied each of those requirements, and the party has certified to the Secretary of State that he is a bona fide presidential candidate affiliated with the Colorado Republican Party.

The Secretary of State has no basis upon which to thwart the party's political choice and deny him a place on the ballot. As the Secretary herself acknowledges, Section does not give her the authority to evaluate whether a bona fide candidate as selected by the Colorado Republican Party would be subject to disqualification under Section 3 of the Fourteenth Amendment.

And for all the reasons articulated by Mr. Gessler, which I will not repeat and we have briefed, the Constitution doesn't give the Secretary the independent right to do so, nor does it authorize this Court to.

Thank you.

THE COURT: Anything from the Secretary of State?

MR. SULLIVAN: Very briefly, Your Honor.

THE COURT: Okay.

MR. SULLIVAN: Thank you, Your Honor.

Good morning. Grant Sullivan for the

[p.63]

Secretary of State, may it please the Court.

It's been said that this is an extraordinary case, and the Secretary agrees. I think the video that we just saw shows that.

But in many ways, this is a very typical proceeding under the Colorado Election Code, specifically Section 3.

JA190

As in nearly all Section 3 actions, a group of eligible voters alleges that an election official, here the Secretary, is about to commit a breach of her duties or other wrongful act. And like other Section 3 cases, a candidate and a political party have intervened to participate.

That's not at all unusual. It's also not at all unusual for the Secretary of State or other election official, in a 113 action, to act as a nominal respondent and await the Court's direction while the real parties in interest present evidence on the factual issues.

Our pleadings cite three examples from just the last couple of election cycles.

Consistent with this history and practice, the Secretary of State does not intend to offer any evidence in her own right in this case. The Secretary, unsurprisingly, does not have any direct evidence on whether Donald Trump engaged in insurrection or rebellion

[p.64]

against the United States.

Other parties, of course, will present evidence on that question.

What the Secretary can do and will do in this case is make her deputy elections director available to testify on the election administration issues that the Court has signaled some interest in.

We anticipate that the deputy elections director will testify regarding how the Secretary's office administers Colorado's election law to ensure conformance with federal law. And that includes the presidential primary provisions in Colorado's Proposition 107.

Now, at the end of the day, and the beginning of the day, the Secretary believes that Donald Trump bears significant responsibility for the attack on the Capitol on January 6. But she welcomes the Court's direction on

JA191

whether his actions rise to such a level as to disqualify him from appearing on the presidential primary ballot in Colorado. And she will, of course, follow the Court's judgment on that question.

Thank you, Your Honor.

THE COURT: Great.

Are the petitioners ready to call their first witness?

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MR. OLSON: Your Honor, before that, we just wanted to get your preference on admission of exhibits. Was it appropriate to move for the unobjected-to exhibits I referenced in opening now, or would you like to do that at a break? What's Your Honor's preference?

THE COURT: Why don't we do that at a break.

MR. OLSON: Okay. Thank you, Your Honor.

MR. SHAW: Your Honor, springboarding from the Secretary's counsel's request earlier, but our representative, Mr. Dave Williams, is also listed as a witness. We would ask permission to be able to have him log in either online or view the proceedings.

THE COURT: Any objection?

MR. OLSON: No objection.

MR. SULLIVAN: No objection, Your Honor.

MR. GESSLER: None from us, Your Honor.

MR. SHAW: Thank you, Your Honor.

THE COURT: Of course, then.

MR. SUS: Good morning, Your Honor. Nikhel Sus for the petitioners. Petitioners call Officer Daniel Hodges.

THE COURT: And I'm sorry, I did not catch your name.

[p.66]

MR. SUS: Nikhel Sus.

DANIEL HODGES,

having been first duly sworn, was examined and testified as follows:

THE COURT: Just be sure to speak into the microphone.

THE WITNESS: Yes.

THE COURT: And you should feel free to kind of position that screen in any way that you like. You don't need to look right into it.

THE WITNESS: Thank you.

DIRECT EXAMINATION

BY MR. SUS:

Q. Please state your name for the record.

A. My name is Daniel Hodges.

Q. And where do you currently work?

A. I currently work for the Metropolitan Police Department of Washington, DC.

Q. And what is your rank?

A. I'm an officer.

Q. When did you join the DC Police Department?

A. I joined the DC Police Department in December of 2014, so I've been on for almost nine years now.

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Q. And what was your job prior to joining the DC Police Department?

A. Prior to joining the DC Police Department, I joined the Virginia National Guard in 2012. I served a six-year contract and was honorably discharged in 2018.

Q. What divisions are you assigned to at the DC Police Department?

JA193

A. At MPD, I am assigned to patrol in the Fourth District. I am also assigned to Civil Disturbance Unit 42.

Q. And how long have you been a member of Civil Disturbance Unit 42?

A. I've been with Civil Disturbance Unit 42, or CD 42, since its inception, approximately five years.

Q. And what is the Civil Disturbance Unit?

A. Civil Disturbance Unit is organization within MPD that officers are assigned to specific platoons. We are activated and deployed to planned First Amendment assemblies on an as-needed basis.

Once we are there, we perform law enforcement duties around that First Amendment assembly, be it traffic control or just high visibility, making our presence known, and should they turn riotous, we police that as well.

Q. And what duties do you perform as a member [p.68]

of the Civil Disturbance Unit?

A. As a member of CD 42, I perform all the duties that I just described. CD 42 is also what's called a rapid response platoon. That means that we are issued hard gear, pads, that are not standardized for — that are not standard to all CD members, so we use those as well.

Q. Do you use any other sort of special equipment as a member of the CDU?

A. I do. CDU officers are issued ballistic helmets, gas masks, riot batons, and then the hard gear, the pads I just told you about.

Q. And as a member of the CDU, do you receive special training?

A. We do. CDU members are trained in ways to move in formations as a group, effectively utilize ourselves in a crowd for- — or formations, and how to make arrests and

JA194

protect ourselves and others in the event of a criminal First Amendment assembly riot.

Q. Does the CDU respond to civil disturbances anywhere in Washington, DC, or only in particular areas of the city?

A. Typically MPD's CDU units respond to areas under a local city — under the control of a local city. However, we also respond to property that belongs to our

[p.69]

federal partners should they request our assistance.

Q. I'd like to turn now to the morning of January 6, 2021.

Were you on assignment with the Civil Disturbance Unit that morning?

A. I was.

Q. Were you aware of any proceedings happening at the U.S. Capitol Building that day?

A. I was.

Q. What was that?

A. I was aware that at the United States Capitol that day, they were certifying the presidential election with Congress and the Vice President.

Q. And what were your initial orders?

A. Initially, my platoon was ordered to respond to around 11th and Constitution in the morning of January 6 in a high visibility capacity, which means that we simply stood on Constitution Avenue making ourselves visible, letting people know that the police were present.

Q. And about what time was that?

A. We probably arrived on scene around 8:00 in the morning.

Q. And were you monitoring a particular

[p.70]

event?

JA195

A. We were. We were monitoring Donald Trump's rally on the Ellipse.

Q. As you were monitoring the crowd, did you notice anything unusual about how they were dressed?

A. As I was monitoring the crowd, I noticed that there were multiple people who were wearing tactical gear, that — some had helmets like my own ballistic helmets, goggles, gas masks, armored gloves, backpacks full of gear that we couldn't identify, tactical boots, some earpieces for radios, things of that nature.

Q. How did you feel seeing those people wearing tactical gear?

A. It made me very uncomfortable, nervous.

Q. Why is that?

A. Because there's no need for all that tactical gear to listen to a politician speak in a park.

Q. While you were deployed on Constitution Avenue, did you have any other cause for concern about what would happen that day?

A. I did. While I was on Constitution Avenue, I was monitoring our radio frequency we were using for that day for the First Amendment assembly.

I was — heard our Gun Recovery Unit, our GRU unit — or GRU, rather, was identifying people in the

[p.71]

crowd who had firearms or they thought potentially had firearms. They were identifying them so they could make arrests later on, or at the time as need be.

I also heard our Explosive Ordnance Disposal Unit, EOD, come over the air and say that they had identified a device on the Capitol Grounds. They also said that the device was viable, and I took this to mean that they had found a bomb.

JA196

Q. Did the crowd stay at the site of President Trump's rally at the Ellipse?

A. Largely the crowd, after staying at the Ellipse for some time, flowed back in the opposite direction on Constitution Avenue towards the United States Capitol.

Q. And what was the general tenor of the crowd as they were moving towards the Capitol Building?

A. The crowd, as they were moving toward the Capitol, were moving with a sense of purpose. They — it would seem like they were moving as they had something to do there, even though the — ostensibly the event they were there to attend had concluded, or come close to it.

Q. And was your platoon eventually deployed to the Capitol?

A. We were. We were monitoring the radio, and we heard our commander that day getting more and more

[p.72]

agitated as people continued to flow toward the United States Capitol. He was — you could tell from the way he was talking, they were — the crowd was becoming aggressive and attacking and overwhelming the defenses present.

Eventually, he requested CD to back them up at the Capitol, at which time we went back to our vans that we used to transport ourselves, put on our hard gear, and made our way toward the Capitol Grounds.

Q. And about what time did you receive the order to deploy to the Capitol?

A. I believe it was about 1:30.

Q. And what was your understanding of why you were being deployed to the Capitol?

A. We were being deployed to the Capitol to reinforce the defense there, to prevent people who were attacking officers from gaining entry to the Capitol.

JA197

Q. Prior to January 6th, 2021, had you ever been called to respond to civil unrest at the U.S. Capitol Building?

A. No.

Q. What did you do after receiving that order to deploy to the Capitol?

A. After receiving the order to deploy to the Capitol, we — as I said, we went back to the vans, made

[p.73]

our way toward the Capitol Grounds. We made our way toward the — I'd say northwestern port edge of the Capitol Grounds, where we got out on foot, organized ourselves into two columns, and started marching toward the West Terrace of the Capitol.

Q. I want to focus now on the hours — between the hours of 1:50 p.m. to 3:10 p.m.

Could you tell us what happened when you arrived at the Capitol Building?

A. When we arrived at the Capitol, as I said, we organized ourselves into two columns, started marching toward the West Terrace. The crowd at the edges of the Capitol Grounds were more spread out, less aggressive.

However, they quickly identified us and started hurling insults at us, calling us traitors, oath breakers, telling us to remember our oaths, telling us to be on the right side of history. And then we — we ignored them, we moved on.

As we got closer to the West Terrace, the crowd became more dense and more aggressive, until eventually we were attacked. They — our assailants cut us in half, whereas the forward part of our element was able to keep moving toward the West Terrace, the rear portion, which I was a part of, was cut off and encircled by our assailants. And we were attacked at that point

[p.74]

and had to defend ourselves there.

Q. Over the course of the day, how did the crowd attack you?

A. The crowd attacked me in a variety of ways, punching, kicking, pushing. I — chemical irritants such as OC spray or pepper spray. I was beaten in the head with blunt instruments, including my own riot baton. I was pinned and crushed with a police shield. I can't remember all the different ways in which I was assaulted.

Q. Did you sustain injuries?

A. I did.

Q. Which injuries?

A. I experienced pain and bruising about my body and a swollen hand. I had a large contusion on my head from being struck with my riot baton, which I believe resulted in a concussion as I experienced a headache for about two weeks after the fact. I had a — lacerations of the face, bleeding from the mouth, and pain in my eye from where someone attempted to gouge it out.

Q. Tell us what was going through your head when you were being attacked that day.

A. I was afraid. I was afraid for my life and for that of my colleagues. I was afraid for the

[p.75]

people in the United States Capitol Building. I was afraid for Congress, the Vice President, and what these people would do to them and how it would affect our democracy.

Q. Over the course of the day, did you see your fellow officers attacked?

A. I did.

Q. How?

JA199

A. In very much the same way as I was attacked: punching, kicking, pushing, being struck with blunt instruments.

I, unfortunately, couldn't pay too much attention to the ways in which they were being attacked as I had my hands full myself.

Q. Over the course of the day, did you see the attackers use weapons?

A. I did.

Q. What types?

A. They used flagpoles that they had brought as blunt instruments to beat us with. They used stolen police equipment, such as riot batons, police shields to assault us.

They used pieces of what's called bike rack-style barriers, which they had broken into its constituent pieces, the poles, passed out amongst the —

[p.76]

the mob to attack us. And pepper spray, chemical irritants.

Yeah, that's all — that's all I can think of.

Q. And you testified earlier that you saw people on the morning of January 6 wearing tactical gear; is that right?

A. That's correct.

Q. At the Capitol, did you see individuals in the crowd wearing similar types of tactical gear?

A. I did.

Q. And did you observe any behavior by the crowd indicating why they were at the Capitol Building?

A. I did.

MR. SHAW: Objection. Your Honor, I just want to be very careful because I have read some of his prior testimony, and he has a definite tendency to mind-read.

JA200

So I want to be very careful that he limits himself to what he actually observed and not try to get into the head and speculate about what was going through the heads of individual members of the crowd or the crowd as a whole.

THE COURT: Okay. Well, he hasn't testified as to any of those things, so I'm going to

[p.77]

overrule the objection. And if and when he does, you can make a request to strike.

Q. (By Mr. Sus) Do you need me to repeat the question?

A. Please.

Q. Did you observe any behavior by the crowd indicating why they were at the Capitol?

A. I did. I saw the crowd carrying flags with Trump campaign slogans on it, advertising "Trump for ," which was confusing as the presidential election was over.

I saw them carrying banners that said "Stop the Steal," and it's my understanding that that's the — the slogan means that they — bearers believe that the presidential election was somehow stolen.

MR. SHAW: Objection, Your Honor. Unless he has a basis for saying what that slogan meant to any particular person carrying it, that is pure speculation.

THE COURT: Overruled.

But would you just make sure when you make the objections, to speak into the microphone.

MR. SHAW: Yes, Your Honor.

THE COURT: You don't need to stand up if you don't want to.

A. I saw people carrying banners saying "Stop

[p.78]

the Steal," which, based on my understanding, means that people believed the presidential election was stolen,

JA201

which was confusing to me as I was not aware of any evidence that this was the case.

I saw — I heard them chant “Fight for Trump,” which seems very to the point.

They were carrying very — various flags referencing war and revolution.

They told us that we were on the wrong side of history when we were defending the United States Capitol and the peaceful transfer of power.

Q. (By Mr. Sus) Did members of the crowd reference President Trump?

A. They did.

Q. How?

A. By the clothes they wore, the banners they carried, saying “Fight for Trump.” They called — referenced Joe Biden as a tyrant, things of that nature.

Q. Over the course of the day, did you get a sense of how big the crowd was?

A. I did. It was difficult to gauge on the ground where I was, and I have no formal training in crowd estimates.

However, when I was on the — in front of the West Terrace, rather, I was able to look out over the

[p.79]

crowd a bit, and I could not see the end of them. There were thousands, I would say.

Q. How did the size of the mob compare to the size of law enforcement that were present that day?

A. I would — the mob outnumbered us a great deal. I would say 50, 70 to 1.

Q. What impact, if any, did the size of the mob have on your ability to do your job that day?

A. The size of the mob was the greatest weapon utilized by the mob that day — or, rather, most effectively

utilized, I should say. They had us completely outnumbered. They had us encircled.

We were unable to escape should we need to get out of there for medical attention. We were unable to easily receive reinforcements.

There were no uniformed-differentiating people who were violent from people who were not. So the mob aided and abetted those who were violent in that way, as those who were violent would then fall back into the crowd and we would be unable to engage them.

THE COURT: Officer, just pause for a second so that — I think there was an objection trying to be made.

MR. SHAW: Yes, Your Honor. The objection is he continually talks about the mob as if all of the

[p.80]

individuals in the crowd were acting with a single mind or single intent, when clearly —

THE COURT: This is — that's a cross-examination point. He can use the words that he chooses to use. So overruled. I think you probably need to remind him where he was.

Q. (By Mr. Sus) Officer Hodges, I was asking you, did the size of the mob have your — what impact did the size of the mob have on your ability to do your job that day?

A. That's right. It — it was the most effective weapon utilized by the mob. They — we had to treat everyone as a threat, and in that way, we couldn't focus on people who were violent. We — our attention was divided so thinly that it was difficult to engage and protect ourselves and others.

Q. How, if at all, did the size of the mob impact your ability to use firearms?

A. The size of the mob made it extremely difficult to use firearms. While there were those in the mob who at

times used force or assaulted us in ways that were likely to cause serious bodily injury or death, we could not — it made it extremely difficult to engage them legally with firearms as we are not allowed to shoot

[p.81]

into a crowd.

As the crowd was largely the main element present, and very rarely did we encounter individuals that we could not handle one on one, it made it so that firearms were an extremely risky proposition both legally and morally.

Q. How, if at all, did the size of the mob impact your ability to make arrests?

A. The size of the mob made it impossible to make arrests. When we make a custodial arrest, we are legally obligated to the safety, security, and medical treatment of our prisoner.

These are things that we could not guarantee for ourselves at the time, let alone members of Congress and the Vice President inside, let alone, again, any prisoners we might want to take.

Again, if we took a prisoner, typically that requires two officers to guard them at all times, and we needed every officer we had to assist in the defense.

And so taking prisoners at that time was simply untenable.

Q. How, if at all, did the size of the mob impact the ability of emergency medical personnel to render aid to individuals at the Capitol?

[p.82]

A. As far as I could tell, the Capitol was encircled. There was no way for medical personnel to access the — to access the Capitol.

So the mob made it impossible for us to receive professional medical care.

Q. What about nonviolent people in the mob; how, if at all, did they impact your ability to do your job?

A. Nonviolent people in the mob were still a part of the crowd. They created all the problems that I had previously testified to.

Q. So, Officer Hodges, are DC Metro Police officers required to wear body cameras when they're on duty?

A. We are.

Q. Were you wearing your department-issued body camera on January 6, 2021?

A. I was.

Q. And was your body camera activated when you were on the U.S. Capitol Grounds?

A. It was.

MR. SUS: Mr. Hehn, please pull up what's been admitted as Exhibit and pause the video.

Q. (By Mr. Sus) Officer Hodges, can you see the video on your screen?

[p.83]

A. I can.

Q. What is this?

A. This is — depicts me and my platoon walking towards the West Terrace on January 6, 2021.

THE COURT: Okay. And I'm going to apologize because I think I probably confused people. When you — when you're using an exhibit, we should offer and admit it into evidence.

MR. SUS: Oh, okay. I can go back and do that for this.

THE COURT: Okay.

Q. (By Mr. Sus) So, Officer Hodges, can you see what's on your screen?

A. I can.

Q. What is this?

A. This is my body-worn camera recording from January 6, 2021.

Q. And does the footage fairly and accurately depict what you witnessed on January 6, 2021?

A. It does.

MR. SUS: Your Honor, move to admit Exhibit 10.

MR. SHAW: Your Honor, we haven't yet seen the video, so I'm not sure how he can state that it accurately depicts what he saw that day.

[p.84]

THE COURT: Okay. But presumably he's seen it before. And you've had access to it, so do you have an objection?

MR. GESSLER: Your Honor, may I speak?

THE COURT: Sure. But in general, I'd like to limit whoever is — to one party, but . . .

MR. GESSLER: Absolutely.

Your Honor, I understand the procedural posture of this case. Normally, you know, you listen to the video, he looks at the whole thing, he authenticates it. Then's the time for objection or admission.

I guess our preference is and — I mean, I understand that this has been admitted already. I understand we've seen it and —

THE COURT: And —

MR. GESSLER: — but just for purposes of the record, we think that may be the best way to do it, but if you want to provide guidance otherwise, we're willing to follow that.

THE COURT: Okay. So I want to make clear, you made some objections to exhibits, and I overruled some of that — objections.

That doesn't mean that it's admitted into evidence. It needs to be presented at trial to actually be admitted into evidence.

[p.85]

And so I think that he's offering to admit it. I know — I assume you object. If you do, let's get it on the record and proceed.

Does that make sense?

MR. GESSLER: There is text underneath it.

THE COURT: Uh-huh.

MR. GESSLER: If we can just listen to it and, you know, if the text reflects what was said and, you know, indicates it, we're not going to object.

THE COURT: Okay. Perfect.

MR. GESSLER: Let me put it that way.

THE COURT: Why don't we play the video.

MR. SUS: Please play the video.

(Video playing.)

MR. SUS: Stop the video at 13:59:53.

Q. (By Mr. Sus) Officer Hodges, let me ask you first, do you see the numbers on the top right corner of the screen?

A. I do.

Q. What are those numbers?

A. The first set of numbers is the date: 2021/01/06.

The second set of numbers is the time at which the recording was taken in the 24-hour clock. 13:59; in this 12-hour clock, it would be 1:59 p.m.

[p.86]

Q. Now, in this point in the video, where are you headed?

A. Currently we're headed toward the West Terrace.

Q. And what types of things are people shouting in the video?

JA207

A. In the video, people are shouting at us, calling us oath breakers, traitors, telling us to remember our oaths, we're on the wrong side of history. That sort of thing.

Q. And how did you interpret those words at the time?

A. At the time, I interpreted those words to mean that they — the people shouting at us —

MR. SHAW: Objection, Your Honor. His interpretation of the — of those shouts is irrelevant to any issue in this case. The shouts were made, but what he understood them to mean is irrelevant.

THE COURT: Objection overruled.

A. I understood the shouts to mean that the people who were shouting at us, which was everyone in the mob that I could perceive, disapproved of us being there.

They understood that we were there to protect the Capitol, which was antithetical to their goals; that by protecting the United States Capitol, we

[p.87]

were somehow breaking our oaths to the Constitution; that we were traitors to the United States.

Q. (By Mr. Sus) And why did you and your fellow officers have your hands on each others' shoulders in the video?

A. We put our hands on each others' shoulders spontaneously as the crowd became more dense and aggressive in an effort to try and keep ourselves from getting separated.

Q. Had you ever done that prior to January 6, 2021?

A. No, we had not.

MR. SUS: Mr. Hehn, please resume the video at time stamp 13:59:53.

(Video playing.)

MR. SUS: Let's pause the video at 14:00:35.

JA208

Q. (By Mr. Sus) Officer Hodges, could you describe what we just saw?

A. In the video, we were — my platoon, rather, we were making our way towards the West Terrace when we were attacked by the mob.

I was assaulted in various ways that I've testified to, and someone attempted to steal my riot baton. I wrestled with control of the baton and was able

[p.88]

to retain my weapon.

When we fended off the initial assault, we were encircled by the mob, at which point they started yelling at us, telling us that we're on the wrong team, which suggested to me that they were going against our efforts to defend the United States Capitol.

MR. SUS: Mr. Hehn, please resume the video at 14:00:35.

(Video playing.)

MR. SUS: Let's pause the video at 14:01:20.

Q. (By Mr. Sus) Officer Hodges, do you see the man wearing a vest in the video?

A. I do.

Q. What kind of vest is that?

A. It appears to be an external carrier vest designed to carry within it a ballistic panel that would protect the wearer from firearms. And judging from the way it's bulging outward, it appears to carry such a panel.

MR. SUS: Okay. Mr. Hehn, please pull up what's been admitted as Exhibit and hit pause.

Q. (By Mr. Sus) Officer Hodges, can you see the video on your screen?

A. I can.

[p.89]

Q. What is this?

JA209

A. This further depicts the — the time in which we were making our way — or trying to fight off the mob and make our way to the west terrace.

Q. Is this your body camera footage from January 6, 2021?

A. It is.

Q. Did you review this footage prior to your testimony today?

A. I did.

Q. Does the footage fairly and accurately depict the events you witnessed on January 6?

A. It does.

MR. SUS: Your Honor, at this time we would move to admit Exhibit 11.

THE COURT: Let's go back to 10. You asked to admit it. I didn't rule. Counsel for Intervenor Trump, I think, wanted to wait to decide whether to make an objection.

MR. SHAW: We have no objection to Exhibit 10, Your Honor.

THE COURT: Okay. 10 is admitted.
(Exhibit was admitted into evidence.)

THE COURT: I will let you play 11, and then why don't you give them an opportunity to make an
[p.90]

objection if they would like to.

MR. SUS: Sure.

Please play Exhibit 11.

(Video playing.)

MR. SUS: Let's pause the video at 14:02:41.

Would now be an appropriate time to move to admit, Your Honor?

THE COURT: Is that the end of the video?

MR. SUS: That is the end of this clip, yes.

JA210

THE COURT: Okay. Any objection?

MR. SHAW: No, Your Honor.

THE COURT: Exhibit 11 is admitted.

(Exhibit 11 was admitted into evidence.)

Q. (By Mr. Sus) Officer Hodges, could you describe what we just saw?

A. Yes. I had attempted to forge a path through the mob for the rest of my platoon to follow so we could join the defense of the West Terrace.

However, I looked back and saw that my platoon was again being assaulted by the mob, their forward progress effectively halted and being pushed back.

I backtracked, started pulling off members

[p.91]

of the mob by their backpacks until someone observed me and then assaulted me as well.

We — they tried to steal my riot baton again. We wrestled for control. I was elbowed. We went to the ground, kicked in the chest, at which point I ended up on my hands and knees with the medical mask I was wearing pulled up over my eyes, so I was blind for a moment.

Q. And looking at Exhibit 11 at time stamp 14:02:41, what type of vest is the man wearing in the video?

A. The man appears to be wearing an external carrier vest designed to carry within it a ballistic panel. And again, judging from the way it's bulging outward, it appears to carry such a panel.

MR. SUS: Your Honor, this video does actually contain more content on it, so I prematurely moved to admit it.

And frankly, to explain myself, I thought that these videos were previously admitted and so — but could we watch the rest of the video, and then I move to admit it again? Okay. Thank you.

JA211

So, Mr. Hehn, please resume the video at time stamp 14:02:41.

(Video playing.)

[p.92]

MR. SUS: Pause the video at 14:03:20.

Q. (By Mr. Sus) Officer Hodges, did you hear what the man said in the video?

A. I did.

Q. What did he say?

A. He wanted to get me out of there. He — I told him — he asked me what he could do to help. I told him to leave. He said, “That ain’t gonna happen.” And he said, “It’s going to turn bad,” and that the others were coming up from the back.

Q. And what did you understand those words to mean?

MR. SHAW: Objection. It is — his understanding is irrelevant, it’s speculative, and it’s — he lacks foundation.

THE COURT: Overruled. He can testify as to what somebody said to him, what he thought it meant. It doesn’t mean that’s what they meant. It means it’s what he thought they meant.

Objection overruled.

A. I understood the — the words he told me were very concerning. He said that it was going to turn bad, which means that it was going to — he didn’t think it was bad yet, and it was going to get worse.

He said that the others were coming up

[p.93]

from the back. This indicated to me that there was preplanning, coordination, and that they were intentionally encircling the United States Capitol.

Q. (By Mr. Sus) And when the man asked what he could do to help, you said, “Leave”; is that right?

A. That’s correct.

JA212

Q. Why did you say that?

A. Because aside from convincing other people to leave as well, that is the only thing he could do to help.

His presence there was the biggest problem to us, that he was a part of the mob, and the mob was the threat.

MR. SUS: Mr. Hehn, please pull up Exhibit 12, and press pause.

Yes, Your Honor, at this time we'd move to admit Exhibit 11.

MR. SHAW: No objection.

THE COURT: 11 is admitted.

(Exhibit 11 was admitted into evidence.)

MR. SUS: And now could we pull up Exhibit 12, Mr. Hehn.

Q. (By Mr. Sus) Officer Hodges, can you see the video on your screen?

A. I can.

[p.94]

Q. What is this?

A. This further depicts the — our time on the Capitol Grounds as we make our way towards the West Terrace, “we” being the remnant of CD that was attacked.

Q. Is this your body camera footage from January 6, 2021?

A. It is.

Q. Did you review this footage prior to your testimony today?

A. I did.

Q. Does the footage fairly and accurately depict what you witnessed on January 6, 2021?

A. It does.

MR. SUS: And if we could play the video starting at 14:03:57.

(Video playing.)

JA213

Q. (By Mr. Sus) Officer Hodges, could you describe what we just saw?

A. The video depicts me as I, once again, attempt to forge a path through the mob for the rest of my platoon to follow as we make our way towards the West Terrace.

This time I was successful. I was able to push my way through. We made our way toward the area in

[p.95]

front of the West Terrace, where we joined a police line being held there.

Q. And could you describe what you saw in the crowd as you ran through them?

A. In the crowd, I saw people destroying property, breaking down the bike rack-style barriers into its poles, which I saw in the day used as weapons.

I saw agitator — an agitator with a megaphone encouraging further violence. I saw munitions going off, chaos, no one — no one obeying our lawful orders to go home.

Q. And the people in the crowd you were running through, did every one of them try to physically attack you?

A. No.

Q. So did the people just peacefully standing there impede your ability to do your job that day?

A. Yes.

Q. How is that?

A. Even the people who were not — I didn't observe attacking us made it difficult for us to analyze the threats, engage those who were violent, and — because we had no idea who was going to become violent or who would not. The crowd made it so that the mob, when they fell back, had a defense that made it very difficult

[p.96]

for us to deal with.

Q. And did you hear the alarm sound playing in the video?

A. I did.

Q. What was that?

A. That is our LRAD system, which is like a loudspeaker system. It's deployed when a First Amendment assembly becomes unlawful or is unlawful. It broadcasts a very loud order to disperse, and I — it's very — very audible.

Q. And where the crowd was standing in the area depicted in the video, was that area open to the general public?

A. No.

Q. What, if any, chemical irritants did the police deploy that day?

A. That day, I understand the police deployed OC spray or pepper spray, and CS gas or tear gas.

Q. In your experience as a member of the Civil Disturbance Unit, what do crowds typically do after the police deploy chemical irritants?

A. In my experience, crowds typically disperse when confronted with chemical irritants. It's very persuasive in getting them to change their minds about what they're trying to do. Gets them to break up

[p.97]

into individuals instead of continuing to function as a singular group.

MR. SUS: Mr. Hehn, please resume the video at time stamp 14:04:03.

(Video playing.)

MR. SUS: Let's stop at 14:04:45.

JA215

Q. (By Mr. Sus) Officer Hodges, looking at the video, where on the Capitol Grounds are you located at this point in the video?

A. At this point in the video, I am in front of the West Terrace.

Q. And is there a police line shown in the video?

A. There is.

Q. What, if anything, happened to that police line that day?

A. Later on, the mob was able to break through the police line.

MR. SUS: Your Honor, at this time, we'd move to admit Exhibit 12.

MR. SHAW: No objection.

THE COURT: Exhibit 12 is admitted.

(Exhibit was admitted into evidence.)

THE COURT: Are you going to be moving on to another exhibit?

[p.98]

MR. SUS: Yes.

THE COURT: Okay. Let's take a break from 10:15 to 10:30. We're going to resume promptly afterwards.

Did you need something, Mr. Gessler?

MR. GESSLER: No. I'm just —

THE COURT: Stretching your legs?

MR. GESSLER: I've had four glasses of water this morning.

THE COURT: So at 10:30, we will be back on the record.

(Recess taken from 10:14 a.m. until 10:34 a.m.)

THE COURT: You may be seated.

MR. SUS: Ready, Your Honor?

THE COURT: You may proceed.

JA216

MR. SUS: Mr. Hehn, please pull up Exhibit 13, starting at time stamp 14:13:30.

Q. (By Mr. Sus) Officer Hodges, do you see the video on your screen?

A. I do.

Q. Is this your body camera footage from January 6, 2021?

A. It is.

Q. Did you review this footage prior to your [p.99]

testimony today?

A. I did.

Q. Does the footage fairly and accurately depict what you witnessed on January 6, 2021?

A. It does.

MR. SUS: Mr. Hehn, please play the video.

(Video playing.)

MR. SUS: And we're pausing at 14:13:42.

Q. (By Mr. Sus) Officer Hodges, do you see the yellow flag that says, "Don't Tread on Me," in the video?

A. I do.

Q. Over the course of the day on January 6, did you see the mob holding up flags referencing American wars?

A. I did.

Q. Which ones?

A. I saw the flag you just referenced, which I know to be the Gadsden flag. It's a Revolutionary War flag of the United States.

And I saw Confederate battle flags, referencing the United States Civil War.

Q. Did any other flags stand out?

A. I saw flags advertising Trump for the presidential election of 2020, which at that point was

[p.100]

over.

I saw another flag in the video, crossed rifles, signifying the military and willingness to violence. I —

MR. SHAW: Objection. Foundation.

THE COURT: You can —

MR. SHAW: Move to strike.

THE COURT: I will sustain the objection. You can ask him how he knows.

MR. SUS: I'll move on, Your Honor.

Q. (By Mr. Sus) Officer Hodges, what, if any, Trump paraphernalia did you see among the crowd that day?

A. I saw lots of Trump paraphernalia. People wearing articles of clothing with Trump's name on them. Trump advertisements. Flags and articles of clothing saying, "God, Guns, Trump." Again, the "Stop the Steal" slogan was prevalent.

Q. And what, if anything, did you hear the mob say about President Trump?

A. I heard them say, "Fight for Trump." It was a chant. They — that was the most explicit one.

MR. SUS: And, Mr. Hehn, could you play the video again.

(Video playing.)

MR. SUS: And, Your Honor, that's the

[p.101]

complete video. At this time, we would move to admit Exhibit 13.

THE COURT: Any —

MR. SHAW: No objection.

THE COURT: 13 is admitted.

(Exhibit 13 was admitted into evidence.)

MR. SUS: Mr. Hehn, could you pull up Exhibit 14 at time stamp 14:25:11.

JA218

Q. (By Mr. Sus) Officer Hodges, do you see the video on your screen?

A. I do.

Q. Is this your body camera footage from January 6, 2021?

A. It is.

Q. Did you review this footage prior to your testimony today?

A. I did.

Q. Does the footage fairly and accurately depict the events of January 6, 2021, as you remember them?

A. It does.

MR. SUS: Mr. Hehn, please play the video.

(Video playing.)

Q. (By Mr. Sus) Officer Hodges, did you hear [p.102] the man speaking in the video?

A. I did.

Q. How did you interpret his statements at the time?

A. At the time, I interpreted his statements to — as an attempt to coerce us into joining their assault on the Capitol. He explicitly asks us to take off our badges and put down our weapons and join them. He says that if we don't, then they will run over us.

He then references our guns, saying that, "Do you think those little pee shooters are going to stop us?" This was particularly concerning to me that it meant that he was willing to withstand lethal force that we might use and — in his efforts to achieve his objective.

MR. SUS: Your Honor, at this time, we would move to admit Exhibit 14.

MR. SHAW: No objection.

THE COURT: Exhibit 14 is admitted.

(Exhibit 14 was admitted into evidence.)

JA219

MR. SUS: Mr. Hehn, please pull up Exhibit 15, time stamp 14:28:45.

Q. (By Mr. Sus) Officer Hodges, do you see the video on your screen?

A. I do.

[p.103]

Q. Is this your body camera footage from January 6, 2021?

A. It is.

Q. Did you review this video prior to your testimony today?

A. I did.

Q. Does the video fairly and accurately depict the events of January 6, 2021, as you recall them?

A. It does.

MR. SUS: Mr. Hehn, please play the video.

(Video playing.)

MR. SUS: We're stopping the video at 14:30:33.

Q. (By Mr. Sus) Officer Hodges, could you describe what we just saw?

A. The video depicts the police line in front of the West Terrace at the time it was breached by the mob. The — the mob was able to breach the line, they pushed through us, and the sheer size and number of people involved made it impossible to re- — get the line back where it was.

We — they continued to assault us, push us back. We were beaten, pushed, kicked. I was overwhelmed by members of the mob, being pushed back by several at once, until I was pushed back against that

[p.104]

waist/back-high wall you see in the video. I was held there while one of the assailants attempted to gouge out my eye.

And I was able to repel the attackers, and we were forced to retreat.

JA220

Q. Officer Hodges, how did the assailant try to gouge out your eye?

A. He grabbed my face and stuck his thumb in my eye and pushed it in, tried to dig it out as best he could.

Q. So the time stamp at the start of this video was around 2:28 p.m.

Is that about when — the time the mob started to surge?

A. That's correct.

Q. Had you ever seen a crowd break through a police line like that before?

A. No.

Q. To your knowledge, prior to this point, had the DC Metropolitan Police Department ever had to fall back from a police line because a crowd broke through it?

A. No.

Q. Did you hear the man in the video say, "This is our house"?

[p.105]

A. I did.

Q. What did you understand those words to mean?

MR. SHAW: Objection. Relevance.

THE COURT: Overruled.

MR. SHAW: Foundation as well.

THE COURT: You may testify as to what you understood it to mean.

A. At the time, I understood the assailants' words "This is our house" to mean that they had the right to be there or they believed they had the right to be there, that they had the right to enter whenever they wanted, and they had the right to decide what went on and, more pertinently, what did not go on inside the United States Capitol.

JA221

Q. (By Mr. Sus) Over the course of the day, did you hear other individuals say, "This is our house"?

A. I did.

MR. SUS: Your Honor, at this time, we would move to admit Exhibit 15.

MR. SHAW: No objection.

THE COURT: Exhibit 15 is admitted.

(Exhibit 15 was admitted into evidence.)

MR. SUS: Mr. Hehn, please pull up Exhibit 16, starting at time stamp 14:30:44, and pause

[p.106]

the video.

Q. (By Mr. Sus) Officer Hodges, do you see the video on your screen?

A. I do.

Q. Is this your body camera footage from January 6, 2021?

A. It is.

Q. Did you review this footage prior to your testimony today?

A. I did.

Q. Is this footage a fair and accurate depiction of the events of January 6, 2021, as you recall them?

A. It is.

MR. SUS: Please play the video.

(Video playing.)

Q. (By Mr. Sus) Officer Hodges, could you describe what we just saw?

A. As we were retreating from the police line being broken on — in front of the West Terrace, I observed a man who was on the ground and had a large knife on his belt. Other officers were attempting to disarm him of his knife, and I assisted while another officer took possession of the knife.

JA222

Q. To your knowledge, was this man arrested
[p.107]
at the scene?

A. No.

Q. Why not?

A. As I previously testified, the current conditions that you see in the video made it untenable to make arrests. We could not guard him adequately with our manpower, nor provide for his safety, security, and medical treatment.

MR. SUS: Your Honor, at this time we would move to admit Exhibit 16.

MR. SHAW: No objection, Your Honor.

THE COURT: Exhibit 16 is admitted.

(Exhibit 16 was admitted into evidence.)

MR. SUS: Mr. Hehn, please pull up Exhibit 17, starting at time stamp 14:32:15, and press pause.

Q. (By Mr. Sus) Officer Hodges, do you see the video on your screen?

A. Yes.

Q. Is this your body camera footage from January 6, 2021?

A. It is.

Q. Did you review this footage prior to your testimony today?

A. I did.

[p.108]

Q. Is this a fair and accurate depiction of the events of January 6, 2021, as you recall them?

A. It is.

MR. SUS: Please play the video.

(Video playing.)

JA223

Q. (By Mr. Sus) Officer Hodges, just to orient us, can you describe where you start at the beginning of the video and then where you ended up?

A. At the beginning of the video, I was in front of the West Terrace. I ascended the stairs of the inaugural stage up to the West Terrace proper.

Q. And looking at the time stamp currently showing on Exhibit 17, it says 14:13:11.

So this is approximately 2:33 p.m.; is that right?

A. 14:30- — 14:33, is that what you mean?

Q. Yes.

A. Correct.

Q. And by this time, 2:33 p.m., were the police still in control of where you were standing on the West Terrace of the Capitol?

A. Yes.

Q. Were the police able to maintain control of the West Terrace of the Capitol the rest of the day?

A. No.

[p.109]

MR. SUS: Your Honor, at this time we would move to admit Exhibit 17.

MR. SHAW: No objection.

THE COURT: Exhibit 17 is admitted.

(Exhibit 17 was admitted into evidence.)

MR. SUS: Mr. Hehn, please pull up Exhibit 18, starting at time stamp 14:36:10.

Q. (By Mr. Sus) Officer Hodges, do you see the video on your screen?

A. I do.

Q. Is this more of your body camera footage from January 6, 2021?

A. It is.

JA224

Q. Did you review this footage prior to your testimony today?

A. I did.

Q. Is this a fair and accurate depiction of the events of January 6, 2021, as you recall them?

A. It is.

MR. SUS: Please play the video.

(Video playing.)

MR. SUS: Let's pause the video at 14:37:06.

Q. (By Mr. Sus) Officer Hodges, just to orient us again, can you walk us through where you

[p.110]

started at the beginning of the video and then where you ended up?

A. At the beginning of the video, I was on the West Terrace. I then entered the doorway and into the tunnel that connects the West Terrace to the room known as the Crypt.

Q. And who was coughing in the video?

A. That was me.

Q. Why were you coughing?

A. I was experiencing the effects of CS gas, or tear gas, in the air.

MR. SUS: Your Honor, at this time, we would move to admit Exhibit 18.

MR. SHAW: No objection.

THE COURT: Admitted.

(Exhibit 18 was admitted into evidence.)

MR. SUS: Mr. Hehn, please pull up Exhibit 19, starting at time stamp 19:54:38.

Q. (By Mr. Sus) Officer Hodges, do you see the video on your screen?

A. Yes.

JA225

Q. Is this more of your body camera footage from January 6, 2021?

A. Yes.

Q. Did you review this video prior to your [p.111] testimony today?

A. I did.

Q. Is this a fair and accurate depiction of the events of January 6, 2021 —

A. Yes.

Q. — as you recall them?

A. Yes.

Q. Could you tell us where you're located at this point in the video —

MR. SUS: Oh, I'm sorry, Your Honor. Could we please play the video.

(Video playing.)

Q. (By Mr. Sus) Now, Officer Hodges, could you tell us where you're located at this point in the video?

A. At this point in the video, I am in the tunnel that connects the West Terrace to the Crypt.

Q. So you were on the other side of the tunnel that you had previously seen walking through in the prior video?

A. Correct.

Q. And can you describe what was happening in the video?

A. In the video, we are forming a line inside the tunnel, attempting to defend that entrance from the

[p.112] mob.

Q. And could you describe the scene inside of that tunnel?

A. The scene inside of the tunnel was a sensory overload. It was chaotic. It was extremely loud. There

JA226

was alarms going off. Lots of people yelling. There were chemical munitions in the air, strobe lights.

And intense body-to-body contact. We — as you got closer to where the assailants in the police line was, the more compressed everyone got, until it was a lot of pressure being exerted on you.

Q. By this point in the day, around 2:55 p.m., had the mob taken control of the West Terrace of the Capitol?

A. Yes.

Q. What was your belief of what would happen if the mob broke through that police line in that tunnel?

A. We — at the time, we had no idea if the mob was able to gain entry into the Capitol building through any other means. We believed that if they were to defeat our line in the tunnel, they would have unfettered access to the Capitol itself and make good on all their threats.

Q. Threats against whom?

[p.113]

A. Congress, the Vice President.

Q. Did you hear the officers in the video say, “Interlock the shields”?

A. Yes.

Q. And what does that mean?

A. Some of our police shields are designed by their shape to be able to interlock with each other when placed next to each other in a certain way. This allows them to function as a single shield and thus eliminates the vulnerability of having two individual shields as individual pieces of equipment.

Q. Prior to January 6, 2021, had you ever used that interlocking shield function?

A. I had not.

MR. SUS: At this time, Your Honor, we would move to admit Exhibit 19.

JA227

MR. SHAW: No objection.

THE COURT: Exhibit 19 is admitted.

(Exhibit 19 was admitted into evidence.)

THE COURT: Officer Hodges, could you just explain for the Court exactly, like — I'm not sure I understand this tunnel. Like, a tunnel from where to where and — and — yeah.

A. It's — it's commonly referred to as the tunnel, but it's a hallway.

[p.114]

THE COURT: Oh.

A. It just connects the outside, the terrace where I was, to the inside of the Capitol itself. It's a hallway.

THE COURT: In my mind, it was some sort of underground tunnel, so . . .

MR. SUS: Mr. Hehn, please pull up Exhibit 20 and pause the video.

Q. (By Mr. Sus) Officer Hodges, do you see the video on your screen?

A. I do.

Q. And what does this video show?

A. This video shows the inside of the tunnel connecting the West Terrace to the Crypt while we were defending it from the mob, who was trying to gain entry to the Capitol.

Q. Did you review this video prior to your testimony today?

A. I did.

Q. And is it a fair and accurate depiction of the events from January 6, 2021, as you remember them?

A. It is.

MR. SUS: Please play the video.

(Video playing.)

Q. (By Mr. Sus) Officer Hodges, can you

[p.115]

describe what we just saw?

A. The video depicts the time at which I had moved to the front of the police line inside the tunnel connecting the West Terrace to the Crypt.

And when I was attempting to repel the attackers, I had positioned myself in front of a metal rigid doorframe in an attempt to use it to support my efforts to push forward. Unfortunately, that time, the momentum had shifted and our assailants had me pushed back and pinned me against the doorframe with a police shield.

At that time, one of my assailants took advantage of my vulnerability, grabbing my gas mask on my face, pushing and pulling rapidly, effectively punching me in the face several times, and then ripping it off my head.

He was able to — at the time, my arms were pinned to my sides. I was effectively defenseless. With this in mind, he was able to rip away my riot baton and then strike me in the head with it.

I — at that point, I was experiencing all the effects of the day: various assaults, the head trauma I had just endured, chemical irritants, and the crushing pressure from the crowd. And I was — my — I could feel my senses diminishing. I was still trapped, though, so I

[p.116]

did the only thing I could do: called for help.

Fortunately, other officers were able to extricate me from my position, and I fell back to the rear of the tunnel.

Q. Did you hear the mob shouting, “Heave ho”?

A. I did.

Q. What was your understanding of what they were doing?

A. The mob shouting “Heave-ho,” I understood to be them coordinating their efforts in order to break through

JA229

our defensive line. They were synchronizing their movement to multiply the force it applied and use their bodies to break through our line and gain access to the Capitol.

Q. Now, the body camera video we previously watched, Exhibit 19, showed you in the tunnel around 2:55 p.m., according to the time stamp on that video; is that right?

A. That's correct.

Q. Approximately how long after 2:55 p.m. did the events shown in this video, Exhibit 20, take place?

A. Approximately 10, 15 minutes.

Q. Okay. So around 3:05 or 3:10?

A. That's correct.

MR. SUS: Your Honor, at this time, we
[p.117]

would move to admit Exhibit 20.

MR. SHAW: No objection.

THE COURT: Admitted.

(Exhibit 20 was admitted into evidence.)

Q. (By Mr. Sus) Officer Hodges, how long did you remain in the tunnel after 3:10?

A. I did not remain in the tunnel for very long at that point. I fell back to the Crypt to convalesce as best I could.

However, the fight was still ongoing, and we needed every body we had in the defense of the Capitol. So I went back out there.

I no longer had my gas mask and a lot of my equipment. I was afraid I would be a liability in the tunnel, so I ascended a stair nearby back out to the West Terrace and joined a police line that was there.

JA230

I remained on that line until reinforcements started to arrive from outside agencies, at which point I returned to the Crypt and waited there.

MR. SUS: Mr. Hehn, could you please pull down the video.

Q. (By Mr. Sus) Officer Hodges, when you left the tunnel, did you still have your body camera on you?

A. I did not.

Q. What happened to it?

[p.118]

A. It either fell off or was ripped off my chest where it was mounted and fell to the ground, where it remained until another officer found it the following day.

Q. And did you retrieve it at some point from that officer?

A. Through my agency, it returned to my possession, yes.

Q. And so what did you do for the remainder of the day after you left the Crypt?

A. Back in the Crypt, I waited while members of my platoon gradually gathered, and we waited to — until we were all assembled, at which point we stood by, waiting for further orders. We stayed there until around midnight, at which point we were told that we were able to clear the Capitol.

We left the Capitol grounds. Those who needed immediate medical attention went to hospitals. Those of us who did not were still on-duty. We reported to downtown and awaited further orders.

I believe at about 1:00 a.m., eventually we were told we could go home. And we went back to our district from there, and then went our separate ways.

Q. How would you characterize the events you witnessed on January 6, 2021?

[p.119]

A. The events on January 6, 2021 at the United States Capitol were horrific. It was a terrorist attack on the United States of America, an assault on democracy, and an attempt to prevent the peaceful transfer of power.

Q. About how many protest events have you worked as a member of the Civil Disturbance Unit?

A. Dozens.

Q. How did the events of January 6, 2021 compare to those other experiences you had as a member of the CDU?

A. The events of January 6 are incomparable to any other riots or protests or First Amendment assemblies I have policed. There is just no — no comparison on the level of violence and stakes.

Q. And what were you fighting for on January 6?

A. On January 6, I was fighting for —

MR. SHAW: Objection. Relevance.

THE COURT: Overruled.

A. On January 6, I was fighting for democracy. I was fighting for the safety and well-being of the members of Congress, the Vice President, the congressional staff who were in the building that day. I was fighting for myself, for my colleagues, and everyone

[p.120]

who participates in our democracy.

MR. SUS: Thank you, Officer Hodges.

No further questions.

THE COURT: Cross-examination.

MR. SHAW: I may want that a little later, but not yet.

CROSS-EXAMINATION

BY MR. SHAW:

Q. Officer Hodges, there were multiple demonstrations —

JA232

THE COURT: Mr. Shaw, can you move the microphone? You're taller so can you —

MR. SHAW: Sure.

THE COURT: — make sure that you're speaking into it?

MR. SHAW: Sure thing. Is that better?

THE COURT: Yeah, a little bit.

Q. (By Mr. Shaw) Officer Hodges, how many demonstrations were there in Washington, DC on January 6?

A. I'm only aware of what transpired at the Capitol and the one at the Ellipse.

Q. Okay. Are you aware that there were people who spoke at the Supreme Court?

A. No.

[p.121]

Q. Are you aware that there were people who spoke at other venues in Washington, DC that day?

A. No.

Q. Are you aware that there were protesters who did not attend any of the events where people spoke?

A. No.

Q. You said that you thought there were — based on your view of the crowd that day, there were at least thousands of people present; is that correct?

A. Correct.

Q. How many people attended demonstrations in Washington, DC, overall, that day?

A. I don't have an exact number.

Q. Okay. Have you heard any estimates of the number who were in attendance at various demonstrations that day?

A. I — at the Capitol, I heard of — or I've read of a number around 9,400.

JA233

Q. Okay. Have you heard an overall number in excess of 120,000?

A. No.

Q. Okay. Is it your position that all of the people who attended demonstrations in Washington, DC that day were members of what you called “the mob”?

A. If there are demonstrations that were not [p.122]

part of the assault on the Capitol, then no.

Q. So “the mob,” if I understand you correctly, you’re defining as just the subset of people who assaulted the Capitol?

A. Correct.

Q. And as you sit here today, are you able to tell me what percentage of what you call “the mob” attended President Trump’s speech at The Ellipse?

A. No.

Q. Are you able to tell me what percentage of what you call “the mob” listened to President Trump’s speech at the Ellipse?

A. No.

Q. Now, several times, you said: The mob did this, the mob said this, I saw the mob do this, or words to that effect.

Do you remember that?

A. Yes.

Q. Okay. Fair to say what you’re really saying is, I saw individuals in what I call “the mob” do this or say this, correct?

A. A mob is composed of individuals, so yes.

Q. Okay. And there were other people who were standing there who did not do or say those things, right?

[p.123]

A. That is correct.

JA234

Q. And some portion of the people who were standing there were there and did not physically assault anybody, right?

A. I did not — there were times where I observed people and they were not assaulting anyone, correct.

Q. And there were other demonstrators in Washington, DC that day who did not form part of the mob, as you define it, correct?

A. I'm only aware of what transpired at the Ellipse and at the Capitol.

Q. Okay. Now, fair to say that you are not able to read minds, right?

A. That is fair to say.

Q. And just by looking at someone who was there that day, you weren't able to tell if that person attended the speech at the Ellipse, correct?

A. That's correct.

Q. Or if that person had heard the speech, right?

A. Correct.

Q. Or, for that matter, if that person had ever read a tweet by President Trump, correct?

A. Correct.

[p.124]

MR. SHAW: Would you put up Exhibit 14, please. And just pause it right at the very beginning, whoever was working the . . .

Yeah. Okay, great. Joanna's doing it, okay.

Q. (By Mr. Shaw) So, for example, if we look at this picture, you can't tell whether — this woman on the left in the striped shirt, you can't tell whether she attended the — the speech on the Ellipse, correct?

A. I cannot tell that by looking at her, no.

Q. Or in — or in any other way, right?

A. Correct.

JA235

Q. And the man behind her who, a few moments later, was going to yell at you, you can't tell whether he attended that speech, right?

A. Correct.

Q. Or any of the other people in that picture, right?

A. Correct.

Q. Or, in fact, any of the other people in any of the other film exhibits that we saw earlier today, right?

A. I cannot identify individuals who attended the speech and then were at the Capitol.

Q. Or who read any of President Trump's [p.125]

tweets, correct?

A. Correct.

Q. And I wanted to clear up a couple of things I just wasn't clear about from your testimony.

At one point, you said that the — and I forget the exact name of it, but you said there was a gun unit?

A. Gun Recovery Unit?

Q. Gun Recovery Unit. That's it. Thank you.

And you said, I believe, that they identified people who either had weapons or who they thought might have weapons.

Is that correct?

A. That's correct.

Q. Okay. Do you know how many people have been prosecuted for firearms crimes arising out of the January 6 demonstration?

A. No.

Q. Would it surprise you to learn that it is a total of five?

A. No.

JA236

Q. Okay. And that one of those people arrived on January 7 in Washington, DC; so it was really four on January 6?

A. Okay.

[p.126]

Q. And do you know how many people in — how many demonstrators discharged a firearm in Washington, DC on January 6?

A. I do not know.

Q. Would it surprise you to learn it was zero?

A. No.

Q. And then I just — I believe you said that you — you thought you had suffered a concussion, is that correct, because you had a headache for —

A. That's —

Q. — for two weeks?

A. That's correct.

Q. Okay. Were you diagnosed with a concussion by a medical professional?

A. I went to the Police & Fire Clinic, and they sent me to Washington Hospital Center, which is a hospital in Washington, DC.

Received an MRI, and I wasn't diagnosed with a concussion, but that they — they asked me if I wanted to do any further tests for that. And I said no, because if I was or wasn't, the course of treatment is the same.

Q. Okay.

MR. SHAW: I have no further questions for

[p.127]

you, sir. Thank you.

THE COURT: Any questions from the Colorado Republican Party?

MS. RASKIN: No questions, Your Honor.

JA237

THE COURT: Any questions from Secretary Griswold?

MR. SULLIVAN: No questions, Your Honor.

THE COURT: Any redirect?

MR. SUS: Brief redirect, Your Honor.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. SUS:

Q. Officer Hodges, you testified that you were initially stationed on Constitution Avenue; is that right?

A. That's correct.

Q. On January 6?

A. Yes.

Q. And that was between the hours of 7:00 a.m. and 1:30 p.m.; is that accurate?

A. That's accurate.

Q. And during that time, did you observe the crowd walking — or your testimony earlier today was that you observed the crowd walking from the Ellipse area to the Capitol; is that right?

[p.128]

A. That's correct.

Q. Okay.

MR. SUS: No further questions, Your Honor.

THE COURT: Officer Hodges, thank you so much for your testimony and your service to this country.

THE WITNESS: Yes, Your Honor.

THE COURT: Next witness.

MS. TIERNEY: Your Honor, our next witness is remote, and so it might just take about one minute. I think they're all ready. We just have to let them in, and they are — it will now be under Congressman Eric Swalwell.

Your Honor, the petitioners call Congressman Eric Swalwell.

JA238

Okay, he's coming right now. Sorry for the delay. Here he is, Your Honor.

THE COURT: I can't see him. Am I supposed to be able to?

MS. TIERNEY: Thank you, Congressman Swalwell. Just one moment while we get the tech set up.

Okay. Good afternoon, Congressman. Can you please introduce yourself.

THE COURT: I need to swear him in.

[p.129]

MS. TIERNEY: Oh, sorry.

THE COURT: Now I'm fumbling with the technology.

MS. TIERNEY: Well, and we have a siren again.

THE COURT: Congressman Swalwell, can you hear us?

THE WITNESS: Yes, Your Honor, I can.

THE COURT: Great.

Will you please raise your right hand.

ERIC SWALWELL,

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. TIERNEY:

Q. Good afternoon, Congressman Swalwell. Could you please introduce yourself.

A. Good afternoon. My name is Eric Swalwell, and I represent the 14th Congressional District from California.

Q. How long have you been a member of Congress?

A. Going on 11 years. Elected in 2012 and sworn in on January 3, 2013.

Q. Were you at the U.S. Capitol on January 6,

[p.130]
2021?

A. Yes, I was.

Q. And what was supposed to happen in Congress that day?

A. We were sworn in three days earlier, and on the 6th was to be the day where the Congress votes to certify the electoral college votes that were sent from December after being ratified by the states.

Q. I'm going to ask you some more questions about January 6, 2021. But first, I would like to ask you some questions about prior presidential elections.

When, if ever, had you participated in Congress's counting of electoral votes for President before January 6, 2021?

A. I had also participated in the January 6, 2013 certification for the reelection of President Barack Obama, and I also participated on January 6, 2017 for the election of President Donald Trump.

Q. And does Congress always count the votes on January 6?

A. Yes, every four years on January 6.

Again, the new Congress sworn in on the 3rd, and then on the 6th is when the certification occurs.

Q. In your experience, what is the process for counting and certification of electoral votes on

[p.131]
January 6?

A. Largely ceremonial, in that, you know, the Congress convenes in what's called a joint session, meaning the House and the Senate are in the Congress. The Vice President of the United States, the President of the Senate, presides over the count.

JA240

And each state alphabetically has their votes called. If there's an objection, you need somebody to meet your objection from the other Chamber.

So, for example, if a House member objects, a Senator would also have to object. And then both bodies would go back to their Chambers and debate the objection, and then come back for resuming the count.

Q. And how are those objections resolved?

A. They're resolved through debate and then a vote.

Q. And I think you testified about this, but what role does the Vice President play in those proceedings, generally?

A. As the President of the Senate, the Vice President, you know, presides over the count.

There are tellers who are seated just below the Vice President from both Chambers, both parties. They tally the counts that are sent from the states, and the Vice President literally — you know,

[p.132]

kind of like in an award show — opens up the count and reads how the state went for each individual candidate.

Q. In 2016, were there objections to the counting and certification of electoral votes from any state?

A. Do you mean in 2017?

Q. Yes, I'm sorry. Arising out of the 2016 election, so on January 6, 2017.

A. I do recall there was at least one, and perhaps more, Democratic House objections. But I also recall that there was no Senator to sign off, so to speak, or cosign on the objection, and so we never adjourned for a debate.

Q. And so what happened with those objections?

A. I remember Vice President Biden — I was in the Chamber and Vice President Biden asked if there was a Senator who also objected. No Senator objected, and the

JA241

Vice President would open up the envelope or look at the votes sent from the state, and they would just alphabetically proceed to the next state.

Q. And did you object to the counting or certification of any electoral votes?

A. Not in 2013 and not in 2017, no.

Q. Do you recall any of the objectors in [p.133]

2017, on January 6, 2017, suggesting that then-Vice President Biden, as President of the Senate, could have rejected any of the electoral votes submitted by the states?

A. No, I do not recall that ever coming up in any caucus meetings or any public representations.

Q. And what do you recall, if anything, about anyone suggesting that then-Vice President Biden, as President of the Senate, could declare Hillary Clinton the winner of the 2016 election?

A. To my recollection, that was never discussed by any of my House colleagues.

Q. Before late 2020 or early 2021, had you ever heard anyone suggest that the Vice President, as President of the Senate, had discretion to reject electoral votes from states?

A. I would — I would not hear of that line of argument until after the election from the former President, Donald Trump, and his team.

Q. And did then-Vice President Biden try to do any of those things during the counting and certifying of the 2016 presidential election?

A. He did not. If there was not a Senator to match a House member's objection, he moved on with the count.

[p.134]

Q. Do you recall any candidate or colleague suggesting that Congress should ignore the Constitution and certify the election for the winner of the 2016 popular vote?

A. I don't recall that ever happening.

Q. And did any person supporting any candidate for President, to your knowledge, attack the Capitol on January 6, 2017?

A. That definitely did not happen on January 6, 2017.

Q. And are you aware of anyone ever attacking the Capitol during Congress's counting and certification of presidential electoral votes in the history of our country prior to January 6, 2021?

A. Certainly not in my lifetime and not any knowledge I have of the Congress's history.

Q. I now want to turn to the election. Did you have any concerns in the weeks and months leading up to the 2020 presidential election about whether Mr. Trump would accept the results of the election if he lost?

A. I did. And that was the evening of the election, when a statement was made by the President early in the morning, essentially — or not essentially — he was saying that the election was

[p.135]

rigged.

And then — and to be honest, prior to the election, the President would not honor reporters' requests to accept the outcome of the election if he lost.

And then, of course, on the night of the election, he had said in his first public statement that he believed it was rigged.

And then in the weeks after the media declared Joe Biden as the President-elect and the states certified the election outcomes and the lawsuits that the President and

his team had brought had all been dismissed in the courts, the President ramped up his rhetoric in public appearances and on Twitter.

And the one that I recall was an invitation in mid-December via Twitter for people to come to the Capitol on January 6 and stating in the tweet, "Will be wild."

Q. You testified just there that there were legal challenges that you were aware of brought by Mr. Trump to the election.

By December 14, 2020, are you aware of what the status of those legal challenges was?

A. By December 14, I think that, if I recall, is the date where the states were certifying their

[p.136]

counts. Every challenge to the states' counting and doing their certification had been dismissed or dropped by the President's team.

Q. Okay. Following the states' certification of electoral votes on December 14, 2020, what was your understanding as to whether Mr. Trump had any further legal avenues to challenge the election?

A. Again, my understanding was the next step in the process was the January 6 certification and then the January inauguration for President-elect Biden, but that was it. They had been exhausted.

Q. Let's turn now to January 6, 2021.

What was your role in the counting and certification process on January 6, 2021?

A. I was told the day before by Speaker Pelosi that she would like me to preside as the speaker-designate at noon on January 6 to gavel us in, so to speak. And so the day starts, every congressional day starts with the Speaker gaveling the Congress in.

JA244

And so I gaveled us in, led us in Pledge of Allegiance. There was a new chaplain to the Congress, and asked the chaplain — as we do every opening of a session, asked the chaplain to lead us in prayer.

And then I read an appointment of the tellers that each side — that each party in each Chamber

[p.137]

had designated to participate in the count on January 6. And then I adjourned.

And all of that lasted no more than ten minutes.

Q. I'm going to back you up just briefly.

What did you do that morning before the certification process began?

A. I ran from the residence I have in Washington, DC to the Capitol and then back. It's a run I do often.

And I recall on the run back from the Capitol, actually running up North Capitol, seeing dozens of individuals carrying signs that read, "Stop the Steal," and wearing body armor and military fatigue — fatigues.

And I remember pulling down the cap that I was wearing, it was pretty cold, so kind of pulling it over my face because I didn't want to be seen by this crowd or recognized by this crowd.

But it certainly just gave me an unsettling feeling about the direction the day was headed.

Q. Did you watch any of Mr. Trump's speech on the Ellipse that day?

A. I did. Once I returned to the Capitol and

[p.138]

after I had opened the session, I had — I was on the Floor with my Democratic colleagues, and many of us had our phones out, and we were watching the speech on the Floor.

We would step off the Floor into this area called a Cloakroom, which is just footsteps from the Floor, and there were televisions on in the Cloakroom playing the speech from the President and his supporters at the Ellipse.

Q. And what was your reaction to that speech or the parts that you saw of it?

A. Well, in the weeks before January 6, again, the President had fired up his supporters with claims that the election was rigged; said the 6th was going to be wild; and it came together on the 6th. Like just from what I saw of individuals on the streets of Washington and then what I saw in the speech, it appeared that an angry mob had assembled around the Capitol and near the White House.

And when the President said that he was — that his supporters must fight like hell or they won't have a country anymore, that worried me because we were undergoing the process of certifying the election he lost.

And when he aimed them at the Capitol by

[p.139]

saying that he was, in solidarity, going to the Capitol with them, that, "We're going to go to the Capitol," a lot of us in the Cloakroom looked at each other in a "Oh, God, like, what does this mean for us" kind of feeling.

Q. So how did the counting and certification of electoral votes on January 6, 2021 go?

A. So after I recessed, we took a break for about 50 minutes. And then Speaker Pelosi and Vice President Pence, as the President of the Senate, would next reconvene the House and the Senate in the House Chamber. And as I said, it begins alphabetically.

So on the Democratic side, because of COVID, only members of leadership and members from the states that were going to have to defend the vote were on the House

Floor. Any other Democrat would have to watch in the gallery.

So there were, you know, no more than two dozen or so of myself and others on the House Floor. And I should have added, at that time, I was a member of House leadership.

And so Arizona was, you know, the first state to be challenged and, if I recall, Congressman Gosar, Paul Gosar from Arizona, challenged the Arizona vote.

The Vice President asked if there was a

[p.140]

Senator who would cosign the challenge, and I believe it was Senator Cruz from Texas who signed off. And so we adjourned the joint session, meaning the senators left to go to their own Chamber for debate; we stayed in our Chamber; and Speaker Pelosi took the gavel to kick off the debate on the matter of Arizona.

Q. At some point thereafter, you learned that rioters had breached the Capitol, correct?

A. Myself and everyone around us on the floor had our phones out and were watching intently on what was happening around the Capitol.

We were also receiving a number of Capitol Police alerts. There's an email — an internal email system for members and staff, and the alerts were telling us about the mob that was assembling around the Capitol, the Capitol office buildings that were closed, suspected pipe bombs around the Capitol that had been discovered.

And so we were focused on the debate, but also our own security posture, whether it was watching Twitter or receiving the Capitol Police alerts, was also right in front of us in our handheld devices.

Q. And about what time was this happening?

JA247

A. This was between 1:00 and 2:00, as we watched either people who were in the mob and staged at the Capitol during the speech or people who were at the

[p.141]

Ellipse and moved, you know, toward the Capitol after the speech.

Q. What was the first thing that occurred that was unusual to you inside the Capitol?

A. Well, first, I would say watching the mob on our devices blow past, with force, various security perimeters was unusual. We had never seen anything like that before.

But also on the floor, Speaker Pelosi was presiding in the House Chamber and, abruptly, she was asked to step off the podium, and her security detail took her off the Floor.

And I also noticed Mr. Hoyer, who was the majority leader, Steny Hoyer of Maryland, and James Clyburn of South Carolina, who was the majority whip, also their details hurriedly went to them and took them off the Floor.

Q. And about what time was that?

A. This was in the 1:00 hour, I would say mid 1:00 hour.

And at that point, James McGovern, who is a rules committee chairman from Massachusetts, he stepped up to the podium. And so it was a seamless transition; debate did not stop. He stepped up to the podium and presided over the debate on the matter of Arizona.

[p.142]

Q. After Speaker Pelosi and the other members of leadership that you mentioned were moved out of the Chamber, you said debate continued for — for about how long did debate continue?

JA248

A. For probably another — no more than 30 more minutes. And it may have been even fewer.

Q. What happened next in terms of safety recommendations?

A. Mr. McGovern suspended debate, and a Capitol Police officer went to the podium. I remember it being the lower podium.

So the podium where the Speaker presides — there's two podiums in what's called the rostrum. The upper podium is where the Speaker presides, and that's where I gaveled us in, and that's where Speaker Pelosi and Pence presided; that's where McGovern presided.

The lower podium, if you think about State of the Unions, where the President speaks.

So a security officer went to that lower podium and told the members that there were people unauthorized inside the building and that Capitol Police was dispersing tear gas, and that we were to reach under our seats and pull out a gas mask and be ready to put it on in case they had to disperse tear gas inside the

[p.143]

Chamber and also be ready to move through an evacuation route.

Q. Had you ever had to put a gas mask on in the Capitol House Chamber before?

A. I didn't — until that moment, I did not know that there were gas masks under our seats. And we had also never before, you know, rehearsed any type of scenario like this.

So first, there was just — I think people were surprised that they were even there. We sit on top of them every day; we just didn't know.

Q. Who were you sitting with at that time?

A. I had moved from sitting with Barbara Lee and Cheri Bustos early in the debate over to Congressman Ruben Gallego of Arizona.

His wife had reached out to me. She was worried that — that Ruben would probably not follow orders of the Capitol Police and that he would want to fight the mob or the protesters, and she asked me if I could just look out for Ruben.

And so I went over and sat — sat with Ruben Gallego.

Q. And what can you tell us about Congressman Gallego's training?

A. So I knew and most of our colleagues knew

[p.144]

that Ruben had served a combat mission as a Marine in the Iraq War.

And so as we were pulling out the gas masks, he saw immediately that I had no idea how to use or even open the gas mask. And so he started having women first throw him or toss him their gas masks, and he was ripping them open, sometimes using his teeth to rip them open, and was just handing out the gas masks and telling people to not breathe too quickly because that could lead you to pass out.

He and I agreed that we would take off our coats so that our congressional pins were not obvious if we had to move to any of the rioters and also so that we had more freedom of movement.

He also handed me a pen that was sitting on the table where he was prepared to debate for Arizona, and he said to me as he handed me the pen, he said, "If any of them get near you, just put this in their neck."

Q. So what was going through your mind at that moment?

JA250

A. A lot. Uncertainty, disbelief that this was happening, that we were taking our coats off, that we were looking for weapons or how to use gas masks.

At that point, as we're waiting for the security officer to give us further instructions, the

[p.145]

chaplain, who I had asked to lead us in prayer earlier in the day, went back up to the podium and, uninvited, unannounced, just started reading from that lower podium a prayer, and she asked all of us if we would pray with her.

Q. What, if anything, did you notice being done to secure the Chamber at that time?

A. So after I and my colleagues prayed, I noticed that Capitol police officers were — along with some — actually, some of my Republican members, were pushing — Republican colleagues, were pushing furniture against the back door.

So if you think of — again, the State of the Union is probably the best way to orient yourself. But the door that the President walks through for the State of the Union, that's the back of the Chamber. Those double doors have glass panes on them, and so furniture was being moved to block those doors because we could hear the pounding on those doors and the shouting of the rioters outside.

In the front of the Chamber where the rostrum is, where the podiums are for the speakers, there's — there's two massive portraits: There's the portrait of George Washington, and that's on the Democratic side. And there's a portrait of

[p.146]

General Lafayette, the French general from the Revolutionary War; that's on the Republican side.

So on the Democratic side, right behind the portrait is a set of double doors that takes you off the Floor and you — they're glass doors. So I could see through the glass doors in what's called the Speaker's Lobby that Capitol Police were stacking furniture and chairs against the doors that lead into the Speaker's Lobby. And they were stacking them as high as they could stack them with what they had. And we — we sat, as I said, and waited for instructions on the evacuation.

Q. How would you characterize the group of people gathered outside the Speaker's Lobby and the House Chamber at that time?

A. I could — at that point, I can mostly just hear the sounds of the banging or the screaming. I — I would not see them until we left.

Q. And how would you characterize those sounds? What did it sound like?

A. They were — they were — it was haunting.

And I say that because the Chamber's mostly windowless. And so just having been alerted on our phones that bombs, suspected bombs were found around the building and watching the violence against the police

[p.147]

officers and seeing that the mob had breached multiple perimeters and had come closer to the Chamber, it was really just the uncertainty of what they wanted or what they would do.

Q. How concerned were you for your personal safety at that moment?

A. It was escalating as we went from gas masks, to a pen in my hand, to a prayer from the chaplain. And it was when the chaplain read that prayer that I finally texted my wife, something I did not want to text her.

JA252

I had essentially been telling her, you know: We're going to be fine. It's okay. I didn't want to, you know, worry her throughout the morning.

Q. During the attack on the Capitol, were you following Mr. Trump's tweets?

A. I was. And as I said, almost all of my colleagues, we had our phones out and we were reading our phones and following the tweets and the Ellipse speeches and listening to debate.

Q. And why were you following his tweets?

A. We connected the President's tweets to our own safety, our own safety in the Chamber, and also the integrity of the proceedings that were taking place.

MS. TIERNEY: I'm going to ask for
[p.148]

Exhibit 148 to be displayed, please.

And, Your Honor, this exhibit has been stipulated by both — by all sides. This is one of Mr. Trump's tweets.

THE COURT: Okay. Are you offering it into —

MS. TIERNEY: I am offering it into evidence, Exhibit 148, Your Honor.

And this is a long exhibit, so we're — we're only going to look at two tweets —

THE COURT: Okay.

MS. TIERNEY: — of the whole compilation.

So this tweet is on page 83 and it has a time stamp of 2:24 p.m. on January 6, 2021.

THE COURT: Okay. Exhibit 148 is admitted.

(Exhibit 148 was admitted into evidence.)

Q. (By Ms. Tierney) Congressman Swalwell, can you see the exhibit on your screen?

A. Yes, I see the tweet from the verified account of the former President.

Q. And do you remember reading this tweet while you were in the Chamber?

A. Yes. We were — the time stamp reflects what I recall — the time that I recall being still on

[p.149]

the floor, which is 2:24 p.m. on the 6th.

Q. And what did — what did — how did you interpret this tweet? What did you interpret it to mean?

A. I interpreted that the President believed that the Vice President was refusing to do something that could overturn the outcome the President wanted.

But again, for my personal safety and the proceedings we were engaged in, the colleagues that I was with, we interpreted it as a target had been painted on the Capitol because that's where the Vice President was when the tweet was sent.

Q. And can you read the tweet, Congressman?

A. Yes.

“Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!”

Q. Did you notice any change in — in what was happening outside the Chamber after this tweet occurred, was sent?

A. Well, we didn't feel more safe. It wasn't as if, you know, the mob subsided. You know, we were — continued to be updated by Capitol security, that they

[p.150]

were trying to secure an evacuation route and that we should stand ready and — but the pounding and the shouting continued.

JA254

THE COURT: Representative Swalwell, could you just speak up a teeny bit?

THE WITNESS: Sure.

THE COURT: You're starting to trail just a little bit.

THE WITNESS: Yeah. I'm happy to repeat that, too, if that —

THE COURT: If you wouldn't mind.

THE WITNESS: Sure.

A. When the tweet was sent, we did not feel more safe. It wasn't as if the mob subsided.

And so we waited, and this was near the point where we would ultimately leave the Floor, but you could still hear the sounds of the pounding of side of the Chamber and the screaming of the protesters.

Q. (By Ms. Tierney) When — at some point, you were led out of the Chamber; is that correct?

A. Yes. Again, the security officer went to that lower podium and told us there was an evacuation route and that we were to go in the direction of the Lafayette portrait.

Again, two sides: One is Washington;
[p.151]

that's where they were stacking chairs. The other was the Lafayette portrait exit. And so we went — we were told to go in that direction.

(Connection lost.)

MS. TIERNEY: Sorry, Your Honor. Small tech issue. Did the entire WebEx go down?

THE COURT: The WebEx seems to still be on.

MS. TIERNEY: Okay.

THE COURT: Congressman Swalwell, we're just having a technical problem.

THE WITNESS: No problem.

MS. TIERNEY: Should I wait?

THE COURT: Let's wait a minute.

MS. TIERNEY: Yeah.

THE COURT: If it doesn't get fixed in a minute, we can still hear him, so . . .

MS. TIERNEY: Okay.

(A pause occurred in the proceedings.)

THE COURT: Ms. Tierney, let's just — I just wanted to make sure that the court reporter could continue if she couldn't see him for lip reading, but she says she can, so why don't we continue while they work on the technical issue.

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MS. TIERNEY: Okay. Thank you, Your Honor.

Q. (By Ms. Tierney) Congressman Swalwell, can you hear me?

THE COURT: Yes.

MS. TIERNEY: Oh, I just can't hear him.

THE COURT: Oh, he — can you — can you say something, Mr. Swalwell?

THE WITNESS: Yes, I'm unmuted now. It doesn't allow me on my end to unmute.

MS. TIERNEY: Okay.

THE WITNESS: But I can hear you.

MS. TIERNEY: Okay. Hopefully we'll be back to visual in just a moment.

Q. (By Ms. Tierney) Did you play a role in the evacuation of the Chamber?

A. Well, no. The brave police officers were the ones who asked us to leave.

Being a rule follower, the son of a cop, I immediately started to follow the police officers as we were asked to leave.

But I did see my colleague, Ruben Gallego, who is not a rule follower, did not follow the orders of the police. And

JA256

I saw that he was standing on the House chairs, yelling at the members in the gallery, that they

[p.153]

were going to be okay and just reminding them about their gas masks.

And so I went back to the Washington side of the Chamber, of the Washington portrait side, and started yelling, "Ruben, Ruben, time to go. We've got to go." And was ultimately able to get Ruben to walk out of the Chamber with me.

Q. And what path did you take during the evacuation?

A. So we went out of the doors near the Lafayette portrait, which is the Republican side of the Chamber. And there's a long hallway that those doors lead into that's called the Speaker's Lobby. And in a non-COVID time, that's where the press corps assemble and interview members. There were no press at the time because of the COVID restrictions, and so I went out that door and then down the stairway that was just off that exit.

Q. When you were starting to leave, did you notice that there were any — was there anybody still in the Chamber?

A. There were — there were still police officers in the Chamber. And as I said, if I recall, there were one or two Republican colleagues who were standing at the double doors at the back of the Chamber,

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helping push the furniture against the doors.

But Gallego was one of the last ones on the floor, and so I had finally pulled him out. And as we were leaving, I looked down the long hallway of the Speaker's Lobby at the — where they had stacked the chairs and saw the mob, you know, pressed up against the — the glass doors that lead into the lobby.

JA257

Q. When you were leaving the Chamber, was — were there any people left in the gallery?

A. Unfortunately, the gallery colleagues of mine were not able to leave at the same time that we were.

They — many — I did look up at the gallery a number of times, and especially when Ruben was — Congressman Gallego was yelling at them. Many of them were lying under the chairs of the gallery. Some of them had their gas masks on. Some of them looked like they were in kind of like a prayer group, praying together.

But the Capitol Police, as I would later learn in the impeachment, had not yet secured the exit for the third floor doors.

Q. Okay. And what was your reaction to seeing those members and staff in the gallery?

A. Horrified. And felt helpless that I and
[p.155]

the police were not able to get them out and, frankly, felt guilt that I was able to leave and they were still up there.

Q. You testified a moment ago that the path you took led you through the Speaker's Lobby. How long did you stay in the Speaker's Lobby?

A. We were encouraged to move as quickly as we could, but you can only — I learned you would only move as fast as the people in front of you. And with, you know, hundreds of members leaving the floor, there were fits and starts, and so we would move and then we would stop and cluster.

And the evacuation route would last, I recall, well over 10 to 15 minutes to get us out of there.

Q. Did you hear anything as you exited the Chamber?

A. As I was leaving the Chamber and going through the Speaker's Lobby, I did hear what sounded like a gunshot. I did not see it, and I was in the mix of members

who were trying to move as fast as we could to follow the route.

Q. And when did you ultimately make it to a safe location?

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A. It took, as I said, at least 10 to 15 minutes. And so I would say, you know, sometime in the — just before 3:00 or near the 3:00 hour.

Q. Who else from Congress did you meet up with there?

A. House leadership had been taken off the floor when Speaker Pelosi was taken off the Floor. So anyone who remained on the Floor was members of Democratic leadership, members from states that were defending their vote, and then most of my Republican colleagues. It didn't appear that they had the same COVID restrictions that we had on our side. And so that was the group that moved together off the Floor.

Eventually in the evacuation room, our colleagues from the gallery would join us, members of the press corps would join us, and then members of leadership staff who worked in offices in the Capitol would join us.

Q. Once you were in that location, were you receiving updates as to what was going on in the Capitol and outside?

A. The Sergeant of Arms, who is the individual charged with House security, moved with us and was in the room when we arrived.

And so he routinely gave us updates and, you know, frankly, it felt like being on a delayed flight

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where the captain just kept telling me the same thing every 15 minutes, which was that the Capitol was under attack, they were trying to get more resources to clear the

Capitol, but we would have to stay there until the Capitol was cleared.

And that was, you know, every 15 to 20 minutes or so.

Q. Was there communication in that location between you and your colleagues about what was happening outside?

A. Certainly, yes, and there was Republicans and Democrats, you know, in the same room.

And at one point, I do recall that the Sergeant of Arms had kind of loosely implied that they may be bringing buses to the site and that we would leave in buses.

And I was seated next to — for most of the time, next to Congressman Adam Schiff. And I do remember Mr. Schiff vocalizing that we should not leave, we should stay, and that essentially the worst thing we could do, you know, if there's an attempted coup taking place is to leave, you know, the site of the coup. That we needed to go back to the Capitol and finish the count.

Q. I'm going to now show —

A. And I also recall — just, sorry —

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Q. No.

A. Ruben Gallego also — because I remember asking Gallego, like: Should, like, we consider the buses?

And Gallego was adamant that he — I remember the phrase, like we would be “sitting ducks” if we got on a bus and left, that that would be the worst thing for us, for our personal safety.

Q. At some point that afternoon, are you aware that Mr. Trump made a statement?

A. Yes. I remember — I remember multiple statements and a video, but yes.

Q. And the —

JA260

MS. TIERNEY: I'm going to have Mr. Hehn 5 bring up Exhibit Number P68.

Your Honor, this is also a stipulated exhibit.

THE COURT: P68 is admitted.

(Exhibit P68 was admitted into evidence.)

Q. (By Ms. Tierney) And can you — do you remember seeing this video, Congressman Swalwell?

A. Yes, I do.

MS. TIERNEY: Can you play the video, Mr. Hehn. He indicates there's an issue with the

[p.159]

WebEx audio.

THE COURT: Ms. Tierney, how much longer do you have with him? I'm wondering if maybe we should break for lunch, and people can figure out the technology.

MS. TIERNEY: I've probably got about another 10 or 15 minutes.

THE COURT: I mean, I was hoping to get through direct before lunch, but I'm worried that the technology issue might take some figuring out.

MS. TIERNEY: Okay. That's fine, Your Honor.

THE COURT: And it may be that it's not possible to play the video over WebEx with sound, so hopefully your tech people can talk to the Court's tech people and we'll figure something out.

MS. TIERNEY: I can also have the video played locally for Congressman Swalwell because everybody here can see the video, I think. So maybe that's an option, too.

THE COURT: Okay. Why don't we figure that out because I — yeah, I'd like to see the video, so —

MS. TIERNEY: Okay. Yeah. And it's only one minute. It's a short video.

[p.160]

THE COURT: Okay. Let's take a break. We will reconvene at 1:15, and hopefully somebody on your team can talk to Collin and the IT people here and figure it out.

MS. TIERNEY: We'll work very hard to do that. Thank you, Your Honor.

THE COURT: Okay.

(Recess taken from 12:08 p.m. until 1:15 p.m.)

AFTERNOON SESSION, MONDAY, OCTOBER 30,
2023

THE COURT: You may be seated.

Representative Swalwell, can you hear us?

I think he's on mute.

Can you hear us, Representative Swalwell?

THE WITNESS: Yes, I can.

THE COURT: Great. You may proceed.

MR. OLSON: Thank you, Your Honor.

Thank you, Congressman Swalwell.

THE WITNESS: Okay.

CONTINUED DIRECT EXAMINATION

BY MS. TIERNEY:

Q. Before we go to the video that halted us for a little bit there, I wanted to circle back and ask you a question about earlier in the afternoon.

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Do you recall Vice President Pence issuing a statement that day before the certification began?

A. I do. I recall it being, I believe, like the 1:00 hour, almost right as we gaveled in.

Q. And what was in the statement, if you can recall?

A. I recall it was written in like a "Dear Colleague" fashion. I think it was a member of Congress —

MS. TIERNEY: One second, sorry. Court reporter asking for a tech pause.

JA262

Q. (By Ms. Tierney) Can we start over with that answer? Do you recall what was in the statement, Congressman?

A. I recall it being printed in the cloakroom and being passed around with the members. I remember it being written as a “Dear Colleague,” which is a way that members communicate to each other. And Pence, of course, as president of the Senate, is also a member of Congress, so to speak. And he’s a former member, and I thought it was interesting that he wrote it in that format.

But it essentially informed us that he would not be stepping outside what he believed his constitutional duties were, in the counting of the votes.

Q. Okay. So just in follow-up to that, so

[p.162]

you testified that he stated that he would not be stepping outside his bounds.

Can you explain what you mean by that?

A. It was well-known among myself and my colleagues and the public that President Trump believed that Pence had the — that Vice President Pence had the ability to essentially reject the electoral ballots that were sent from the states.

And so in the 1:00 hour, I do recall being handed, from the cloakroom, a “Dear Colleague” that Pence had sent, essentially saying that he was not going — that he did not believe he had the authority to do what the former President was asking him to do, and that he would not step outside the ceremonial duty of adding up the electoral ballots and declaring a winner.

Q. Okay. Great.

MS. TIERNEY: Okay. Let’s try with Exhibit P-68, please, Mr. Hehn.

(Video playing.)

JA263

Q. (By Ms. Tierney) Do you recall seeing that video on January 6, 2021?

A. Yes, I do.

Q. And do you recall approximately what time that video came out?

A. I recall that being in the 3:00 hour. I

[p.163]

don't know the exact time.

Q. Okay. What, if anything, changed after Mr. Trump issued this statement?

A. As I said, we were still in a holding pattern at the evacuation site, being told by the Sergeant of Arms that the rioters were still inside the Capitol. And so at least when it was sent, or when the statement was made, there was still an active attack on the Capitol.

Now, I would watch, you know, on Twitter, in the minutes after the statement, footage of individuals being interviewed or making their own posts that were reposted saying that Trump told them to go home, it was time to go home. So — and these were rioters who had been in the Capitol.

So we do recall — I do recall being with my colleagues and seeing that that statement had at least an effect on some of the people who were posting on social media.

Q. And at this time, you're still in the secure location, correct?

A. That's right.

Q. Now I'm going to have Mr. Hehn pull up another tweet.

MS. TIERNEY: It's P 148, Your Honor,

[p.164]

which we've already stipulated into evidence, and this is just a different page from that tweet — that compilation of tweets.

THE COURT: Okay.

Q. (By Ms. Tierney) Do you see the tweet on your screen, Congressman Swalwell?

A. Yes, I do. Yes.

Q. And can you read it?

A. Yes. It's a tweet from the former President's verified account at 6:01 on January 6, saying:

"These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!"

Q. And where were you when this tweet came out?

A. I was still with my colleagues in the evacuation room, not too far from the Capitol.

Q. And so this, as you testified a moment ago, was about 6:00 p.m. on January 6?

A. That's right.

Q. And what happened, if anything, after this

[p.165]

tweet came out?

A. We were still being updated by the Sergeant of Arms that — that reinforcements and law enforcement were on the way to clear the Capitol, that rioters were still in the building, it wasn't safe for us to go back.

And at about this time, Speaker Pelosi also arrived with other members of leadership and told us that she had been on the phone with the Vice President, the Department of Defense, and local governors about getting the National Guard to the Capitol as well so that we could go back and finish the count.

Q. At some point, did Congress resume counting and certifying the states' electoral votes for the presidential election?

A. Around the 8:00 hour, we were told that the Capitol had been secured and that we were going to be able to head back to the Capitol, and there would likely be speeches by — by the leaders of the — both chambers, and then the debate and the count would resume.

Q. And what did you expect would happen when you returned to the Chamber in terms of the debate?

A. Well, certainly that we would just go back to what we had done in 2017 and 2013, which was to not see a contest of the count, considering violence had

[p.166]
occurred.

And so when we learned — when I learned and my Democratic colleagues learned that there were going to be further challenges, again, it was unsettling because we believed that that could still invite further violence. And it was also in a, like, “Are you kidding me” sentiment that, like, after we just went through all of this, we would really go back to trying to challenge the election and believe that the Vice President could do something about it.

Q. About how long had you been gone when you returned to the Chamber?

A. It was about five hours that I had been in the evacuation room and then walked through the Cannon Tunnel, which connects the House office buildings to the Chamber, that I and many colleagues walked back over to wait for the debate.

Q. And what did you observe in the Chamber on your way back in?

A. I went through the back double doors; and again to reorient you, these are the doors for our State of the Union where the President would enter. Those are the doors that, on the other side on the Chamber side, Capitol Police and some Republican colleagues had been

[p.167]

putting furniture against during the attack on the Capitol.

And I stepped over glass, and as the Capitol police officer told me to be careful, I was among one of the first groups to go back. So they were still sweeping up — a cleaning crew was sweeping up glass as you stepped into the Chamber.

And then when I stepped into the Chamber, I noticed two individuals wearing a blue FBI technician jacket, and they were taking photographs and conducting measurements on the House Floor.

Q. Was that unusual?

A. I've never seen — photographs are not allowed on the House Floor, so odd — I don't know why but that was one of the first things I remember thinking, like, You're not allowed to take photos of the House Floor. But, of course, it had become a crime scene.

But yes, it was unusual to see that.

Q. How were other members reacting, in your view?

A. There was a lot of anxiety that the debate would continue, and we were un- — I don't want to speak for everyone.

I was unclear, and the people I spoke to were unclear if —

[p.168]

MS. TIERNEY: Hold on one — just one second, Congressman. There's a siren coming by the courtroom.

THE COURT: You can start again. Sorry about that.

THE WITNESS: That's okay.

A. I — I was anxious because I feared if we were going to continue to challenge — if Republicans were going to continue to challenge the outcome, that the mob could

return and that the scene on the Floor could also become combustible among the members.

Q. (By Ms. Tierney) Were — did you hear any 3 meaningful speeches?

A. Well, one contentious moment was during the challenge of the Pennsylvania results. And I was seated directly behind Conor Lamb, a Democrat from Pennsylvania, as he defended the count in Pennsylvania.

And Conor began his remarks, essentially saying before the riot, he prepared remarks that was going to show deference and respect to the Republican challenges, but considering that the riot occurred and we're still doing this, they're not worthy of his respect.

And — and then a Republican from Maryland, Andy Harris, started shouting, "Down, Conor,"

[p.169]

and then some of my Democratic colleagues beelined over to Andy Harris, who was behind me, and told them to let Conor finish.

I jumped up and went over, and I saw that Andy Harris and Democrat Colin Allred, a former NFL player from Texas, were essentially in an argument. And I recall yelling at Andy, "You don't want to do that, Andy. He used to tackle people for a living, Andy, you don't want to do that."

And fortunately, it stopped there.

Q. Did Congress ultimately finish the counting and certifying of the states' electoral votes for the presidential election that evening?

A. We did, and it was in the 3:00 a.m. hour the next day, January 7.

Q. And what was the very last act of the night?

A. It was Vice President Pence presiding over the joint session, receiving the tallying from the tellers, and

declaring that Joseph R. Biden was the winner and would be inaugurated on January 20.

Q. What time did you get home that night?

A. I got home just after 4:00 a.m.

Q. And what happened when you returned home?

A. I was greeted by my wife. There was a lot

[p.170]

of late nights at the Capitol. That was the first time she had ever waited up for me.

And gave her a big hug, and then went up and did something that I also would never do with little children, which is to go into their room when they're sleeping, and I just gave both of them kisses on their forehead.

Q. After January 6, 2021, what conclusion, if any, did you come to as to what or who caused or instigated the attack on the Capitol?

MR. SHAW: Objection.

A. Well, I — I —

MR. SHAW: His conclusions are not relevant, Your Honor.

THE COURT: Sustained.

Q. (By Ms. Tierney) In the aftermath of the attack, did Congress consider any action against Donald Trump for his role in the attack?

A. As we were in the evacuation room, colleagues of mine on the Judiciary Committee, David Cicilline, Ted Lieu and Joe Neguse, were already thinking about what we would have to do legislatively to make sure that the inauguration could take place if we did finish the count.

And so within days, Speaker Pelosi,

[p.171]

working with them, would bring forth articles of impeachment, and that would be voted on and — or debated and voted on one week later, on January 13.

Q. How did you vote on the impeachment?

A. I voted with my Democratic colleagues and ten other Republican colleagues to impeach on the count of insurrection.

Q. And what role did you have, if any, in those proceedings, those impeachment proceedings?

A. A few hours before the vote, Speaker Pelosi called me and asked me if I would serve as an impeachment manager on the impeachment team in the Senate, and I — I accepted and would be a part of a nine-person impeachment manager team led by lead manager, Jamie Raskin.

Q. And you testified a moment ago that there were Democrats and Republicans that voted in favor of the impeachment.

Did the — did that vote result in an impeachment of the President by the House?

A. Yes. On January 13, in the evening, President Donald Trump was impeached a second time by the House.

Q. Was there a trial in the Senate?

A. There was, yes.

[p.172]

Q. And what was the result of that trial?

A. In the Senate, the President — 50 Democrats and 7 Republicans voted that the President had, indeed, committed insurrection, although that would be 10 votes short of the two-third requirement for removal.

Q. Did any Republican senators who voted against conviction publicly reveal the reasons for their vote?

MR. SHAW: Objection, Your Honor. This is not relevant.

MS. TIERNEY: Your Honor, I'll try to tie it together here with another question.

JA270

THE COURT: Overruled.

Q. (By Ms. Tierney) Do you want me to repeat the question, Congressman?

A. Oh, no, I understand the question.

Shortly after the Senate proceedings, Leader McConnell went to the Floor and said that his vote to acquit did not mean that Donald Trump would escape accountability at all and that there were other legal means, civilly and criminally, that would hold him accountable.

Q. As a member of the House of Representatives, Congressman Swalwell, are you required to take an oath of office?

[p.173]

A. Yes, I take it every other year, if elected, on January 3.

Q. And does that include an oath to the Constitution?

A. Yes, it does.

Q. And what do you understand that oath to the Constitution to mean?

A. That that oath predominates my loyalty to anything else, and I have a duty to defend and protect.

MS. TIERNEY: No further questions.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. SHAW:

Q. Good afternoon, Representative Swalwell.

A. Good afternoon, Counsel.

Q. Am I correct that you weren't injured on January 6?

A. I was not, no, not physically.

Q. Yet you are the plaintiff in a personal injury lawsuit that you brought against Donald Trump in the United

States District Court for the District of Columbia; is that correct?

A. Yes.

Q. And you're seeking damages in that lawsuit?

[p.174]

A. Unstated, but yes, meaning no dollar amount has been stated.

Q. And as a lawyer, you understand that if this proceeding against President Trump is successful, 5 that would improve your chances of success in that 6 lawsuit, correct?

A. I'm sorry, Counsel, could you rephrase the question?

Q. Yeah.

You're a lawyer, are you not?

A. Yes.

Q. And you understand that if this case goes against President Trump, that likely increases your probable success in your personal injury lawsuit against him, right?

MS. TIERNEY: Objection, Your Honor. Relevance.

MR. SHAW: It goes to bias, Your Honor.

THE COURT: Overruled.

A. I'll leave it to the legal experts as to what this means for a separate lawsuit. I don't know.

Q. (By Mr. Shaw) Is it your view, sir, that President Trump has some — or had some lesser quantum of First Amendment rights than every other American on January 6?

[p.175]

A. No, that's not my view.

Q. So he enjoyed the full — as far as you're concerned, he had every right that every other American had to speak with full First Amendment protections on that date?

JA272

A. In accordance with the law, yes.

Q. And you pointed out that during his January 6 speech, he used the phrase “Fight and fight like hell,” correct?

A. Yes.

Q. Okay. And you would acknowledge that that is, in fact, common, or certainly not uncommon discourse, in political circles during speeches, right?

A. I’m sorry, could you clarify, Counsel.

Q. Yeah.

Politicians often say, “Fight or fight like hell,” or words like that, right, when they give speeches?

A. Yes, sir.

Q. You’ve done it yourself, right?

A. I have.

Q. Many of your Democratic colleagues do 3 that, too, right?

A. That’s right. That’s correct.

Q. Okay. And when you do it, you’re not [p.176]

calling for physical violence, right?

A. I am not.

Q. And you’re not saying that your Democratic colleagues are calling for physical violence, right?

A. In my experience, that’s not how I’d interpret it, no.

Q. And you judge that by the words that are said, right?

A. And the surroundings of where they are, but yes.

Q. I’d like to show you Exhibit 1066.

MR. SHAW: Which is a — was designated as a cross exhibit.

Well, I’m not asking you to put it up on the screen. I’m asking, was there — did you have an objection to that?

MS. TIERNEY: Oh. No.

MR. SHAW: Okay. Could you put up Exhibit 1066, please.

THE COURT: Are you asking for it to be admitted?

MR. SHAW: I will, yes. Since there appears to be no objection, can it be admitted, Your Honor?

THE COURT: 1066 is admitted.

[p.177]

(Exhibit 1066 was admitted into evidence.)

Q. (By Mr. Shaw) Okay. And, sir, I will represent to you that this is a collection of tweets from your — your Twitter account. And — we're having a slight technical snafu, so —

A. No worries.

Q. — we'll ask you to bear with us. I'm not going to go through all of these, sir, but why don't we look at page 16 first.

A. Sure.

MR. SHAW: So if you would put page 16 up.

Q. (By Mr. Shaw) Okay. And I ask you if you recognize that as a tweet from your verified Twitter 5 account, dated May 2, 2022?

A. Yes, I do.

Q. Okay. And you wrote, "If you think they'll stop with a women's right to choose, you haven't been paying attention. We have to fight like our lives depend on it, because clearly, they do."

You wrote that, right?

A. Yes, I did.

Q. And you were not calling for any sort of a physical fight, correct?

A. No, sir, I was not.

[p.178]

Q. Okay. You were not advocating violence?

A. I was not.

JA274

Q. Okay. And if you'd look at the next page, please.

Okay. And this is another tweet from your verified account; is that right?

A. Yes, sir.

Q. Okay. And you wrote: "This is just the beginning. They won't stop."

"Fight like your lives depend on it."

"Because they do."

Right?

A. And it says, "Hashtag Vote Blue," yes.

Q. And again, you were not calling for physical violence; that was a metaphorical fight, right?

A. Correct.

Q. Okay. And I could go through a bunch more examples, but I'm not going to spend a great deal of time on that.

There was one other tweet in here that I was — I did want to bring to your attention and ask you about. If you would look at page 13, please.

Is this a tweet from your verified Twitter account, dated February 4, 2022?

A. It looks like it, yes.

[p.179]

Q. Okay. And you write there, "Cheney & Kinzinger may not be in my party but in this fight, we're all on the same side."

Do you see that?

A. Yes, I do.

Q. Okay. And what "fight" were you referring to here?

A. I'd have to see the tweet above it to have context, but I'm assuming, based on the date, that it refers to the January 6, 2021 investigation. But again, I'd have to have more context.

JA275

Q. When you say the January 6 investigation, you mean the January 6 Select Committee?

A. Yes, sir.

Q. Okay. And that was because Representatives Cheney and Kinzinger were the two Republican members who Speaker Pelosi had appointed to that committee; is that right?

A. Yes, sir.

Q. And you considered them to be on your side of that fight, correct?

A. I think I said “we,” but all of our side, yes, which I was on, yes.

Q. Okay. All right. We’ll put that exhibit aside.

[p.180]

Now, earlier today, counsel showed you some tweets by President Trump.

You remember that?

A. I do.

Q. Did counsel pick which tweets they were going to show you, or did you discuss with them which tweets you wanted to testify about?

A. Those are — those are chosen by counsel.

THE COURT: Did you have an objection?

MS. TIERNEY: I’ll let it go, Your Honor.

THE COURT: I’m sorry. So now I missed the — can you repeat the question and the answer.

MR. SHAW: I think he said that they were chosen by counsel, Your Honor.

THE COURT: Okay.

Q. (By Mr. Shaw) So one that counsel focused on —

MR. SHAW: If you would put up the 2:24 p.m.

Q. (By Mr. Shaw) So this is Exhibit 148, page 83, in that first one.

Do you remember discussing this one from 2:24 p.m.?

A. Yes, I do.

Q. Okay. And then —

[p.181]

MR. SHAW: If you go to the next page, the second tweet on that page.

Q. (By Mr. Shaw) And you remember discussing the second tweet at — from 6:01 p.m.?

A. Yes, I do.

Q. Okay. Now let's look at the two that counsel decided to skip that were right in between those two, okay?

Let's look first at the tweet from 15 minutes after the first one you discuss at 2:24 p.m.

MR. SHAW: Page 83, second tweet on the page.

A. Yeah, I see it.

Q. (By Mr. Shaw) Okay. And at 2:38 p.m., 15 minutes or so after the tweet that you discussed about — about Vice President Pence, you see that President Trump wrote, "Please support our Capitol Police and Law Enforcement. They are truly on the side of our Country. Stay peaceful!"

Do you see that?

A. Yes, I do.

Q. Do you remember reading that on January 6?

A. I do.

Q. Okay. What did you understand that tweet to mean?

[p.182]

A. That we needed it ten exits before he sent it, before the mob had come, but he, I imagine, had seen the violence committed against the officers and believed that he had the power, because he sent them there, to stop them from abusing the officers.

Q. So that's — strike that.

JA277

So whether he had the power or not, certainly he's telling people to support our Capitol Police and law enforcement and stay peaceful, right?

A. In that tweet, yes.

Q. Yeah. And he told them that in his speech, right? He told them to proceed peaceably and patriotically to the Capitol, right?

A. You would have to play that for me. I don't have a line-by-line —

Q. Okay. The judge has heard it, so I'm not going to take the time to replay it now. Let's look at the next tweet that he sent, at 3:13 p.m.

MR. SHAW: If you put that up, please.

Q. (By Mr. Shaw) Do you see that tweet? He says, "I am asking for everyone at the U.S. Capitol to remain peaceful. No violence! Remember, WE are the Party of Law & Order - respect the Law and our great men and women in Blue. Thank you!"

[p.183]

You see that?

A. I do, sir, yes.

Q. Okay. Do you remember reading that on January 6, 2021?

A. I do, yes.

Q. Okay. What did you understand that to mean on January 6, 2021, sir?

A. That a lot of violence had taken place. At that time, I was, as I said, probably just arriving with a gas mask in my hand to the evacuation room, and the President is asking the violent rioters to stop attacking the police.

Q. Okay. So that's a couple of posts between the two posts that you had previously discussed where the President has — is asking people to stop attacking and be peaceful, right?

JA278

A. In these tweets, yes.

Q. In those tweets.

And we looked at a — at a short video of about one minute where he asks the people to do exactly the same thing, right, to be peaceful?

A. Essentially, yes.

Q. Yeah. And that came somewhere in the 3:00 hour, so presumably around or slightly after that 3:13 p.m. tweet, right?

[p.184]

A. That's about right, yes.

Q. Yeah.

MR. SHAW: I'm done with that document. Thank you.

I don't have any further questions for you, sir. Thank you very much.

THE WITNESS: Thank you, Counsel.

THE COURT: Are there any questions from the Colorado Republican Party?

MS. RASKIN: No questions, Your Honor.

THE COURT: How about Secretary of State?

MR. KOTLARCZYK: No questions, Your Honor.

THE COURT: Okay. Redirect?

MS. TIERNEY: Thank you, Your Honor, very briefly.

REDIRECT EXAMINATION

BY MS. TIERNEY:

Q. Congressman Swalwell, in colloquy with counsel just a moment ago, he asked you about two other tweets that Mr. Trump sent.

In either of those tweets, did Mr. Trump ask people to go home?

A. No.

Q. And did he ask people to leave the Capitol?

[p.185]

A. Not in those two tweets.

MS. TIERNEY: Thank you.

THE COURT: Congressman Swalwell, I think you're done. Thank you so much for your testimony.

THE WITNESS: Thank you, Your Honor.

MR. NICOLAIS: Your Honor, Mario Nicolais on behalf of the petitioners.

And we are going to call Officer Winston Pingeon as our next witness.

THE COURT: You said it's pronounced "Pingeon"?

MR. NICOLAIS: "Pingeon."

THE COURT: "Pingeon." Okay.

WINSTON PINGEON,

having been first duly sworn, was examined and testified as follows:

THE COURT: So when you sit down, just make sure to speak into the microphone, okay?

THE WITNESS: Yes.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. NICOLAIS:

Q. Good afternoon, Officer Pingeon. Would you please state and spell your name for the record.

A. Yes. My name is Winston Pingeon,

[p.186]

W-i-n-s-t-o-n, P-i-n-g-e-o-n.

Q. Officer Pingeon, where did you go to college?

A. I went to American University in Washington, DC.

Q. And what degree did you receive there?

A. I received a bachelor's in justice and law, which is a criminal justice degree.

Q. When did you receive that degree?

A. In May of 2016.

JA280

Q. Where did you go to work after you graduated from American University?

A. I joined the United States Capitol Police as a police officer.

Q. And roughly when was that?

A. June of 2016.

Q. Are you still currently employed with the USCP?

A. I am not, no.

Q. When did you leave the USCP?

A. I left the department in October of 2021.

Q. Okay. During the course of your career with USCP, what units were you assigned to?

A. I was primarily assigned to the House Division, but I also served on a variety of other

[p.187]

collateral assignments: The Ceremonial Unit or Honor Guard, the Special Operations Division, and the Civil Disturbance Unit.

Q. Can you describe for the Court what the Civil Disturbance Unit is?

A. Yes. The Civil Disturbance Unit is effectively the riot team for the Capitol Police.

Q. Okay. Prior to January 6, 2021, were you ever deployed as a part of the CDU?

A. Yes, I was, multiple times.

Q. Can you describe just briefly some of your deployments prior to January 6?

A. Yes. For large-scale protests or events that the — of numerous people coming to the Capitol, we were deployed sometimes in full riot gear, sometimes with our gear just on standby. But it was commonplace for — for CDU to be deployed for a variety of events of groups that would come and protest or demonstrate around the Capitol.

JA281

Q. Can you provide the Court with some examples of those, those other events?

A. Yes. A few in the summer of 2020 of Black Lives Matter protests, as well as two different ones in November and December of in protesting the results of the election.

[p.188]

Q. During those prior events, did you witness any violence at those events?

A. Nothing large scale, no, but there were — there were times where we would have to arrest people, but no major violence, no.

Q. And did you ever feel, when you were serving in the CDU at those prior events, that your unit would be overrun?

A. No.

Q. Were your lines ever broken in those prior events?

A. No.

Q. Did you ever fear for your life during any of those prior events?

A. No.

Q. Officer Pingeon, I want to take you to January 6, 2021. Were you on duty that day?

A. Yes, I was.

Q. When did you report for duty on January 6?

A. I reported at approximately 8:00 or 9:00 a.m. that morning.

Q. And were you assigned your regular duty or to a separate unit?

A. I was assigned to CDU that morning. My

[p.189]

normal assignment at that time was 3:00 p.m. to 11:00 p.m., so I was working overtime early with CDU.

Q. Okay. What is your understanding of why that changed?

A. I understood that to be the case because of what Congress was doing that day of certifying the results of the election, as well as the former President was hosting a rally or event near the White House.

Q. Okay. How many officers were in your CDU squad that day?

A. In my squad, there were approximately 25 or 30 of us.

Q. Okay. Officer Pingeon, I'm going to ask you just a couple questions about —

MR. NICOLAIS: I want to bring up what's previously been marked as Exhibit P-163, Your Honor. Sorry. I'm grabbing the wrong one.

Q. (By Mr. Nicolais) Officer Pingeon, as a USCP officer, are you familiar with the layout of the U.S. Capitol itself?

A. Yes, I am.

Q. And how are you familiar with the layout of the Capitol?

A. I'm familiar with it because I spent five years there and worked numerous events, and so I

[p.190]

spent a significant amount of time in the Capitol and around the Capitol grounds over my career there.

Q. Okay. And are you familiar with the Capitol grounds as well?

A. Yes, very much so.

Q. So I brought up what is Plaintiffs' Exhibit 163, and I'd like you to take a look at it.

Have you reviewed this exhibit before?

A. Yes, I have.

Q. Would you say that it's a fair and accurate representation of the Capitol grounds and one level of the U.S. Capitol?

A. Yes, it is.

Q. Would you say that this would help you to explain your testimony to the Court?

A. Yes, it would.

MR. NICOLAIS: Your Honor, I'd like to, at this time, move to admit Plaintiffs' Exhibit 163 as a demonstrative exhibit.

MR. SHAW: Your Honor, can I get some clarification? Is this a general representation of the Capitol grounds, or is it a representation at some specific time? Because there are all sorts of markings and —

MR. NICOLAIS: Your Honor, I can — let
[p.191]

Me —

MR. GESSLER: Let him finish, please.

MR. SHAW: There are all sorts of markings and — and annotations on this.

THE COURT: I don't think either one of those really go to admissibility, so I'm going to admit the exhibit.

(Exhibit 63 was admitted into evidence.)

THE COURT: And you can ask questions about what they are, and you can certainly ask on cross-examination.

MR. NICOLAIS: I'll tell you what, I'll try to actually lay some foundation for that, Your Honor.

Q. (By Mr. Nicolais) Officer Pingeon, were you around the Capitol and the Capitol grounds prior to January 6 in the weeks leading up to that?

A. I was on leave the week of Christmas of 2020, but — so I believe my first day back on duty was that Monday, which — January 4, I think.

JA284

Q. Okay. And so when you — were you familiar with some of the additional things that — barricades and things that were placed there prior to the inauguration?

A. Yes.

Q. And does this exhibit, does it accurately

[p.192]

and fairly represent some of those additional structures that were placed there?

A. Yes, it does.

Q. Thank you, Officer Pingeon.

Okay. I'd like to go to — to go back to January 6 and talk to you a little bit about that.

Where did your group — where did your group, your squad, ultimately stage from?

A. We had our roll call in the Longworth House Office Building, but we ultimately staged in the — what we call the truck tunnel along New Jersey Avenue and Constitution Avenue in the northwest. So —

Q. Okay. So I'm — I'm going to use my mouse here.

A. Yes.

Q. And if you can direct me towards where you were talking about.

A. So approximately in this — this area right here (indicating), be New Jersey Ave.

Q. What is that?

A. Well, so where your cursor is now is where we had roll call initially, and opposite from that on the map, about there (indicating), is where we staged and awaited further orders.

Q. Okay. So you were awaiting further

[p.193]

orders. What time was this, roughly, that you were staged over there?

A. That was approximately 11:00 a.m. or so.

JA285

Q. Okay. Were you told to do — how were you to receive further orders?

A. Yes. My lieutenant, who was my commander that day, told us to put our riot gear on around that time.

Q. Okay. Do you remember getting a call on the radio later that day?

A. Yes, I do.

Q. And what was that call, what — what did you hear in that call?

A. In that call, I heard that one of our outer perimeter lines had been breached and that the officers there had been overrun, and I remember distinctly hearing the need for help in the officer's voice.

As a police officer, you know when something's not right. You can hear it in people's voices on the radio. And that was one of those times.

Q. And why were they calling for the CDU at that point?

A. They needed additional officers to respond, and because we were with the CDU, and more

[p.194]

specifically the CDU hard squad in full riot gear, they needed us to — to go assist to back them up.

Q. Can you describe the gear you put on that day?

A. Yes. The CDU gear is similar to hockey or football pads of chest protector over my bulletproof vest, arm protectors, groin protector, thigh protectors, shin pads, as well as additional gear on my belt, like my PR 24 baton, my gas mask, and we had protective sunglasses, too, in case of lasers being pointed at us.

Q. Okay. Were you wearing a body camera at that time?

JA286

A. No, I was not. I was never issued a body camera, and no Capitol police officer at that time wore body cameras.

Q. All right. You said that you had a call from — where was it you said you received a call from?

A. The call came from the — near Peace Circle where Pennsylvania Avenue meets the — meets the Capitol.

Q. I'd like you to take a look at the map again, and is this roughly where you — where you're talking about you received the call from?

A. Yes.

Q. And what was going on in the Peace Circle

[p.195]

at that time, as you understood it?

A. The call for help was that the line had been breached and that people had pushed past those officers and were making their way towards the Capitol.

Q. In response to that call, what did your squad do?

A. We responded over to assist.

Q. And so as I understand it, this is — is this roughly where you were at, where my pointer is?

A. Yes, in that rough area.

Q. And what was your path to get to respond?

A. So we were on a Capitol Police bus, and the bus took us through the north barricade, which is where the Delaware Avenue meets Constitution Avenue.

We went straight, or south, from there and then curved along down the northwest drive to approximately where it says the — Summer House is where we — we stopped.

Q. And is that roughly here (indicating)?

A. Yes, that's correct.

JA287

Q. Okay. When you stopped at that — and what's in that Summer House area? Can you describe it a little bit to the Court?

A. Yes. It's — you know, there's some trees, and it's — I think — I don't know the full

[p.196]

history of it, but I'm — it's historic, old function, and there — the white lines there are pedestrian walkways.

So it's an area where tourists or people, you know, neighbors would often jog or bike or walk their dog, that kind of thing.

Q. Okay. What did you see when you got out there near the Summer House?

A. From there, I could see that already individuals of the crowd had made their way up closer to — to the lower West Terrace of the Capitol (indicating).

Q. I see you're pointing at the map, so I just want to, for the Court — so you said originally the call came from the Peace Circle because there's a barricade.

You said that — where were they making their way up to?

A. So they continued — I guess that's southeast along what we call the Pennsylvania Avenue walkway, because the road ends at Peace Circle, but that white area where your mouse is, that's the walkway; and people had made their way up that.

Q. And what's at the end of that walkway?

A. The stairs — well, there's stairs, and at

[p.197]

that time, there were construction parts of the inauguration stage.

Q. So how long between when you received the call and when you got there and saw people making — already on the stage, how long was that?

JA288

A. Oh, approximately five minutes or less even.

Q. Okay. How would you describe the crowd that you saw when you got out?

A. From there, I could see that they were dressed in numerous Trump apparel, red hats and carrying flags, and that they were advancing quickly and that the crowd was already growing larger, just by the minute.

Q. Okay. When you got out, did you put on any additional gear at that point?

A. Yes, I did.

Q. What did you put on, what additional gear?

A. I put on my gas mask.

Q. Had you ever worn your gas mask in the line of duty before?

A. No. Only in a training environment.

Q. And why were you told to put on a gas mask on this day?

A. There were calls that potentially gas either was already deployed or was soon to be deployed,

[p.198]

so the decision was made that we would do that in order to be best prepared.

Q. Okay. So I want to go back. You were — you were here (indicating), and you got out. So is this roughly where you were putting on your gas mask?

A. Yes.

Q. Where did you go from there?

A. From there, we marched — we formed up and marched as best we could to the steps. And ended up in the area here of sort of northwest lawn along that walkway, and we ended up right in that grassy area, right where your — where your mouse is now.

Q. Tell you what, I'm going to zoom in a little bit, Officer Pingeon, so you can see it a little bit better.

JA289

Okay. So you said right about here on the map (indicating)?

A. Yes, that's correct.

Q. Okay. As you were arriving there, did you see anyone in medical distress?

A. Yes, I did.

Q. And what did you see?

A. I saw an individual being carried out on a stretcher and somebody performing CPR on that person.

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Q. How did the crowd react to the first responders providing medical care?

A. Well, it was mixed, but I would soon see another person in need of medical care, where the, at that point, mob, had turned hostile and was assaulting officers that were trying to go and help the — the second person in distress.

Q. Officer Pingeon, so from this position where my cursor is currently at, from where your squad was deployed, could you see beyond the immediate area around you?

A. Yes, I could.

Q. And why could you see beyond the immediate area?

A. Primarily because of the elevation of Capitol Hill that I could see and just the direction of how we were sort of lined up closely to Pennsylvania Avenue, that I could see down — down Pennsylvania Avenue looking towards downtown DC.

Q. So would that be looking out over the Peace Circle?

A. Yes, facing west.

Q. And how far beyond that could you see?

A. I could probably see 10 or so blocks until the road shifts.

[p.200]

Q. And what did you see when you looked in that direction?

A. When I looked down there, I could see that there appeared to be thousands of people coming towards the Capitol.

Q. And they were — they were coming towards the Capitol along what route?

A. Along Pennsylvania Avenue.

Q. Did you notice anything unusual about what members of the mob were wearing while you were on the northwest lawn?

A. Yes, I did.

Q. And what was that?

A. That was the equipment that some of them were wearing, to include things like helmets, goggles, what appeared to me to be body armor, paramilitary style gear and equipment that they — that they were wearing.

Q. As a USCP officer, did that concern you?

A. Yes, it did.

Q. And why did that concern you?

A. It concerned me because I had not seen that before and because we don't typically face people who appear to me to be prepared for physical altercations or violence.

Q. Okay. Can you describe any interactions

[p.201]

between your unit and members of the mob while you were on the northwest West Terrace lawn, so roughly where my pointer is?

A. Yes. They were saying things to us as they would continue to say throughout the day, things like, "Trump sent us," and things like, "We don't want to hurt you, but we will." "We're getting in that building."

JA291

And, of course, chanting things like, "Stop the Steal," and a variety of other pro-Trump messages like that.

Q. Were any — were either you or any of the members of your squad physically assaulted in that area?

A. Yes. Members of my squad there started to be assaulted, pushed, and pepper-sprayed by members of the mob.

Q. Could you see any other — could you see members of the mob engage with other law enforcement units in the vicinity?

A. Yes, I could.

Q. And what did you see?

A. From where I was posted, I could see that what's marked here as the northwest steps, that the mob was advancing up those steps and engaging with other Capitol police officers and assaulting them with what

[p.202]

appeared to me to be pieces of construction materials and flagpoles and other things like that that they were striking officers with.

And also spraying them with what appeared to me to be pepper spray or chemical irritants.

Q. Okay. How long, roughly, were you at that position on the northwest lawn?

A. I was there for approximately an hour, maybe a little bit more.

Q. And in that time, what change in size or nature of the mob did you observe?

A. Well, the size of it, like I said, continued to grow larger, and they seemingly became more emboldened by — by that size, that it was apparent to me we were very outnumbered.

JA292

Q. Do you remember your attackers saying or doing anything that would have indicated what they were trying to do?

A. Yes.

Q. And what was that?

A. Well, like I said, they — some of them told me that they were there to break inside and to get into the U.S. Capitol.

Q. Did any of them threaten you?

A. Yes, they did.

[p.203]

Q. And how did they threaten you?

A. Oh, well, saying things like, “We don’t want to hurt you, but we will,” and other taunts of saying, you know, “You look scared and you might need your baton,” or, you know, stuff like that.

Q. You said you were there for roughly an hour, from — from 1:00 to 2:00; is that accurate?

A. Yes, approximately.

Q. Was your CDU unit able to hold the line at the base of the West Terrace?

A. No, we were not.

Q. And why weren’t you able to hold that line?

A. We were not able to hold that line because the mob became increasingly aggressive and hostile towards us, and we were simply outnumbered. So ultimately, the 25, 30 of us or so sort of ended up forming a circle where we were guarding nothing but each other’s backs as the mob sort of surrounded us there.

Q. Okay. Did you eventually leave that position?

A. Yes, I did.

Q. And where did you decide to go from there?

A. So I knew that we needed to get to the upper West Terrace to have that higher ground strategic

[p.204]

advantage because I could see the progress that they had made and were making up those northwest steps, that we needed to go and help those officers.

Q. Can you describe the path that you took to get there?

A. Yes. Basically I went kind of along the corner of the Capitol here, up the northwest lawn, up the north lawn, and was able to, you know, access the upper West Terrace again via this north access path.

Q. And where did you go from there, Officer Pingeon?

A. From there, I knew — excuse me, I knew we needed to get back to where those steps were, so I continued west or down along the North Terrace, sort of where that green line is, and I kind of followed that green line over.

Q. And Officer Pingeon, how many members of your squad were with you at that time?

A. Well, I thought that my whole squad was with me, but I would soon learn that we were getting separated. And given the nature of having all of our riot gear on and having to go up the hill and be impeded by some members of the mob as well, it took some time, and we got separated.

So I soon would learn that it was just

[p.205]

myself and three or four other officers.

Q. Okay. So you said you were going along the North Terrace, walking down, or west at this point?

A. Yes.

Q. Where did you — did you stop there, did you continue on?

JA294

A. I continued and rounded the first corner and continued to go to assist those other officers and help defend the building.

Q. And when you got to this corner here (indicating), Officer Pingeon, what did you see?

A. From there, I was horrified to see that there were many members of the mob who had already flooded up into that area of the upper West Terrace, so —

Q. Roughly there (indicating)?

A. More so sort of over here (indicating), but I could see all the way down, but — but they were more in this sort of circle area, from that point I could see.

Q. Okay. And when you rounded that corner, did you stop there?

A. No, I didn't, so I continued forward because, again, I knew I needed to do my job and respond and get — get there as quickly as I could.

[p.206]

Q. When you said you continued forward, what — what direction were you going?

A. Yes. So at this point, I was going southbound, so again kind of tracing that green line over to that northwest courtyard area.

Q. And, Officer Pingeon, what did you see when you got roughly here on the map (indicating)?

A. So again, I could — was also horrified even more to see that they had broken into the building and that the mob was streaming inside, into the U.S. Capitol.

Q. When you said they had gotten access, what had they gotten — how had they gotten access, how had they gotten in?

A. Well, from there, I could see that they were entering where the red arrow is here, which is an emergency exit fire door, so I could — I assume that they

had broken their way in because those doors are locked and secured normally.

Q. I'm going to zoom in a little bit so that it's easier to see, Officer Pingeon.

So just to be clear, you said from here (indicating), you saw that people were accessing through — what is this Number 1, what's at that Number 1?

[p.207]

A. So where Number is, is it's an emergency exit fire door, and there are windows on either side of it.

Q. Is that what this Number and are?

A. Yes.

Q. And what about Number 3?

A. 3 is a fire door emergency exit.

Q. And what do you find if you go through that emergency exit?

A. There, you'll be in the Senate side of the U.S. Capitol on the first floor there.

Q. Okay. How many people do you think — would you estimate you saw in the northwest courtyard when you came around this corner?

A. I would say at least a few hundred, but again, it was growing because they were coming up the steps as well.

Q. And again, how many of your squad were there?

A. At that point, it was just myself and three or four other officers.

Q. What did you and those three or four officers do at that point?

A. We continued. And I was the first officer, and I led them to go closer to — to those

[p.208]

breach points in an effort to secure those and prevent further people from breaching and accessing the building.

JA296

Q. And did they — did the members of the mob let you through?

A. No, they did not.

Q. What happened when you tried to get to those access doors?

A. When I tried to push forward, I was attacked by members of the mob, and I was punched in the face on my left side, and I was also pushed or attacked on the right side.

And before I knew it, they had knocked me on my back. And I couldn't see anything because either my helmet had come down over my eyes and it felt like somebody was on top of me.

Q. Were you able to maintain all of your equipment at that point?

A. No, I was not.

Q. What happened to your equipment?

A. My PR baton, which I had — was holding out in my hands, was ripped from my grip and stolen from me by some person.

Q. Were you concerned about your service weapon?

A. Yes, very much so.

[p.209]

Q. And what did you do with that concern?

A. Well, because my baton had been stolen from me so quickly and so easily, I was very concerned that they would take my gun from me. So I did what I was trained to do, which was just to hold on to it as best I could and maintain that retention and control in my holster.

Q. And this was all while you were on your back on the ground?

A. Yes.

Q. Did you consider radioing for help, Officer Pingeon?

A. I did briefly.

Q. You did briefly. But did you — did you actually radio for help?

A. No, I did not. And the reason for that was basically because we were just so outnumbered, I felt that there was help needed in many other places as well, and I didn't know if help would come or — or when. So — so that's why I didn't.

THE COURT: And I'm sorry, what's the time frame that we're —

Q. (By Mr. Nicolais) How long — how long were you at the — I'm sorry. How long were you at the northwest lawn?

[p.210]

A. So —

Q. What time frame?

A. So that was — that would have been approximately at maybe 2:30 or so.

THE COURT: So this is —

Q. (By Mr. Nicolais) You're saying — when were you in the northwest courtyard, is that —

A. Yeah, approximately 2:30. So by the time I left the lower West Terrace and made it — you know, by the time I was in the lower West Terrace was probably an hour or so, and so by the time I got up was approximately 2:15, 2:30.

Q. Okay.

THE COURT: And your testimony is, is that people were going through all four of those windows and — and fire exits?

A. They were going through, through Number. And I couldn't see exactly, but I knew they were going through Door Number , and I think either one or both of those windows nearby that.

JA298

Q. (By Mr. Nicolais) All right. So we're roughly at 2:30 when that's — when that's happening, and it's roughly — roughly 2:30, you're lying on your back in the northwest courtyard.

Did you think your life was in imminent
[p.211]
danger?

A. Yes, I did.

Q. How did you get up off the ground, Officer Pigeon?

A. Fortunately, with the assistance of one of my squad mates, as well as just my own strength and training, I was able to — to get up and — and right myself there.

Q. You said you were headed towards this Number — this Arrow Number 3.

Were you ever able to get there?

A. Yes. Well, we were just headed in to where we could help and stop the breach. That just happened to be the first most accessible door.

But yes, I was — I was able to continue to fight my way through to ultimately get to that door.

Q. And what did you and your squad do when you reached that door?

A. We were able to close it and secure it as best we could; because — because it is a fire door, once it's locked from the outside — or once it's closed, it is locked from the outside.

Q. And were you on the inside of the Capitol or outside of the Capitol after you closed the door?

A. We stayed on the outside, so we shut the
[p.212]

door and continued to defend the door from — from the outside.

JA299

Q. Did members of the mob who were in that courtyard say anything to you while you were there and securing the door?

A. Yes, they did.

Q. And what did they say?

A. They said all kinds of things similar to what they had told me down previously at the lower West Terrace of, again, you know, "We don't want to hurt you, but we will," and we took an oath to the Constitution, that we were traitors, and that, you know, they were getting in the building.

Q. Okay. Did members of that mob attack you while you were securing that door?

A. Yes. And they continued to throw things at myself and my fellow officers there.

Q. Were you and your fellow officers able to hold or maintain that position at the door?

A. Not for very long, no.

Q. Why weren't you able to hold or maintain that position?

A. Again, primarily because we were so outnumbered and we, similar to before, had to effectively reevaluate very quickly and determine what we needed to

[p.213]

do for a more strategic and tactical advantage, which was not just stand there at that point.

Q. While you were securing that door, was anyone stopping them from going into the other breach points?

A. Not that I could tell, no.

Q. Do you believe that the assault against you could have been more severe if the only point of entry was where you were guarding?

MR. SHAW: Objection. Speculation.

THE COURT: Sustained.

JA300

Q. (By Mr. Nicolais) Can you describe the impression of the mob demeanor as they went through the open breaches?

A. Yes. At this point, it had changed because they were very excited and they were cheering, and so they were celebrating because — because they were breaching into the building.

Q. You said before that you found that guarding that door, that breachment was untenable.

What did you do next after deciding you couldn't keep that position?

A. So again, because we couldn't keep that because other officers also had equipment stolen from them and we were so outnumbered, we collectively felt we

[p.214]

needed to get inside the building to, again, get that strategic tactical advantage where we could push them out of the building and try to maintain some kind of control.

Q. Okay. So how did you get back to the building, what path did you take?

A. So I effectively retraced my steps of the way I had come, which was down and then north, effectively along that green line, and then up to where it says "North Terrace" and into the north door where that — as marked by that yellow arrow.

Q. Officer Pigeon, was your way impeded in — were you impeded in any way in getting there?

A. Yes, I was.

Q. And how were you impeded?

A. At that point, the whole upper West Terrace had become overrun by people from the mob, and when I got to that door, there was many individuals trying to gain access there.

JA301

Q. So roughly what time? I understand you probably weren't looking at your watch, but do you have an idea of what time this was?

A. So that time was probably anywhere between 2:30 and 3:00 p.m. or so.

Q. Okay. Were you able to make it through the north doors at any point?

[p.215]

A. I was ultimately, by forcing my way and fighting with some of the members there to — to ultimately get in, because there were officers inside defending those doors. So it was difficult, but I was able to — to enter the building there.

Q. When you entered the building through the north doors there, what did you see?

A. From there, I could see just complete chaos and that the halls of the U.S. Capitol were overrun by this mob.

Q. And I want to actually ask you a little bit more about the layout of the U.S. Capitol.

So if you're standing at the north doors and you're facing the way that that arrow is facing, what can you see?

A. So normally you could see effectively all the way to the south door, as marked there (indicating). That —

Q. I'm sorry, when you said "there," can I — I'm just going to put my marker. Is — I saw where you're pointing.

Is that roughly where you were pointing (indicating)?

A. Yes, that's correct.

So that hallway there serves like the main

[p.216]

artery of the building, on the first floor at least, and so you can typically see clear from — from one door all the way to the other, across the whole Capitol.

JA302

Q. How large is that hallway?

A. It's a standard hallway. But it — but it's, you know, fairly large.

Q. Did you — did you walk down the hallway in this building before?

A. In this courthouse today?

Q. In this courtroom.

A. Yes, I did.

Q. Was it roughly as wide as that hallway?

A. I would say yes, or maybe slightly narrower than this.

Q. Is it roughly that long?

A. The hallway in the Capitol is longer. To me, it appears to be longer than the hallway here in this courthouse.

Q. When you looked down that hallway on January and you said it was chaos, what could you see looking down the hallway?

A. Well, I certainly couldn't see all the way down to the end because there were so many people already in the building impeding any further view of mine.

Q. Once you were inside, what did you do?

[p.217]

A. From there, it, again, was very chaotic, but we were in that area where it says "lower Senate corridors" and were trying to, again, maintain — or gain some kind of control to maintain and enforce some sort of order.

Q. And when you were saying we were trying to enforce some sort of order, how — how would — did you go about doing that?

A. Well, primarily it was to secure the doors and try to push people back outside who had — who had already breached and entered.

Q. When you tried to push people outside, did they willingly go?

A. No, they did not.

Q. And how would you describe your engagement with the members of that mob?

A. Well, it was very difficult because, again, there were so many of them, and it just sort of turned into like a back-and-forth where we would get some of them out and then they'd get more back in. So it was just sort of that — that tug-of-war or back-and-forth for a while.

Q. Were you engaging with them from a distance, or how close were you to members of the mob?

A. Oh, I was very close and — and in those [p.218]

corridors, there were many people there that I effectively was engaged in hand-to-hand combat with.

Q. And how long, roughly, were you engaged in hand-to-hand combat in the halls of the U.S. Capitol?

A. For probably two to three hours.

Q. Okay. Were you ever able to — were you ever able to make it back from the inside to that — to the breach point here?

A. Yes, I was.

Q. And what happened when you got there? What were you — what did you and your squad do?

A. Well, from there, we again attempted to secure that door from the inside, but it was a similar kind of pushing and pulling of the — of the mob. But there were some Metro Transit police officers who had responded and were assisting us there in an attempt to secure that.

Q. What about — what is this where my marker is right here (indicating)? What does that represent?

A. That is a staircase that leads up to the Senate Chambers, Senate Gallery areas.

Q. Did you ever engage members of the mob at those stairs?

A. Yes, I did. And we attempted to form a line to prevent further members of the mob from accessing

[p.219]

upstairs, but again, with the chaos and how outnumbered we were, it was not a position I could maintain very long.

Q. Also in that area, did you see any — did you — I'm sorry, let me rephrase.

In that area, did you see any members of the mob outside of the corridors?

A. Yes. In what's marked here as the "Senate Parliamentarian's Office."

Q. And what did you see inside the Senate Parliamentarian's office?

A. Inside there, I could see that members of the mob had totally ransacked the office. They had turned furniture over. They were ripping through file cabinets, pulling papers out, stealing alcohol from drawers, and just really vandalizing and just totally desecrating that office.

Q. Okay. Officer Pingeon, during the two to three hours that you were in hand-to-hand combat, were you ever near the emergency door and windows that you had talked about up here (indicating)?

A. Yes, I was.

Q. What happened there, Officer Pingeon?

A. So there we were, again, trying to push them — push them out, kind of back and forth. But we

[p.220]

ultimately used — did as best we could to barricade those doors in an attempt to prevent any further people from coming in.

Q. When you say "barricade those doors," what did you use to barricade the doors?

JA305

A. We used what we could, which were primarily wooden placards, sort of information for tourists, you know. There's sort of like a small desk almost with — with historical information about the building and about Congress's and our country's history.

And we had pulled those because that was what was most immediately accessible, as well as wooden fire extinguisher holders or cases. Really anything that we could find that we could push up against that door and those windows, we were using.

Q. Did members of the mob continue attacking you through that barricade?

A. Yes, they did.

Q. Do you remember any particular attack on you through that barricade?

A. Yes, I do.

Q. What happened?

A. At one point, I distinctly remember dodging lines of pepper spray that came through — through the broken window there, as well as a sharpened

[p.221]

flagpole that was stabbed that came just about this close (indicating) to my face.

Q. Just for the record, Officer Pigeon, you said "this close to my face."

How close to your face did the sharpened edge of a flagpole come?

A. Approximately 2 inches.

Q. And where did the end of that flagpole finally end up?

A. Past my head, past my ear.

Q. Did that — did that cause you significant fear when that went by your head?

A. Yes, it did.

JA306

Q. Why did that cause you significant fear?

A. Well, because of the force that was used, I was very much fearful that had it hit me in my eye, it would take my eye. Or further, that it could take my life.

Q. Okay. During this time that you were guarding that area of the Capitol, was your radio on?

A. Yes, it was.

Q. How loud did you have your radio turned up?

A. I had it turned up very loud because the alarms of the door breach were blaring, as well as

[p.222]

members of the mob having megaphones and all kinds of noise from them.

So I had it turned up as high — I think as high as it would go so I could hear as best I could what was going on outside the building and in and around the building.

Q. Do you remember any unusual radio calls from — on your radio?

A. Yes, I do.

Q. And what did you — what was — what was one of the unusual calls that you heard?

A. One of them was that there were shots fired.

Q. What went through your mind when you heard that there were shots fired?

A. I was obviously very concerned, and where my mind most immediately went to was that one of my fellow officers had potentially been shot or been shot at.

Q. Okay. How close were members of the mob to you when you got that call?

A. Very close, like within arm's reach.

Q. Do you believe that they probably could have heard that radio call as well?

A. Yes. I know some of them heard it because

[p.223]

I could see how they reacted.

Q. And how did they react to that call?

A. Well, some of them didn't — I guess some of them seemed hesitant about it or perhaps uncomfortable, but by and large, most of them really didn't seem to care.

Q. Okay. At any point in time, did you respond to an "officer down" radio call?

A. Yes, I did.

Q. And can you explain what happened there?

A. Yes. There was a call for assistance for an officer down in the area beneath — under the floor where I was, in the area between where the U.S. Capitol connects underground via subway trolley cars over to the Senate side, and so I responded down in that area to assist.

Q. When you say "down in that area," how — how did you get down there?

A. I went, I believe it was these stairs here (indicating)

—

Q. I'm going to use my marker to show where it looks like you're pointing.

Is this the accurate reflection —

A. Yes.

Q. — of where you were

[p.224]

pointing (indicating)?

So these stairs here, you went down these stairs (indicating)?

A. Correct, and down into that lower basement area.

Q. What did you find when you went down those stairs?

A. When I got down there, I saw that there were already numerous officers on scene there to assist.

JA308

And so knowing that I had no additional formal medical training beyond basic first aid and CPR that I had received in the Academy like every other officer had received, I knew that I needed to get back — also because I was in riot gear — that I needed to go back and — that I couldn't be useful there; I needed to be more useful back where I was upstairs.

Q. Officer Pingeon, did you later find out who that officer — that officer was that was receiving help?

A. Yes, I did.

Q. Who was that officer?

A. Officer Brian Sicknick.

Q. And do you know what happened to Officer Sicknick that day and the next day?

A. Yes. He was assaulted in the line of duty
[p.225]

that day and sprayed with chemical irritants like bear spray, and he died the next day, line-of-duty death.

Q. Officer Pingeon, did you attend Officer Sicknick's funeral?

A. Yes, I did.

Q. In what capacity did you attend his funeral?

A. I was at that point, a month or so later, assigned with my honor guard, the ceremonial unit, and I was one of the officers who guarded his remains in the Rotunda of the U.S. Capitol during his lying in honor ceremony.

Q. Okay. Officer Pingeon, I'd like to take you back to January 6. So you talked about the funeral.

Do you at any point in time remember seeing attackers in the Crypt of the U.S. Capitol?

A. Yes, I do.

Q. And so just to orient the Court, is this roughly where you saw them? Is this the Crypt (indicating)?

A. Yes.

JA309

Q. Okay. What did you do when you saw — when you saw people there?

A. I ultimately responded to the Crypt and down the stairs to the tunnel, where I believe I had

[p.226]

heard on the radio or talked to other officers around that additional assistance was needed down there.

Q. Officer — Officer Pingeon, you said down the stairs. So these stairs, or what — what are we looking at?

A. So there's stairs underneath those. So there's sort of two sets of stairs, one on top of the other: One that leads up to the Rotunda, and one that is — leads down, down to what's marked as the tunnel where the yellow arrow is, a hallway down that leads — feeds right out to the inauguration stage.

Q. Okay. So if you go down these stairs here, there's a tunnel directly to — is — this?

A. Yes, that's correct. A hallway that leads — leads out to that.

Q. And so the inauguration balcony over here (indicating)?

A. Correct. Yes. The — the tunnel opens up to the walkway right to the — and then you're on the stage, when — when the stage is built.

Q. Is this the same tunnel that Presidents use to walk out to the inauguration stage?

A. Yes, it is.

Q. Okay. What do you remember seeing when you got down into that tunnel?

[p.227]

A. When I got down there, I could see that there were numerous officers with injuries, some with fairly extensive injuries, and I could see that there were officers

JA310

defending that door, entryway to the tunnel from the stage that — and there are many officers packed in tightly as they were defending it from the mob.

Q. And do you have a rough idea when this was, what time this was?

A. This was probably around 5:00 p.m. or so.

Q. Okay. Do you remember anyone asking for additional help at that point in time?

A. Yes, I do.

Q. And what happened, what was the ask?

A. I believe it was — a Capitol Police official was there and was yelling for fresh bodies, fresh officers to go to the front of the line.

Q. And how did you respond at that time?

A. Well, at that time, I also witnessed additional officers from the Virginia State Police and Fairfax County Police had responded there. And so knowing that there were fresh officers there, and I myself was very much not fresh after having been engaged with the mob for hours at that point, I stepped aside and let those additional officers go ahead and answer that call.

[p.228]

Q. Okay. Were you ever — were you ever able to exit the tunnel?

A. Yes, I was.

Q. And what happened when you exited the tunnel? Where did you go?

A. Well, so after I had sort of gotten to regain myself and my composure and maybe had a sip of water or something there, I was able to exit through the tunnel. There were no longer officers guarding it. They had gone out to the stage, and so I followed and went out to the inauguration stage.

JA311

Q. At any point, did you meet any members of the National Guard?

A. Yes.

Q. And what happened when you met those members of the National Guard?

A. I had a conversation with a National Guard commander, command staff, and we got to talk about that day.

Q. What — what did you talk about?

A. Well, he told me that they had been wanting to come but they just didn't have the authorization. They were waiting and really trying to come to our assistance, but that they could not because of their orders.

[p.229]

Q. How did that make you feel, Officer Pingeon?

A. It made me feel angry and very disappointed.

Q. Okay. After you spoke with that National Guard member, though, were you — did you believe you needed to continue fighting, protecting the Capitol?

A. Well, thankfully at that time, it appeared to me that at least most of the Capitol or the parts that I could see as I went back through the Crypt back to the Senate side, that there were no longer members of the mob in there.

But again, I couldn't — I obviously couldn't see the entire building, so I was feeling better, but I was still concerned that there could be people in the building or that they could — because it wasn't secure, they could have left weapons or explosives or anything that we didn't know about inside the Capitol.

Q. Okay. Were you — were you ever able to regroup with the rest of your squad that day?

A. Yes, I was.

Q. When did that happen?

A. That happened probably around 6:00 or 7:00 p.m.

JA312

Q. Okay. And where did you meet up with
[p.230]
them?

A. We — so I was able to find a few, and then I think somebody, our lieutenant or sergeant, called on the radio for us to regroup back in the Senate side around those corridors.

Q. So roughly here (indicating) is where you regrouped?

A. Yes, right in that area.

Q. What were — what was the condition of your squad members when you got there?

A. Well, not good. One of our officers would go to the hospital for injuries, and others had, similar to me, been assaulted and had equipment and gear stolen from them.

Q. Okay. When did you finally leave the U.S. Capitol on January 6?

A. Probably maybe around 7:00 or 8:00 p.m.

Q. Okay.

A. I mean, we went back to Longworth to just stage, so — stage in case we were further needed.

Q. Officer Pingeon, at any time during the time that you were in the U.S. Capitol, were you able to use your cell phone?

A. Yes, at one point.

Q. And what did you use it for?

[p.231]

A. At one point, I was able to — when we had regained some semblance of control, I was able to escape into an office to send a text message to my family.

Q. And what did you tell your family?

A. I told them that I had been attacked and — but I was okay, but — and that I loved them, but that I had to go back and that I was going back in to keep fighting.

JA313

Q. So this was in the middle of fighting, so you had to go back again; is that what you're saying?

A. Yes.

Q. Okay. So this wasn't after you were done?

A. No.

Q. Okay. Officer Pingeon, how did you feel at the end of the day on January 6, 2021?

A. Physically, I was completely exhausted. And mentally, I was just devastated to see everything that had happened that I could not have even imagined, of how desecrated the building had been and how violent the mob had been towards me and my fellow officers.

MR. NICOLAIS: Thank you, Officer Pingeon.

I have no further questions, Your Honor.

THE COURT: Cross-examination?

CROSS-EXAMINATION

[p.232]

BY MR. SHAW:

Q. Good afternoon, sir.

You mentioned the death of Officer —

THE COURT: Try again.

MR. SHAW: Try it again.

Okay. All right, that's better.

Q. (By Mr. Shaw) You mentioned earlier the death of Officer Sicknick.

Do you recall that?

A. Yes.

Q. Okay. And you said that it was a line-of-duty death; is that correct?

A. Yes.

Q. Are you familiar with the criteria for declaring something a line-of-duty death?

A. I am familiar with what the chief of police tells us.

JA314

Q. And what does the chief of police tell you?

A. Well, that this was, in fact, a line-of-duty death.

Q. Okay. So you know that this particular death was declared a line-of-duty death, but you do not know what criteria were used to make the determination; is that fair?

[p.233]

A. Yes.

Q. Okay. Are you aware that the DC Medical Examiner conducted an autopsy of Officer Sicknick?

A. I believe so, that that's the standard thing to do, yes.

Q. Do you know what the results of that autopsy were?

A. Not off the top of my head right now, no.

Q. Are you aware that the DC Medical Examiner found that Officer Sicknick died on January of natural causes, sir?

A. I may have heard that, but I can't — I'm not totally sure.

Q. Are you aware that the Department accepted the findings of the Medical Examiner but, nonetheless, declared it a line-of-duty death?

A. I'm not aware. As I was just an officer, I'm not aware what the department would —

Q. Are you aware, based on your time as an officer, that it makes a difference in terms of the benefits that the survivors of an officer receive depending on whether the department declares it a line-of-duty death versus a non-line-of-duty death?

A. I'm not aware of the specifics or what the difference of those are, no.

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Q. Okay. You have no reason to second-guess the findings of the DC Medical Examiner, correct?

A. No.

JA315

Q. Okay. So if the DC Medical Examiner found that Officer Sicknick's death was due to natural causes rather than to anything that occurred on January 6, you have no reason to question that, correct?

A. I'm not a doctor, so I — no, I can't question their rulings.

Q. Okay. Do you know how many demonstrations there were in DC on January 6?

A. No, I do not.

Q. Do you know if it was more than one?

A. Well, are you talking permitted demonstrations?

Q. I'm not sure what you mean by permanent demonstrations.

A. Oh, sorry, "permitted."

Q. Oh, "permitted." Yes. All right. First of all, let's start with permitted.

Do you know how many permitted demonstrations there were?

A. No, I do not.

Q. Do you know if there were multiple permitted demonstrations?

[p.235]

A. All I knew at that time was that there — well, I don't even know if it was permitted or not, but all I knew at that time was there was one big one at the White House.

Q. So there was one at the Ellipse, that's what you mean by the White House?

A. Yes.

Q. Okay. Do you know if there was another permitted one at the Supreme Court?

A. I do not know.

Q. Do you know if there was another permitted one elsewhere?

A. No.

JA316

Q. Okay. Do you know if there were people who were demonstrating in DC at unpermitted demonstrations that day?

A. I do not know.

Q. Do you know how many demonstrators were in DC that day in total?

A. No.

Q. Do you have an estimate of how many were?

A. Thousands at least.

Q. Okay. Would it surprise you that estimates in the area of 120,000, have been circulated?

A. That would not surprise me, no.

[p.236]

Q. Okay. You spoke about what you called "the mob"; is that correct?

A. Yes.

Q. And how are you defining "the mob"?

A. Well, I don't know the dictionary definition, but to me, a crowd turns into a mob when they are engaging in unlawful conduct and violence.

Q. Okay. I asked a bad question, so I apologize for that.

I'm asking about "the mob." Was it a particular group of people on January 6 that you're referring to as "the mob"?

A. It was the — I'm not quite sure —

Q. So if you assume — so if you accept for purposes of this question that there were perhaps 120,000 or that order of magnitude people in DC demonstrating that day, are you saying that all of those 120,000 people were "the mob," or is it a subset of them?

A. I didn't see personally 120,000 people so I couldn't characterize all of them as "a mob."

JA317

Q. In terms of the people who were at the Capitol during the afternoon when you were there, do you have an estimate of how many people were there?

A. Thousands, but I couldn't — I don't know an exact number, no.

[p.237]

Q. Somewhere in the — well, let me change that.

You know that an extensive investigation has been conducted by the Department of Justice and the FBI in the wake of January 6, correct?

A. Yes.

Q. And do you know how many people have been prosecuted, roughly?

A. I think more than 1,000, but I don't know exactly.

Q. About 1200 sound right to you?

A. Potentially, yes.

Q. Okay. In terms of the people who were at the — at or around the Capitol that day, do you know what percentage of them attended the rally at the Ellipse?

A. No, I do not.

Q. Do you know what percentage of the people who attended the rally at the Ellipse did not go anywhere near the Capitol that day?

A. No, I do not.

Q. I take it that you don't claim any ability to read people's minds; is that fair?

A. That is fair.

Q. And just by looking at the folks who were

[p.238]

there that day, you weren't able to tell if any particular person attended the rally at the Ellipse, right?

A. Correct.

JA318

Q. And you weren't able to tell if any particular person heard President Trump speak at that rally, correct?

A. Correct.

Q. And you weren't able to tell if any particular person had seen any of President Trump's tweets, correct?

A. That's correct.

Q. What do you currently do for a living, sir?

MR. NICOLAIS: Objection, Your Honor. Relevance.

THE COURT: Can you respond?

MR. SHAW: Yes. I think the relevance will become clear in a moment, Your Honor.

Q. (By Mr. Shaw) What do you currently do for a living, sir?

THE COURT: Well, hey, you don't reask the question when I haven't ruled on the objection.

MR. SHAW: Sorry, Your Honor.

THE COURT: I will — I will allow you to

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answer, but if I don't find it relevant, I'll strike the answer.

A. I work as a sales — I have a sales position in a technology company.

THE COURT: I'm sorry, what kind of company?

A. Technology, software company.

THE COURT: Okay.

Q. (By Mr. Shaw) Do you also sell your artwork?

A. Yes, I do. I am also an artist.

Q. Is much of your artwork January 6 themed?

A. Well, I've been an artist for most of my life, so I've explored numerous mediums and subject matter. But yes, after January 6, it was a source of inspiration, and I use my artwork as a form of healing for the trauma that I endured that day.

JA319

Q. And you — you sell the artwork that you create, correct?

A. I do, yes.

Q. You have an Etsy store?

A. I do.

Q. And you sell your pictures for between \$50 and \$250 a picture; is that correct?

A. Some are lower, some are higher, but

[p.240]

approximately, yes.

Q. And so far, you've sold about 300 pictures from your Etsy store; is that — is that right?

A. I'd have to look exactly, but that sounds about right, yes.

Q. Is it fair to say that you would like to attract more visitors to your Etsy store to buy more pictures?

MR. NICOLAIS: Objection, Your Honor. I don't understand the relevance of Etsy store.

THE COURT: I think I do, but it's — the objection is overruled.

A. You know, as an artist and, I guess you could call it small business owner, yes, it is attractive for me to have more customers buying my artwork.

Q. (By Mr. Shaw) And is it fair to say you expect that being in a televised trial like this one about January 6 is likely to raise your profile and sell more pictures about January 6?

MR. NICOLAIS: Objection, Your Honor. This calls for speculation from the witness.

THE COURT: Overruled.

You can answer.

A. With your endorsement, perhaps.

Q. (By Mr. Shaw) If I can help, glad to.

[p.241]

MR. SHAW: I have no further questions for you, sir.

THE COURT: Any questions from the Colorado Republican Party?

MS. RASKIN: No questions.

MR. KOTLARCZYK: No questions, Your Honor.

THE COURT: Okay. Redirect?

MR. NICOLAIS: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. NICOLAIS:

Q. Officer Pingeon, I'll try to keep this brief. Did the — did the autopsy results of Officer Sicknick keep him from being honored in the Rotunda of the U.S. Capitol?

A. No, they did not.

Q. And just to be clear, you guarded his body in the Rotunda?

A. His remains, yes.

Q. Okay. I want to go back also to — you were asked about definition of “the mob,” and I want to make sure I got this right.

You said “a mob” is a group of people who engages in unlawful conduct and violence.

Does that sound roughly about what you

[p.242]

said?

A. Yes.

Q. Would you characterize the people who assaulted you on January 6 as “a mob” under that definition?

A. Yes.

Q. Officer Pingeon, there was a question about rallies and permitted events, et cetera.

You responded you thought there was one big event at the Ellipse?

A. Yes.

JA321

Q. And when you were on the northwest lawn and you were looking down from your elevated position, what were you looking toward?

A. Down Pennsylvania Avenue, leads towards the White House and the Ellipse.

Q. And what did you see coming down Pennsylvania Avenue?

A. Thousands of people coming towards the Capitol.

Q. Okay. I do — I'll be brief about your artwork, Officer Pingeon.

Is your artwork your primary source of income?

A. No. Far from it. I — I wish it could

[p.243]

be, but no.

Q. What is the primary reason that you engage in artwork post January 6, Officer Pingeon?

A. Like I previously stated, it's — you know, I always turn to art in difficult times as a creative outlet to express myself, but it became more important post January 6, as I dealt with posttraumatic stress symptoms, to be able to express myself and heal from that experience by expressing myself artistically.

Q. Are you here today to sell more artwork?

A. No.

Q. Why are you here today, Officer Pingeon?

A. I'm here today to share my story and speak the truth of what happened to me and what I saw, heard, and experienced on January 6.

MR. NICOLAIS: Thank you very much. I have no further questions.

THE COURT: Officer Pingeon, thank you so much for your testimony today.

THE WITNESS: Thank you.

THE COURT: You are released.

JA322

THE WITNESS: Thank you.

THE COURT: We will go on break until 3:20.

(Recess taken from 3:05 p.m. until
[p.244]

3:22 p.m.)

THE COURT: You may be seated.

And we're going to be watching some videos?

MR. GRIMSLEY: We're going to be watching some videos and seeing some photos. And I know we had discussed it in earlier hearing that there was going to be a period in the case where we wanted to present video evidence and some of the other evidence that wouldn't be coming in through a witness, so we'll do that now.

Your Honor will be happy to hear that we are well ahead of time. And then given what I had said this morning about the witnesses who abruptly pulled out, that gives us some time back as well. So I think we're going to be good.

I don't think the evidence presentation will go all the way through to 5:30.

THE COURT: Okay.

MR. GRIMSLEY: But we've already spoken to counsel for respondents, and we would start with our next witness tomorrow morning.

THE COURT: Okay. That's fine.

Did you — did you bring popcorn?

MR. GRIMSLEY: I did not. I don't know if it's going to be that scintillating, but —

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THE COURT: I think the popcorn is if it isn't that scintillating.

MR. GRIMSLEY: Perhaps you're right as to why we might need it.

JA323

But just in terms of timing, I wanted to let Your Honor know why we don't have that witness here —

THE COURT: Yeah.

MR. GRIMSLEY: — at the ready.

The estimates for cross-examination — and I'm not going to fault them at all —

THE COURT: Yeah.

MR. GESSLER: — were quite a bit longer, shall we say, than the cross-examinations actually were.

THE COURT: Yeah.

MR. GRIMSLEY: So we're well, as I said, ahead of schedule right now.

THE COURT: So we'll just do whatever video evidence you have, and then we'll break for the day?

MR. GRIMSLEY: Yes. And there will be some discussion, I think, of how you would like us to present some of the January 6 Report findings.

THE COURT: Okay.

MR. GRIMSLEY: We could — I could read [p.246]

them, but we can — we could talk about whether that makes sense to do —

THE COURT: Okay.

MR. GRIMSLEY: — in terms of a good use of everyone's time.

But Mr. Gessler has said that he has a procedural matter that he wanted to raise before the entertainment begins.

THE COURT: Okay.

MR. GESSLER: Thank you, Your Honor.

So I want to go back to our status conference — I believe it was last week. They're all beginning to bleed together — and we had talked a little bit about experts.

THE COURT: Uh-huh.

JA324

MR. GESSLER: We have — Your Honor had said, you know, if there's a way for us to get in an expert, we might — the door was open to testimony next week sometime. And I think we have identified an expert on political communications as a —

THE COURT: Okay.

MR. GESSLER: — as a rebuttal expert for Professor Simi.

May we present that? We'll produce a report. I can't give you an exact timeline, but I know

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the timeline is going to be within a few days. I understand it's pretty fast.

But I'm asking if we would be able to do that, Your Honor.

THE COURT: And do the petitioners have any objection?

MR. GESSLER: And — and, Your Honor, I just sprung this on them, so this is the first they've heard of it as well.

MR. GRIMSLEY: We do have an objection, Your Honor.

Our expert on the subject is going to be testifying tomorrow. He's not, obviously, going to have an opportunity or ability to respond. And they are going to be able to tailor any sort of report, expert report, to his testimony that's offered tomorrow.

We think that is unfair. They've had ample amount of time to find somebody and have not. I don't think next week was meant for an entirely new expert. I think it may have been meant for if Mr. Heaphy needed to testify next week or if there was some fact witness, but this is introducing a whole new kettle of fish into the case.

THE COURT: Okay. I'm going to let them. Everything has been on an extremely compressed schedule,

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and I know it's been hard for both parties to get witnesses to appear on that schedule, but I will allow.

So this is to respond to Professor Simi?

MR. GRIMSLEY: Correct.

THE COURT: If Professor Simi wants to have a rebuttal to that, which would normally happen in his testimony, and wants to do so by phone — by video next week, the Court will allow that, so long as that rebuttal testimony is, you know, disclosed.

Are we going to get a report?

MR. GESSLER: Yes, of course, Your Honor. No, we're going to work very hard to get that. I'm not looking to do an ambush here, but we're going to — we've had some communications. We have to firm that up, and we're going to work like crazy to — to get something to petitioners. It will be a meaningful report.

Understanding the Court's framework from before, that there's not an opinion that's in the report that cannot be elicited on the stand. So we're prepared to abide by that and go forward.

MR. GRIMSLEY: And, Your Honor, as for us, I assume — and I would ask if it's not the correct assumption — that Professor Simi doesn't have to now submit a rebuttal report in advance of his rebuttal testimony in response to the testimony that we don't yet

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know what it is going to be?

THE COURT: Let's — let's see what this rebuttal report looks like before we get too deep into this conversation.

But I'm — I understand that, normally, in a normal course, Professor Simi would have a chance potentially to rebut and that he would do so when he's on the stand and that he's obviously not going to have that opportunity.

So I'm going to make — we'll do what it takes to level the playing fields.

MR. GRIMSLEY: Thank you, Your Honor.

THE COURT: And is Mr. Heaphy coming or testifying?

MR. GRIMSLEY: He is available to testify remotely on Friday, so we can — I expect that I would do a short direct with Mr. Heaphy and then opposing counsel would be able to cross-examine.

THE COURT: Okay. So he'll be testifying out of order?

MR. GRIMSLEY: Yes. He'll be, I think, testifying from Washington, DC.

THE COURT: Okay. So the videos.

MR. GRIMSLEY: Yes.

So I've tried to limit this to exhibits

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that Your Honor has already ruled on, saying that they would be admitted —

THE COURT: Okay.

MR. GRIMSLEY: — or were conditionally admissible.

There were a few — I raised one earlier today — that has not been ruled on yet, but I will obviously raise that when I get to it, so —

THE COURT: Okay. Is that the — is that the videos on — which were embedded in the tweets?

MR. GRIMSLEY: Yes. Those too, Your Honor. I think there's one of those in here. I don't know if it's both in here.

JA327

So I was going to raise that when we got there, but I was thinking of the Giuliani and Eastman speech. Again, President Trump referred to that speech — or those speeches explicitly within his Ellipse speech.

It was the justification that President Trump gave and provided to the crowd on that day, that Vice President Trump — or Vice President Pence had the ability to reject certification of the electoral votes, and so was a critical piece of that speech.

And President Trump actually selected them as speakers before he took the stage, so — and, again,

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we're not offering it for the truth of the matter asserted.

THE COURT: I understand you're not offering it for the truth of the matter asserted, but I do have, kind of, fairness issues with having a speech of someone who then isn't available for cross-examination, though I suppose Mr. Gessler would have a lot better chance of getting Mr. Eastman or Mr. Giuliani to respond, so I need — I'm still thinking about it.

MR. GRIMSLEY: And, Your Honor, to be fair, I think, to everyone, I don't think anybody's getting either of those two to testify, other than to assert their Fifth Amendment right against self-incrimination, given that they're both currently under indictment.

But, again, if it had been a document that President Trump held up and said, "Here's the proof that I have that Vice President Trump — or Vice President Pence can decertify the election," I think you would allow it in as part of the speech.

He refers to it, and it comes right before his speech that day. It is an integral part of what he did in his plan to incite the riot.

And obviously Your Honor can take it for the weight it warrants.

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THE COURT: Any response, Mr. Gessler?

MR. GESSLER: Your Honor, at the end of the day, we're talking about President Trump's — whether or not he, quote, engaged in an insurrection, and referral to other speakers is not President Trump speaking. It's not. And it's not President Trump's engagement.

And so we would continue to object to that, just as President Trump may refer to many things and has referred to many things over six, eight years of a political career, or more.

But not every one of them — we would submit none of them — are admissible as his statement or as his embracing of that statement.

MR. GRIMSLEY: I would say that that is generally true, but this was the speech right before him on the Ellipse on January 6, speeches that he planned to have there that day, speeches that he referred to explicitly within his own speech as what gave him the justification for saying that the Vice President could decertify.

It's incredibly important context to understand what President Trump was saying.

MR. GESSLER: Your Honor, I would simply say the Rules of Evidence don't change on January 6.

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MR. GRIMSLEY: No, they don't.

MR. GESSLER: They remain the same.

THE COURT: I'm going to — I'm going to continue to ponder it while I also simultaneously watch the other videos.

MR. GRIMSLEY: Okay. Well, I was going to start and try and break this up into two different categories.

The first is additional evidence that there was an insurrection on January 6 and then additional evidence that President Trump engaged in that insurrection.

THE COURT: Okay.

MR. GRIMSLEY: So I'm going to start with an admitted exhibit, Plaintiffs' 133.

THE COURT: Okay. 133 will be officially admitted.

(Exhibit 133 was admitted into evidence.)

MR. GRIMSLEY: And Exhibit 133 is a series of photos taken by Nate Gowdy. He was a photographer that was present at the Ellipse and then at the Capitol on January 6, and we'll just run through a few of those.

The nice thing about these photos is they have a time stamp on the upper left-hand side. So I just want to look at a few.

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So let's go to page 4. And the time stamp there is 11:38 a.m. Eastern Standard Time. And you see there, somebody there with "Pence Has the Power." And, again, this is why I think it's so important, the Giuliani speech.

Photos of individuals in camo and gear with those plates that were discussed earlier.

(Siren interruption.)

THE COURT: See, Mr. Gessler, I told you they would get their turn.

MR. GESSLER: I'm glad to know the ambulances are an equal opportunity interrupter.

THE COURT: Yeah. Mr. Grimsley, just make sure you speak into the microphone so that —

MR. GRIMSLEY: Yes.

And then let's go to page 17, which is from 2:14 p.m. that afternoon. And you see people holding on and carrying away the bike racks.

JA330

At 2:36 — and this is after the tweet about Vice President Pence — you see the tear gas and chemical irritant and individuals swarming the Capitol.

Here again is another photo that shows individuals carrying — the attackers carrying the Trump flags and various Trump paraphernalia, and that's

[p.255]

Page 26, 3:27 p.m.

This is page 30 at 3:55 p.m., and you see the sign there: "Certify Honesty Not Fraud," reflecting the claims of fraudulent — of a fraudulent election. And you see again the Trump paraphernalia and flags and the crowd proceeding towards the Capitol.

And then here on page 37 is a photo at 5:07, and you see still Trump paraphernalia. It's getting dark outside, and you see the tear gas and chemical irritant there as well.

Now I'd like to play a portion of Plaintiffs' Exhibit 9-

—

MR. GESSLER: Your Honor, may I just make one clarification.

These are being admitted over our objection, so we are clear. We would object to counsel's characterization of them. They're not the evidence.

So, for example, the people lined up with the vests, I mean, did the photographer say, "Hey, come on in and let me get a photo of you all," or were they locked arm in arm preparing to storm the Capitol? There's just no context.

So we're going to make that objection for the record, and we will ask the Court not consider Counsel's characterization of these photos because

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it's — doesn't come from a witness, and counsel's statements are not evidence.

Thank you, Your Honor.

MR. GRIMSLEY: Your Honor, I'm next going to play a clip from Plaintiffs' Exhibit 94. It's a video that was admitted by Your Honor on October 27. Part of it, I think, has already been played in the opening, so I'll play only a portion of it here.

THE COURT: And 94 is admitted over objection.

(Exhibit 94 was admitted into evidence.)

(Video playing.)

MR. GRIMSLEY: And so I think you heard other portions of Exhibit 94 during openings, so I won't play those here. Next I'd like to show Exhibit 105.

THE COURT: Exhibit 105 is admitted.

(Exhibit 105 was admitted into evidence.)

MR. GRIMSLEY: And this is an exhibit Your Honor has said was admitted. It is a transcript of the closing argument in the —

THE COURT: Did I — have I ruled on this previously, or am I jumping the gun?

MR. GRIMSLEY: Oh, I'm sorry. It's stipulated. You have not ruled on it. It was

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stipulated.

THE COURT: Okay.

MR. GRIMSLEY: And so this is a transcript of the closing argument in the second impeachment trial.

This is from President Trump's lawyer, Mr. van der Veen, and he says: "Yet the question before us is not whether there was a violent insurrection of the Capitol. On that point everyone agrees."

And I've got video of that as well. We hadn't marked that. I can play that. But to be fair, I haven't provided that to the other side, and we can wait if they would like, but it's just video of the same statement.

JA332

THE COURT: I don't — I don't need video of the same statement.

MR. GRIMSLEY: Thank you.

Now I want to play video from Plaintiffs' Exhibit 1. Again, not the entire video, but this is video from January 6.

(Video playing.)

MR. GRIMSLEY: The time stamp on the upper right.

So I would move to admit Plaintiffs' Exhibit 1, as well as Plaintiffs' Exhibit 105. I forgot about that one.

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THE COURT: Hold on.

Plaintiffs' Exhibit 1 is admitted and the other one you said was 105?

(Exhibit 1 was admitted into evidence.)

MR. GRIMSLEY: 105, Your Honor.

THE COURT: And 105 is stipulated, so admitted.

(Exhibit was admitted into evidence.)

MR. GESSLER: Your Honor, if I may.

THE COURT: Yeah.

MR. GESSLER: I don't think Number 105 was stipulated. I think — it was? I may be corrected.

THE COURT: That's what my notes say as well.

MR. GESSLER: Okay.

Again, Number 94 and Number 1 are over our objection.

And I'll simply renew my objection with respect to the first video you saw. That's a movie production. There's sound overlays on it. It's a montage. It is — it's a — it's a good movie production, and it was produced by the January 6 Commission for the purpose of being a good movie production.

It shouldn't be evidence here. I don't

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have an opportunity to cross-examine. I don't know the full context of each one of those videos. We have not been able to pull them apart. We have not been able to pull up the witnesses or the people who actually took those videos or — or the actual context of those radio transmissions and how it's all been assembled together.

So just as I would submit that you wouldn't accept a Steven Spielberg production for the truth of the matter asserted — maybe this rises to that level of quality — but you wouldn't accept this one, either.

So that's going to be our objection there.

MR. GRIMSLEY: You might if it was documentary footage, which is what we have here.

MR. GESSLER: We don't think Michael Moore would be accepted — Michael Moore's documentaries would be accepted by this Court either if we want to use that analogy.

THE COURT: 94 is admitted.

MR. GRIMSLEY: And so we just looked at a portion of Plaintiffs' Exhibit 1.

I want to play a portion of Plaintiffs' Exhibit 92. Again, that was ordered admissible on October 27.

(Video playing.)

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MR. GRIMSLEY: I move to admit Plaintiffs' Exhibit 92.

THE COURT: Admitted. 92 will be admitted.

(Exhibit 92 was admitted into evidence.)

MR. GRIMSLEY: Now I want to show a page from Plaintiffs' Exhibit 26, which is the GAO report from February of 2023 regarding the investigation of that entity into the Capitol security during January 6. This is one that was admitted as well.

THE COURT: Stipulated, I believe. And it's admitted now.

(Exhibit 26 was admitted into evidence.)

MR. GRIMSLEY: And I would just like to go to page 7. And this is a finding from that document:

In the months leading up to the attack on the U.S. Capitol on January 6, 2021, there were reported efforts to organize large groups of protesters to travel to Washington, DC to dispute the outcome of the 2020 presidential election.

Over the course of about 7 hours, more than 2,000 protesters 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.

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The attack resulted in assaults on at least 174 police officers, including 114 Capitol Police and 60 DC Metropolitan Police Department officers. These events led to at least seven deaths and caused about \$2.7 billion in estimated costs.

As of September 2022, more than 870 individuals have been arrested on charges including entering a Restricted Federal Building, assaulting officers with a deadly weapon, and seditious conspiracy.

THE COURT: And so when you say that it's page — is it page 7 of the exhibit even though it says page 1?

MR. GRIMSLEY: It's page 7 of the document, but page 1, I guess, of the report. It probably has some little i's and little two i's.

THE COURT: Okay.

MR. GRIMSLEY: And now I wanted to point to just a couple of the January 6 Report findings that Your Honor has found conditionally admissible.

JA335

And the first is Finding 119, which is at page 35 of Plaintiffs' Exhibit 78:

More than 140 Capitol and Metropolitan Police were injured, some very seriously. A perimeter security line of Metropolitan Police intended to secure the Capitol against intrusion broke in the face of

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thousands of armed rioters, more than 2,000 of whom gained access to the interior of the Capitol Building.

A woman who attempted to forcibly enter the Chamber of the House of Representatives through a broken window while the House was in session was shot and killed by police guarding the Chamber.

Vice President Pence and his family were at risk, as were those Secret Service professionals protecting him. Congressional proceedings were halted, and legislators were rushed to secure locations.

So that's the evidence I wanted to present now on whether there was an insurrection.

I'd like to turn now to whether President Trump engaged in that insurrection.

MR. GESSLER: I'm doing this for the record, Your Honor.

We're going to object to that January 6 finding. We're particularly going to object to the characterization that the protesters were armed. All the testimony you've heard today from police officers was that they weren't armed with any firearms or knives or weapons.

So that's our objection, Your Honor.

THE COURT: And I just want to make sure we're all on the same page, and thank you for your

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objection. But just because I allow a finding in does not mean that I am accepting it as true.

MR. GESSLER: I understand, Your Honor, and it's our job to explain to you why that is the correct finding.

THE COURT: But I just want to — in case you didn't hear me say it before, I just want to make sure that just because I allow in the January 6 Report does not mean that I agree with all of the findings.

MR. GESSLER: I understand, Your Honor.

MR. GRIMSLEY: So now turning to the evidence on engagement, I wanted to start with Plaintiffs' Exhibit 47.

This is — these are clips from President Trump's speech from election night or, really, the next morning, so very early November 4, 2020.

THE COURT: And that — that will be admitted. Exhibit 47, correct?

MR. GRIMSLEY: Yes.

(Exhibit 47 was admitted into evidence.)

(Video playing.)

MR. GRIMSLEY: So that's the first clip. And I'm not going to play the entire speech. It's about nine minutes long.

So the second . . .

[p.264]

(Video playing.)

THE COURT: And I apologize. You said this is all from the same speech that was 90 minutes long on the night — the morning after the election?

MR. GRIMSLEY: It was only nine minutes long, Your Honor.

THE COURT: Oh, nine minutes. I was like —

MR. GRIMSLEY: So I wanted to spare you the whole speech. We can play it, if you want, but just wanted to play those two portions.

THE COURT: Only if Mr. Gessler wants to play the whole thing.

JA337

MR. GESSLER: You never know, Your Honor, but not right now.

THE COURT: Okay.

MR. GRIMSLEY: So now I want to move on to Plaintiffs' Exhibit 148, which has already been admitted. That is the compilation of President Trump's tweets over time. And I want to start with page 12.

And I'm going to walk through these. Mr. Olson walked through some of these during his opening, but I will walk through more of them here.

So November 5, 2020, this is the morning after the speech we just saw at 9:12 a.m. He tweets,

[p.265]

"Stop the Count."

November 8, a few days later: "We believe these people are thieves. The big city machines are corrupt. This was a stolen election. Best pollster in Britain wrote this morning that this clearly was a stolen election, that it's impossible to imagine that Biden outran Obama in some of these states."

Next one, same page: "Where it mattered, they stole what they had to steal." And that, too, I believe, is November 8.

Next page, page 13, November 9: "Nevada is turning out to be a cesspool of Fake Votes. @MSchlapp and @AdamLexalt are finding things that when released will be absolutely shocking."

The next day, November 10: "People will not accept this Rigged Election!"

Next page, 14: "A guy named Al Schmidt, a Philadelphia Commissioner and so-called Republican (RINO), is being used big time by the Fake News Media to explain how honest things were with respect to the

JA338

Election in Philadelphia. He refuses to look at a mountain of corruption & dishonesty. We win!"

November 12: "Report: Dominion deleted 2.7 million Trump votes nationwide. Data analysis finds 221,000 Pennsylvania votes switched from President Trump

[p.266]

to Biden. 941,000 Trump votes deleted. States using Dominion voting systems switched 435,000 votes from Trump to Biden."

On page 15, November 13: "Georgia Secretary of State, a so-called Republican (RINO), won't let the people checking the ballots see the signatures for fraud. Why? Without this the whole process is very unfair and close to meaningless. Everyone knows that we won the state. Where is Brian Kemp?"

Go down to the bottom of page 16, November 14: "What are they trying to hide. They know and so does everyone else. Expose the crime!"

November 14, page 17, 11:17 p.m.: "Antifa scum" run for the — "ran for the hills today when they tried attacking the people at the Trump Rally, because those people aggressively fought back. Antifa waited until tonight, when percent were gone, to attack innocent MAGA people. DC Police, get going - do your job and don't hold back!!!"

November 16, page 18: "Dominion is running our Election. Rigged!"

They go on. December 1, 2020 on page 27: "Rigged election. Shows signatures and envelopes. Expose the massive voter fraud in Georgia. What is Secretary of State and @BrianKemp Georgia afraid of?

[p.267]

They know what will find."

JA339

And Your Honor, this was one of the tweets with the embedded video that I had talked about earlier.

THE COURT: Yeah. I'm going to allow videos that President Trump tweeted, so . . .

MR. GRIMSLEY: This is Plaintiffs' 126, so we would move for admission of it.

(Video playing.)

MR. GRIMSLEY: So back to —

THE COURT: Okay. So just to be clear, that is —

MR. GRIMSLEY: That is —

THE COURT: P-126, which —

MR. GRIMSLEY: P-126, which is a video embedded in a tweet in Plaintiffs' 148.

THE COURT: And that's admitted.

(Exhibit 126 was admitted into evidence.)

THE COURT: Do you object, Mr. Gessler?

MR. GESSLER: Yeah, I do, Your Honor. Look, I mean, as a former Secretary of State who's received death threats, violent sexualized threats against my mother, my daughter, and my wife, I'm empathetic to this.

But this is an out-of-court statement intended to prove the truth of the matter asserted. It's

[p.268]

highly inflammatory. It should not be part of this hearing.

THE COURT: So the Court rules, A, it was adopted by President Trump when he decided to tweet it to however many followers President Trump has, which I assume is many, and so I'm going to allow it.

MR. GESSLER: And, Your Honor —

MR. GRIMSLEY: Your Honor —

MR. GESSLER: — I would submit that it's an improper inference to say that President Trump adopted this as his own.

JA340

THE COURT: He tweet — he — he tweeted this statement, okay? Whether that's a legal adoption or not, I'm going to allow it in based on the fact that he is the one that has publicized this statement, vis-a-vis his Twitter account, or whatever they call it now.

MR. GRIMSLEY: And, Your Honor, it's not that we're offering it necessarily for the truth of the matter asserted, although we're happy to do that as well.

It's to show President Trump's state of mind and his communications to his supporters, and that's why I wanted to come back to this tweet on page 27 of Exhibit 148, which is the tweet where President Trump retweets this video that you just saw. "Rigged election. Shows signatures and envelopes. Expose the massive voter

[p.269]

fraud in Georgia. What is Secretary of State and @Brad Kemp GA afraid of? They know what will find."

And there's just more of these, so I'll skip over.

So page 33, tweet from December 10, 2020, 9:24 a.m.: "The Supreme Court has a chance to save our Country from the greatest Election abuse in the history of the United States. 78 percent of the people feel (know!) the Election was Rigged."

3:28 p.m. December 11: "If the Supreme Court shows great Wisdom and Courage, the American People will win perhaps the most important case in history, and our Electoral Process will be respected again!"

December 11, later in the day, 11:50 p.m.: "The Supreme Court really let us down. No Wisdom, No Courage!"

So let's fast-forward to December 19, and this is on page 41. And you've seen this tweet already. But it says: "Peter Navarro releases 36-page report alleging election fraud 'more than sufficient' to swing victory to Trump -"

JA341

At great report by Peter — “A great report. Statistically impossible to have lost the Election. Big protest in DC on January 6th. Be there, will be wild!”

And then this is the other embedded video

[p.270]

that we were talking about, Your Honor. It was played in part in opening. I believe this is — the embedded video is Plaintiffs’ 73.

And the important point here is, it’s released the very same day right after, basically, the “will be wild” tweet on December 19.

THE COURT: I’m going to watch it first before I rule on its admissibility.

(Video playing.)

MR. GRIMSLEY: So that was a video that President Trump retweeted on December to his followers.

THE COURT: And the Court will admit it. It’s not being offered for the truth of the matter asserted.

(Exhibit 73 was admitted into evidence.)

MR. GRIMSLEY: And that’s Exhibit 1- — or Exhibit 73, Your Honor.

And I’m not going to go through the tweets that Mr. Olson put up where he showed the number of times between December 19 and January 6 where President Trump tweeted out about the rally on January 6.

And just moving to January 5, this is page 75 of Exhibit 148. Donald Trump 10:27 a.m.: “See you in DC.”

[p.271]

11:06 a.m.: “The Vice President has the power to reject fraudulently chosen electors.”

5:05 p.m. on page 76: “Washington is being inundated with people who don’t want to see an election victory stolen by emboldened Radical Left Democrats. Our Country has had enough, they won’t take it anymore! We

JA342

hear you (and love you) from the Oval Office. Make America Great Again!”

7 minutes later, 5:12 p.m.: “I hope the Democrats, and even more importantly, the weak and ineffective RINO section of the Republican Party, are looking at the thousands of people pouring into DC. They won’t stand for a landslide election victory to be stolen.”

January 5, a few minutes later, I think, 5:25 p.m. this is page 77: “Antifa is a Terrorist Organization, stay out of Washington. Law enforcement is watching you very closely! @DeptofDefense @TheJusticeDept @DHSgov @DHS_Wolf @SecBernhardt @SecretService @FBI.”

Fast-forwarding to 1:00 a.m. in the morning, January 6, 2021, this is page 80 of the exhibit. ”If Vice President Mike Pence comes through for us, we will win the Presidency. Many States want to decertify the mistake they made in certifying incorrect & even

[p.272]

fraudulent numbers in a process NOT approved by their State legislators (which it must be). Mike can send it back!”

Later that morning, 8:17 a.m.: “States want to correct their votes, which they now know were based on irregularities and fraud, plus corrupt process never received legislative approval. All Mike Pence has to do is send them back to the states, AND WE WIN. Do it Mike, this is a time for extreme courage!”

And it wasn’t just tweets that the President was sending out over this period of time. I want to show clips from two speeches.

The first is Plaintiffs’ Exhibit 99. This is a speech by President Trump from December 2 of 2020. That I think has been admitted or will be admitted pursuant to this Court’s order.

JA343

THE COURT: So 99 will be admitted.

(Exhibit 99 was admitted into evidence.)

THE COURT: And did you say it's clips or the whole
— MR. GRIMSLEY: It's a clip.

THE COURT: Okay. And I just want to make clear
in terms of the rule of completeness that the intervenor is
always welcome to play other parts of the clips as — so
should they choose.

[p.273]

(Video playing.)

MR. GRIMSLEY: So move to admit Plaintiffs'
Exhibit 99.

THE COURT: Admitted.

MR. GRIMSLEY: The next speech is from December
22. Again, it is a clip. This is Plaintiffs' Exhibit 100.

(Video playing.)

MR. GRIMSLEY: So I've shown evidence of what
went on between November 3 and January 6, so I now
want to turn to January 6 itself.

And, Your Honor, this is where I would play Plaintiffs'
Exhibit 131, Mr. Giuliani and Mr. Eastman.

THE COURT: I'm going to — I'm going to sustain
the objection on Mr. Giuliani and Mr. Eastman. There's
been plenty of evidence that he was — that President
Trump was telling people that Vice President Pence had
the authority to do something, and I think it's cumulative.
And also I think there's a sense of unfairness since they
won't be here to testify.

MR. GRIMSLEY: Thank you, Your Honor.

So I wanted then to move to Plaintiffs' Exhibit 49 and
— and these are clips from President Trump's speech on
the Ellipse. It's about 12 minutes in

[p.274]

total.

THE COURT: Okay.

MR. GRIMSLEY: We didn't want to submit everybody to the 90 minutes, but certainly if Your Honor wants to watch it, I encourage you to do so.

But move to admit 49. I don't think there's any objection to that.

THE COURT: It's been stipulated to, so it's admitted. (Exhibit 49 was admitted into evidence.)

THE COURT: So this is the Ellipse speech, but it's not the whole thing?

MR. GRIMSLEY: It's not the whole thing, Your Honor. And, in fact, I have with me, just for ease of reference, a highlighted transcript, which has the clips, so I think that would be good for everybody if they want to follow along.

May I approach?

THE COURT: Yes, please.

MR. GRIMSLEY: And I'm trying to get the volume right, but these are so variable, so I — you've got to hold on for a second sometimes. So I hope I'm not going to blow anybody's ears out here.

(Video playing.)

(Technical difficulties with video.)

[p.275]

MR. GRIMSLEY: I blame Mr. Gessler.

MR. GESSLER: Bring it. I think that was President Trump's fault, actually.

(A pause occurred in the proceedings.)

MR. GRIMSLEY: You may get a little repeat here, but . . .

(Video playing.)

MR. GRIMSLEY: So that's — I think it's already admitted. That's Plaintiffs' Exhibit 49, at least clips from it.

JA345

I'd now like — see if this works this time. Go to the January 6 Report, which is the findings, Plaintiffs' Exhibit 78.

Finding 315, and this is page 96 of the exhibit:

“At 1:10 p.m. on January 6 President Trump concluded his speech at the Ellipse. By that time, the attack on the U.S. Capitol had already begun, but it was about to get much worse. The President told thousands of people in attendance to march down Pennsylvania Avenue to the Capitol. He told them to fight like hell because if they didn't, they were not going to have a country anymore.”

“Not everyone who left the Ellipse did as the Commander in Chief ordered, but many of them did.

[p.276]

The fighting intensified during the hours that followed.”

I'd like to go back to Exhibit 148, which is compilation of tweets, and see one that we've seen quite a bit already. This is the 2:24 p.m. tweet from January 6.

“Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!”

And then I'd like to show Your Honor some additional clips from Plaintiffs' Exhibit 94, which has already been admitted. And some of these we've seen, but not all, I don't think.

(Video playing.)

MR. GRIMSLEY: And I'll show another one.

(Video playing.)

JA346

MR. GRIMSLEY: Now I'd like to move to Plaintiffs' Exhibit 6, and I believe this will be admitted per the October 27 order.

This is a very lengthy video. It's footage from the camera taken on top of the Capitol looking down. I just have a few clips. It's nice to see because it has, I think, the time stamp.

[p.277]

And Mr. Olson reminded me, I did not move to admit Exhibit 100, which was the December 22 Trump speech, so I would like to move to admit that.

THE COURT: Admitted.

(Exhibit 100 was admitted into evidence.)

THE COURT: And then we're on P-6, you said?

MR. GRIMSLEY: Correct, Your Honor.

THE COURT: That's also admitted.

(Exhibit 6 was admitted into evidence.)

MR. GRIMSLEY: And there's no sound here, but you can see the time stamp in the upper left. And it will skip a few as we do the clips, but you'll see it in the time stamp.

So right now this is roughly four minutes after that tweet.

(Video playing.)

MR. GRIMSLEY: Ten minutes, 20 minutes, and a little over 30 minutes.

And then the question I'd like to move on is what President Trump was doing during this time besides putting out some tweets.

And here again, I'll go to the January 6 Report Findings, page 16, Exhibit 148.

THE COURT: I think he said 1—

[p.278]

MR. GRIMSLEY: Yeah, I was mistaken. It's 78, Your Honor.

JA347

Finding 55: “Once Trump returned to the White House, he was informed almost immediately that violence and lawlessness had broken out at the Capitol among his supporters.”

Then page 36, Finding 120. Sorry, this one’s a little longer.

“From the outset of the violence and for several hours that followed, people at the Capitol, people inside President Trump’s Administration, elected officials of both parties, members of President Trump’s family, and Fox News commentators sympathetic to President Trump all tried to contact him to urge him to do one singular thing, one thing that all of these people immediately understood was required: Instruct his supporters to stand down and disperse, to leave the Capitol.”

“As the evidence overwhelmingly demonstrates, President Trump specifically and repeatedly refused to do so for multiple hours while the mayhem ensued.”

“Chapter 8 of this report explains in meticulous detail the horrific nature of the violence taking place that was directed at law enforcement

[p.279]

officers at the Capitol and put the lives of American lawmakers at risk. Yet in spite of this, President Trump watched the violence on television from a dining room adjacent to the Oval Office, calling Senators to urge them to help him delay the electoral count, but refusing to supply the specific help that everyone knew was unequivocally required.”

“As this report shows, when Trump finally did make such a statement at 4:17 p.m. after hours of violence, the statement immediately had the expected effect: The

rioters began to disperse immediately and leave the Capitol.”

Go to page 6 —

MR. GESSLER: Your Honor, if I may, I haven’t stood up for a while so I feel as though I need to stand up and make an objection.

I don’t even know where to begin on this one. How do we cross-examine? How do we examine any of this evidence? It contains speculation and opinion in this. This is a finding that is — that characterizes or exemplifies the very worst aspects of the January 6 Commission, so we object to it.

THE COURT: Would you like to just have a continuing objection to the January 6 Report Findings —

MR. GESSLER: Well —

[p.280]

THE COURT: — or do you want to get up and —

MR. GESSLER: Some I feel very strongly about getting up, and this is sort of one of them, Your Honor.

THE COURT: Okay. Well, I’m going to let you make whatever objections you want.

MR. GESSLER: I appreciate that. Thank you.

MR. GRIMSLEY: So we’re going to page 6 of the Findings, Finding 24.

“President Trump had authority and responsibility to direct deployment of the National Guard in the District of Columbia, but never gave any order to deploy the National Guard on January 6 or on any other day, nor did he instruct any federal law enforcement agency to assist.”

Going to page 40 of Exhibit 78, the Findings, going to Finding 134.

“At 3:13 p.m. President Trump sent another tweet, but again declined to tell people to go home. ‘I am asking for everyone at the U.S. Capitol to remain peaceful, no

violence. Remember, we are the party of law and order. Respect the law and our great men and women in blue. Thank you.”

[p.281]

“Almost everyone, including staff in the White House, also found the President’s 2:38 p.m. and 3:15 tweets to be insufficient because they did not instruct the rioters to leave the Capitol. Evidence showed that neither of these tweets had any appreciable impact on the violent rioters, unlike the video message tweet that did not come until 4:17 finally instructing the rioters to leave. Neither the 2:38 nor the 3:13 tweets made any difference.”

And then finally on this, Your Honor, page 100, Finding 331:

“It was not until it was obvious that the riot would fail to stop the certification of the vote that the President finally relented and released a video statement made public at 4:17 p.m.”

And I’d like to show a Truth Social post — I don’t think it’s called a tweet — from two years later that goes to President Trump’s state of mind.

This is a Truth Social post, December 3, 2022. I believe it’s admissible under Your Honor’s 10/27 order, so we would move to admit Plaintiffs’ 74.

THE COURT: Admitted.

(Exhibit 74 was admitted into evidence.)

MR. GRIMSLEY: “So, with the revelation of massive and widespread fraud and deception and working

[p.282]

closely with big tech companies, the DNC and the Democratic Party” — “Democrat Party, do you throw the

Presidential Election Results of 2020 OUT and declare the RIGHTFUL WINNER, or do you have a NEW ELECTION? A Massive Fraud of this type and

magnitude allows for the termination of all rules, regulations, and articles, even those found in the Constitution. Our great ‘founders’ did not want, and would not condone, False and Fraudulent elections!”

And Your Honor, there are some additional findings at some point that we would move into evidence from the January 6 Report, but I don’t want to take up people’s time reading those today.

THE COURT: Okay.

MR. GRIMSLEY: But those are the ones that I did want to present.

THE COURT: Okay. Is that the conclusion of —

MR. GRIMSLEY: It is.

THE COURT: — your presentation today?

MR. GRIMSLEY: It is, Your Honor.

THE COURT: Okay.

MR. OLSON: I have nothing new to present, Your Honor, but I was able to take notes while Mr. Grimsley was talking, and I think we still need to

[p.283]

have P-49 admitted officially.

MR. GRIMSLEY: That’s the Ellipse speech.

MR. OLSON: Ellipse speech. I don’t think — we’ve talked about it, played it, but it wasn’t admitted.

THE COURT: Okay. It’s admitted.

(Exhibit 49 was admitted into evidence.)

MR. OLSON: And then the only other exhibit that I showed in opening that we would like to move for admission is the first portion of P-109. This is the “stand back and stand by” comment that Trump made.

You had ruled the rest of that video clip had your statement that the Trump section was admissible. That’s what we played, and we would move to admit that section of P-109.

JA351

THE COURT: That's admitted, but you will at some point need to put — all the exhibits are going to have to be dealt with, but you'll need to make sure that only that clip is submitted —

MR. OLSON: Yes.

THE COURT: — to the Court.

(Exhibit 109 was admitted into evidence.)

MR. OLSON: We will. And, Your Honor, is it your preference that we revise P-49 or we make a new — I'm sorry, P-109 or we make a new exhibit, just

[p.284]

the clip?

THE COURT: I think a revise — when you actually submit P-49 at the end, just have it be what was allowed in.

MR. OLSON: Okay. Thank you, Your Honor. That's all we have.

THE COURT: Okay. So since we have a few extra moments, I think that the — one of — Mr. Gessler, one of the things that you had mentioned at the beginning of the day was that there was the pending question on specific intent, your motion, which I think was largely agreed to by the petitioners with some caveats.

MR. GESSLER: I'm not sure if it was quite a motion, Your Honor.

THE COURT: Yeah.

MR. GESSLER: More like a trial brief.

THE COURT: Right.

MR. GESSLER: But I just wanted to point that out.

THE COURT: Yeah. It's clear that specific intent is going to apply to this case. Exactly how that plays out with the nuances that the petitioners want, something that I will rule on when I make my findings of the facts,

conclusions of law. And I will address your First Amendment arguments regarding

[p.285]

Brandenburg at that time as well.

MR. GESSLER: Okay. Thank you, Your Honor.

THE COURT: Is there anything else we need to address before we stop for the day?

MR. OLSON: Not from petitioners' perspective. Thank you.

MR. GESSLER: More simply, none from us, Your Honor.

THE COURT: Okay. So we will start again at 8:00. Does that work, and is that the plan with your witnesses?

MR. OLSON: Yes, Your Honor. Dr. Simi will be our first witness at 8:00 tomorrow morning.

THE COURT: Okay. And are you thinking, other than Mr. Heaphy, that you will conclude tomorrow?

MR. OLSON: It depends on the brevity of cross, but I think it's possible, but unlikely —

THE COURT: Okay.

MR. OLSON: — I would say.

THE COURT: I just want to make sure that the intervenors are going to be prepared to start whenever it is that the petitioners finish their case absent Mr. Heaphy.

MR. GESSLER: Yeah. We're — Your Honor,

[p.286]

we're anticipating starting Wednesday. So I guess tomorrow's a little bit of a short day, if I remember correctly, until 4:00.

THE COURT: Oh, for Halloween, correct.

MR. GESSLER: Yeah. We probably won't be ready to start tomorrow afternoon if it's done that early, but — but we'll be prepared Monday — Wednesday morning.

JA353

THE COURT: Okay. So we will end at the latest on 4:00 tomorrow. If we finish earlier, then we'll still just go to Wednesday morning, at which point we'll either be finishing petitioners' case or you'll be prepared to start.

MR. GESSLER: Great. And, Your Honor, would it be possible to get a time update, maybe tomorrow morning? No — no rush on that.

THE COURT: Well, I have one, apparently. So the — as we've calculated, the petitioners have used 4 hours and 34 minutes and the intervenors have used 1 hour and 9 minutes.

MR. GESSLER: Okay. Thank you, Your Honor.

THE COURT: And I just remind the parties to tell Collin who is going to be live tomorrow so that security knows.

JA354

DISTRICT COURT, CITY AND COUNTY OF
DENVER, COLORADO
1437 Bannock Street
Denver, CO 80203

Case Number 2023CV032577, Division/Courtroom 209

CERTIFIED STENOGRAPHER'S TRIAL
TRANSCRIPT
TRIAL DAY 2: October 31, 2023

NORMA ANDERSON, MICHELLE PRIOLA,
CLAUDINE CMARADA, KRISTA KAFER,
KATHI WRIGHT, and CHRISTOPHER CASTILIAN,

Petitioners,

v.

JENA GRISWOLD, in her official capacity as
Colorado Secretary of State, and

DONALD J. TRUMP,

Respondents,

and

COLORADO REPUBLICAN STATE CENTRAL
COMMITTEE, and DONALD J. TRUMP,

Intervenors.

The trial in the above-entitled matter, commenced on
Tuesday, October 31, 2023, at 8:06 a.m., before the
HONORABLE SARAH B. WALLACE, Judge of the
District Court.

JA355

This transcript is a complete transcription of the proceedings that were had in the above-entitled matter on the aforesaid date.

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P R O C E E D I N G S

THE COURT: Good morning. We're on the record on Norma Anderson, et al., vs. Jena Griswold and Intervenor Colorado Republican State Central Committee and Donald J. Trump.

May I have entry of appearance — if just one person for each group could make the appearances.

MR. OLSON: Good morning, Your Honor. Eric Olson for petitioners along with Sean Grimsley, Jason Murray, Martha Tierney, Mario Nicolais, and Nikhel Sus.

THE COURT: Perfect. Thank you.

MR. GESSLER: Good morning, Your Honor. Scott Gessler on behalf of President Trump. With me is Geoff Blue, Jacob Roth, Chris Halbohn who's not been admitted yet pro se [sic]. We'll keep him quiet. Mr. Justin North as well.

And I think that's it for our side for the attorneys. Thank you, Your Honor.

THE COURT: There's so many of you, it becomes a memory test.

MS. RASKIN: Here's more for the list. Jane Raskin on behalf of the intervenor, Republican State Committee of Colorado. With me, Mike Melito,

[p.8]

Nathan Moelker, and Bob Kitsmiller.

THE COURT: Great. For some reason, it's Colorado State Central Committee.

MS. RASKIN: State Central Committee. A lot of Cs.

THE COURT: Yeah. That tripped me up as well.

JA356

MR. KOTLARCZYK: Good morning, Your Honor. Michael Kotlarczyk from the Attorney General's Office on behalf of Secretary of State Jena Griswold. With me at counsel table is the Deputy Secretary of State, Christopher Beall, and also Jen Sullivan from the Attorney General's Office.

THE COURT: Great. Thank you.

MR. KOTLARCZYK: Thank you.

THE COURT: Are the petitioners ready to proceed?

MR. OLSON: Yes, Your Honor. I do think one preliminary matter about the potential expert from Intervenor Trump. Based on discussion this morning, they've said that they've decided an expert is not available, so they're not going to call an expert — a new expert, yeah.

MR. GESSLER: That's correct, Your Honor. It was a false alarm yesterday. We were not

[p.9]

able to get him.

THE COURT: Okay.

MR. GESSLER: And then also, we are withdrawing one witness.

THE COURT: Okay.

MR. GESSLER: And I think I've notified opposing counsel of that.

THE COURT: Okay.

MR. OLSON: Thank you. We are ready to proceed with testimony. Oh, sorry.

MR. GESSLER: Just one thing.

Your Honor, for clarification of protection order at this point, are we able to reveal the names of witnesses? I know some of them were revealed in opening argument, but I want to just get clarification.

JA357

THE COURT: Do the petitioners have a point of view? I think you were mainly concerned about witnesses you were calling.

MR. OLSON: Correct. I guess the question is it going forward, or is it a question of unsealing the stuff that's been filed already?

MR. GESSLER: I've had questions about the names of witnesses. I'd like to be able to reveal them, but I want to be mindful of the protective

[p.10]
order.

THE COURT: Of your own witnesses?

MR. GESSLER: Yes.

MR. OLSON: So our view is what Your Honor said, which was we wanted to make sure that we didn't lose any witnesses before the hearing, which we did.

But now that we're underway in the public proceeding, the names of the witnesses are fine to reveal.

MR. GESSLER: Okay.

THE COURT: Okay. That's fine with the Court as well.

MR. OLSON: Are we ready to start with testimony?

THE COURT: If you are.

MR. OLSON: I am. All right. At this point, the petitioners call Dr. Peter Simi.

THE COURT: Will you raise your right hand, please.

PETER SIMI,

having been first duly sworn/affirmed, was examined and testified as follows:

THE COURT: Great. Just make sure to speak into the microphone, okay?

[p.11]

THE WITNESS: Yes.

JA358

DIRECT EXAMINATION

BY MR. OLSON:

Q. Good morning, Dr. Simi.

A. Good morning.

Q. Could you please introduce yourself and spell your last name?

A. Pete Simi, S-i-m-i.

Q. Dr. Simi, what do you do?

A. I'm a professor of sociology at Chapman University.

Q. Where is Chapman?

A. It's in Southern California.

Q. You're here as an expert witness.

How would you describe your expertise?

A. In short, political violence and political extremism.

Q. How do you know about political violence and political extremism?

A. I've been studying these issues my entire career, 27 years, since 1996.

Q. Do you have any formal training in political violence and political extremism?

A. Yes. I earned a PhD in sociology. That was one of my main emphases in my studies in 2003.

[p.12]

Q. And you said you've been working in this field for about 25, 27 years.

Tell us a little bit about the kind of work you've done over the past two and a half decades.

A. Yeah. I've collected data using a number of different methods to study political extremism and political violence, to include ethnographic fieldwork, interviews with current and former members of extremist groups, and then a variety of different type of archival methods to gather data and information about both political extremism and political violence.

JA359

Q. I want to talk about some of the methodologies you just mentioned. And to help us keep track, I'm going to write them down on the flip chart so we can come back to it a couple times in your testimony.

A. Okay.

Q. And I believe the first kind of methodology you mentioned was fieldwork; is that right?

A. Yes. That's correct.

Q. Okay. What is fieldwork?

A. Fieldwork is a type of method that's employed by a range of different disciplines in the

[p.13]

social sciences and, frankly, outside the social sciences — in the military and business world as well.

But it's a method of gathering information where you spend time with people in their natural environments in order to understand a culture, a community, a group, a set of individuals. Learn from their perspective, learn how they understand the world, learn about their lives in their natural settings.

And so for me that's meant spending lots of time with active members of different types of extremist groups, actually living with families and individuals in some cases attending gatherings and so forth.

Q. When you say "living with families in some instances," tell us a little bit more about that kind of fieldwork.

A. Well, that's sometimes referred to as embedded fieldwork, where you're actually, you know, living with the objects — the subjects of your study. And, you know, for me that meant staying in spare bedrooms or crashing on their living room couch and observing individuals in their daily lives and the other types of activities that they're involved in

[p.14]

beyond, you know, what they do in their home.

Q. And I believe the second kind of methodology you mentioned that you relied on for the past two and a half decades was interviews; is that right?

A. Yes. That's correct.

Q. Okay. Tell us what you mean by interviews.

A. Well, interviews are basically a structured type of conversation where you, you know, sit down with a person and ask, you know, specific questions based on, you know, whatever the focus of your study is. And so for me that meant interviewing current members of extremist groups, but also former members as well.

Q. Okay. What was the third kind of methodology you mentioned?

A. Archival.

Q. Okay. Tell us what archival work is.

A. Well, that's kind of a big bucket. It covers a broad kind of range of — different things would fall under archival research. That would be — you know, if you think about an archive, it's basically just a collection of information.

Sometimes archives are generated for

[p.15]

very specific purposes to allow researchers to conduct, you know, studies of various kind. And other archives are not necessarily generated for that purpose explicitly, but they do provide researchers an opportunity to conduct studies.

So if you think about, for instance, a video archive would be YouTube. And then, of course, there's lots of different historical archives that are available at universities, for example. Social media is a type of archive where you're studying platforms and how people

JA361

communicate on platforms. That would be a kind of archive. Websites are a kind of archive, newspapers are a kind of archive.

So it does cover — a broad range of things would fall under that.

Q. Great. Thanks, Dr. Simi.

And if I could just make a request for the court reporter's benefit: If we could slow down a little bit when we're talking, I'm sure —

A. Excuse me. Sorry.

Q. Now, are — these three kinds of methodologies that we've talked about, are those standard methodologies used in sociology?

A. Very much so.

Q. How do you know that?

[p.16]

A. Well, working in the field for 27 years, part of that is — that's part of my job. Part of what you do in terms of presenting your research at professional conferences, that's one of the things that's discussed is research methodology. When you submit your research for peer review in terms of academic journal articles, research methods are certainly scrutinized and reviewed.

And then I teach both undergraduate research methods now at Chapman, but previously at the University of Nebraska I taught PhD-level research methods.

Q. Is your teaching part of the course, or is that a stand-alone course?

A. Okay. Research methods is a stand-alone course.

Q. Okay. And are the methods that we're talking about today the methods you teach in your research methods course?

A. Yes, it is.

JA362

Q. Okay. Now, I want to talk a little bit about some of your experience with each of these methodologies.

And I want to talk first generally, and then we'll talk specifically about the groups involved

[p.17]

in the January 6 attack, okay?

A. Okay. Sure.

Q. How many — well, how much fieldwork have you done generally in your career to study extremist groups?

A. Thousands of hours, literally.

Q. Okay. And then have you done fieldwork — well, I know I'm supposed to talk into the microphone. Let me ask the question.

Have you done fieldwork — well, let me ask a threshold question.

What groups have you identified as playing a leading role in the January 6 attack?

A. The Proud Boys, Three Percenters, and Oath Keepers.

Q. Okay. Have you also done fieldwork with those groups?

A. Yes, I have.

Q. Okay. So if it's okay with you, Dr. Simi, I'll just write "J6," and put all three to show you're familiar with all the groups in this case.

A. Yeah. Sure. That's fine.

THE COURT: I'm sorry. What does the J stand for?

MR. OLSON: The groups involved in

[p.18]

January 6.

THE COURT: Oh, duh.

MR. OLSON: Sorry. Trying to fit it all on one chart, Your Honor.

JA363

Q. (By Mr. Olson) For interviews, how many interviews of right-wing extremists have you done in your career?

A. 217.

Q. And how many interviews have you done with members of the Oath Keepers, Proud Boys, and Three Percenters?

A. 14.

Q. And what about archival research? How would you describe the amount of archival research you've done in your career?

A. It's a little trickier than the fieldwork where you can count hours, or the interviews you can count the number of interviews.

But, you know, you can look at it in terms of time spent, you can look at it in terms of the number of different archives, number of websites, social media platforms. But given that's really where I started in 1996 — was all online and doing archival research online. It would definitely be in the thousands.

[p.19]

Q. Okay. And have you done archival research involving the three groups involved in January 6?

A. Yes, I have.

Q. Okay. Now, Dr. Simi, I want to talk a little bit about your work in this case.

How did the archival material available for your work here compare to the kind of archival material you typically rely on?

A. It's very consistent.

Q. How is that?

A. Similar types of materials. It was social media materials, court documents, scholarship — you know, existing scholarship, folks who are also studying the same

JA364

topics, looking at their findings — government reports. You know, just a variety of different kind of materials that I've used over the years were very comparable to what was done in this case.

Q. And you've used all the three methodologies for your work in this case; is that right?

A. Yes. That's correct.

Q. Is it common for work in sociology to rely on all three of these methodologies?

[p.20]

A. Well, this would be referred to as a multimethod approach. And multimethod approaches are often referred to as kind of gold standard. Certainly to conduct research in an accurate manner doesn't require using all three. You could conduct a very legitimate study with any one or some combination, but using all three certainly would be, like I said, the gold standard.

Q. Dr. Simi, have you testified as an expert before?

A. Yes, I have.

Q. Tell us a little bit about that.

A. I testified in the Sines v. Kessler civil case that was related to the Unite the Right rally in Charlottesville, Virginia.

As you may recall, that was a rally that turned deadly violent in 2017. And I testified on behalf of the plaintiffs in that case as it relates to the way in which the Unite the Right rally was organized and the central role that violence played in how the event was organized.

Q. Have you worked on other cases as an expert?

A. Yes, I have.

Q. Tell us a little bit about that.

[p.21]

A. I testified in a murder case in Portland, Oregon. I was asked by the Multnomah County District Attorney's

JA365

Office to review some materials in terms of statements in posts and so forth that the defendant who had been charged in this case had made. And the district attorney's office asked for me to offer an opinion as to whether I felt those statements were consistent with white supremacist extremist beliefs.

Q. Have you ever worked on behalf of defendants in cases?

A. Yes, I have. Many times. I've worked with public defender offices, for example, across the country.

Q. Now, have you published on extremist political violence?

A. Yes, I have.

Q. Tell us about some of your publications.

A. Well, I've written a number of articles, more than peer-reviewed articles or book chapters and edited volumes that address different facets of political violence and extremism. And I've published — co-authored two books on the topic.

Q. Tell us about the two books.

A. Okay. The first book was "America's
[p.22]

Swastika: Inside the White Power Movement's Hidden Spaces of Hate." That relied on all three of the methods that we were just discussing — fieldwork and interviews and archival research. And the basic focus of the book was looking at the type of cultural and social spaces that are important to white supremacist extremists in terms of sustaining their beliefs and the central role violence plays in that culture.

And the second book that's due to be published in the next month or so, I guess, is actually looking at the forces or the influences that ultimately led to the attack on the Capitol on January 6.

JA366

Q. What's your new book called?

A. "Out of Hiding."

Q. Why did you choose that title?

A. Well, we look at the way in which the — starting with the election of Barack Obama in 2008 and a series of other developments following that, how that led to a substantial reemergence of far-right extremists.

Q. And the "Out of Hiding" refers to sort of coming out of hiding?

A. Yes. Exactly.

Q. Okay.

[p.23]

A. Yep.

Q. Now, on the screen I've put Plaintiffs 161, which is a copy of your CV. And I don't want to go into everything in this.

MR. OLSON: And really, I welcome guidance from Your Honor in terms of how you want to do this.

But would it be easiest to move it to a demonstrative exhibit so you have an understanding of his expertise, Your Honor? Or we can go through a couple of highlights.

What would be most preferable to you?

THE COURT: Why don't we just walk through his qualifications. The highlights would be fine.

MR. OLSON: Okay. Great.

Q. (By Mr. Olson) So, Dr. Simi, if we — if we scroll down we see your education, and we've already talked about that.

Can you tell us a little bit about some of the trainings that you've given?

A. Yes. I've done a number of trainings for law enforcement, the legal field, educators over the years in terms of law enforcement. I've provided training to the Federal Bureau of Investigation,

[p.24]

Department of Homeland Security, Federal Bureau of Prisons, Department of Justice, and a number of state-level and local-level law enforcement agencies across the country. I've done trainings for legal organizations like the American Bar Association, and educational institutions across country.

Q. And have you received some grants and fellowships — some grants from federal government agencies to study political extremism?

A. Yes, I have.

Q. Can you tell us — it's on the screen right now. Can you tell us a couple examples of those?

A. Sure. The National Institute of Justice, which is housed within the Department of Justice, Department of Homeland Security.

Q. What kind of trainings do you provide — I'm sorry. What kind of work do you do under those grants?

A. Sure. It's basic research; that is, research intended to look at different questions as it relates to the causes and consequences of political extremism and political violence, looking at different

[p.25]

factors of the individual group. And on a broader societal level, in terms of what kinds of things influence these issues and what kinds of measures seem to be most effective in terms of countering them.

Q. And here on the screen I have your expert legal consultation.

Is this a list of the cases where you've been retained as an expert, this page and the next?

A. Yep. It appears to be.

Q. Okay. And then did you provide testimony to the January 6 Committee?

A. Yes, I did.

Q. Why was that?

A. I was invited to provide written testimony.

Q. Fair to say, Dr. Simi, you've been working on issues of right-wing extremism well before we've been working together on this case?

A. Yes, I have. My entire career basically.

Q. Okay. Did you work with us to prepare a demonstrative exhibit to summarize your work in this case?

A. Yes, I did.

Q. Okay. I'm having a little bit of

[p.26]

computer issue. Let me see if I can bring it up on the right screen.

THE COURT: While you're doing that, I just have a quick question.

THE WITNESS: Yes.

THE COURT: You said that your book, "Coming [sic] Out of Hiding" is from 2008 forward.

When did — kind of culminating on January 6; is that correct?

THE WITNESS: That's correct, Your Honor.

THE COURT: Did you start working on it before January?

THE WITNESS: We did. Yeah, we did. That happened while we were working on it, which obviously added an additional item that — certainly, an additional development that we needed to address because it was a new facet that was a substantial, important historical event that was very relevant to what we were already analyzing and discussing.

THE COURT: So that was a work in progress, and then that book becomes a new chapter or chapters?

JA369

THE WITNESS: Absolutely.

THE COURT: Thank you.

[p.27]

Q. (By Mr. Olson) On that, Dr. Simi, did you express any concerns about the possibilities of violence related to the — after the 2020 election, before it happened?

A. Yes, I did.

Q. Tell us a little bit about that.

A. Well, in the summer of 2020, I thought it was pretty clear that depending on the outcome of the election there was a lot of anger and resentment and mobilization that was really starting to increase among far-right extremists. And that, should Donald Trump not be reelected, I thought it was pretty clear that far-right extremists would respond with political violence.

MR. OLSON: I think I've got the tech issues worked out.

Q. (By Mr. Olson) So this is the demonstrative that we worked together to prepare for your summary?

A. Yes, it is.

Q. Okay. Let's go to the first page. And tell us, what topic did you address in your work in this case?

A. Looking at the kind of defining characteristics of far-right extremism, including the

[p.28]

central aspects of their communication style; the influence that Donald Trump and relationship Donald Trump has developed with far-right extremists that includes certain communication strategies; the motives for those who attacked the Capitol on January; and then Donald Trump's role in the attack on the Capitol.

Q. How does your expertise over the past years help you address these topics?

JA370

A. Well, when you've spent as much time as I have, you know, directly observing, directly engaging, interviewing active and formerly active members of far-right extremist groups and that those aren't, you know, affiliated with specific groups as well, understanding that culture provides lots of different types of insight about things like motivations.

And then the archival research is really important as well because that also provides certain insight about people's perspectives, motivations, communication strategies, and so forth.

Q. You talked about communication strategies.

Can you give us a couple examples of things that are particularly unique to right-wing extremist communication just to help us understand

[p.29]

what you mean by that?

A. Sure. You know, in terms of this case, for example 1776, is very relevant.

To an outsider, that might just sound like a number or a fairly innocuous historical reference to the, you know, Revolutionary War. But to insiders within far-right extremist culture, that has a very specific connotation and relationship to violence, and it really is a direct call to violence.

Q. Tell us a little bit about the materials that you reviewed in this case to address these four issues.

THE COURT: Before you go there, I just have one follow-up question. Sorry.

MR. OLSON: No, please. Go ahead.

THE COURT: When you were talking about the fieldwork, and you said that sometimes you — I heard you say you embed yourself? What do you mean? How is that different than an interview? And does the group that

JA371

you're embedding yourself, like, do they know that you're embedding yourself, or are you undercover?

I'm just trying to understand what the distinction is between fieldwork and the interviews.

THE WITNESS: Sure. It's a great

[p.30]

question, Your Honor.

The fieldwork would involve a more immersive experience from a research standpoint. So it would include a lot of observation. It would include informal interviews, which would be much more conversational in style.

When you're embedded, depending on the approval you receive from what's called the Institutional Review Board — which academic research is governed under federal regulations under institutional review boards. There is a way to do that where you don't have to obtain informed consent and you could do it — you could be embedded surreptitiously without your participants' or subjects' knowledge.

But the fieldwork I did in terms — certainly in terms of the folks that I lived with, they knew that I was doing research. Some of the larger gatherings that I attended as part of fieldwork, people wouldn't necessarily know that I was a researcher, and they might assume that I was one of them. And then I essentially would notify people as my relationship with them kind of developed.

And so the main distinction, I would say, between the interviews is they're much more

[p.31]

structured than compared to the fieldwork, which is, again, intended to be a much more naturalistic way of gathering information, whereas the interviews are, while

JA372

helpful and certainly provide a lot of insight, are also pretty structured and formalized.

THE COURT: But for the most part, you're not going — you're not becoming a member of the group or pretending to be a member of the group while you're doing research?

THE WITNESS: I've never done that, Your Honor.

THE COURT: Okay. Thank you.

Q. (By Mr. Olson) And, Dr. Simi, can you just give us a couple real-life examples of — you mentioned sleeping on someone's couch or their spare bedroom.

How do those come to be?

A. Well, it's a pretty kind of involved process you might say in terms of gaining people's trust and building rapport with individuals, spending time with them, to where they feel comfortable with inviting you to do that.

Now, sometimes it ends up happening much quicker than I expected.

Contacting folks, you know, when I first

[p.32]

started, this was in the early stage of the internet, so P.O. boxes were still kind of a thing. So my first contacts actually, you know, emerged through letters that I wrote to P.O. boxes, and I was able to meet with individuals in person. And then from there, develop relationships where they were comfortable enough with inviting me into their homes.

Q. And help us understand how sort of someone who is a member of a right-wing extremist group would say to a university professor, "Why don't you come stay in my bedroom."

How does that come to be?

A. It doesn't always quite happen like that. I've had many doors slammed in my face. I've certainly been

JA373

asked in not-so-polite terms to get lost. So that certainly happens.

But for some, they see it, I think, for a lot of different reasons. First, sometimes people enjoy being the focus of attention, you know. So having a researcher say that, you know, they're interested in you and want to spend time with you, for some people they find that satisfying on some level.

For some they see it as an opportunity to get their message out, to recruit potentially the — if not the researcher, then at least get their

[p.33]

message out there and try and, you know, shape things and influence things more broadly.

So I think there's a number of different motives that, you know, lead to people making those kind of invitations.

Q. And I want to be clear. We've talked about sort of your work with fieldwork and interviews with the groups involved in Jan 6.

Did that work happen before or after January 6, 2021?

A. Before.

Q. Okay. And did you rely on all three of these methodologies in your work in this case?

A. Yes, I did.

Q. Okay. And are these the sort of methods and materials that experts in your field reasonably rely on in forming opinions upon the subject in political extremism?

A. Yes, it is.

Q. Okay. Based on your scholarship, your prior work, and your review of materials in this case, are you familiar with events of and leading up to January, those who participated in the attack, and Mr. Trump's role in those events?

A. Yes, I am.

[p.34]

MR. OLSON: Your Honor, at this point in time, we'd tender Dr. Simi as an expert on political extremism, including how extremists communicate and how the events leading up to and including the January attack relate to longstanding patterns of behavior and communication by political extremists.

MR. GESSLER: We'll renew our 702 objections, Your Honor.

THE COURT: Okay. Professor Simi will be admitted as an expert on political extremism, excluding [sic] how extremists communicates, and his interpretation of January 6 vis-a-vis his expertise in extremism and extremism communications.

MR. OLSON: Thank you very much, Your Honor.

Q. (By Mr. Olson) Let's turn to some high-level findings, and then we'll get more granular as our conversation continues, okay, Dr. Simi?

A. Sounds good.

Q. So on the screen we have pictures of the three groups we've talked about. But let's start with a basic definition.

What is far-right extremism?

A. The best way to think about far-right extremism is that it's defined by some core

[p.35]

characteristics. And let me first say, in terms of thinking about it and visualizing it, is if you think about a constellation in the sky, if you think about a broad-based network, that's what we're talking about with far-right extremism.

There's individual appearance, there's groups and organizations. These are all part of this constellation.

JA375

And it's pretty far-ranging. It includes, you know, a disparate set of elements.

But then there are these core characteristics that cut across certain beliefs, practices, and then communication strategies.

Q. Let's talk about some of these core characteristics.

What are some of the core characteristics about beliefs in far-right extremism?

A. Several things, really.

Heavy reliance on conspiracy theory. Explaining events, situations as the result of kind of shadowy forces that are on scene. And those, you know, specific types of conspiracy theories are pretty far-ranging that are kind of adhered to among far-right extremists, but the use of conspiracy theory is very central.

A strong distinction between us and

[p.36]

them. And, of course, people, you know, in general make distinctions between us and them, and oftentimes it's quite innocuous. If you think about, for instance, sports fans, you know, make distinctions — Packers fans or Vikings fans and so forth. Pretty innocuous for the most part.

But what we're talking about here in terms of distinctions between us and them for far-right extremists is that "them" are really viewed as enemies, as representing existential threat, and are often described in very dehumanizing terms — degenerates, scum, infestation. These kind of dehumanizing terms are often used among far-right extremists to describe the — you know, the people that they believe are opponents and that represent these threats.

Another central kind of tenet is really a kind of antidemocratic ethos that really, you know, moves in the

JA376

direction of supporting authoritarian impulses, authoritarian beliefs, authoritarian leaders/structures of various sorts.

So I would say those are kind of three defining aspects of beliefs.

Q. Next on your slide is “Practices Including Violence.”

[p.37]

Talk to us about the role that violence plays in far-right extremism.

A. Because, in part, of what I just mentioned about beliefs, the idea that there’s these existential threats out there that have been dehumanized, violence is viewed as a necessary tactic to achieve political goals.

Violence is glamorized and glorified in many ways, viewed in a kind of legitimized fashion, seen as a form of self-defense to fend off these existential threats.

So it is, again, very central to — it’s certainly not the only practice, but it is a central practice.

Q. And the last core characteristic is communication strategies.

Tell us a little bit about communication strategies you’ve observed in your work.

A. Yeah. So some of the things in terms of communication strategies that I’ve observed, but other scholars in the field have also observed as it relates to far-right extremism, is a reliance on doublespeak, which is a specific kind of deceptive style of communication that often involves using words that have multiple meanings — one meaning for insiders,

[p.38]

another meaning, potentially, for outsiders. Using language with a so-called wink and a nod, you might say.

JA377

Also making substantial kind of distinctions between front- and backstage behaviors. So presenting oneself or a group in a particular way that is more favorable on the front stage, and then being much more open about things like the use of violence on the backstage.

And the same would apply to the doublespeak in terms of its relationship to violence, that it's a technique, a communication strategy that's used to promote violence but in a kind of deceptive way.

Q. And let me stop you right there, Dr. Simi.

Where would the 1776 example that you talked to us about earlier fit in to this vocabulary you're talking about right now?

A. Yeah. That would be a type of doublespeak, because, again, it would have a certain meaning to outsiders who aren't familiar with the kind of inside culture. But to insiders within the culture, they would understand and interpret that word differently.

[p.39]

Q. Do all far-right extremists share these beliefs, practices, and communication strategies?

A. These are core characteristics that cut across the culture. But we are dealing with, you know, a large culture that has different elements. And so, you know, you're going to see varying degrees. But these characteristics do have a high degree of salience that does cut across culture.

Q. You've selected three groups to highlight here on this slide.

Can you tell us a little about each of these groups?

A. Sure. The first group to my left is the Proud Boys. And they were founded in 2016 by Gavin McInnes, more recently been led by Enrique Tarrio. They were really founded, according to McInnes's own words, as a violent

JA378

street gang with a political ideology that is referred to as Western chauvinism.

Q. I'm sorry. You said Western —

A. Chauvinism.

Q. Okay. I'm sorry.

Tell us a little bit more about the Proud Boys.

A. Sure. So the political violence that they gravitate towards is, you know, directed to

[p.40]

people they believe to be political opponents. And the emphasis or the kind of central nature of violence for the Proud Boys is kind of best you might say exemplified by their mantra, "Fuck around and find out."

THE WITNESS: Excuse my language, Your Honor.

A. And that's a commonly used mantra. In fact, you actually see it in that image there in terms of the acronym. But that's really kind of an — in a nutshell, how they view the important use of violence to achieve their goals.

Q. (By Mr. Olson) Tell us about the Oath Keepers.

A. Sure. They were founded in 2009 by Stewart Rhodes, who is a Yale Law School graduate. And the Oath Keepers were a part of the second wave of the antigovernment militia movement that emerged shortly after Barack Obama's election in 2008.

The first wave was, of course, during the 1990s and ultimately culminated in the Oklahoma City bombing in 1995. And then the movement was — kind of somewhat dissipated for a period of time, but it then had a second wave that reemerged in 2008.

And so the Oath Keepers were part of

[p.41]

that. They focus a lot on the idea of law enforcement and military, maintaining their oath that — to maintain the

JA379

Constitution, which they believe the government has become tyrannical and is violating the Constitution. And they adhere to lots of different types of conspiracy theories about the government putting people in detention camps and things of that nature.

So there's a high degree of kind of paranoia among the Oath Keepers. They've been involved in various armed standoffs, like the Bundy ranch standoff in 2014 in Nevada, and the Malheur Wildlife Refuge in Oregon, the standoff that occurred there in 2016, and several others.

So that's kind of the Oath Keepers in a nutshell.

Q. What about the Three Percenters?

A. They were founded just a year before the Oath Keepers, so in 2008. So they were also part of the second wave of the antigovernment militia movement that emerged at that time. And the Three Percenters were founded by Mike Vanderboegh, who actually had been involved in the first wave of the militia movement in the 1990s.

And they developed kind of a more

[p.42]

decentralized set of — different types of Three Percenter groups across the country. They've been involved in actual plots — domestic terror plots on multiple occasions. And their name itself refers to the idea — the actually inaccurate idea that only 3 percent of the colonists fought against the British in the American Revolution.

And the reason why that's important for them is because they believe they're this same kind of vanguard that's now fighting against the U.S. government that's become tyrannical.

Q. Let's turn to the next slide.

JA380

And tell us — we've talked generally about the role violence plays in far-right extremism.

But tell us why you chose pictures of the Unite the Right rally to show this violence and the role that violence plays more generally.

A. Well, it was a very important event among far-right extremists. Of course, the name itself indicates in part some of their efforts in terms of uniting the right, and the fact that violence was always intended to be part of this event.

When you looked at the social media platforms where Unite the Right was organized, Discord and other platforms, there were discussions, for

[p.43]

example, of using automobiles to attack individuals that were counterprotester, which obviously ultimately happened on the second day.

Q. Excuse me. Is that what we see on the right?

A. Yes. Yes. So there you see James Fields' car mowing into this group of counterprotesters in the afternoon after the state of emergency had been called and things were starting to disperse.

And, of course, Heather Heyer was murdered in this car attack. And a number of other individuals — you see there Marcus Martin in mid-air — he was permanently disabled from his being struck by the car, and — as were a number of other individuals seriously injured.

So we have the car attack, and then to the left, you see the way in which a flagpole is being used to bludgeon individuals they perceive as political opponents.

That was also discussed ahead of time. Individuals on Discord platform and other platforms were talking about what types of instruments they could use as weapons and

the importance of framing it as self-defense, and also the importance of framing it

[p.44]

as that we're just joking about committing violence.

Q. I want to talk a little bit more about this framing of self-defense.

Tell us a little bit more about that.

A. Well, given that within society we generally recognize the right that individuals have to defend themselves in certain situations where they may be harmed or their life is being threatened, any time an individual or group can frame their violence as self-defense, it offers a degree of legitimacy. And that is true of individuals and it's true of groups.

It's also a part of this worldview that they have that they really are under threat, under attack from a variety of forces. And so, therefore, any time they engage in violence, from their perspective, it becomes kind of seen as a type of self-defense.

Q. And you mentioned some of the humor, I believe, when you answered just now. Let's turn to the next slide.

And tell us what you see on the left. Why did you choose to have this quote from Robert Ray on the left?

A. So Robert Ray was one of the central organizers of the Unite the Right rally. And here he

[p.45]

is actually explaining. And this is where archival material becomes really useful and important from a research standpoint because in this quote he's explaining the role or the function in terms of how they use humor to essentially promote violence, but do it in a way that is not always obvious. To keep people off balance in terms of not knowing whether their calls for violence are to be taken seriously or not.

JA382

They know as insiders that the calls are meant to be taken seriously, but they understand that by framing it as humor, outsiders may not always be able to discern the difference.

Q. And one more question on the violence and far-right extremism.

Does everyone attracted to far-right extremism engage in violence?

A. No. No. Not at all. There's, I think — you know, we can talk about different roles that individuals have in terms of within this culture as it relates to violence.

One are violence players. That is, these are individuals who really help orchestrate, plot violence, but aren't directly involved in it themselves. Stewart Rhodes, Enrique Tarrío would be

[p.46]

current examples that fit that mold.

Then you have your violent implementers. These are individuals who may help in the planning or may not help in the planning, but their primary kind of role is to actually execute or implement the violence. These individuals often come prepared to commit violence. They may have weapons of various sorts or other instruments that are helpful for them in terms of trying to complete their violent acts.

Then you have other folks that in some situations, they may be open to committing violence, but they're not involved in the planning, and they aren't necessarily, you know, intending to commit violence at the outset. But given a certain situation, they might be open to it or certainly at least wouldn't necessarily prevent violence from occurring.

And then you have kind of a fourth bucket of folks that are kind of sympathetic bystanders you might say. And

JA383

these are folks who aren't planning. You know, they're not, you know, engaging in the violence, but they may, you know, more indirectly, in more subtle ways support the violence.

Q. And on the left we see a picture of a person attacking wearing a helmet and goggles.

[p.47]

Is that an example — like what category of — would you put someone like that in?

A. Without — I would say probably a violence implementer.

Q. Why is that?

A. Well, they've come prepared for violence in terms of having the goggles and the headgear. And then they're, you know, using an instrument that's meant to be, you know, for displaying a symbol. They've turned that into a weapon.

And, again, based on what we know about how Unite the Right was planned and the directives that were discussed in great length about how to use things like flagpoles as weapons, I think that certainly we could, you know, infer that this person came prepared to use their flagpole in that respect.

Q. Okay. Let's go to the communication style. And on the right we have a video of Nick Fuentes.

Who is Nick Fuentes?

A. In short, he is a white supremacist leader, quite influential among folks who follow him. He was present at the attack on the Capitol, January 6. He was present at Unite the Right rally. He has substantial presence in terms of social media

[p.48]

platforms as well as offline. And yeah, that's Fuentes.

Q. And we'll play the video.

JA384

MR. OLSON: But just to make sure we're doing housekeeping correctly, this is P-120, which is admissible, but hasn't yet been admitted under the Court's October 27 order.

So I'll go ahead and play the video.

THE COURT: And is it — is he part of one of the three groups, or is he out on his own?

THE WITNESS: No. He's not involved in those three groups.

THE COURT: Okay. And what — you said it was which video?

MR. OLSON: P-120.

Can I play the video, Your Honor?

(Video was played.)

THE COURT: Could you actually replay it a little louder?

MR. OLSON: Yes.

(Video was played.)

Q. (By Mr. Olson) So, Dr. Simi, why did you include this video of Nick Fuentes?

A. It's an illustration of how the doublespeak works in real time where you have both

[p.49]

advocacy and then — you know, part of doublespeak is about developing plausible deniability where you insert certain aspects in terms of the communication that allows you then to say after the fact, "Well, I didn't mean it." Or it gives you some type of kind of built-in excuse, you might say, built-in rationale for why you shouldn't be taken in terms of saying what you said as a promotion of violence.

So this really kind of exemplifies that style of communication. And I think it's important to recognize that among far-right extremist leaders like Nick Fuentes,

you're not going to see very often just completely open promotions of violence.

Oftentimes, there's these efforts to build in the plausible deniability so that it's not obvious, and a person can't be — or it's more difficult to hold a person criminally or civilly liable for promoting violence.

So this is, you know, very consistent with what we see among far-right extremists more broadly.

Q. To make sure we understand exactly what you mean, talk us through the specific things Mr. Fuentes did in this video that is that doublespeak.

[p.50]

A. Yeah. Do you want to replay it one more time?

Q. Sure.

(Video was played.)

A. Okay. Stop it. So right there —

(Video was played.)

A. So. Right. The first statement is, you know, killing state legislators. We've got him saying, "What else are you going to do?" And then we get the negation, "but I'm not suggesting that." But then, "What else can you do, right?"

So it's kind of a teeter-totter back and forth in terms of promoting, bringing it back, and then still promoting. And so that's — that's the strategy.

Q. (By Mr. Olson) Are these techniques unique to far-right extremists?

A. Doublespeak and front- and backstage behavior, these are common aspects of human behavior more broadly.

All of us, I would assume, in this room at some point in our lives have used some form of deceptive language, have used some types of doublespeak. We all present ourselves differently on the front stage.

[p.51]

If you think about a job interview, for example, you're going to present yourself in one fashion. And then on the backstage when we're in the privacy of our home, we might engage differently. So these are very common things.

What's distinctive about what we're talking about here today is that the front- and backstage and the doublespeak are connected to violence and the use of violence. So that's what distinguishes far-right extremists in these respects as it relates to these communication strategies.

Q. How do you know these communication strategies work?

A. Well, that comes, again, from the data collection. That comes from the fieldwork and having the opportunities to observe the culture and how it operates. That comes from interviewing active members of these groups and formerly active members of these groups and having them discuss these strategies and how things are structured in terms of within the culture.

And that comes from the archival material. I mean, this quote here from Robert Ray is — again, it's an important example of what can be learned from archival material in terms of, you know,

[p.52]

some of these issues.

Q. What about instances where violence occurs and then there's discussion of violence after the violence has occurred? Have you looked at that in your work?

A. I'm sorry. Could you repeat the question?

Q. Yeah. What about when violence occurs and then there's communication after the violence? Did you look at that in your work in this case?

A. Yes.

Q. Okay. Tell us what you learned about these communications strategies from looking at what people say after violence occurs.

A. Well, you're going to get certain kinds of promotions, certain kinds of endorsements. But, again, it's not always going to be completely transparent in the endorsements for public relations purposes, for, you know, in particular. But certainly, the endorsements afterwards in terms of supporting violence is an important part of reinforcing kind of the cultural — acceptable role violence plays within the culture.

Q. What about condemnation after; is that an important factor? After the condemnation, is that

[p.53]

something you study?

A. Yeah. When you have an absence of condemnation, that then can be interpreted — and often is interpreted among far-right extremists — as essentially a type of endorsement, that is, an endorsement by omission.

Q. And how are you confident that the audiences understand these speakers' messages when they use this communication style?

A. 27 years of gathering data, spending thousands of hours in the field talking with individuals immersed in this culture, talking with individuals who used to be immersed in this culture and aren't anymore, going through the volume of archival materials. You know, I feel very confident that these strategies are widely understood. Individuals indicate this.

And other scholarship finds similar things, so there's consistency in what I've found with other scholars who've also studied this issue.

JA388

Q. In your report you talk about repeat interactions between a speaker and the audience.

Does repeat interactions influence your conclusion that these communication styles are effective?

[p.54]

A. Yes. Absolutely. Again, that's part of kind of this cultural immersion. As people become more immersed within a cultural environment — and that would be true of any culture, really. The more repeated interactions between a speaker and an audience, the more understanding develops, the more people begin to be able to interpret contextual cues which are an important part of what we're talking about here. Context is very relevant in terms of understanding communication.

And so the more immersed you are within a culture, the more able you are to interpret context.

Q. Talk to us about your earlier example of 1776 through the lens of this immersed in culture and repeat interactions.

What did you see in your study?

A. Well, for individuals that, again, are immersed in the culture, then you're going to over time start to develop an understanding of a term like "1776" and how it becomes a call for violence. And so as people interact both online and offline and are exposed to the messaging, then that's where the familiarity develops.

Q. Tell us — I think you said this already, but just to make sure we're clear: Based on

[p.55]

your work, what does 1776 mean among far-right extremists?

A. It's a violent call for a revolution.

Q. Okay. Did you see examples of 1776 being used as a violent call for revolution leading up to it on January 6?

JA389

A. I saw the speeches. There's a document that the Proud Boys acquired, "1776 Returns," which was basically a blueprint for attacking the Capitol.

So yes, there were several aspects to 1776 in my opinion was being used as a call for violence.

Q. What is — you talked about a document, "1776 Returns."

Tell us a little bit more about that document.

A. Well, it's a document that Enrique Tarrío acquired through an associate. And the document was — like I said, it was a blueprint. It had logistics in terms of how to go about attacking the Capitol. It had scenarios, you know, vantage points in terms of different location spots, vulnerabilities, and so forth.

So it was, you know, a recipe of sorts, you might say.

[p.56]

Q. Now I want to turn from far-right extremists generally and focus on their relationship and communication with Donald Trump.

Can you describe these — oh, sorry, I'm getting ahead of myself — the relationship between Donald Trump and far-right extremists?

A. Well, in my years of studying this — and, again, this is confirmed among other scholars — far-right extremists generally would perceive national political leaders with a lot of skepticism and cynicism because of their view of the government being basically corrupt and so forth.

So the relationship that developed between Donald Trump and far-right extremists really, in many respects, is somewhat unprecedented, certainly at least in recent history, in that far-right extremists really were galvanized by his candidacy starting in 2015. And a relationship really emerged between Donald Trump and far-right extremists, with far-right extremists really

JA390

seeing him as speaking their language and, you know, really addressing many of their key grievances.

Q. So on the screen we have an excerpt from Donald Trump's campaign launch speech in 2015.

Tell us why you chose to highlight this
[p.57]

portion of Donald Trump's 2015 speech.

A. Yes. And if I may just very briefly.

Even before 2015, you know, Donald Trump was promoting — you know, one of the kind of leading figures for promoting birther as the challenging — conspiracy theory challenging Barack Obama's legitimacy to serve as President.

And that put him in the orbit of folks like Alex Jones, you know, far-right media influencer. And so that was really the beginning.

And then when he announced his candidacy to run for President there in June of 2015 and used this language, that was a real kind of clarion call for far-right extremists, that this is somebody we want to pay attention to.

And you can see here in the quote referring to when Mexico sends its people, "They're sending people . . . They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people."

And using terms like "they're rapists," that phrase, that would be the kind of conversations the far-right extremists have and the kind of terminology they use both on- and offline.

So there was a real kind of alignment in
[p.58]

terms of language with what they heard in his announcement speech and, you know, the things that are important to them.

JA391

Q. Is calling people from Mexico — claiming they're bringing drugs, crime, and that they're rapists — is that consistent with the Western chauvinism —

A. Absolutely.

Q. — belief structure you mentioned earlier?

A. Yeah. Absolutely.

Q. Okay. Tell us a little bit about what Western chauvinism is.

A. Well, Western chauvinism is a way of claiming that Western civilization is basically superior and that other non-Western cultures and civilizations are deficient. And they use terms like, you know, "West is right" and so forth to kind of underscore this point.

And so it's — that's, you know, Western chauvinism in a nutshell.

Q. And here Donald Trump ends this quote by saying "Some, I assume, are good people."

Why doesn't that sort of undo the earlier language?

[p.59]

A. Well, this is — we get back to what we were discussing earlier in terms of plausible deniability. So you get this kind of negation that's inserted after using this inflammatory language. And that then provides the speaker with "Well, I didn't say 'all.'"

But for far-right extremists, they hear the rapist part. They hear that language, and so consistent with the kind of conversations they're having, as I mentioned, and understand that the negation is necessary. They understand because this is how they communicate amongst themselves as well.

And their own leaders use and establish plausible deniability, so they understand that a national, you know, individual who is running for the office of the presidency is also going to need to establish plausible deniability.

JA392

Q. Now, I want to turn to a specific aspect of Donald Trump's communications over the years, and that's the Stop the Steal movement and Trump's role in it.

Could you describe the movement generally to the Court?

A. Yeah. It's, you know, the conspiracy theory that focuses on different aspects of how the

[p.60]

2020 presidential election was corrupt, stolen, fraudulent, you know, marked by, you know, substantial amount of fraud, and, you know, a variety of different kind of aspects of that conspiracy.

Q. And you've chosen a couple of tweets here.

Before I talk about the tweets, did Donald Trump start the Stop the Steal language questioning elections in 2020, or did it start before then?

A. No, it really predates 2020.

Q. Okay.

A. Yes.

Q. What do we see on the screen here?

A. Yeah, so you see here the upper tweet there from 2012 where Donald Trump is referring to the Romney-Obama election and that there were election machines that switched the votes from Romney to Obama. And "Don't let your vote be stolen." So, again, using that language, that verbiage about, you know, elections being stolen.

And then below that, you see from midterms in 2018 references to, you know, election corruption. "We must protect our democracy" because elections are being stolen, so . . .

[p.61]

Q. What relationship did you find between the far-right extremists and the Stop the Steal movement?

A. A lot of overlap really. Starting at the beginning when it really starts to emerge in full force in 2020, you see one of the first rallies, for example, in Arizona. Alex Jones is present there as a speaker. Armed antigovernment militia types are there at that rally in Arizona, and then that continues to be the case.

As more and more Stop the Steal rallies, you know, transpired during that time, you see a substantial presence of folks like Proud Boys and others.

Q. Now, moving forward to the 2020 election, in your work did you see Donald Trump spreading doubt about the 2020 election?

A. Yes, I did.

Q. Okay. Let's look at a couple of videos you highlighted.

Why did you choose this video from August 17, 2020?

A. Because it's, you know, multiple months prior to the election, and it's a very clear kind of statement about the election being fraudulent unless

[p.62]

Donald Trump is reelected.

MR. OLSON: Okay. And this video is P-61. It's another one of these deemed admitted but not yet admitted video exhibits, Your Honor.

And I guess I forgot to move for the admission of P-120.

So would you like to play the video? And then I'd like to move to admit both of these.

THE COURT: So on P-120, which was the Fuentes —

MR. OLSON: Yes.

THE COURT: — I'm actually going to just consider that a demonstrative and a basis for his report but not admit it into evidence.

MR. OLSON: Right.

JA394

THE COURT: The two speeches we're about to see, which are — are which numbers?

MR. OLSON: Well, P-61 is Trump's speech and has not yet been admitted. The one on the right has already been admitted. That's P-47.

THE COURT: Okay. So I'll admit 61, the Trump speech.

(Exhibit 61 admitted into evidence.)

MR. OLSON: Okay. So I'll play the video on the left.
[p.63]

A. Okay.

(Video was played.)

Q. (By Mr. Olson) Why did you choose to highlight this video, Dr. Simi?

A. Well, again, it's multiple months, and we're already getting this narrative, this, you know, conspiracy theory.

Q. Multiple months? I'm sorry?

A. I'm sorry. Before the election itself in November. And it's, you know, very clear, you know, what the message is.

Q. Now, let's play the video on the right.

And this is from the early-morning hours of election night, right?

A. That's correct.

Q. Okay. At this point in time that Trump is giving this speech, have the election results been determined?

A. No. It's still unclear, undecided.

(Video was played.)

Q. (By Mr. Olson) Why did you choose to highlight this speech?

A. This underscores the strategy that had been discussed by people like Steve Bannon, for instance, about claiming victory no matter what on

[p.64]

election night. Irregardless of what the results suggest, claim victory.

Q. Is there anything else notable about how Trump talked about these elections in these two speeches that you'd like to draw our attention to?

A. Yeah. Very, very much.

Again, this is the language of corruption, of elections being stolen. For far-right extremists, that's going to resonate because it's central to their worldview, to their perspective that, you know, there's this corrupt system that's preventing them from electing somebody that they support, that the system is rigged.

And so, again, you're going to have a high degree of alignment there and resonance for far-right extremists with that kind of language.

Q. Did you select some examples of how far-right extremists responded to this language from Donald Trump?

A. Yes, I did.

Q. All right. What are we — what example did you put on the screen here?

A. Yeah. So this is — these are messages on the Parler social media platform. And this is from Joe Biggs who at the time was a prominent member of

[p.65]

the Proud Boys. And you can see the time stamps there to my left and — beginning at 5:03 p.m.

The first message, "The left is stealing the election," so there's that and that alignment there. They're "not even trying to hide it. We have no justice, no law and order, and no democracy."

And these are followed up. The second message is, I'd say, additional intensification in the second message

which is about 17 minutes later where there's reference to "The Democrats are shameful, un-American, Commie pieces of shit. I hope you all have shitty, fucking lives. Fuck you."

So this is representative of a certain kind of intensification, amplification that's happening among far-right extremists as it relates to the idea of the election being stolen.

THE STENOGRAPHER: And if you can please watch your speed for me. Thank you.

THE WITNESS: Apologies.

Q. (By Mr. Olson) I want to turn from Trump — I want to turn to Trump's relationship or use of some of these techniques to call for political violence that we talked about earlier. And I want to go to the next slide.

And did you see Trump use these same

[p.66]

doublespeak and other communication strategies to call for violence?

A. Yes, I did.

Q. Okay. Can you — we'll look at a couple of examples, but tell us generally the kinds of things you saw in your work.

A. What you see is this kind of relationship develops. With the relationship that develops between Donald Trump and far-right extremists, one facet of it — and it's a multifaceted relationship, really, so it's happening in many different ways.

But one facet is certainly through rallies where violence is occurring. And there are both promotion and endorsement of violent incidents or violent assaults that are occurring in rallies. So that would be one facet. Again, I would underscore, though, that the relationship

is emerging between Donald Trump and far-right extremists on a lot of different aspects.

MR. OLSON: All right. So the video on the left, Your Honor, is P-53. It's another admissible but not yet admitted exhibit.

THE COURT: And that's a video of President Trump?

[p.67]

MR. OLSON: Yes.

THE COURT: Okay. 53 will be admitted.

(Exhibit 53 admitted into evidence.)

MR. OLSON: We'll play the video.

(Video was played.)

Q. (By Mr. Olson) How does this exchange support your opinion in this case?

A. Well, this was a press conference. Actually, Ben Carson had just dropped out, and this was to announce his support for Donald Trump's candidacy.

But during the Q and A portion of the press conference, one of the journalists asked Donald Trump about violence at rallies, and so Donald Trump was responding to that question, specifically referring to what appears to have been violence that had just recently occurred prior to this at a rally in Las Vegas.

And what you hear there is, again, this focus on self-defense, violent self-defense. So he's setting up this scenario that you have these counterprotesters that are kind of antagonizing things and that his supporters then used violence as a form of self-defense. And he's really endorsing that, and he's pretty clear in the comments.

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MR. OLSON: And, Your Honor, the second video is P-56. We'd also move for its admission.

THE COURT: And that is also a speech of President Trump?

MR. OLSON: Yes.

THE COURT: P-56 is admitted.

(Exhibit 56 admitted into evidence.)

(Video was played.)

Q. (By Mr. Olson) So set the stage in the video first, and then tell us what you saw in the video.

A. Sure. So this was, you know, a press conference on the heels of the Unite the Right rally which was, again, just to underscore, a deadly Unite the Right rally where one person is murdered and dozens of others injured by white supremacists who had planned and organized an event to be violent, showed up in Charlottesville, Virginia, and executed dozens of acts of violence throughout the day, including murder.

And during this press conference, we hear the President refer to there being “fine people.” And one of the things — as part of this group of white supremacists who had gathered that day.

And one of the things certainly that we

[p.69]

know is white supremacists and other far-right extremists heard that message as an endorsement. And they tell us that; they thanked the President afterwards for the comments.

Q. Who thanked the President?

A. David Duke, who was present that day at the Unite the Right rally; longtime neo-Nazi, Clansman, Richard Spencer, one of the key organizers of Unite the Right who was present that day; Andrew Anglin, the founder of the Daily Stormer, who wasn’t present at the Unite the Right, but a leading kind of influencer among far-right extremists.

JA399

All three of those folks thanked the President for the comments and said that they understood some degree of kind of condemnation in the comments was necessary on his part. But in large, they took it as an endorsement.

Q. And in your work on leaders of political extremism, have you ever seen a national leading political figure endorse violence in the way that you see Donald Trump endorse violence?

A. No, I have not.

Q. Now, let's go to a rally in Alabama.

And tell us what we're going to see here.

[p.70]

A. So on the — my left there, the rally, you know, in Alabama, in Birmingham, you're going to hear Donald Trump comment about a protester at the rally and needed to be removed.

Q. And then what do we see on the right?

A. And then the following day is Fox News saying that — where Donald Trump is calling in on the phone and is being asked a question about what happened at the rally.

MR. OLSON: And, Your Honor, this is Exhibits P-50 and -48. We move for both of their admission.

THE COURT: Let me — I'll admit P — is this the one on the left? P —

MR. OLSON: P-50 is on the left.

(Exhibit 50 admitted into evidence.)

THE COURT: P-50. And let me —

MR. OLSON: Okay.

THE COURT: — see the interview before I —

MR. OLSON: Great.

THE COURT: — make a ruling.

MR. OLSON: All right. Let's play P-50.

A. Sure.

(Video was played.)

[p.71]

Q. (By Mr. Olson) And then now it seems he's referring to a protester?

A. He's referring to a protester, yeah.

Q. And now let's play the interview, P-48.

A. Yeah.

(Video was played.)

THE COURT: That is -51?

MR. OLSON: P-48.

THE COURT: P-48 is admitted.

MR. OLSON: Thank you, Your Honor.

(Exhibit 48 admitted into evidence.)

MR. OLSON: Thank you, Your Honor.

Q. (By Mr. Olson) So tell us, Dr. Simi, what did you see in Trump's reaction the next day about his relationship to political violence?

A. He made an endorsement. Again, the built-in kind of defense — self-defense argument there in terms of his comments. But you get an endorsement, "Maybe he should have been roughed up." You get the "maybe" inserted which qualifies it a bit.

But what far-right extremists hear is they hear the comments at the rally, the strong language about getting him out of here, the person's assaulted at the rally by multiple people, and then the next day Donald Trump essentially endorses the

[p.72]

assault that is committed.

Q. Okay. And we have one more series of — or pair of Trump videos. Let's go to that slide.

MR. OLSON: And, Your Honor, these are both Trump speeches, P-123 and P-56. And they're both just Trump speaking.

THE COURT: Okay. 123 and 126 are admitted.

JA401

MR. OLSON: Sorry. It's P-56 and 123.

THE COURT: P-56 and 123.

(Exhibit 123 admitted into evidence.)

MR. OLSON: Thank you very much.

(Video was played.)

Q. (By Mr. Olson) So tell us about the communication strategies Donald Trump is using in that video.

A. Well, he makes this proposition about "If I say go get him" — which I have no idea why a national political figure would ever say "Go get him" — right? — that — kind of use that kind of language.

So that's that unconventional aspect that we were just talking about that for far-right extremists is something that they are galvanized by, that they're — you know, they're really mobilized by

[p.73]

that lack of convention.

But he says — you know, if he says that, then he gets in trouble, but if he says "Don't hurt him," then they say he's weak. And so it's this very kind of mixed message.

But certainly, there's no clear, consistent message about condemning violence in any, you know, way, shape, or form, which you would expect, again, among our leaders.

MR. GESSLER: Your Honor, I'm going to object. The witness continues to say "you would expect this among our leaders. Historically, I'm not aware of any leader like this."

We'll accept — or the Court has accepted his expertise in far-right-wing extremism. He is not an expert on political discourse, political campaigns, issues along those lines, historical behavior of other presidents.

So we'd object to that. He has very limited expertise here, and that's what he's here for.

JA402

THE COURT: I will strike it, Professor Simi's statement regarding what one would expect of political leaders.

Q. (By Mr. Olson) Dr. Simi, in your 27 years working on far-right extremism, do you look

[p.74]

at the relationship between far-right extremists and politicians as part of that work that you've done?

A. Yes, I do.

Q. Both local and national politicians?

A. That's right.

Q. In your 27 years of experience, have you ever seen either a statewide or a national politician use the kind of language that we're seeing here from Donald Trump about violence?

MR. GESSLER: Same objection, Your Honor.

THE COURT: Overruled.

A. No, I have not.

Q. (By Mr. Olson) Okay. Let's turn to the second video. And before we play the second video on the screen, tell us what you see — tell us what we're going to see.

A. Okay. This is also from the press conference after Unite the Right, so same press conference where we saw the earlier clip about "fine people." And we're going to see additional comments.

(Video was played.)

Q. (By Mr. Olson) Why does Donald Trump saying "there was some rough, bad people" sort of serve as a condemnation that you said you were looking

[p.75]

for?

A. Far-right extremists understand that those kinds of engagements, that kind of condemnation is going to be necessary on some level. And, again, they tell us that.

JA403

So it's very clear that from an audience perspective, far-right extremists realize that the — that that part of the comments were necessary, but that still the overall message for them they received was affirmation.

Q. And as part of your work on far-right extremism, have you looked at how Trump supporters react to these kind of statements that we've seen?

A. Yes, I have.

Q. And as a general matter, what did you see?

A. Yeah. Well, I mentioned, for instance, you know, Andrew Anglin and the comments that he made, where he actually literally says that basically Trump, you know, gave us, you know, encouragement, affirmation. Gave us a little bit of condemnation, which we understand is necessary. Overall, it's good for us.

And, you know, many, you know, nonleaders, rank-and-file, similar sentiments expressed, on, you know, various social media

[p.76]

platforms and so forth.

Q. Okay. Now, in your work have you seen other politicians use language like "fight," et cetera, in their speech?

A. Oh, sure.

Q. And what observed differences do you see between Donald Trump's use of rhetoric like that and other political speakers?

A. Well, this is all about context, what we've been discussing, this relationship between Donald Trump and far-right extremists. It's — you know, it has to be understood within a pattern that developed over multiple years.

And so the meaning of words within that pattern, within that context, take certain shape. The same word,

JA404

though, in a different context without that pattern would obviously have different meanings.

Q. All right. In your study, have you ever seen any other national political figure have the same kind of repeated violence occurring in their presence and refusal to condemn or endorsement of it as you see with Donald Trump?

A. No, I have not.

Q. I want to turn now to the events leading up to January 6. We've talked about sort of Donald
[p.77]

Trump's relationship with far-right extremists generally, and I want to focus on the lead-up to January 6.

And I want to start with the admitted exhibit about Donald Trump saying to the Proud Boys, "Stand back and stand by."

So let's play this, and then I have a couple questions for you about this statement.

(Video was played.)

Q. (By Mr. Olson) What impacts did Trump's statement of "Stand back and stand by" to the Proud Boys have?

A. Well, it's powerful. It's influential almost immediately. Well received. Received as, again, affirmation, as an endorsement of sorts. You start to see Proud Boys turn the mantra into T-shirts that are being sold.

And it's not just the Proud Boys that received that message. Far-right extremists more broadly saw and heard that message as affirmation, as an endorsement.

Q. In this exchange, who — well, who used the word "Proud Boys"? Was he asked a question about the Proud Boys, or did he pick that out of his own brain to say it?

[p.78]

A. Yeah. Can you replay it?

Q. Sure.

A. It's right there on the screen.

(Video was played.)

Q. (By Mr. Olson) Did replaying it help answer the question?

A. Yeah. There's some crosstalk, so, you know, it's a little bit harder in terms of the audible. It sounds — I mean, he obviously says "Proud Boys."

Q. Yeah. And you mentioned that Proud Boys and other extremist groups took this as an endorsement.

Did Trump eventually issue a statement that these groups understood as a call to stop standing by, but rather to act?

THE COURT: Before you go there, I mean, I don't — I mean, what does "Stand back, stand by" — what — how did they, in your view, interpret it? Because it doesn't mean anything to me.

THE WITNESS: Sure. Yeah. They interpreted it as a preparedness, as an endorsement to be prepared and to kind of be on alert, you might say.

THE COURT: For something?

THE WITNESS: For something.

[p.79]

Q. (By Mr. Olson) And did Donald Trump then tell them what that something was?

A. Yes, he did.

Q. Okay. Let's show the next slide.

What do we see on the left on this slide?

A. A tweet from Donald Trump.

Q. And in your work, what importance does this tweet have?

JA406

A. Very substantial. You see the reference to a 36-page report about election fraud. And then at the end of the statement is the final kind of line, "Big protest in D.C. on January 6. Be there. Will be wild," with an explanation point.

Q. And in your work did you look at how the far-right extremists reacted to this tweet?

A. Yes, I did.

Q. Okay. Let's play Exhibit P-80.

MR. OLSON: And, Your Honor, this was on the admitted — or admissible exhibits based on Your Honor's earlier ruling.

Let's just play this as a demonstration rather than admissible evidence, okay?

THE COURT: Okay.

(Video was played.)

[p.80]

Q. (By Mr. Olson) What did you see in the reaction of right-wing extremists to Trump's tweet in that video?

A. Well, there's quite a bit there. You have various references, including specific references to attacking the Capitol, storming the Capitol, pushing indoors. You have a reference to a "red wedding," which is a reference to a TV show, a massacre that occurs on a TV show. You have general kind of calls to action based on the tweet and the tweets that followed in terms of, you know, encouraging, urging people to go to January 6.

Q. In your review of this, did you also look at other reactions of right-wing extremists to Donald Trump's "Will be wild" tweet beyond this?

A. Yes, I did.

Q. And in your general review of the reaction to the "Will be wild" tweet, did you see folks understand the purpose of being there?

JA407

A. Yeah, absolutely. Including that it's now time to take action. We were on standby, and now it's time for action.

Q. Okay.

A. So there's actual explicit references and statements made by far-right extremists about that

[p.81]

understanding.

Q. Now, I want to play Exhibit P-73 next, which is the video that Trump retweeted the same day as the "Will be wild" speech. And I want — let's play the video, and then I'm going to ask you how you connect — what connection you see between the "Will be wild" tweet and the video.

(Video was played.)

Q. (By Mr. Olson) So, Dr. Simi, I have a few questions about this video.

Tell us how the communication strategies used in this video relate to communication strategies used by other leaders of far-right extremists.

A. Well, the "Fight for Trump" and "Save the World, Save America."

So, again, this goes back to something we've, you know, been talking a lot about, which is this idea of an existential threat. And that's — requires certain kinds of action, violent action, to fend off these threats.

I should point out that the video is reposted from TheDonald.win, a site that became a hotbed for violent, far-right extremists' comments/statements, including specifically related to the attack on the Capitol. And that's that context

[p.82]

that's also important that we've been talking a lot about, looking at the larger context from where the video comes — you know, comes from and the consistency —

JA408

Q. And let me stop you there.

What do you mean by reposted from TheDonald.win?

Tell us how this video came to be — did Donald Trump post it from his Twitter feed, right?

A. Correct.

Q. Okay. So what do you mean it was reposted from TheDonald.win?

A. It originally appeared on TheDonald.win —

Q. Okay.

A. — as — you know, a video appears on any platform; it can be reposted on a different platform. And so prior to Donald Trump posting on Twitter, it appeared on TheDonald.win site.

Q. And what significance to you does that context have?

A. Again, as I mentioned, TheDonald.win, you know, had — for quite some time had been a hotbed for far-right extremists' comments/statements involving violence. And then ultimately in the

[p.83]

lead-up to the attack on the Capitol, there were specific statements about attacking the Capitol and committing various acts of violence on January 6.

So that's —

THE COURT: And this is Donald.win.com, or something?

THE WITNESS: Net, I believe. Yeah. Which it's actually now Patriots. And so the name — the domain name has changed since January 6.

Q. (By Mr. Olson) So it was Donald.win.net?

A. At the — yeah, at the time.

Q. Okay.

A. At that time. I couldn't tell you exactly when the domain name change happened.

Q. And how — based on your work, how do followers — the right-wing extremist followers of Donald Trump, interpret this “Fight for Trump” mantra that we hear chanted over and over again in the video?

A. Far-right extremists view the word “fight” in political terms. And “fight” implies the need to commit violence to fend off threats. And, again, they — from their perspective, they would see fighting as a form of self-defense.

Q. Now, based on your work —
[p.84]

THE COURT: When you say “self-defense,” it’s more of, like, an existential self-defense of democracy?

THE WITNESS: It’s a — well, yeah, they tend to be antidemocratic, so I would leave off the last part. But, yes, definitely an existential threat that needs to be fended off.

THE COURT: And a threat to democracy as they see it because they feel like it’s corrupt, et cetera? I mean . . .

THE WITNESS: Yeah. So in that respect, yeah.

Q. (By Mr. Olson) And talk to us, Dr. Simi, about how this self-defense language, the Stop the Steal movement in the fall of 2020, how that plays into the extremists’ view of the election process that is going to play out from November through January.

A. I’m sorry. Could you repeat the question?

Q. Yeah. Sure. Just following up on the judge’s question.

In terms of the existential threat that you’ve talked about far-right extremists seeing and their framing it in terms of self-defense — let me

[p.85]

ask a preliminary question first.

JA410

How does self-defense, that viewpoint, relate to the way the extremists looked at the election and the process that followed the election?

A. Again, it's about, you know, this idea of theft and being — still having things taken, things stolen. So the election was stolen, the system is corrupted, all of that. It's consistent with the broader kind of worldview that they tend to have.

Q. Okay. And what did they view, based on your work, as the existential threat that the election posed to them?

A. To no longer have Donald Trump in power and to have that taken from them.

Q. Now, based on your work, how did far-right extremists react to Trump's calls to come to Washington, D.C., on January 6?

A. That they were galvanized, mobilized, energized.

Q. Beyond organizing them to come to Washington, D.C., what did you see about other reactions they had to Trump's call for them to be there?

A. Well, a number of things happened after the December 19 tweet, and certainly lots of messaging

[p.86]

occurred in terms of far-right extremists, you know, being energized, mobilized in terms of January 6.

Q. And on the next slide we have a couple examples of some extremist reactions to the "Will be wild" tweet.

Tell us what we see on the left. First, who is the group, the Three Percenters, originally?

A. Well, as I mentioned at the beginning, the Three Percenters are, you know, organized in different kinds of sects. The Three Percenters Original would be one kind of sect of Three Percenters, and you might have another one, Three Percenters Kansas, so forth and so on across the country.

JA411

So this was one of those.

Q. And what do you see in the quote — the first quote where they said “Stand ready and are standing by to answer the call from our President”?

A. Yeah. This is — you know, goes to, you know, the way in which the comment about — you know, that was made during the debate really resonated with far-right extremists. Not just the Proud Boys, but here you see the Three Percenters referencing the statement that Donald Trump made during the debate and saying they’re, you know, ready for action.

[p.87]

Q. And the next quote says “Pure evil that is conspiring to steal the country away from our American people.”

Do you see that?

A. Uh-huh. Yes.

Q. How does that fit into the pattern of communication?

A. Again, it represents the worldview in terms of seeing these imminent threats, these existential threats deeply tied to the idea of a stolen election. But also more broad than that. That, you know, basically our country is on the verge of being completely taken away from us.

Q. And the next quote from the Three Percenters Original is instructing “any member who can attend . . . to participate on January 6 because ‘the President of the United States has put out a general call for patriots of this nation to gather in Washington, D.C.’”

Did you see other examples of far-right extremists viewing the “Will be wild” tweet as a general call for patriots of this nation to gather in Washington, D.C.?

A. Yes. It was very — I’d say very substantial — a general — I’d say, across far-right

[p.88]

extremists, that was a substantial presence of that reaction.

Q. On the right we see another message.

Why don't you read the message and tell us how that fits into what you see in those patterns of communication.

A. Yeah. So here you have a message that says "Trump is calling for Proud Boys to show up on the 6th." So pretty straightforward in terms of the — you know, the — that's how the message was received in terms of the tweet.

Q. Now, beyond using social media to bring people to Washington, D.C., on January 6, did Trump say or do anything else to communicate his support for protesters who were coming out to support him?

A. Yes, he did.

Q. Okay. Were there rallies between — after the election and before January 6 in D.C.?

A. Yes, there were.

Q. Okay. Was there one in November?

A. Yes, there was. The Million MAGA March.

Q. And at the Million MAGA March, did it turn violent?

A. Yes, it did.

Q. Okay.

[p.89]

MR. OLSON: And, Your Honor, I'd like to show a video for demonstrative purposes only. This is a video that — on the left is Donald Trump's motorcade sort of driving through the march.

It hasn't been admitted, but I think just for demonstrative purpose only, if I can show it for the expert?

THE COURT: Yep. That's fine.

(Video was played.)

Q. (By Mr. Olson) So what do we see in that video, Dr. Simi?

A. Well, you see a presidential motorcade driving, you know, through the protest, the site of the protest. And obviously, they're responding very favorably to the motorcade and are very excited, and, you know, viewing this as what seems to be an affirmation of sorts.

Q. In your work on political violence and extremism, have you ever seen a national politician show support like this for a rally that turned violent?

MR. GESSLER: Objection. Your Honor. That's a leading question.

MR. OLSON: I'll re-ask it.

THE COURT: If you can rephrase.

[p.90]

The objection is sustained.

Q. (By Mr. Olson) Dr. Simi, how does the video we just watched relate to your study of other national politicians?

MR. GESSLER: Objection. Your Honor. I don't think he's testified that he's studied other politicians. It's beyond the scope of expertise.

THE COURT: He did actually previously testify that a part of his work includes studying national politicians in general and their relationship to extremism.

So I'm going to let him answer the question to the extent he can.

A. I've never seen anything — certainly in recent history that's similar to this — what happened in the video.

Q. (By Mr. Olson) On the right, what do we see?

JA414

A. So this is a tweet by Donald Trump responding to what happened ultimately in terms of the violence that occurred.

And you see it starts with “Antifa scum ran for the hills today when they tried attacking people at the Trump rally, because those people aggressively fought back. Antifa waited until

[p.91]

tonight” — ultimately, it says “to attack innocent, hashtag, MAGA people. D.C. police, get going. Do your job and don’t hold back.”

THE COURT: So was the violence before or after the drive-through?

THE WITNESS: After.

THE COURT: After?

THE WITNESS: Yeah. It was in the evening.

Q. (By Mr. Olson) How did far-right extremists view Donald Trump’s comments on the violence?

A. Endorsement. It’s pointing, you know, essentially responsibility for — at Antifa. And using, you know, a language that would be consistent with the kind of language they would use to describe Antifa as scum.

So again, there’s alignment in terms of the language, and then there’s the, you know, at least perceived endorsement of the violence that, again, framed as self-defense, that the violence directed towards Antifa was necessary for self-defense purposes.

Q. Were there events outside of rallies that show you how extremists reacted to Trump’s

[p.92]

rhetoric about Stop the Steal and invocation of political violence?

A. Yes, there were.

JA415

Q. Okay. Let's look, next, at the video — the video that's already been admitted into evidence.

And before we play the video, tell us, what are we looking at here?

A. As the Stop the Steal conspiracy theory started galvanizing far-right extremists, one of the things we saw was a substantial increase in threats to election workers and election officials.

And so here we're about to hear from one of the officials in Georgia in the Secretary of State's office essentially ask President Trump to stop inciting violence. So that would be his comments —

Q. Okay.

A. — in the video.

Q. So let's play the video, and then let's talk about how Trump responded to that request.

A. Okay.

(Video was played.)

Q. (By Mr. Olson) Who was he telling to stop encouraging people to engage in violence?

A. President Trump.

Q. Okay. How did President Trump respond

[p.93]

to that specific call from the Georgia Secretary of State worker to stop telling people to engage in violence?

A. So to the right of the video you just played is Donald Trump tweeting a message, but also retweeting the video that — it's a clip of the video that we just saw. So we see in the comment, "Rigged election. Show signatures and envelopes. Expose the massive voter fraud in Georgia."

So we get the video where he's being asked to condemn violence, stop inspiring violence. And the response is to double-down on the very thing that Mr.

JA416

Sterling has claimed is inspiring the threats of violence towards the election workers and officials in Georgia.

So the double-down on the thing that's inspiring it, no reference to condemning violent threats or saying there's no place for that. That's completely omitted in the —

THE STENOGRAPHER: In the what?

A. In the video clip.

Q. (By Mr. Olson) Based on your work, how would far-right extremists perceive Trump's response?

A. Endorsement. Support. This is — there's no condemnation. There's — so you get that

[p.94]

omission that we talked about earlier, which is often perceived by far-right extremists as a sign of support. But also the doubling-down on the very thing that's galvanizing the threats in the first place would be a sign of support from the perspective of far-right extremism.

Q. I want to turn now to the days leading up to January 6.

In your review of what happened, did you find evidence that helped you understand why some attacked the Capitol?

A. Yes, I did.

Q. Okay. I want to play for demonstrative purposes only a video, P-81, and then we can talk about the context that these speeches fit into the larger January 6 event.

(Video was played.)

Q. (By Mr. Olson) So what do we see here, Dr. Simi? Why is this important for your work in this case?

A. In the first portion of the video clip, you see Ali Alexander talking about 1776— speaking to 1776 being an option. And you see the references to the deep state being degenerates. So, again, we're back to the dehumanizing language, which is an

[p.95]

important piece of this in terms of enabling violence. So that's that portion of the beginning.

And then the second kind of portion is Alex Jones shouting repeatedly, "1776." And, again, within this cultural context, that term is going to have a very specific meaning that's different than it would for outsiders outside of that context.

Q. And in the video we see a couple banners in the background.

Tell us what those banners show.

A. Well, you see one to my right, a white banner that says "Stop the" — "Stop the Steal." It's sort of — "Stop the Steal" in black lettering. There's a "Trump" banner, "2020." There's — you know, so . . .

Q. Okay. And now, do you know which people on January 6 stormed the Capitol saw which political speech the day before?

A. I mean, certainly not across the board, no.

Q. Yeah. And does that undercut your ability to explain what happened on January 6?

A. No, I don't think so.

Q. Why not?

A. We're talking about a lot of different

[p.96]

sources of influence. We're talking about what happened specifically on January 6 in terms of the speech at the Ellipse. We're talking about various tweets. We're talking about various events in the lead-up to January 6.

So, you know, for saying one thing is the source of the influence would, you know, not be really accurate.

What we can see, though, is among far-right extremists how these different sources of influence

JA418

ultimately resulted in terms of producing the attack on the Capitol.

Q. And in your work, did you see Donald Trump as leading that influence?

A. Yes, I did.

Q. Now, let's talk about what happened on January 6.

THE COURT: So before — I think what we're going to do, since it's been almost two hours —

MR. OLSON: Okay.

THE COURT: — is — let's take a break.

But, Mr. Gessler, I just want to make sure that you'll do cross probably immediately following without a break in between.

Because I'm assuming, Mr. Olson, that

[p.97]

you're kind of getting towards the end?

MR. OLSON: Yeah. I probably have another 20 to 30 minutes.

THE COURT: Okay. So we'll go straight into direct after Mr. Olson finishes — or we'll go straight into cross after Mr. Olson finishes his direct. And we will be back at —

MR. OLSON: Just — before we break, I just want to make sure we have a common understanding about the — our interaction with witnesses during breaks that are on the stand.

I assume we're not to talk to them about the subject of testimony —

THE COURT: Yes. Yes, please.

MR. OLSON: — while on a break? Okay. Great. Thank you.

THE COURT: So we will be back at 10:15.

(Recess from 10:01 a.m. to 10:19 a.m.)

THE COURT: Everyone may be seated.

JA419

So I think we were at the day of?

MR. OLSON: Yes.

THE COURT: Okay.

MR. OLSON: Thank you, Your Honor. Just one quick housekeeping matter.

Q. (By Mr. Olson) Dr. Simi, over the break

[p.98]

I was looking at your report, and in your report you talked about a website called TheDonald.win.

A. Yes.

Q. Is that what we were talking about before?

A. Yes.

Q. Okay.

A. Forgive me.

Q. Thank you.

I want to turn now to the morning of January 6.

Did Trump make any statements or remarks that you focused on before the speech?

A. Yes, I did.

Q. You —

A. I'm sorry. Yes, I did.

Q. Okay.

A. Yes, sir.

Q. What do we see here on the morning of January 6 before the speech?

A. Two tweets from Donald Trump, both referencing Vice President Mike Pence. In the upper tweet:

"If Vice President Mike Pence comes through for us, we will win the presidency. Many

[p.99]

states want to decertify the mistakes they made in certifying incorrect and even fraudulent numbers in a process not approved by the state legislators. Mike can send it back."

JA420

THE COURT: So, Professor Simi, when you read, then you're even faster. And I have the vantage point of being able to see the court reporter struggling.

THE WITNESS: Okay.

THE COURT: So —

THE WITNESS: My sincere apologies.

THE COURT: I'm just trying to protect the record.

THE WITNESS: Sure. Sure.

THE COURT: Did you get it?

THE STENOGRAPHER: I believe so.

Q. (By Mr. Olson) So let's not read the second tweet, Dr. Simi.

But I do want to ask you, both focus on Mike Pence, right?

A. That's correct.

Q. What significance does these early warning statements focusing on Mike Pence from Donald Trump have in your study?

A. It's part of the — this stolen

[p.100]

election, that if Mike Pence takes certain actions, then, you know, Donald Trump would remain in power. Which, again, for far-right extremists, they're seeing this in terms of the — what's necessary to prevent the transfer of power for Donald Trump to remain President.

Q. Now let's turn to some of the speech that Donald Trump gave on the Ellipse.

But before we do that, can you tell us, did you see similarities or differences between the speeches of Donald Trump that we looked at earlier today and the speech he gave on the Ellipse in terms of his use of language?

A. Yeah. Many similarities.

Q. Okay. Can you give us some examples we should be looking for?

JA421

A. Sure. A certain aggressive kind of words in terms of phrasing of things, the really strong emphasis, again, on this issue about an existential threat, the idea that something is going to be taken from you — your country, your culture, your way of life. These kind of themes that we've been discussing, very prevalent.

Q. Okay. Let's watch the speech, and then I want to ask you some questions about it — or

[p.101]

portions of the speech.

(Video was played.)

Q. (By Mr. Olson) What did we see in this speech that related to Trump's use of language?

You mentioned it was similar to what he's used before. What do we see here in terms of his use of language before that led to violence?

A. "Fight" or "fighting," some variation is mentioned approximately 20 times in the speech. There was a strong emphasis on this. There's at one point the association between fighting and playing by a different set of rules when you have fraud.

So there's this kind of — what you might call permission in terms of using other — other actions than one might take. There is a — the focus on losing your country is a consistent theme. And there is a mention of peaceful and patriotic, which is also consistent with many things we've been talking about in terms of plausible deniability.

Q. Based on your understanding of political extremism, how would extremists have understood Trump's repeated calls to fight in that speech?

A. A call to violence.

Q. Why?

A. It's — within far-right extremist

[p.102]

culture, fighting is meant to be taken literally. A call to fight for far-right extremists, especially within the context as it's laid out, that these threats are imminent and that you're going to lose your country, then fighting would be understood as requiring violent action.

Q. Trump in the speech said, "We're going to walk peacefully and patriotically."

Why wouldn't the extremists in the audience have understood Trump calling only for a protest, a peaceful protest?

A. Part of it has to do with the emphasis. So we get back to contextual cues which are extremely important in terms of understanding how communication operates. And in this case there's such a balance in favor of the fighting versus only the one reference to the peaceful — you know, marching peacefully down to the Capitol.

So there's a clear — for far-right extremists, there would be a clear understanding that fighting is the real message, not being peaceful.

THE COURT: Is it your testimony that if you had watched that speech that — and nothing had happened, that you would have the same view? I mean, I guess, what worries me with all of this is it's all

[p.103]

kind of in sort of 20/20 hindsight. You know, we know what happened.

So if — and first of all, did you watch the speech in real time?

THE WITNESS: No, I did not.

THE COURT: Okay. But is it your testimony that had you watched it in real time prior to knowing the ultimate result that you would have considered it a call to violence?

JA423

THE WITNESS: Yes, that is my testimony. Yeah. I was already concerned, certainly, about the precursors to January 6. And that speech in real time, given the language, the reference, the amount of emphasis on fighting, that would have given me very, very substantial concern that violence would be soon to follow.

Q. (By Mr. Olson) And, Dr. Simi, if I can follow up on that.

Did you have an interview with a reporter prior to the election in 2020?

A. Yes, I did.

Q. And in that interview to the reporter — a reporter for The Atlantic, I think?

A. That's correct.

Q. Okay. And in that interview with The [p.104]

Atlantic, did you — what did you say about the likelihood of political violence led by Donald Trump?

A. I said it was quite high, especially in a scenario if he was not reelected. That my concern was not necessarily the election itself. It would be post-election, in particular as we get closer to inauguration time.

Q. Did what we saw on January 6 reflect your concern that you made before the election?

A. Yes, it did.

Q. About political violence led by Donald Trump?

A. Yes, it did.

Q. Okay. Now we've heard some testimony that some of the Proud Boys and Oath Keepers already had a plan to attack the Capitol. You mentioned the "1776 Return" sort of planning document.

How could this speech by Donald Trump affect them if they already had a plan and were already executing the plan?

JA424

A. Well, two things I would just want to mention.

First, the plan among those like the Proud Boys to, you know, go directly to the Capitol and essentially begin executing the attack, that was

[p.105]

largely influenced by things that happened prior to January 6 that involved Donald Trump. Not the least of which would have been the December 19 “Will be wild.”

In terms of what happens on January 6, though, the individuals who ultimately marched to the Capitol and take — for those that take part in the attack on the Capitol, they are going there at the urging of Donald Trump. What that ends up doing, it creates a situation where you have this very — you know, much larger crowd than you would have had, you know, with just those that went directly to the Capitol.

And, of course, that — you know, as Officer Hodges testified to yesterday, that becomes a weapon of sorts itself. It certainly becomes a force multiplier. And so that large number of individuals who then appear at the Capitol, some of whom then directly take part in the attack, all of that becomes, you know, a reinforcement to those who went there directly.

Q. And earlier you talked about sort of the violence implementers, the violence planners.

Remind us the term for the folks that are maybe open to it but don't show up with a plan.

[p.106]

A. There — well, we refer to them exactly in those terms. So there's also the term “sympathetic bystander” which would fit some of those who, you know, marched to the Capitol as well who may not have necessarily directly partaken in the violence, but were there.

JA425

And, you know, as was, I think, illustrated yesterday, just the size of the crowd became, you know, a very substantial obstacle that prevented the Capitol from being protected.

Q. And you spoke — well, let me ask a threshold question first.

Based on your review of what happened on January 6, did the crowd have a unity or purpose that you saw?

A. Yes, it did.

Q. Okay. Even though some were more prone to violence than others?

MR. GESSLER: Objection. Leading, Your Honor.

THE COURT: Why don't you just answer the first question.

The original question was did the crowd have unity or purpose that you saw?

THE WITNESS: Yes, it did. I can go
[p.107]

ahead and expand.

THE COURT: Can you explain?

THE WITNESS: Yeah. Sure.

A. It certainly wasn't that every single person — there was a kind of single mind to the crowd. But you can see, as demonstrated in some of the video footage, some of the things that people said after the fact, some of the things we learned from some of the court documents, for example — you can see there were certainly, you know, a degree of unity of purpose in terms of coordination and cooperation and collaboration during the attack on the Capitol.

Q. (By Mr. Olson) Okay. Let's play some videos from the Capitol.

MR. OLSON: And, Your Honor, P-117 similarly is a list — is an exhibit that you deemed admissible. We'll

JA426

play it just for demonstrative purposes here because it involves folks other than Trump.

But let's play this video, and then I have a couple of questions.

THE COURT: Okay.

(Video was played.)

Q. (By Mr. Olson) So I want to first focus on the first call that "This is our house; this is a

[p.108]
revolution."

Based on your understanding of the communication patterns of far-right extremists, what does "This is a revolution" — how would that be interpreted?

A. It's a violent revolution. Yeah. And, of course, by this time, you know, there had been various violent acts taken.

Q. And on the second clip we see with the language still on the screen, you see "Fight back. They touch us, we hit them back."

How does that relate to some of the communication patterns we talked about today?

A. Very consistent with this theme of self-defense, so framing the violence that one might be committing, but setting it up as necessary to defend oneself.

Q. And who is the "they" in here?

A. The members of the crowd that are saying it.

Q. No. I'm sorry. "They touch us" —

A. Oh, I'm sorry. Yeah. The police officers.

Q. Now, on the right we see a flag flying there. We see two flags.

[p.109]

What's the meaning of the symbolism in the bigger flag?

JA427

A. Yeah. So it's a — you know, a U.S. flag there, but it has a Three Percenter symbol in the blue portion. And then you can see in the background there's a Confederate flag, which is a pretty prominent symbol used among far-right extremists to represent the Confederacy and the U.S. Civil War.

Q. Now, did you see — in your review of what happened in the Capitol, did you see other indicia that folks came, planned to commit violence there.

A. Yes, I did.

Q. Talk to us about what you saw, evidence of folks came planning to commit violence?

A. Based on equipment the people brought, including weapons. But also things like tactical gear, headgear, various sorts of kind of preparation — you know, things that would indicate a certain person had planned ahead of time that they would be engaged in violence.

Q. You mentioned weapons. And I believe Mr. Gessler said yesterday there were no weapons discovered at the Capitol.

Were there weapons discovered at the
[p.110]
Capitol?

A. Yes. Absolutely.

Q. Okay. What kinds of weapons?

A. A wide range. Certainly knives. There were, of course, flagpoles that were used as weapons. Officers in some cases had their own weapons taken from them and used. And, of course, you know —

MR. GESSLER: Your Honor, we're going to object to this. He's testifying on items that he has no personal knowledge of.

Obviously, he is able to base his expert report and develop his opinions based on hearsay, but here he's

actually testifying as a fact to things he has no personal knowledge of.

To the extent the petitioners want to prove weaponry, they can use sources and whatever they seek to do, but they don't get it in through expert testimony.

MR. OLSON: Your Honor, if may I respond?

THE COURT: Sure.

MR. OLSON: This goes directly to Dr. Simi's observation that many of the right-wing extremists at the Capitol came prepared to be violent. Just like they brought tactical gear, the fact that

[p.111]

they brought weapons supports his claim or his opinion and finding that the people were there with a purpose of committing violence and engaging a violent political attack on the Capitol.

THE COURT: And was this disclosed?

MR. OLSON: Yes. This was on page 33 of his report.

MR. GESSLER: Can you just give me a moment to look at page?

THE COURT: Sure. Of course.

MR. GESSLER: Your Honor, his opinion is that people coming armed to the Capitol is consistent. That is different than, you know, him providing substantive testimony that people actually were armed. If he wants to accept that information as a hypothetical, then he can base an opinion on it.

But the fact of the matter is, Your Honor, when Mr. Olson said, "Can you," he's basing that on his observations. If he was at the Capitol on January 6, he can certainly testify to that. And if that's a premise of his opinion, that's fine.

But he doesn't get to testify as to the actual testimony of that — the actual facts.

THE COURT: Okay. Well, he was here and he watched the videos where we all saw people armed.

[p.112]

But . . .

MR. OLSON: Your Honor, if I may —

THE COURT: I'm taking it for what it's worth, Mr. Gessler. He obviously was not a — he didn't — he wasn't at the Capitol, I presume?

THE WITNESS: That's correct.

THE COURT: And so his testimony is based on — in part on what he's observed in court. And I'm not going to strike his testimony that it's his understanding that people were armed.

MR. OLSON: Your Honor, if I could? I just want to correct a significant misrepresentation that Mr. Gessler just made about the report.

I put a page on the screen about what Dr. Simi actually said. And he didn't say what Mr. Gessler said. He says, in the first line there, "Many who attended came prepared for violence from those armed with weapons, including guns to tactical gear."

Then he talks through a list of significant examples where there were findings by people. Either they refused to go through the magnetometers or folks were arrested.

So this is a significant and substantial disclosure that Mr. Gessler misrepresented.

[p.113]

THE COURT: Okay. So the objection is —

THE STENOGRAPHER: The objection is what?

THE COURT: Overruled.

Q. (By Mr. Olson) Let me get us back to where we were. So we'll pick up where we left off, Dr. Simi. We talked about this slide.

JA430

Now, in addition to coming armed and with tactical gear, was there other evidence that you relied on in understanding the mob's purpose at the Capitol?

A. Sure. A variety of things. Things that were, you know, apparent on the video footage, things that were learned after the fact in terms of statements that individuals made. And then, of course, you know, prior to January 6 itself, the information that was available on open source, on social media about the plans in terms of committing an attack on the Capitol, so . . .

Q. Okay. Did you review as part of your work a collection of sort of social media statements that participants in the — that the mob made describing why they were there and what their purpose was?

[p.114]

A. That's correct.

MR. OLSON: Okay. I'm not offering this for admissibility, but just to talk about the basis for Dr. Simi's opinion.

If I could bring up Exhibit P-25 just to show the kind of things he relied on. I just wanted to — Your Honor, instead of hearsay, we're not offering it as direct evidence, but it's a demonstration of the kind of material that Dr. Simi relied on.

THE COURT: Well, that's — let's get him to confirm that first.

MR. OLSON: Okay. So can I show it to him to make sure we're talking —

THE COURT: Yeah.

MR. OLSON: Okay. Great. Thank you.

Q. (By Mr. Olson) So, Dr. Simi, on the screen should be — nope. This is — I'm sorry. I have the wrong exhibit.

MR. OLSON: We'll move on, Your Honor. I apologize.

JA431

Q. (By Mr. Olson) But did you rely on a compilation of statements on social media as to why people were there at the Capitol?

A. Yes, I did.

[p.115]

Q. And can you just tell us at a high level what that was — or the kind of statements they made?

Excuse me.

A. Yeah. To — you know, to attack the Capitol to prevent the certification of the election results, to disrupt the democratic —

THE STENOGRAPHER: To disrupt the what?

A. The democratic transfer of power.

Q. (By Mr. Olson) Did you — great.

And then did you look at — sorry. We already saw that.

Did you look at some videos of the mob itself in terms of their unity of purpose?

A. Yes, I did.

Q. Okay. I think we've seen the video on the right a couple of times. This is when Danny Hodges was attacked, so let's not play that.

But tell us what the video on the left is.

A. In this you're going to see a substantial number of folks start chanting, "Heave-ho." And so that's a coordination and kind of vocalization that they're engaged in as they're moving in a particular direction.

Q. And what are they trying to do?

[p.116]

A. They're trying to essentially push through the barricade of officers in this kind of tunnel — tunnel area.

(Video was played.)

MR. OLSON: And, Your Honor, that was Exhibit P-21. And we — it's on the — the objection was overruled.

JA432

It was on the to-be-admitted exhibit list. We move for admission of P-21.

THE COURT: Admitted.

(Exhibit 21 admitted into evidence.)

Q. (By Mr. Olson) Now, we've talked — I'll skip to the next one.

We've talked about the mob's purposes.

Did you see any evidence in your review of the material in this case that showed Trump's role in the attack as the attackers — what they thought Trump's role in the attack was?

A. Yeah. There was definitely consistent themes in terms of individuals reporting that they — they believed Donald Trump had sent them there, that — you know, indicating substantial influence from Donald Trump.

MR. OLSON: And if we — this is video P-96. Again, it is the video of what happened on January 6, Your Honor.

[p.117]

We would — it's on the to-be-admitted list from October 27. We move for its admission as well.

THE COURT: Is this the one that was prepared by the January 6—

MR. OLSON: Yes.

THE COURT: — Committee?

MR. OLSON: Yes.

THE COURT: I will admit.

MR. OLSON: Thank you.

Q. (By Mr. Olson) Let's play the video, Dr. Simi.

(Video was played.)

Q. (By Mr. Olson) And in addition to this compilation put together by the January 6 Committee, do you see other evidence of the stated purpose why people were there?

A. Yes, I did.

Q. Okay. And actually, I think I had the right exhibit up. I was looking at the wrong page from before. So let's try this again. I apologize.

MR. OLSON: Again, for demonstrative purposes only, Your Honor, let's look at P-25.

Q. (By Mr. Olson) And if we scroll down here — and I can just — can you read that okay, or

[p.118]

do I need to make that bigger?

A. No, I can read that fine. Thanks.

Q. Okay.

A. That helped.

Q. And, for instance, we see — is this what you — part of what you looked at in your work on this case?

A. That's correct.

Q. And we see statements like this that were collected as part of legal proceedings: "I am here to see what my President called me to D.C. for."

Do you see that?

A. Yes, I see that.

Q. And then we see this sort of statement after statement of a similar vein. We can just pull up this page.

And — like we see a statement here from a Watson about why they went to D.C.

Are these the kind of statements you relied on to see the purpose for why these folks went to D.C.?

A. Yes. This would be consistent.

Q. Okay. Now, I want to turn back to the attack on the Capitol.

And did we —

[p.119]

THE COURT: Before we move on, I am going to exclude 96. I apologize. I think I only — I must not have

JA434

watched the whole thing, but I'm going to exclude it as hearsay. That doesn't mean if that's something that Mr. Simi would consider in forming his opinions that he can't do that, but I'm not going to admit it into evidence.

So 96 is excluded.

MR. OLSON: Okay. Thank you, Your Honor.

Q. (By Mr. Olson) And just to make sure the record is clear: Dr. Simi, did you look at Exhibit 96 and other statements by folks at the Capitol as part of forming your opinion?

A. Yes, I did.

Q. Okay. Great.

Now, did Trump do anything during the attack that influenced the extremists engaging in it?

A. I'm sorry. Can you repeat the question?

Q. Did Trump do anything during the attack that influenced the extremists engaging in it?

A. Yes.

Q. What was that?

A. Well, there's a — the tweet we're reading — or we're looking at here from Donald Trump

[p.120]

indicates that Mike Pence didn't have the courage to do what was — he was expecting and what he wanted and that, you know, the fraud would not be rectified, basically, that Mike Pence was supposed to rectify the stolen election and that —

THE STENOGRAPHER: And that what?

A. And that did not happen.

Q. (By Mr. Olson) We saw the tweets earlier in the day where Trump was focused on Mike Pence, right?

A. Yes. That's correct.

Q. And did Trump talk about Mike Pence's courage in the Ellipse speech?

JA435

A. Yes, he did.

Q. Okay. And so now he says “Mike Pence didn’t have the courage.”

Now, we’ve seen the video of the person reading his tweet with a bullhorn, so I’m not going to replay that now. But I do want to ask you about one image from that video, which is the noose that we see there.

Based on your study of the right-wing extremists, does a noose have any particular meaning in that movement?

A. Within far-right extremist culture,
[p.121]

there is a particular book that has a substantial amount of influence called “The Turner Diaries.” It was published in 1978. And it’s a — it’s a fantasy fictional novel, but it envisions a revolution within the United States.

And there’s a passage in the book that’s referred to as the Day of the Rope. And the Day of the Rope in the novel, what they call as race traitors, political opponents of various sorts, are hung from lightposts or lampposts, and this is a mass killing. And that term, “Day of the Rope,” has a lot of salience among far-right extremists.

We actually saw it used by one of the members of the Proud Boys specifically referencing what was going to happen on January 6 use the term, “It’s going to be ‘Day of the Rope.’”

And I’m paraphrasing, but something to that effect, yes.

Q. Okay. Now, did Trump eventually say something that caused the crowd to stop their attack?

A. Yes, he did.

Q. Okay. Let’s look at — was this video what you had in mind?

A. Yes.

Q. Okay. I know we’ve played this video

[p.122]

before, but let's play it one more time. I'd like to get your input on the video based on some of our earlier conversations today.

(Video was played.)

Q. (By Mr. Olson) Dr. Simi, based on our discussions of how leaders of right-wing extremists communicate to their followers, how does this speech fit into that context of the communication style?

A. From the perspective of far-right extremists, I think there's three things happening here. One is a continuing affirmation of the stolen election conspiracy theory. So really continuing to emphasize the idea that the election was stolen.

Two, an affirmation of the attackers and the attack that just happened.

And then, three, there is consistent messaging in terms of going home.

Q. Why is it — consistent messaging in terms of going home notable in your experience?

A. It's not just a one-off. It's not just something that seems more about developing plausible deniability. But it does come across as a consistent theme that this is what Donald Trump wants us to do.

Q. Did he, in this speech, condemn the acts of violence?

[p.123]

A. No, he did not.

Q. I want to turn to one last tweet from Donald Trump.

This is at — this is — was this before or after the speech we just saw?

A. This is after.

Q. Okay.

A. About two hours approximately.

JA437

Q. And how does this tweet about what happened that day fit into the pattern of communication of leaders of far-right extremism?

A. Again, there is no condemnation; there's affirmation. Again, further emphasizing the stolen election, referring to patriots — “great patriots,” actually.

So for far-right extremists, that is a very substantial, meaningful term, because they see themselves as patriots, and this emphasis on being treated unfairly.

Q. Does Donald Trump continue to enjoy strong support from far-right extremists?

A. Yes, he does.

Q. Now, I forgot to ask this earlier.

Before we get to your sort of headline or your conclusions here, Dr. Simi, have you been paid

[p.124]

for your work in this case?

A. Yes, I have.

Q. Tell us how much you've been paid and what your hourly rate is.

A. Approximately \$35,000.

Q. Okay. And what's your hourly rate?

A. \$300 an hour.

Q. Okay. Is that your standard rate?

A. That's my standard, yeah.

Q. All right. Thank you.

Let's look at sort of the conclusion slide here. Could you describe for the Court your conclusions about the issues that you were asked to address in this case?

A. January 6 in terms of the attack on the Capitol certainly should be seen within a larger, longer context of political violence committed by far-right extremists.

JA438

There is certainly a high degree of evidence supporting that the violence was committed for political goals, political purposes. Certainly, there's a large number of people in planning or organization that was present, apparent in terms of the attack on the Capitol. And that the goal really was focused on preventing the democratic transfer of

[p.125]

power.

Now, within that context of far-right extremist violence, January 6 does have some unique aspects to it that are also important to underscore. So the size, the intensity, and the scope would stand out in terms of the — what's represented by the attack on the Capitol.

And there's most notably the role that Donald Trump played in terms of influencing the events. The nurturing of the violence ultimately committed in terms of the attack on the Capitol, that would certainly be distinctive from other — you know, other types of violence committed by far-right extremists.

Q. How confident are you in your conclusion that Donald Trump played a central role leading these events?

A. Very confident.

Q. Why is that?

A. It's in the evidence. It's from my years of studying how far-right extremists, you know, perceive communication; the relationship that they developed with Donald Trump over multiple years; the various signals, including everything from the things we discussed at the rallies in terms of promoting or

[p.126]

endorsing violence; the things done over social media; the messages in regards to various types of out-groups that

are identified by far-right extremists that are aligned with many of the things Trump said over the years.

So that relationship that was established and built really, I think, underscores how much influence he has for far-right extremists and how much they perceive him as essentially on their side or one of them.

Q. And in this pattern — repeated pattern of communications, do you have any doubt in your mind that Donald Trump is aware of the influence his words have on right-wing extremists?

A. It seems pretty clear to me. You know, I'm not in Donald Trump's mind, obviously, but the — you know, in terms of observable patterns, in terms of the repeated nature of the things we've been discussing, that's all pretty apparent.

MR. OLSON: Okay. All right. Your Honor, these are all the questions I had. But I want to — if you had any additional things you wanted to ask Dr. Simi about, I wanted to make sure we covered those before I sit down.

THE COURT: I'll follow up on that last
[p.127]

question about — you know, how obviously you're not a mind reader, you don't know what President Trump was thinking.

I guess, what more can you say about the possibility that this just isn't how — isn't just he speaks this way versus deliberately speaking in a way that would cause people to react?

THE WITNESS: Well, again, I would come back to this point about, yes, social scientists, we are trained to try and identify observable patterns.

And so, you know, I completely am not in Donald Trump's mind. But there are patterns that we've been discussing that were observable that occurred over

JA440

multiple years where you have these kind of repeated, you know, occurrences and things of similar nature kept repeating to occur.

And we also, from a far-right extremist's perspective, have a lot of evidence about how they saw the relationship and how they saw his influence, how they saw him — what they believe to be endorsing and promoting their violence, their cause more broadly.

THE COURT: Right. But, I guess, how it's perceived is one — one element of — but that, again, doesn't — I mean, you don't have any evidence

[p.128]

that President Trump was trained on this kind of form of communication or anything like that, correct?

THE WITNESS: That is correct.

THE COURT: Thank you.

MR. OLSON: And can I just ask a couple quick follow-up questions?

Q. (By Mr. Olson) The Unite the Right rally, when was that?

A. 2017. August 2017.

Q. And we saw that — the speeches from when Trump was President commenting on “very fine people on both sides,” right?

A. That's correct.

Q. Okay. And the Proud Boys were involved in some of the Unite the Right rally?

A. Yes, they were.

Q. Okay. So when you have a political rally where people are — or someone is murdered and other people are hurt — right?

A. Yeah.

Q. I'm sorry.

A. I thought there was an objection.

JA441

Q. And then you later have the President, unprompted, identifying that group by name, right?

A. Correct.

[p.129]

MR. GESSLER: Objection. I'm not sure that was quite a question, but there was an answer to it. This is clearly leading and argumentative.

MR. OLSON: Okay. Well, I'll rephrase my question.

THE COURT: Okay. I'm going to sustain the objection, not on the argumentative part but the leading.

MR. OLSON: Okay.

Q. (By Mr. Olson) You just talked about patterns, observable patterns to the social scientists?

A. That's correct.

Q. Okay. Is what we see between the 2017 rally, 2019 comment, is that an observable pattern or not in your mind?

A. Yes. It's certainly part of one.

Q. Okay. Why is that?

A. Well, you know, things that are said, things that are done, these are things that we can point to as happening or not happening. We can look at how the statements or actions are interpreted by others, how they are perceived by others. These are all things that we can, you know, observe.

Again, when we're talking about being in

[p.130]

somebody's mind, that's not really observable.

Q. But in terms of when you're talking about observable patterns, this is an example of one, right?

A. Yes. Yeah, exactly.

MR. OLSON: Okay. Thank you very much, Dr. Simi. I have no further questions at this time. We may get to talk again after Mr. Gessler, but thank you.

JA442

THE WITNESS: You're welcome.

MR. GESSLER: Your Honor, might I have about three or four minutes to fumble around with the technology? And I can't promise my fumbling will be over at that point, but I just want to get set up here, Your Honor.

THE COURT: Okay.

MR. GESSLER: Okay. I'm just going to try and go somewhat technology-free. We'll see how that works, Your Honor.

CROSS-EXAMINATION

BY MR. GESSLER:

Q. Good morning, Dr. Simi.

How are you today?

A. Doing well.

Q. Good.

[p.131]

A. Good morning to you.

Q. And we shook hands briefly yesterday —

A. That's correct.

Q. — outside the men's room. So thank you for being here.

So since you've been a witness before, you know how this works. I'll ask you some questions. If I'm not clear on something, please just tell me.

A. Sounds good.

Q. So I want to ask you a little bit about your methodology here.

So you've, it says, done about interviews, you said, of far-right-wing extremists?

A. That's correct.

Q. And over how many years is that?

A. Beginning in 1997.

Q. Okay. So 20— over about 26 years?

A. Yeah.

Q. Okay.

A. That's correct.

Q. And 14 of the Proud Boys, Oath Keepers, and Three Percenters; is that correct?

A. That's correct.

Q. Okay. And how many of those interviews
[p.132]

were people who participated in the January 6 riots?

A. So that's — it sounds like a question that's a little bit complicated.

There's Institutional Review Board regulations that provide confidentiality, so I certainly wouldn't be able to name individuals that I've interviewed. I don't know if that was — you know, if that's kind of where you were going with the question, but . . .

THE COURT: Was that where you were going?

MR. GESSLER: I may, but I'm — but probably not.

THE COURT: Okay. Yeah. I took the question just as a — whether the people in your 14 were involved in the January 6 protests.

A. None to my knowledge; however, it's certainly possible that — you know, obviously, I don't know the identity of every single person, you know, that participated in January 6, so . . .

Q. (By Mr. Gessler) Right. So —

A. None to my knowledge.

Q. So you may have interviewed Person A, and that person may have shown up on January 6, but you just don't know?

[p.133]

A. That's right.

Q. Okay.

A. Yeah.

JA444

Q. So it would be fair to say that you interviewed these people well before January 6, those 14?

A. Yes. That's correct.

Q. Okay. Did you interview any participants, far-right-wing extremist participants in the January 6 after January 6?

A. No, I have not.

Q. Okay. Did you live with any families or people who participated in the January 6 riots?

A. Not to my knowledge.

Q. Okay. So your field — so your interviews and sort of fieldwork living with people — I'm sorry. This — okay.

Does fieldwork — fieldwork consists of interviews and sort of embedding yourself or living with people; would that be correct?

A. That's correct. The interviews are — can be either formal in nature or more informal.

Q. I just want to make sure I'm properly describing fieldwork.

So your fieldwork also occurred with

[p.134]

respect to this group of people before January 6; is that fair to say?

A. Yes. That's correct.

Q. Okay. And then as far as embedding yourself or living with families, did you embed yourself or live with any families that participated in the January riots, to your knowledge?

A. To my knowledge, no.

Q. Okay. As far as the archives go, so which archives did you rely on here? I saw a number — let me — let me back up.

So I saw a number of — we counted your expert report citations.

JA445

A. Sure.

Q. And I'm going to represent to you we counted about 78 citations to the January 6 report.

Does that sound about right to you?

A. I counted the same number.

Q. Well, that's good. Thank you for answering my question on that.

What other archives did you rely on?

A. So as I mentioned, archives can be more formal in natural or informal in nature. So social media, for example, would be — those would be — the various platforms are all types of archives which has

[p.135]

been a big — big part of, you know, my research and what I looked at, including in this case.

So various, you know, social media platforms would fit there.

Certainly, videos. Again, I mentioned at the outset, YouTube really is an important type of archive. It's widely used among researchers in terms of accessing different kinds of collections of material. They're housed in that. Again, it's not established for research purposes, but it provides information that —

Q. So let me ask you a question.

And I'm sorry. I don't mean to interrupt.

A. No.

Q. I might do that a little bit, but —

A. Sure.

Q. So in determining — how do you determine whether you're going to look at one social media archive versus another archive? Or do you just choose every single archive you can get your hands on?

I mean, how does that selection process occur?

JA446

A. Yeah. It — you know, some — some archives are — have a greater presence of far-right

[p.136]

extremists than others. But you certainly want to try and sample from as many different archives as possible. You're certainly—it's unlikely to be able to use every single social media platform. But I certainly utilize the kind of major social media platforms. They're more what you might call the mainstream-type platforms like Twitter or what used to be Twitter, Facebook, Instagram.

But then also more what you might call niche or fringe social media platforms like Telegram. But it has a substantial concentration of far-right extremists.

Q. So let me ask you this.

So if there's a body of opinion, say a body of opinion among sort of far-right extremists, what measurements do you have in your profession to determine whether or not a particular archive is representative of that body of opinion?

A. What you would look at is really, A, the presence of, you know, trying to make some determination about their presence on that particular platform.

Q. Okay. So it would be fair to say that the — that the ones that are sort of — have a greater presence or sort of more commentary, perhaps

[p.137]

louder commentary? I don't know quite how you measure loud in the social media world; they type in all caps?

A. Yeah. You look at intensity.

Q. Intensity?

A. Yeah. Q. Okay.

A. So, for instance, a call to violence would be, obviously, a more intense statement on a social media

JA447

platform than a statement that didn't involve a call to violence.

Q. Okay. So that's, in part, how you choose what to look at? You look at the intensity and the amount of presence?

A. Those are two things, yeah.

Q. Okay. Anything else?

A. Well, you'd want to look at how the social media platforms compare to each other as well. That way, you get a sense of their kind of differences in terms of how one platform is used versus another.

Q. Okay. And is any one platform in your experience more representative of sort of the body of far-right-wing opinions?

A. I don't think there is in my opinion. And certainly in the literature there's never been to my knowledge any kind of published scholarly

[p.138]

identification of one platform being most representative.

Q. Okay. So I want to apply that, maybe take it down one level for the January 6 rioters, okay?

Did you — what — did you look at any particular platform that you believe represents the entire spectrum of views — best represents the entire spectrum of views of people who rioted on January 6?

A. Well, I don't think there is one single platform. But I certainly looked at a number of different platforms, yes, to include some of the ones already mentioned — Telegram, for example.

Q. And you chose those platforms in part based on the intensity of the commentary on there and the volume of commentary?

A. Well, not quite.

Q. In part?

JA448

A. Just want to back up on the intensity.

The intensity is something you look at in terms of no matter what their presence is on the platform. You would look at — that would be one indicator of the kind of the nature of the speech and whether there are calls to violence or not.

Q. So —

[p.139]

A. You wouldn't assume necessarily that there is a high degree of intensity.

Q. So how do you measure or identify the opinions of people who aren't on social media platforms?

A. Well, that's why you don't exclusively rely on social media certainly. There's — that's what the fieldwork is.

Q. So interviews?

A. Interviews, yeah, absolutely.

Q. Fieldwork?

A. Absolutely.

Q. Okay.

A. Yeah.

Q. Okay.

A. Surveys can be done.

Q. Okay. Did you do any surveys of participants in the January 6 riots?

A. No, I did not.

Q. So you looked at social media platforms.

You looked at the January 6 report, correct?

A. Those are two things, but . . .

Q. What else?

A. Well, again, scholarly research that's

[p.140]

related to the topic. Certainly looked at —

Q. May I interrupt you just for a second?

A. Yeah.

JA449

Q. So what scholarly research did you look — specifically with respect to January 6?

A. Oh, I'm sorry. I thought you meant political violence more broadly.

Q. No. I understand.

But I'm talking — that's why I interrupted you.

A. Sure.

Q. So specifically with January 6, I saw that you wrote a scholarly work, a published work on that; is that correct?

A. That's correct.

Q. Have you consulted any others?

A. Yeah. Oh, yeah. Absolutely.

Q. Okay.

A. I certainly have looked at other expert testimony in regards to —

Q. For this report?

A. What's that?

Q. For the report that —

A. Yeah —

Q. — you produced today?

[p.141]

A. — for the report. Yeah.

Q. Okay.

A. There's an archive of expert testimony.

Q. Okay. So you looked at other people's opinions on January 6?

A. That's correct.

Q. Okay. Let me ask you a little bit about patterns of behavior. So we talked about patterns of behavior. And I want to make sure I understand sort of correctly what — some of these patterns of behavior.

One, you said, was a sort of conspiracy belief, a belief in conspiracy or shadowy forces?

A. Yeah. That's a central core belief.

JA450

Q. Okay. And the us-versus-them?

A. That's a central dynamic within —

Q. Sort of an antidemocratic ethos is what you called that, authoritarianism?

A. That would be another element.

Q. Okay. And you said violence?

A. That is a practice. Yes. That's correct.

Q. Okay. And then you talked about using various communication strategies?

A. That's correct.

[p.142]

Q. Okay. Now, I want to take each one of those.

My understanding is — from your testimony is that, probably except for violence, a lot of these others are sort of commonly used in political discourse by others?

Is that fair to say?

A. They're generic features of social life, human behavior, which is what makes them so powerful.

Q. Okay. So, for example, conspiracy theories and shadowy forces, is that — that, would be fair to say, is often used in political discourse, correct?

A. I'm sorry. I misinterpreted. I thought you were speaking exclusively about the communication strategies.

Q. Yeah.

A. Conspiracy theory. There's obviously — when you look at, for instance, surveys that measure belief in conspiracy theory, there's quite a bit of variability. So that's not necessarily the same — it doesn't have the generic feature the way, say, the use of doublespeak does, but . . .

Q. Okay. And let's focus on conspiracy theories, for example.

[p.143]

A. Okay.

JA451

Q. So are you familiar with political discourse where people will complain about shadow — special interests controlling our government?

A. Yes, I've heard those phrases. Yes.

Q. Okay. And you agree with me, that's a common feature for people sort of across the political spectrum to be angry or upset about special interests controlling their world?

A. I think that's fair.

Q. Okay. People will talk about big oil or big corporations or big labor.

Those are all sort of a variant of a conspiracy theory; is that fair to say?

A. They could be.

Q. And, in fact, that goes back quite a way.

Are you familiar with the political scientist, Richard Hofstadter?

A. Yes, I am.

Q. And he wrote a very famous book in called "The Paranoid Style in American Politics," right?

A. Yes.

Q. And he sort of talked about conspiracy [p.144]

theories as — in American politics, how they were a consistent feature as far back now as 60 years ago.

Is that fair to say?

A. It is. And a group of scholars that Richard Hofstadter was associated with did identify, though, what they called right-wing radicalism was especially kind of characterized by conspiratorial beliefs.

Q. But they also said that it was common — a common feature throughout American politics?

A. Yeah. Fair enough.

JA452

Q. Okay. How about — let's talk about us-versus-them.

That's — would it be fair to say that that's a common theme in American politics as well?

A. Sure.

Q. Is that fair to say?

A. Yeah.

Q. Okay. Democrats are angry at Republicans; that's an us-versus-them element. And Republicans can get angry at Democrats as an us-versus-them element.

It fits both sides of the political spectrum; is that fair to say?

A. Sure. What we're talking about here as [p.145]

us and them is associated so closely with violence, which —

Q. Understood.

A. — wouldn't be a common feature.

Q. Understood.

A. Yeah.

Q. But I'm trying to isolate each one —

A. Okay.

Q. — to give me a better sense of —

A. Sure.

THE STENOGRAPHER: If you could both please be careful about speaking one at a time for me, please.

MR. GESSLER: I'm sorry.

Q. (By Mr. Gessler) And then, an antidemocratic ethos or authoritarianism.

I think you would — would you agree with me that there — that's also a very frequently occurring or common feature in American politics?

A. I don't know that I would agree with that.

Q. Okay.

JA453

A. Yeah.

Q. So would you agree with me that people on both sides of the political spectrum are sometimes

[p.146]

frustrated to say that the legislature or Congress can't be trusted?

A. That's a statement I've heard from various political orientations, sure.

Q. Okay. You've heard — in fact, we've heard Presidents talk about how, if Congress isn't going to do something, they're going to take matters into their own hands.

You've heard that from both sides of the spectrum; would that be fair to say?

A. Is that — could you repeat that?

Q. We've heard that from both sort of political parties, that Presidents who get frustrated with Congress not moving forward on legislation talk about how they're going to take things into their own hands?

A. Okay. Yeah.

Q. Okay. You've heard arguments where — I'll ask you.

Would it be fair to say you've heard arguments where people on both sides of the political spectrum throughout will argue that the legislature should not be taking action, that it's up to the courts to decide.

Is that fair to say?

[p.147]

A. Generally.

Q. Okay. And so your point is that the thing that characterizes far-right extremism is that they have sort of these three — these elements, and they add to the mix of violence.

Would that be fair to say?

JA454

A. Yes, that's a defining feature of extremism —

Q. Okay.

A. — the close relationship with violence.

Q. Okay. Let's talk about communication strategies.

So you talked a little bit about doublespeak —

A. That's correct.

Q. — right?

And if I remember correctly, you said that we sort of all do doublespeak to some effect?

A. I —

Q. Just —

A. Oh —

Q. To some extent.

I'm sorry. We all do doublespeak to some extent?

A. That's correct.

[p.148]

Q. Okay. And I think you used the example, sometimes we'll put — we'll emphasize a particular aspect towards a job interviewer and a different aspect or a different face towards perhaps a romantic partner or something like that?

A. Actually, I used that example to illustrate the front-and backstage behavior distinction, which is a different concept.

Q. Okay. I'll get to that in a little bit.

A. It's —

Q. Let me continue to focus on the doublespeak.

So doublespeak would be saying one thing in public and a different thing in private.

Is that fair to say?

A. That could be an example. It's also saying one thing, irrespective of whether it's public or private, that could be interpreted different ways depending on the audience's understanding.

JA455

And so it might be understood in one way by outsiders who don't have a good contextual understanding of a particular culture, and then a different way by insiders within a specific culture will understand it to mean something different than what outsiders would.

[p.149]

Q. Okay. So is —

A. The same or different understanding.

Q. Okay. That's what I'm asking.

A. Yeah.

Q. So I'm asking, a person will use the same word in front of one audience, which has a particular meaning, and then they'll use the same word in front of a different audience that has a different meaning.

Is that doublespeak?

A. That would be an example of doublespeak or a facet of doublespeak.

And, again, I would say — underscore again this is a generic facet of communication. Oftentimes it's innocuous. Sometimes it can even have well-intentioned aspects to it in terms of maybe not wanting to use certain language that could be interpreted in a different way so as to not offend someone; for example, to try and be polite or kind of adhere to some form of etiquette.

Again, though, I'm underscoring that for far-right extremists, it's deeply connected to the violence issue.

Q. But it's —

THE COURT: I'm sorry. You said it's

[p.150]

deeper connected to what?

THE WITNESS: Deeply connected to the violence issue.

THE COURT: Okay.

JA456

Q. (By Mr. Gessler) I'm sorry. Did you see "deeper" or "deeply" connected?

A. Deeply.

Q. Okay. So your characteristic — your application to far-right extremists is that they'll use doublespeak just like everyone else, but they also connect it to violence.

Is that fair to say?

A. That's fair to say.

Q. Okay. And then you talked about a couple other communications. I wanted to just sort of go through these. Front- and backstage. That was one of them.

Where you're sort of favorable and you put a favorable foot forward in front of someone, and then a different aspect or personality in front of someone else.

Is that fair to say?

A. Yeah. That's a fair characterization.

Q. Okay. And that was the example of a person will behave one way in a job interview and

[p.151]

behave a different way towards a romantic partner?

A. That's correct.

Q. And that would sort of be a form of doublespeak?

A. A form of front- and backstage.

Q. I'm sorry. That would be a form of front and back?

A. Yes, sir.

Q. I'll work on my sociology degree during this cross-examination.

And one — so would one example of sort of doublespeak be a politician who presents him- or herself in a very moderate way in front of one group and in a very radical way in a different group? Would that be a form of doublespeak?

JA457

A. That would involve — that would likely involve language that would kind of fit the characteristics of doublespeak —

Q. Okay.

A. — based on what you've described here.

Q. So doublespeak, you use different language between the two audiences?

A. Well, you may use different language or you may use the same language with the understanding that audiences will potentially receive it

[p.152]
differently.

Q. Okay. Okay. So I say okay, but I'm not understanding.

A. Okay.

Q. So doublespeak — why don't you give me doublespeak in your words —

A. Sure.

Q. — and we'll go from there.

A. Sure. I mean, we talked about 1776.

THE STENOGRAPHER: Would you speak a little closer to the microphone for me, please?

THE WITNESS: Sure.

A. When we talked about 1776, for example. So the term for insiders within far-right extremist culture is understood in a way that would likely be different for outsiders who aren't steeped in that culture.

So it's the same term, but it has — it's understood differently depending on kind of cultural context, which is really what doublespeak is all about. It's about basically contextual understandings and how they vary depending on a whole host of different factors, including the situation, the audience, what their understanding is, tone of voice.

[p.153]

And you can imagine there's lots of different things that go on to how sort of contextual cues shape understanding.

Q. (By Mr. Gessler) Okay. So let me see if I can understand that.

So let's say — let's say I'm involved in politics, and I'm running for office or I'm an officeholder. And I go to a Fourth of July parade, and I give a speech. And the speech says "Remember the Spirit of 1776. This is why our forbearers fought and died," sort of a rousing patriotic speech. And I frequently use the term "1776," okay? And there's far-right-wing extremists in that audience, okay?

And then let's say I do the same speech at a different — I'm going to a bunch of Fourth of July parades. So I go to one Fourth of July parade and give that rousing speech, and there's far-right-wing extremists in it. And then I go to another Fourth of July parade, I give the same rousing speech or something pretty close, because I've practiced it a lot. So I'm giving a pretty close speech. Maybe I even wave a 1776 flag as part of my speech in both audiences. And that one contains no far-right-wing extremists.

Is that a form of doublespeak?

[p.154]

A. Yeah. Again, you're going to have different understandings.

Q. Okay. Because one crowd will understand it in a particular way, and the other crowd will understand it in a different way?

A. Yes. Q. That's doublespeak?

A. Based on kind of cultural context —

Q. Okay.

A. — and how they understand it.

JA459

Q. Now, as a speaker, do I have to know that there's far-right-wing extremists in one audience? And do I have to know that there aren't far-right-wing extremists in the other audience in order for that to be doublespeak?

A. Not necessarily.

Q. So if I'm — now, I want to make sure I — so if I'm a politician and I'm running for office or I'm holding office and I give my rousing Fourth of July speech in front of far-right-wing extremists — and I don't know they're far-right extremists. I mean, some of them have salt-and-pepper beards like they're grandfathers. I don't know. Maybe, maybe not.

But let's say there are people, but I

[p.155]

just don't know.

A. Okay.

Q. And then I go to this other rally; same speech, no far-right-wing extremists.

I have engaged in, from a sociological standpoint, doublespeak; would that be fair to say?

A. What I've described here in terms of far-right extremism is the doublespeak tends to be intentional.

Q. I —

A. So, you know, you described something that may not be intentional.

Q. I understand that. And I've been very clear on my hypothetical, where it's not intentional.

But I'm asking, is it still doublespeak if it's not intentional?

A. Well, it would have — it may have similar consequences. So the consequence or the effect of it in terms of how it's received, then that would constitute an aspect of doublespeak. It wouldn't be kind of true

JA460

doublespeak without more of an intentional aspect to it, though.

Q. Okay. So it would be fair to say it's characteristic of doublespeak, but absent intentionality, it's not true doublespeak; is that

[p.156]

fair to say?

A. As far as how doublespeak is practiced by far-right extremists, it's associated with, you know, a high degree of intentionality.

Q. Okay. So far-right extremists will be intentional about how they do that?

A. Part of the culture.

Q. Okay. But you can have someone doing the same time thing unintentionally and they're not a far-right extremist?

Let me rephrase that question. It's a terrible question.

A. Thank you.

Q. So you're saying far-right-wing extremists, they're intentional about it, correct?

A. Within far-right extremist culture, doublespeak is used in an intentional fashion.

Q. Okay. And so it's fair to say that when you define doublespeak with respect to far-right-wing extremism, you're implying intentionality; the speaker intends to have a different effect on different audiences?

A. That's correct. And part of that has to do with the violence aspect.

Q. Right. And to some extent, that would

[p.157]

imply that the speaker knows that there's different audiences and that's why he or she is using the doublespeak, because they understand their audiences?

JA461

A. Or they suspect.

Q. Or they maybe suspect?

A. Yeah. They may not be sure about potential differences, but they may have some reason to believe.

Q. Okay. And — all right. So you have to understand the intentionality first before really understanding whether it's a far-right-wing speaker using doublespeak; is that fair to say?

A. Can you rephrase that question?

Q. Do you need to understand intentionality before you can understand whether a far-right-wing speaker is actually using doublespeak?

A. Well, you can observe the practice. So the practice certainly can be observed.

Q. Okay. So you can observe the practice, and you can say, well, one audience here, one audience there. It correlates. It correlates with doublespeak.

Would you say that?

A. It correlates, consistent, yep.

Q. But you don't really know if that

[p.158]

speaker is engaging in doublespeak absent some understanding of their intent?

A. Yes. That's why the fieldwork and interviews is so important.

Q. I see.

A. And also the archival material in some cases will oftentimes betray the intent in some fashion, as the example of Robert Ray, for example.

Q. As an example of — I'm sorry?

A. The example from the organizer of Unite the Right that we discussed earlier when he was talking about how humor is used in terms of a way to establish uncertainty

JA462

among audiences so folks don't know when they're seriously promoting violence or versus joking about it.

Q. Okay. Now, you've also talked about how someone will have — make a statement. And I think you spoke about this in the context of some of President Trump's speeches.

But how someone will make a statement and then negate that statement —

A. Yes.

Q. — correct?

A. Yeah. A certain negation of sorts.

Q. Okay. So something like, you know, "Go
[p.159]

do something terrible, but I'm just joking," or don't really do it.

Would that be an example?

A. Yeah. That's a fair — the video clip we saw of Nick Fuentes doing that.

Q. Okay. And you say that's very common among right-wing extremists?

A. What we found in our research as well as a number of other scholars have found.

THE COURT: I'm sorry. What was the last thing you said?

THE WITNESS: That's what a number of other scholars have found.

THE COURT: Ah. Thank you.

THE WITNESS: Sure.

Q. (By Mr. Gessler) Okay. And I think — and I think you had talked about — if I remember correctly, there was a video from President Trump's press conference after a Unite the Right rally in Charlottesville; is that correct?

A. That's correct.

JA463

Q. Okay. And I have in my notes that you used that as an example of a failure to condemn.

Was that right?

A. I said there was a statement that was

[p.160]

perceived by far-right extremists as promotion despite — we showed two clips, if you recall. The first clip about “fine people on both sides.” The second clip had a type of condemnation and that that, for far-right extremists, was overridden by the “fine people on both sides” comment.

Q. Okay. So the “fine people on both sides.” So the right-wing extremists listened to the “fine people on both sides,” and they said, “That speaks to us.” And then the condemnation in the second clip, they said, “Oh, President Trump is just saying that because he has to”?

A. It’s almost a verbatim quote from Andrew Anglin that you just said, so yeah, I agree with your comment.

Q. I don’t exactly know who he is.

A. He was the — he is the founder the Daily Stormer and —

Q. Okay. So maybe that’s an example of how, I will represent to you, a lawyer who is not a far-right extremist may use similar language as a far-right extremist?

A. Well, I — you or —

Q. As an example in front of you, so . . .

A. I interpreted your comments paraphrasing

[p.161]

what a far-right extremist might say.

THE COURT: You’re both talking over each other.

Q. (By Mr. Gessler) I’m not accusing you of calling me a far-right extremist.

A. Thank you.

Q. Okay. Let’s —

JA464

THE COURT: But, Professor Simi, make sure to allow him to finish his questions before you start answering them.

THE WITNESS: Okay. I apologize.

MR. GESSLER: And my paralegal just sent me a note admonishing me too, my behavior.

Your Honor, can we take a one- or two-minute break? I just need to figure out a way to get the right video loaded.

THE COURT: Okay.

MR. GESSLER: Thank you.

(Pause in the proceedings.)

Q. (By Mr. Gessler) So I'm going to show you a clip, and I think this is a clip you testified about earlier.

A. Okay.

MR. GESSLER: Can we play that, please, starting at — starting at :55.

[p.162]

(Video was played.)

Q. (By Mr. Gessler) So I'm going to stop there.

So it's your — sort of based on your study. And it's your analysis that sort of the first part of his talk where he said, you know, "fine people on both sides," that the far-right extremists sort of took comfort in that, took inspiration.

And then the second part where he said, you know, "Neo-Nazis, they should be condemned entirely," and whatnot, they view that as doublespeak?

A. Yeah. Establishing plausible deniability.

Q. Okay.

A. Inserting negation after offering a source of affirmation.

Q. Okay. So I'm going to show you a video from the day before this, okay?

JA465

MR. GESSLER: And that's Number 1059, please.
And start that at 1:40.

(Video was played.)

MR. GESSLER: Let's go back. How did we practice
law before?

(Video was played.)

Q. (By Mr. Gessler) So I'm going to
[p.163]

represent to you that that speech at the White House took
place the day before.

So in — when put in conjunction with the April 15, how
did far-right extremists interpret those statements?

Did they view that — let me be more specific.

Did they view that as an example of plausible
deniability?

A. They — remember, this — these remarks at that
time, real time. And it was — no, it was not taken because
these set of remarks were very clear. And when they —
what I think really — you have to understand, there was
already a relationship between Donald Trump and far-
right extremists prior to 2017. And far-right extremists
were already perceiving him in certain ways.

But those set of remarks, if that had been the final
word, it's possible their understanding obviously would
have been different, at least as it pertained to the Unite
the Right rally.

But they weren't. They were followed by the
comments that we saw previously about “fine people on
both sides.” And so that's ultimately what far-right
extremists took from Donald Trump in terms

[p.164]

of his characterization of what happened in
Charlottesville.

JA466

Q. Okay. So let me understand this correctly. So Donald Trump goes to the White House. He makes a statement where he's condemning people from both sides, and far-right extremists sort of look at that.

But then they — then the next day, Donald Trump in his press conference says, "There are very fine people on both sides," and then about a minute later he condemns the KKK and neo-Nazis.

And so you're saying that what the far-right extremists took from this was really "the fine people on both sides." That's what inspired them. And that they essentially disregarded the press conference before, and they disregarded the comments — I'm sorry — they disregarded the White House press conference before, and they disregarded the latter remarks subsequent to "the very fine people."

Is that fair to say?

A. Yeah. I'm saying —

Q. Okay.

A. — that far-right extremists actually are pretty clear on that in terms of confirming

[p.165]

what — how you just characterized it.

Q. Okay. So I guess, you know, the analogy that came to my mind is — have you ever seen the movie "Dumb and Dumber"?

A. You know, I never have.

Q. Okay. I'm going to describe to you a scene. Maybe you've heard this scene.

A. Okay.

Q. There's a scene where sort of the protagonist — I think it was played by John [sic] Carrey. He's the guy who — I don't know if he's the dumb or dumber guy.

JA467

But he's talking to a woman he has a crush on, and he says something along the lines of "If we were the only people left on earth, okay, would you" — "would you like me or would you want me?"

And she says, "Well, you know, maybe" — something along the lines of "one in a million chance."

And he gets this big smile on his face, and he says to her, "So you're telling me there's a chance?"

Did you ever hear that scene?

A. No.

Q. No?

[p.166]

A. Vaguely familiar, but not any —

Q. Was that sort of —

A. — specific —

Q. — would that seem to sort of describe a far-right extremist, where they're always looking for something — something to latch on to that they believe inspires them and will disregard any other evidence to the contrary?

A. No. I don't think that's consistent with the pattern in terms of the relationship between Donald Trump and the far-right extremists.

Now, I will say going back to the Unite the Right and "the fine people," you — we have to put that in context in terms of him saying "fine people." This is not something far-right extremists are used to hearing coming from the President of the United States. And that — so that did have a substantial overriding effect. I think you can understand why given their views typically of politicians and conventional politicians.

And so I think the way you just characterized it is not really consistent with that history in terms of the relationship between Donald Trump and the far-right extremists.

JA468

Q. Okay. Let me ask you about this 1776

[p.167]

thing. I think you had said that sort of far-right extremists view the number 1776 or the phrase involving 1776 as a call to violence, right?

A. Within — yeah, within —

Q. Within their circles?

A. Yeah, within —

Q. And you said —

THE STENOGRAPHER: I'm sorry. I did not hear your answer.

A. Within their circles and certain contexts.

Q. (By Mr. Gessler) And you said that it takes — it takes time for someone to develop that understanding; is that correct?

A. Yes. I said that in terms of how culture operates in terms of the more people become immersed over time, the more understanding they'll develop.

Q. So if I'm someone who's not a part of the far-right-wing extreme movement and I see the number 1776 or the Spirit of 1776, I won't — it's unlikely I'll view that as a call to violence; is that fair to say?

A. Yes.

Q. Okay.

[p.168]

A. I think that's fair to say.

Q. And then I start hanging out with these far-right extremists, and they start using this term "1776." And it will take a while, but eventually, if I subscribe to the far-right extremism, I'll view that as a call to violence, a coded call to violence when it's used?

A. Well, the amount of time it takes is going to vary a lot depending on a whole host of different factors. There's no formula, certainly, that says it's going to take X

JA469

number of hours or days or weeks or months. It's going to depend on how much exposure the person has, the types of exposure.

But generally speaking, yes, as a person becomes more familiar with the culture, they'll start to develop an understanding.

Q. Okay. Let me ask you a little bit about the Stop the Steal.

A. Okay.

Q. Okay. Is it your testimony that talking about stealing — a stolen election is consistent with far-right extremism?

A. The word "stolen," in particular the idea of political corruption, the idea of fraud, these have high degrees of salience within far-right

[p.169]

extremist culture.

It doesn't mean every time those terms are used that that's indicative of far-right extremism. But within far-right extremist culture, those terms are very meaningful and would tend to resonate with their worldview.

Q. Would you agree with me that concerns or being upset about a stolen election is a common feature of modern American politics?

A. Yeah.

Q. And you'd agree with me that people who were opposed to Donald Trump thought that the — or voiced concerns, some of them, that the 2016 election was stolen because of Russian interference?

A. Yeah. I am familiar with those —

Q. Okay.

A. — those claims.

Q. And that, in fact, there was an election in Georgia in which the person who lost, she argued that the election

JA470

wasn't valid and was essentially stolen because of voter suppression.

Do you remember that?

A. I do remember that.

Q. Okay. So it's been a — the stolen election theme, unfair election forces that stole the

[p.170]

election is — that's not uncommon, correct?

A. It's not my opinion that it's exclusive to far-right extremism in —

Q. Okay.

THE STENOGRAPHER: In terms of what?

THE WITNESS: In terms of these issues.

THE STENOGRAPHER: And if you could speak into the microphone, please.

Q. (By Mr. Gessler) But what makes it connected to far-right extremism is the connection towards violence; is that correct?

A. Connection towards violence and, again, the contextual issues that when certain allegations are made as it relates to a stolen election, it would have more meaning in some cases for far-right extremists than some of the examples for — you know, the instance that you just pointed to.

Q. Okay. So if Hillary Clinton, the loser of the 2016, says "Our election was stolen. Donald Trump is an illegitimate President because of Russian interference," that would not have resonance for far-right-wing extremists?

A. No. Far-right extremists would perceive Hillary Clinton — or do perceive Hillary Clinton in very antagonistic terms.

[p.171]

Q. Right. And if Donald Trump were to say the same thing — and I understand he didn't blame Russia for the 2020 election.

But were he to say almost the same thing word for word and blame a foreign power, that would resonate with far-right-wing extremists; is that fair to say?

A. Exactly. Because of this relationship that we've been talking about in terms of this pattern over time that developed between Donald Trump and far-right extremists. Those claims would have a very different meaning for far-right extremists than, as you pointed out, Hillary Clinton making similar claims in that scenario.

Q. Okay. Now, let's —

MR. GESSLER: So, Your Honor, before I continue, I would like to move to admit the exhibit — I believe that's 1060 — I'm sorry. Let me make sure I have my numbers correct. Yeah. Number — I believe Number 1060 has already — that's the same video that's already been admitted, the press conference.

And we move to admit Number 1059, the press conference at the Oval Office.

THE COURT: Admitted.

(Exhibit 1059 admitted into evidence.)

[p.172]

Q. (By Mr. Gessler) So let me also understand that — so when Donald Trump talked about — President Trump talked about the, you know, immigrants from Mexico, some of them being rapists and assuming some of them are very fine people, your testimony was that was a clarion call for the far-right extremists?

A. They heard that, those messages, those terms, and it was a substantial alignment that it had with their own conversations. As it relates to immigration, it was a very

JA472

close alignment. And they found that speech and especially that part of the speech to be very powerful. And you certainly had a lot of discussion among far-right extremists after his announcement and when he was — given that the announcement included those terms.

Q. Okay. And that if — so there's been a lot of debate, I'll submit to you, about immigration — immigrants that some people refer to as illegal immigrants or illegal aliens, there's a number of phrases, but of people who have recently entered the United States being in northern cities. And there's mayors that are sort of getting upset by that.

If a mayor like that — let's call it a Democratic mayor, someone who is not viewed as a

[p.173]

conservative or sympathetic to the far right. So if a Democratic mayor were to use those same words, would that be a clarion call to the far right?

A. You know, in a hypothetical situation without any other contextual information, it's hard to say. It would depend on that person, their history, what the far right knew or didn't know about the person.

Which is why, again, I mentioned that with the 2015 — the campaign announcement, you can't take that in isolation. You also have to take into consideration the currency he had developed based on the Birtherism claims and the involvement he had in terms of promoting that conspiracy theory, which was a major facet of far-right extremism in terms of challenging Barack Obama's legitimacy to serve as President, and, frankly, just being very antagonistic about his election.

Q. Okay. So it would be fair to say that it takes a period of time, a consistent pattern of behavior by a

JA473

politician before the far-right-wing extremists will view his or her comments as a clarion call to action?

Is that fair to say?

A. Yeah. It's hard to say exactly how long

[p.174]

it would take, you know. But certainly these — it would have a pattern, and patterns take time to emerge.

Q. Okay. So it could be a couple of months, a couple of years, but it requires a pattern of behavior?

A. Correct.

Q. I'm going to be jumping around a little bit, so I will apologize to you for lack of thematic development.

A. No problem.

Q. I want to go back to sort of the deniability. Can we — where you said President Trump would say one thing and then immediately negate it afterwards.

Do you remember that?

A. I don't remember saying "immediately."

Q. Okay. But would negate it afterwards?

A. That's a common feature —

Q. Okay.

A. — for far-right extremist leaders in general. And, you know, much of what we've been discussing fits that pattern in terms of the relationship between Donald Trump and the far-right extremists.

[p.175]

Q. Okay. I'm going to show you a video and ask you if — certain speech, if that fits that pattern.

A. Okay.

MR. GESSLER: Your Honor, I may take a few minutes here, so I apologize if I do.

Q. (By Mr. Gessler) All right. I'm not going to be able to find the video quickly, so I'm just going to talk to you about it.

JA474

THE COURT: So it's noon, so . . .

MR. GESSLER: So a respite to find my video.

THE COURT: I'm going to give you a Hail Mary here to find all your videos so you are not eating away time on finding videos.

MR. GESSLER: Thank you, Your Honor.

THE COURT: So why don't we just reconvene your cross at 1:00.

MR. GESSLER: Okay. Thank you.

THE COURT: We're off the record.

(Recess from 11:58 a.m. to 1:07 p.m.)

THE COURT: You may be seated.

Mr. Gessler, are you ready to proceed?

MR. GESSLER: Yes, ma'am.

Q. (By Mr. Gessler) Okay. So, Dr. Simi,
[p.176]

I'm going to start with some exhibits here. And I want to — I'm going to talk about some intentionality and interpretation —

THE STENOGRAPHER: I'm sorry. Can you speak a little louder for me, please?

Q. (By Mr. Gessler) I'm going to talk about —

THE COURT: Mr. Gessler —

MR. GESSLER: Yes, ma'am.

Q. (By Mr. Gessler) Let's try that again.

I'm going to talk about intentionality and interpretation for sort of the next part of what we're going to talk about.

So let's bring up 1074. Okay.

(Technical difficulties.)

A. I thought that was a trick question there for a second.

Q. (By Mr. Gessler) Okay. Can we play just the first five speakers on this video, please.

JA475

(Video was played.)

Q. (By Mr. Gessler) So you heard a number of speakers use the term “fight,” correct?

A. That’s correct.

Q. And I’d represent to you that those are leading members of the Democratic party in office.

[p.177]

Are you able to tell from their speech whether or not they’re intending to provide a message to the members of the far-right wing — you know, far-right-wing extremists.

A. If I may explain my answer?

Q. Let’s just start off on small bits, then I’ll certainly give you a chance.

So from what they’re saying, so using the word “fight,” are you able to tell if they’re intending to speak with far-right extremists?

A. No. Absolutely not.

Q. And it’d be fair to say that you can infer that they’re not intending to speak with far-right extremists because they tend towards a different side of the political spectrum?

Would that be fair to say?

A. I wouldn’t necessarily want to make that kind of inference on limited information, but I see where you’re — I understand your characterization.

Q. Would it be fair to say that in order to understand whether they’re — well, let me back up.

Can you tell from what they’re saying whether or not the members of the far — you know, far-right-wing extremists would view that as a communication to them?

[p.178]

A. Ten-second clips? Absolutely not.

Q. You’d need more context, correct?

JA476

A. More information and more context.

Q. And what is some of that more information you need?

A. You'd want to look at past communication patterns. You want to understand the historical context between the speaker and whatever, you know, community or culture you're trying to understand, whether they have a relationship. You'd want information from that culture's perspective — in our case, right-wing extremists — and how they receive messages and in particular as it relates to that specific person.

So there's, you know, a number of different types of information you'd want to, you know, more fully assess and try and identify whether there's any patterns —

Q. Okay.

A. — that are present.

Q. Let's play a little bit more. I'm guessing your answers are going to be the same, but we're going to go through this.

A. All right.

(Video was played.)

[p.179]

Q. (By Mr. Gessler) Would you answer the same for those five?

A. Yes, it is.

Q. Okay. Let's just finish the clip, and I'll ask you a few more questions at the end of this clip, okay?

(Video was played.)

Q. (By Mr. Gessler) Okay. You heard a few speakers in there say, "We're going to take the fight to the streets."

Do you remember hearing that among some of the speakers? A few of them, I believe, said that.

A. Okay. I trust your characterization.

JA477

Q. You don't want me to play that whole thing again, do you?

A. I'd rather not.

Q. Okay. And so there's a couple of speakers that said, "We're going to take the fight to the streets."

If — if they were at a rally with far-right-wing extremists in it, and they used the term "fight" and "We're going to take the fight to the streets," would those far-right-wing extremists interpret that as a call to violence?

A. If they had a relationship with the
[p.180]

speaker that involved a history of that speaker promoting and endorsing violence, both before and after violent incidents had occurred; had developed a relationship, you know, signaling various things that were important to that community, that culture; signaling things in terms of their support for various grievances; using language representing threats as existential in nature and requiring, you know, violent action — if all of those things were present, then, yeah, quite possibly they would interpret it in that fashion.

Q. Okay. And if those things weren't present, it's unlikely they would interpret those terms "fight" and "take the fight to the streets" as a call to violence, correct?

A. It's always hard to, you know, predict — you know, you take something out of the equation. Again, if you're just saying in isolation one thing, and if that one thing is not present, then, yeah, that would make sense that it would have a substantial influence in terms of a lack of action that might not be taken.

Q. Okay. So let me give you a hypothetical. Let's say there's a speaker. Say one of those speakers in there that says, you know, "We're

[p.181]

going to fight like hell” and “We’re going to take the fight to the streets.” That’s what they say. And they say that at a big rally, and that rally has far-right extremists in it.

But they don’t have a history of promoting violence, at least none that the right-wing speakers know of, and they don’t have any perceived relationship with the far-right-wing extremists. So they don’t have those two factors.

Would that be considered a call to violence?

A. What are the other contextual factors present? That would make a big difference too.

So again, you know, some of these hypotheticals, when they’re asked without enough information, it’s hard for me to answer that question and — depending on what’s the context of that speech that’s being given, why were they saying certain things, what was it related to.

You know, the audience is going to receive — even with a lack of information, you could still imagine that an audience would receive certain calls to action in a particular way depending on the situation.

Q. Okay. Let’s take a look at a few more

[p.182]

videos. And I think they’ll provide a little more context, but perhaps not enough. So we’ll talk about that.

A. Okay.

MR. GESSLER: Exhibit 1026, please.

(Video was played.)

MR. GESSLER: Okay. Let’s stop it right there.

Q. (By Mr. Gessler) So you saw the woman in there. And I’ll represent to you that she’s a congresswoman. And she’s speaking to a crowd, and she’s telling them, the crowd, to push back and make people not feel welcome there. And people are cheering her on.

JA479

Is that a call to violence, or would you need additional contextual information?

A. It would — you know, one of the factors that would be important in terms of additional contextual information is, is there — you know, are there individuals and groups present in the audience that have known violent histories for committing acts of political extremism — violent political extremism?

Saying — you know, making a statement like that with a crowd that has that known history is different than saying those things in a crowd where

[p.183]

that's not present.

Q. Okay. This is Congressman Waters. She may or may not know if people have that history are — who have that history are in that crowd.

A. Okay.

Q. So you're saying, well, maybe it's a call to violence if there are people with that history in the crowd, and maybe it's not a call to violence if there's people without that history in the crowd.

Is that a fair characterization?

A. Yeah. That would be one — again, one aspect. There's — we're only talking about one aspect, though.

Q. So what other aspects would I need?

A. I would go back to what we just discussed, which is the history in terms of relationship between the speaker and members of the audience.

Q. Okay. Great.

MR. GESSLER: Let's look at Number 147.

(Video was played.)

Q. (By Mr. Gessler) Okay. So they're joking about smacking people there, and she's laughing at it.

Does that give you enough context to

[p.184]

know whether or not that would be perceived as an endorsement of or a call to violence?

A. No, it really doesn't. I mean, again, fairly short clip. I'm not familiar with the speakers as far as the radio hosts. I — there's just not much contextual information for me to say much about it.

Q. Okay. MR. GESSLER: Let's look at Number 1048, please.

(Video was played.)

Q. (By Mr. Gessler) Okay. Let's talk about that one a little bit.

Do you know who that is speaking, or do you understand the context behind that?

A. I know who the speaker is.

Q. Okay. And you understand the context, that that was involved in a debate with respect to abortion and the possibility of the United States Supreme Court issuing a decision?

A. Yes. That's my understanding based on what I saw.

Q. Okay. Did you have a preexisting understanding before looking at this video?

A. Of this particular clip?

Q. Yeah.

[p.185]

A. No, I did not.

Q. Okay. So you heard Senator Schumer. He talked about how women are coming under attack, how people are waging war on them and taking fundamental rights.

Is that language characteristic of some of the language used by far-right-wing extremists?

I'm not saying he is one, but does it have the same characteristics of some of the language used by far-right-wing extremists?

JA481

A. One of the things I would want to know more about in order to more fully answer your question would be the history of the speaker's use of the term "war" and whether there's, you know, evidence basically that would suggest that the speaker really believes that a literal war is taking place and that some type of action is required or whether the speaker is using a more figurative type of term in terms of "war."

So without that information, that — it's really hard to assess kind of this — how the speaker is using that term, "war."

Q. Okay. Does the speaker using the phrase "we're coming under attack" — does that create a sense of self-defense and an us — does that create a

[p.186]

sense of self-defense among the listeners?

A. It could. Again, you know, how the — the history of the speaker's use of the terms and their understanding of the terms — how they used it in the past, whether they used it in the past — these would all be important, you know, kind of, again, contextual factors to look at.

Q. So you can't really tell just looking at the words?

A. I don't think there's a social scientist in the world that would say you can take just words at face value. Context is always important, whether we're talking about violence or otherwise.

Q. Okay.

MR. GESSLER: Let's take a look at 1054, please.

(Video was played.)

Q. (By Mr. Gessler) Okay. So — and take — when — I believe it was President Joe Biden. He may not have been President yet at that clip.

But at the time President — I'll call him President Joe Biden, because I don't know the time, out of respect.

JA482

At the time he made that comment, could or would that have been interpreted by the far — by

[p.187]

far-right-wing extremists as a call to violence?

A. Well, let me just first say that any one of the contextual factors in looking at that statement is he said, “I wish I were in high school.” So — and that that — and I think you said important aspect of the statement in terms of understanding.

Would far-right extremists —

Q. So let me interrupt you a second.

Couldn't him saying “I wish you were in high school,” be treated as a case of plausible deniability, almost like a joke to mask his violent tendencies?

A. That is possible. Again —

Q. Okay.

A. — with more context, we can make a better determination.

Q. So it would require context to understand whether he's engaged in — is that doublespeak or front/back behavior?

A. Doublespeak.

Q. Doublespeak.

A. But front/backstage would have other application.

Q. Okay. So we would need context to understand whether one of those two methods of

[p.188]

communication were to apply?

A. Yeah. I hate to sound like a broken record, but we'd want to know whether there was a relationship between Joe Biden and far-right extremists such that there had been a pattern developed where he would have far-right extremists who would understand certain things in a certain way based on the speaker's words.

JA483

Q. Okay. Great. I'm not going to subject you to any more of these types of videos.

So thank you very much for that. Let me move on.

I want to go to the — there's a demonstrative exhibit — picture you used. Picture Number 4, if I remember correctly.

Do you remember looking at that?

A. Yes, I do.

Q. Okay. I want you to look at that picture on the left.

A. Okay.

Q. I'm guessing — and I'm wondering if this is your opinion as well that those are two people fighting.

Does that look like two people fighting?

A. When you say "two people," you're

[p.189]

referring to, on my left, a person in a kind of light-blue-colored shirt that's holding the flag that appears to be as a weapon — using as a weapon?

Q. And the person in the green.

A. And the person in the green.

Q. Okay.

A. To me, it appears that the person in the blue is getting ready to, I guess you might say, stab the person in the green with a flagpole.

Q. Okay. And the person — well, let's look at those people.

So the person in the blue has a helmet, right?

A. Yes. That's correct.

Q. And the person in the green has a gas mask on?

A. It appears to be, yes.

Q. Yeah. So it looks as though maybe they both prepared for violence.

Would that be fair to say?

A. I think that's fair.

JA484

Q. Okay. And the person in the blue — and I see what you're saying. It looks as though that person is preparing to stab.

But I had wondered — it would be fair

[p.190]

to — it could be that that person in the blue had just — was pulling the flag away from the person in the green trying to grab it.

The person in the green's arms — their arms are outstretched, right?

A. Yeah. It appears that way.

Q. Okay. So it could be that they are — and I don't know if it is, but they could be trying to pull it away from the person in the green.

That's a fair interpretation of that photo, isn't it?

A. That's fair in this particular photo. I will say that —

Q. Well, let's just stick with the photo. I'll let you explain. I'm not going to entirely cut you off.

A. Sure. Sure. Appreciate it.

Q. And it could be that the person in the blue is preparing to try and stab the person in the green or hit the person in the green with that flagpole, and the person in the green is sort of reaching out to defend themselves.

Could that be the case?

A. Yes.

Q. That could be the case.

[p.191]

And it could be maybe that the person in the green has swung that flagpole, and the person in the blue caught it, and the person in the green just released it.

That could be an interpretation?

A. It could be.

Q. That could have been —

A. Yeah, it could be.

JA485

Q. So from that photo, we're not really sure who's the instigator of the violence, whether it's the person in the green or the person in the blue, right?

A. That's correct.

Q. Okay. And from what I could tell, just looking at the attire, I mean, the person in the blue, I didn't, you know, see any, like a — like a 1776 emblem or a Betsy Ross that we had talked about that would necessarily indicate that that person in the blue was a — or is a member of a far-right-wing extremist group. I mean, is there some attire — and it looks like it's a woman, a she. Long hair. It looks like that from the back. I could be wrong.

But you'd agree with me, there's nothing in that person's attire that signifies it was a far-right-wing extremist?

[p.192]

A. Other than the fact that they attended a Unite the Right rally which was attended by far-right extremists.

Q. Right. That's fair. So the context, where they're located, but not necessarily their attire themselves?

A. No.

Q. Okay. All right.

A. Some people at Unite the Right had more kind of group-specific attire; many others did not. That was pretty common that day.

Q. And you'd agree with me, same person — same with the person in the green? There's nothing necessarily in their attire that signifies that they're a far-right-wing extremist or a member of that group?

Would you agree with me on that?

A. I would agree with you.

Q. Okay. So you had talked about —

JA486

MR. GESSLER: And we can turn that off for a second.

A. You did say I could explain a little bit. Is that —

Q. (By Mr. Gessler) All right. I'll let you explain.

[p.193]

A. Very briefly. The reason I selected that photo is because dozens of people were assaulted by far-right extremists that day using various weapons, including flagpoles.

Q. Okay.

A. And that's — that's a documented fact.

Q. And so you selected that photo?

A. To be representative of the type of violence that happened at Unite the Right that was committed by far-right extremists.

Q. Okay. Now, did you attend? Did you attend that rally?

A. No, I did not.

Q. Were you an observer of the rally?

A. No. I was in Montreal at the time.

Q. Okay. So you were out of the country during the rally?

A. Correct.

Q. Let's talk about the — you talked a little bit about the million MAGA — the Million MAGA March; is that correct?

A. That's correct.

Q. Okay. And you — and there was a video where a car that you said was President Trump's motorcade drove through it?

[p.194]

A. That was my understanding.

Q. That was your understanding.

And what's that understanding based on?

JA487

A. It's been documented in multiple places.

Q. Okay.

A. And I —

Q. And the reason I ask that is I just saw one vehicle drive through. I mean, I guess in my experience, it seems like usually there's sort of a whole convoy.

A. I think we might have seen a little different aspect of the video. There's several vehicles.

Q. Okay. And you testified, if I remember correctly, that the vehicle went through, and then after that, violence broke out?

A. No, that wasn't my testimony.

Q. How did I misunderstand that?

A. The way you're characterizing it now, it sounds like it kind of almost immediately broke out. I said, "at some point later."

Q. Oh, at some point later.

A. Yeah, yeah.

Q. Okay. I'm sorry.

A. Yeah.

[p.195]

Q. I was just trying to get the sequence right.

A. Sure.

Q. I didn't mean to imply that it was immediate.

A. Okay.

Q. So the vehicle drove through, people cheered it, and then at some point later, violence broke out?

A. Correct.

Q. And did you attend that event?

A. No, I did not.

Q. Okay. Now, you also — there was a tweet in which President Trump said that Antifa — I think he called them scum — but he said Antifa attacked and they were driven off, and then later on other people attacked.

JA488

Do you remember that tweet?

A. I do.

Q. Okay. And I remember your testimony very clearly, because I tend to do a fair amount of writing. I mean, that's all that lawyers produce is words and hot air. And so I'm always sort of keenly attuned to the passive tense.

A. Okay.

[p.196]

Q. And you said that after the — you know, after President Trump's motorcade drove through, sometime later violence — it turned violent.

Were you there to witness who instigated violence?

A. I was not present then.

Q. Okay. Is it your testimony that members of far-right extremists started attacking people?

A. It's my testimony that members of far-right extremist groups like the Proud Boys committed acts of violence that night.

Q. Okay. Is it your testimony that they were defending themselves from an attack from Antifa?

A. It's my testimony that President Trump framed it that way in the tweet.

Q. Okay. But we don't, at this point, stand and watch and say at this point — you know, where you are now, you don't know who may have started the violence?

A. My understanding is that certainly some of the members of the Proud Boys instigated the violence, so there were arrests made and so forth. So . . .

Q. And what's that understanding based on?

A. Public documents.

[p.197]

Q. And I guess the reason I'm asking is I didn't see a public document in your expert report that would indicate who caused any of that violence.

A. I mean, I'd have to review my report.

Q. Okay. Let's talk about — let's talk about that Million MAGA March.

President Trump did not organize that march; is that correct?

A. That's correct.

Q. Okay. And he didn't invite the speakers to it, did he?

A. No, he did not.

Q. And he did not invite who attended to it — he didn't invite the attendees, did he?

A. That's correct.

Q. The only thing he did was drive through it, correct?

A. Presidential motorcade, correct.

Q. Okay. Let me ask you another question.

So there was another video, and I think it's Number 73. And I'm just going to play a portion of it to remind you. I'm not quite sure how to describe it.

(Video was played.)

Q. (By Mr. Gessler) So you remember

[p.198]

talking about this video?

A. That — yes, I do.

Q. And you said that that was posted on that Donald — Donald.win?

A. Donald win, yeah. Donald.win.

Q. Donald.win website?

A. Yeah, so it's a website. So it originally started as a subreddit, and then got weird and turned into more of a website.

JA490

Q. Okay. But that's not President Trump's official website, is it?

A. That's correct.

Q. And it's not his personal website?

A. That's correct.

Q. And there's no evidence that he put it on there, is there?

A. No, I didn't testify to that.

Q. And you testified that there was some traffic or other postings or conversations on that website?

A. A substantial amount. These were — these are large sites that have for years had a substantial amount of extremist right-wing — far-right extremists' posts, including ones of a violent nature.

[p.199]

Q. And there's no post on that website from Donald Trump, is there?

A. Not to my knowledge.

Q. Okay. In fact, there's no evidence that President Trump is even aware of that website, is there?

A. I mean, I'm not inside Donald Trump's mind in terms of what he's aware of in terms of specific sites. But I can tell you that it was — as indicated in the report, that there was a specific situation in terms of some of Trump's advisors, staff, that involved some of the posts on that particular site as it related to January 6. And certainly there were a number of posts that specifically addressed the plans to commit violence on January 6.

Q. Now, was one of those posts by Steve Bannon? You had mentioned a post by — a comment by Steve Bannon. I don't remember if you said he had posted on that website or it was elsewhere.

JA491

A. No. When I referenced Steve Bannon, it was in regards to comments he had made about claiming victory no matter what the election results were.

Q. Okay. And do you know the relationship between Steve Bannon and President Trump?

A. I know he served initially as his
[p.200]

primary campaign manager. And then after Donald Trump was elected President, he served as a White House adviser and that they're, at least according to Steve Bannon, maintaining communication.

Q. So Steve Bannon claims that he's maintaining communication with President Trump?

A. I've heard in the public record that he's made statements in regards to that.

Q. Okay. Would it surprise you if — to learn that President Trump had fired Steve Bannon?

A. No. I recall that.

Q. Okay. And do you recall President Trump saying "Steve Bannon has nothing to do with me or my presidency. When he was fired, he not only lost his job, he lost his mind"?

Do you remember President Trump saying that?

A. I do recall that, yes.

Q. Okay. So you remember President Trump disavowing Steve Bannon, correct?

A. Yes. Correct.

Q. Okay. So let's go back to the speech — to sort of speech patterns. So you were talking about relationships and whatnot.

So if President Trump were at a rally —

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and we saw, I think, where he was — there was a protester or something, and he says, “Get that person out of there.”

That could be considered a call to violence if there’s far-right-wing extremists in that group; is that fair to say?

A. Yes, especially if it’s part of a pattern and it involves after-the-fact endorsements.

Q. Okay. And then if he said, “Get that person out of here,” and then like a few seconds or after a pause said, “but don’t hurt him,” would that “but don’t hurt him,” in your view, be plausible deniability?

A. It certainly could be. Again, we’d have to look at the specific instances and the context. But that could certainly — that statement could serve certainly as a means of establishing plausible deniability.

Q. Okay. And so I’m going to give you — well, let me ask you.

So let’s say President Trump said, “Get that person out of here, but don’t hurt them,” and then members of the crowd pushed that person out and roughed them up a bit, injured them a little bit somewhat.

[p.202]

Would that change your opinion?

A. I’m sorry. Could you —

Q. Would that — in your view, if President Trump said, “Get that person out of here,” and then shortly after said, “but don’t hurt them” —

A. Right.

Q. — and members of the crowd interpreted that to get the person out — to physically, forcibly remove that person.

A. Including assaulting the person?

JA493

Q. And there was — that person was hurt, injured, so

—
A. By means of assault?

Q. By means of — well, yeah, exactly what those people did.

A. Okay.

Q. Would you view President Trump's comments as a call to violence?

A. I would view — well, so that's what the previous question was about, plausible deniability.

Q. I understand. Let me — I'll first ask you —

A. Okay.

Q. — if you view that as a call to violence.

[p.203]

A. Within context, if there's a pattern established, if there's been endorsements for violence after the fact, then certainly that would fit that pattern.

Q. Okay. And then if he said, "but don't hurt them," would that be an example of plausible deniability?

A. If there was an after-the-fact endorsement of the violence that occurred, then certainly that would give credence to interpreting the statement that you just mentioned as an effort to create plausible deniability.

Q. Okay. But I'm not going to give you that part of the hypothetical.

A. Okay.

Q. I'm just going to say that President Trump said, "Get him out of here," and then said, "but don't hurt him," and that there was a crowd, and the crowd, in fact, reacted — or at least some members of that crowd reacted with violence. They forcibly put that person out of there, okay?

Is the phrase, "but don't hurt them," is that plausible deniability? That's all we have to go on.

A. I mean, the answer to that is it

[p.204]

depends. It's going to depend on context. It's going to depend on patterns. So giving one isolated example as a hypothetical with small bits of information, you know, it's difficult to know exactly how these things should be interpreted or would be interpreted.

Q. But in your view, there's a possibility that it could be interpreted as a call to violence plus plausible deniability? There's a possibility that that could be the case?

A. Yes.

Q. Okay. And so I want to draw your attention to January 6 or the events leading up to and surrounding January 6. So you testified about a number of tweets, and one of the tweets that you testified was President Trump tweeting "Come to January 6. Will be wild."

Do you remember that?

A. Yes, I do.

Q. And when I say "Come to January 6," I'm paraphrasing that. But he was trying to drum up support, and the last part he said, "Will be wild," right?

A. That's correct.

Q. Okay. Was that phrase, "Will be wild," a call to violence?

[p.205]

A. By itself? Is that what you're asking?

Q. I'm giving you the tweet. I can bring it up again if you want.

A. Not necessary.

Q. Okay. Was that tweet in and of itself a call to violence? A. It was — for far-right extremists, they wouldn't understand it in and of itself; they would understand it within the context of a pattern. And in that

respect, certainly it was interpreted that way, as a call to violence.

Q. Okay. So knowing what you know of all of President Trump's and the far-right-wing extremists and their respective activities leading up to the day where he says "Will be wild," your testimony is that the far-right-wing extremists certainly interpreted that as a call to action?

A. That's correct.

Q. Okay. Was it — do you have evidence that it was President Trump's intention to call them to action?

A. My, you know, opinion is not addressing that issue. Again, not in President Trump's mind. I could tell you about the patterns that have been observed by myself and other scholars as it relates to

[p.206]

issues in terms of far-right extremism and issues. And I can tell you what I've observed in terms of patterns specifically relating to President Trump and his relationship with far-right extremists.

Q. Okay. So your testimony today, then, it's fair to say, is really sort of limited to how far-right-wing extremists interpreted President Trump's remarks?

A. It's — it's referencing that. But it's also — certainly part of observing a pattern is not just observing what far-right extremists do, but also what the speaker, the sender of the message is doing too.

And so that's part of the pattern. The pattern is not just the far-right extremists and their response, but also the messages that are being sent, the things that are being done, the acts that are taken, the words that are spoken — all of that is part of the pattern as well.

JA496

Q. And what you just said is that it's beyond your opinion today as to whether or not Trump intentionally sought to mobilize people to violence on January 6.

Is that right to say?

A. I can say that he expressed a consistent [p.207]

pattern of messages over time that encouraged violence, he expressed messages over time that endorsed violence. And that's very, you know, I think clear in terms of this matter.

Q. Okay. So on January 6 you saw his speech, and you saw where he said, "Go down there and march peacefully and patriotically to the Capitol."

Do you remember that part of the speech?

A. Yes, I do.

Q. Okay. And your testimony is that the — or your conclusion — and tell me if I'm wrong.

Your conclusion is that the far-right-wing extremists interpreted that to be plausible deniability because of this past history and because your belief that President Trump had aggressive language that outweighed the peacefully and patriotic statement — those two factors, the history and the outweighing of the peaceful and patriotic; is that correct?

A. Those are two, yeah, very critical factors. Yeah. I think that's a fair characterization.

Q. And the aggressive language had to do with going down there and fighting and that type of phrasing?

[p.208]

A. As well as the existential threat type of language, you might say, as well as the reference to essentially a different set of rules applying. So it was the aggressive language in terms of the references to fighting, which

JA497

there were a number of times — several times, but also some of these other things I just pointed to as well.

Q. Okay. But at the end of the day, you don't — I mean, like you said, you don't know what was actually going through President Trump's head?

A. I'm not in President Trump's mind.

Q. Okay.

MR. GESSLER: Excuse me one moment, Your Honor. I think I'm almost done.

Q. (By Mr. Gessler) Oh, one other question about plausible deniability.

If I heard you correctly, so if one of the characteristics, would be fair to say, of plausible deniability is that the speaker only says — only makes that denying statement once, and it's a different matter if the speaker makes that denying statement multiple times in a speech?

A. That could make a difference. It would — again, this is all contextual. So, you know, it would depend on the overall statement, what portion

[p.209]

the specific efforts that plausible deniability kind of consisted of. There's just a lot of factors we have to take into consideration.

Q. Okay. So probably it would be fair to sum up your testimony as saying, when someone makes certain comments or speeches, to understand the impact of that speech, you need to understand not just the words that are used but the contextual factors of which there can be many.

Is that fair to say?

A. Very fair.

MR. GESSLER: That's all I have. Thank you, Your Honor.

THE COURT: Any redirect?

JA498

MR. GESSLER: Oh, Your Honor, I would ask to be able to admit the videos I played —10446, -47, -48, -54, and -74. Not for the truth of the matter that those people wanted to fight, but obviously as a basis for the witness's testimony here in these proceedings.

THE COURT: Your response, Mr. Olson?

MR. OLSON: That's fine.

THE COURT: You're okay with that?

MR. OLSON: Yeah.

THE COURT: Okay. Then I will admit
[p.210]

them.

(Exhibits 1046, 1047, 1048, 1054, and 1074 admitted into evidence.)

THE COURT: But I — yeah. Could you repeat the list?

MR. GESSLER: Numbers 146, 147.

THE COURT: Okay. I think you meant 1046, right?

MR. GESSLER: I'm sorry. Let me get — Numbers 1046, 1047, 1048, 1054, and 1074.

THE COURT: Thank you.

MR. GESSLER: Thank you.

REDIRECT EXAMINATION

BY MR. OLSON:

Q. Good afternoon, Dr. Simi.

Do you have enough water?

A. I think I should be fine. Thank you.

Q. Okay. Great.

I want to start by talking about the patterns of Trump's behavior that you referenced in your conversations with Mr. Gessler. And to help us keep track, I want to put some on the flip chart here.

Can you see that, or do I need to scoot it over a little further so you can see it?

JA499

A. I think I should be able to see it.

[p.211]

Some of it is blocked a little bit, but —

Q. Well, let's —

A. That's better.

Q. Is that better?

MR. OLSON: Your Honor, can you see it okay?

THE COURT: If you move over that screen just like 6 inches. Now I can, yeah.

MR. OLSON: And I should ask, Mr. Gessler, can you see it?

MR. GESSLER: Do I have to? No, I'm good.

Q. (By Mr. Olson) So I want to talk about the pattern. And I want to do that by sort of using the list you put in your report as a frame for this discussion. And if you could turn to page 18 of your report. And I have it here. And we're not going to sort of read everything here, but I want to bring up some of the sources you cite for this pattern in your report and talk about them one by one.

And you see here in this — we see at the bottom it's November 2015. I think we've talked about that already, right? We showed that video?

A. Yes. That's correct.

Q. And I can show it if you want.

[p.212]

Would that be helpful?

A. I don't need to see it again.

Q. Okay. But this is the one where we saw both Trump told them to "Get the protesters the hell out of there." And then the next day he said, "Well, maybe the protesters should have been roughed up," right?

A. That's correct.

Q. Okay. So would this be a data point in your pattern?

A. Most definitely.

JA500

Q. Okay. So I'm going to put here "2015." And to help us remember, I'm just going to put a couple phrases from each incident if we could.

What would you use as a two- or three-word phrase?

A. "Roughed up."

Q. Roughed up. Okay. And you see the next example there is 2000—

MR. GESSLER: Can I interrupt just a second? This is a different version of what we have on the screen.

MR. OLSON: This is the revised report.

MR. GESSLER: All right. We'll double-check.

[p.213]

MR. OLSON: Okay.

MR. GESSLER: Sorry.

MR. OLSON: No. It's fine. But do you want to take a minute to make sure you have the right thing?

MR. GESSLER: Why don't you keep — we'll look while you're going, and if there's a problem, we'll shout.

MR. OLSON: Great.

Q. (By Mr. Olson) The next example you give is February 2016.

Do you see that?

A. Yes, I do.

Q. And then at the bottom is a footnote — and this is dangerous to do — but you see the footnote says "Knock the crap out of tomato throwers," and there's a web — a link to Washington Post?

A. Yes, I see that.

Q. All right. Well, let's watch that video and see what Trump says.

(Video was played.)

Q. (By Mr. Olson) Okay. Is this another example in your pattern of Trump's calling for violence in his speeches?

JA501

A. Yes. Absolutely.

[p.214]

Q. Okay. What phrase should we use to remember this one by?

A. Well, I don't know. "Knock the crap"?

Q. Okay. And this was 2016, correct?

A. Correct. February.

Q. Okay. And if we look back at your report, we see the same example. The next one about — in February '16 about punching him in the face; do you see that?

And do you see in Footnote 74 there's a YouTube link there?

A. Yes, I see that.

Q. All right. Well, let's watch that YouTube link.

(Video was played.)

Q. (By Mr. Olson) How would you — this was in 2016.

What catchphrase should we use for this one, part of the pattern?

A. How about "punch"?

Q. Okay. Well, there may be another one that involves punch.

Can we say maybe "punch in the face"?

A. Sure.

Q. Now, if we go back to your report, we

[p.215]

see — you have another example from March 2016 — sorry, we don't have a video for that one. So let's go to the next page, page 20. I'm sorry, I'm jumping ahead of myself. I have my notes going from — oh, here we go.

From October 2018, do you see that one?

A. Yes, I do.

Q. All right. And that is a New York Times link — right? — in the footnote?

A. Yes, it is.

JA502

Q. All right. And let's look and see what that link says. Let's play the video.

(Video was played.)

MR. OLSON: Your Honor, I thought I got rid of all the ads. I apologize. Give me seven seconds.

MR. GESSLER: Your Honor, we want to see all the ads.

THE COURT: We've all been there, waiting for the ads.

(Video was played.)

Q. (By Mr. Olson) Is this another example of the work that you reviewed in your report about Donald Trump's pattern of praising political violence?

A. Yes, it is.

[p.216]

Q. Okay. What —

MR. OLSON: The risk of doing it live.

Q. (By Mr. Olson) What should we use for that catchphrase?

A. "Body slam"?

Q. Great. Now I want to go to — we talked about a little bit at the end of our conversation, the "Stand back and stand by" comment that Trump made.

Do you remember when he made that comment to the Proud Boys, or should I pull the video up?

A. Oh, yes, I remember it.

Q. When was it?

A. Oh, well, it was at the debate, so — gosh. I don't have the exact date off the top of my head.

Q. Okay. Well, I'll pull the slide up so we can just make sure we all get it right on the demonstrative.

A. Okay.

Q. Does seeing the slide help you remember when the "Stand back, stand by" comment was made?

JA503

A. Yes, it does.

Q. Okay.

A. September 29.

[p.217]

Q. Okay. Do you need to see the video or are we good?

A. No.

Q. Okay. And the comment, “Stand back, stand by” here?

A. Yeah, that sounds — that makes sense.

Q. And then another event in 2020 that we talked about on direct, but I want to provide some more context based on the conversation and — that you had with Mr. Gessler about what we can infer from Trump’s patterns. We played a short excerpt of this video.

Do you remember that with your thing?

A. Yes, I do.

Q. Now, I’d like to play the whole video.

But before I do that, can you just remind us again what was important about Trump’s response to the statement by the Georgia election worker to stop calling for violence? What was important about Trump’s response?

A. Well, I would say two things. One, there’s an omission of any kind of clear condemnation to threats of violence or acts of violence. And there’s a doubling-down as it relates to the very specific issue that’s being referenced in terms of

[p.218]

what’s inspiring people to threaten the lives of election workers and election officials.

Q. Okay. Well, I’m going to play the full exhibit.

MR. OLSON: It’s admitted, Your Honor. It’s P-126. And thanks for bearing with me while we switch back between programs.

And we’ll start at the beginning.

JA504

(Video was played.)

Q. (By Mr. Olson) And I want to turn back to President Trump's response. And on the right-hand side of the screen, that's what we see.

Did President Trump at all do anything to discourage his followers from committing those acts of violence? After being specifically identified, specifically requested, and with specific examples given of harm that was caused, did he do anything to stop that?

A. Not a thing.

Q. I know you're not a mind reader, but is it consistent with someone who wants their followers to behave peacefully to give this response to a specific request for help?

A. Not at all.

Q. I want to put this example on our chart.

[p.219]

And our chart so far focuses on words that Trump has used.

So what word — what catchphrase should we use for this — Mr. Sterling — plea for help and Trump's response?

A. Maybe "Help."

THE STENOGRAPHER: Can you repeat that, please?

A. Maybe "Help."

Q. (By Mr. Olson) Well, again, I want to focus on Trump with what we have here.

A. Okay.

Q. And so what language —

A. "No condemnation."

Q. "No condemnation." Okay.

And can I put "Georgia" underneath to help us remember?

A. Sure.

Q. And the last thing I'd like to talk about on this demonstrative is the Ellipse speech on January 2021. And in your conversation with Mr. Gessler, I noticed it — I'm sure it was a mistake or a paraphrase by his part, but he said that Mr. Trump said in that speech to "Go march peacefully."

[p.220]

Did he say those words, or did he say something different?

A. It was something different.

Q. Okay. Was it a command at all?

A. It was not a command —

Q. Okay.

A. — no.

Q. I can play the speech. Do you remember what it was? Well, we can play the speech if it's helpful.

A. If it's possible to get —

Q. Yeah. We can do that.

A. — to that specific part of it.

Q. I'm going to get close but not perfect. So we'll start a little bit before when it happens.

A. Okay.

(Video was played.)

Q. (By Mr. Olson) So that's — was that a command?

A. Not in my opinion.

Q. And how did that differ from the language that Trump used at the — the speech at 4:17 that afternoon?

A. The speech at 4:17 in the video would be much more consistent with commands.

[p.221]

Q. Why is that?

JA506

A. Because they were directives. They were very specific directives in terms of going home, and they were repeated multiple times.

Q. Now, I want to make sure we don't forget to put the Ellipse speech on this demonstrative.

What catchphrase should we use for the Ellipse speech?

A. "Ellipse speech"?

Q. Okay. Now, Dr. Simi, looking at these patterns over and over of Trump's use and, again, acknowledgment of political violence, what does this tell you about his awareness of the effect of his language on his supporters?

A. It suggests — it suggests a — in terms of when encouragement and promotion of violence occurs, that people respond to that. And that it suggests an awareness on the speaker's part — in this case, Donald Trump knowing that these acts of violence occurred — and is able to then basically endorse and affirm the violence.

So that would be hard to do without an awareness.

Q. I want to turn now and talk about a couple of specific things that you and Mr. Gessler

[p.222]

talked about.

You spent some time with him discussing Steve Bannon, right?

A. That's correct.

Q. Do you remember that?

And as part of that conversation, you or he referenced sort of a plan to declare victory before the election. Do you remember that part of the conversation?

A. Yes, I do.

Q. Okay. I'd like to play that clip now.

MR. OLSON: And, Your Honor, this is not admitted evidence. I want to have it — use it for demonstrative

JA507

purposes to give more context to the conversation that he had with Mr. Gessler. And it's just an audio clip, so there's no video.

(Audio was played.)

Q. (By Mr. Olson) Well, I guess we have half of a video there.

But, Dr. Simi, what kind of relationship did Steve Bannon have with right-wing extremists?

A. A very close one.

Q. And Mr. Gessler mentioned that Mr. Bannon was fired at some point by President Trump.

[p.223]

But didn't President Trump pardon Steve Bannon?

A. That's my understanding.

Q. And you talked about this "Fight for Trump" — oops. Sorry. I know what's happening. My apologies. I'm trying to do too much at one time. I apologize.

Do you see the "Fight for Trump" on the screen?

A. Yes, I do.

Q. Okay. And Mr. Gessler asked you a bunch of questions about TheDonald.win and how Donald Trump didn't have anything to do with that.

Do you remember that?

A. I do remember that, yes.

Q. Okay. But who tweeted this video to all of their followers?

A. Donald Trump.

Q. And I want to talk — and this will be my last series of questions — about — one more subject after this — about Trump's personal relationships with other leaders of right-wing extremism.

Do you know who Roger Stone is? You talked about him in your report.

[p.224]

A. Yes, I do.

Q. Okay. Who is Roger Stone?

A. He's a longtime advisor for Donald Trump.

Q. And what relationship did Roger Stone have with right-wing extremism?

A. A very close one. Had been associated with the Proud Boys for some number of years prior to the Capitol attack. Had a relationship with the Oath Keepers, using them as security.

Q. And you said he was a close advisor of President Trump?

A. That's my understanding.

Q. Okay. Was Roger Stone in D.C. around January 6?

A. That's my understanding.

Q. Was he in D.C. with the Proud Boys around January 6?

A. Proud Boys and Oath Keepers.

Q. And then lastly, you mentioned — we saw some speeches from Alex Jones about 1776. And you talked about who he is. I want to talk about Alex Jones' relationship with President Trump.

Did President Trump appear on Alex Jones' radio show shortly after he announced his

[p.225]

candidacy?

A. Yes, he did.

Q. Okay. And that they had other connections over time?

A. Yes, they have.

Q. Okay. And did Alex Jones — you saw a speech of him speaking —

MR. GESSLER: You know, Your Honor, I have two objections on this. One is this is, you know, being —

questioning. Second, this is far beyond the cross. Far beyond.

THE COURT: It seems like Stone is beyond the cross.

MR. OLSON: Okay. I was just — there was an effort to distance Mr. Trump from these right-wing extremist leaders, and I was putting that effort that Mr. Gessler made in context. There were very tight relationships. So that's what I was attempting to do. But that was my last question on that. I'm happy to move on.

THE COURT: Okay.

So objection sustained.

Q. (By Mr. Olson) Okay. And then lastly, you spent a fair bit of time with Mr. Gessler talking about the "fine people on both sides" comment

[p.226]

that President Trump made?

A. Yes. That's right.

Q. And he showed you the video of the earlier speech from the White House?

A. That's right.

Q. And it seemed to maybe seem somewhat incredible that people would focus on just one snippet from those series of speeches that Trump made about "fine people on both sides"?

A. Yes.

Q. Well, how do you know that the far-right extremists responded so strongly to Donald Trump's statement of "fine people on both sides"?

A. That's the research. That's the data collection. The interviews, the archival materials provides us with ample evidence from their own mouths talking about how they interpreted that comment about "fine people."

JA510

Q. Can you give us — I know you talked about it in your report, but can you give us a couple examples just offhand of —

A. Sure.

Q. — the kind of material you're relying on?

A. Yeah. I think I might have mentioned

[p.227]

this earlier. But David Duke, Richard — David Duke, who was present at the Unite the Right rally. He was one of the featured speakers who ended up speaking. But Richard Spencer was one of the key organizers of Unite the Right. And, again, Andrew Anglin. All three of them were very public in their thanking of Donald Trump for those comments.

And certainly those are just three examples, but there were certainly many other, you know, not-so-high-profile folks that were also expressing similar sentiments in terms of interpreting that message in that fashion.

MR. OLSON: Thank you, Dr. Simi. That's all the questions I have.

But just one housekeeping matter, Your Honor. I'd like to admit those videos of President Trump speaking that I pulled up online because — we talked about them. They're not in the exhibit list; they were responsive to the cross.

Oh, they are on the exhibit list. Oh.

So it's Exhibit — I have exhibit numbers. Exhibit P-51 is the — “Knock the crap out” video. Exhibit P-52 is — my colleague used a different catchphrase than I did, so we'll figure that out and come back to that one. Exhibit P-57 is the

[p.228]

“body slam” video. And I will quickly figure out which of the other two are here that have been admitted at a break.

JA511

THE COURT: Okay.

MR. OLSON: But right now, P-51 and P-57 we move for admission.

THE COURT: And P-52, correct? 51, 52, 57?

MR. OLSON: Yes. I'm sorry. Thank you. Yes. And then we'll — yes.

MR. GESSLER: No objection, Your Honor.

THE COURT: Okay. They're admitted.

(Exhibits 51, 52, and 57 admitted into evidence.)

THE COURT: So we are — we are done with —

MR. OLSON: Yes.

MR. GESSLER: I have a little bit of recross, Your Honor.

THE COURT: It will be very short because we're not — I generally don't allow recross at all, Mr. Gessler.

MR. GESSLER: Thank you for your indulgence, Your Honor.

THE COURT: Sorry, Professor Simi.

[p.229]

THE WITNESS: No problem.

RECCROSS-EXAMINATION

BY MR. GESSLER:

Q. Look at it this way, Professor Simi. You're getting more experience on the stand and just for your own development there.

A. I appreciate it.

Q. Okay. Just a couple questions. So the sources — I want to talk about the sources that you went to.

How did you choose — I mean, what was your process for choosing those sources?

A. When you say — can you ask the question again?

Q. What was your process for choosing these sources upon which to base your opinion?

A. The incidents themselves.

JA512

Q. Okay. What was your process? Why did you choose those incidents?

A. Well, that's part of the research process and studying what happens in terms of during the campaign and what happened after Donald Trump was elected. And so there's certain things that would be relevant to focus on and study in more closer detail. And as you're looking at far-right extremists —

[p.230]

Q. So I'm going to cut you off a little bit only because the Court has admonished me to be brief —

A. Sure.

Q. — and I don't want to be too long.

So did you listen to every single speech President Trump gave since?

A. No, I did not.

Q. You didn't listen to every single word, no?

A. No, I did not.

Q. So there may have been lots of parts of those — lots of things he said outside of your scope of review that, perhaps, endorse violence? There could have been, right?

A. You're saying there are additional examples?

Q. No. I'm asking, you don't know whether there were?

A. That's fair.

Q. And you don't know whether there was stuff outside of these examples that you didn't look at that — where he was advocating peacefulness? You just don't know?

A. That's right. In fact, I can guarantee

[p.231]

you that when you have a pattern, there will be exceptions to the pattern. No pattern is ever 100 percent.

Q. So you're familiar with the term "selection bias," right?

JA513

A. Of course.

Q. Okay. So the only way to truly get a representative of President Trump's speech would be to listen to all of it and take a representative sample out, correct?

A. You wouldn't need to listen to the entire total of the speeches to, you know, arrive at an analysis of different segments of the speeches. That wouldn't — you would be — you wouldn't be sampling at that point. You would look at the entire universe, which is different than sampling.

Q. So you'd have to take a sample — a random sample of — a line up of his speeches. You'd have to line them all up, you'd have to provide identifiers for each minute or each segment, and then you'd sample each segment, correct?

A. That would be one way of doing it, although not the only way. Random samples are not the only type of sampling strategy. And, again, if we're talking about identifying patterns, you would not need

[p.232]

to do what you just described to identify a pattern.

Q. What I'm getting at is it's true, isn't it, that you basically focused on the stuff that you thought was relevant to far-right-wing extremism, and you ignored things that you didn't think was relevant to far-right-wing extremism?

A. I don't think that's fair. I think I certainly looked at positive cases, which these would be examples of what we call positive cases. I certainly looked at negative cases. And, again, you can identify a pattern by looking at positive cases without looking at every single case in a sample or a universe.

Q. So let's look at these positive cases.

So the first one is the 2015 "roughed up," right?

A. That's correct.

JA514

Q. And we saw a sample video of that, correct?

A. That's correct.

Q. And that sample video did not — after Trump — or before Trump spoke — President Trump spoke in that video, there was no evidence of someone being roughed up, correct?

A. I'm sorry. Can you repeat that?

[p.233]

Q. There was no evidence in that video of someone actually being roughed up?

A. That's fair.

Q. And in the “knock the crap” video, there was no evidence of anyone actually having the crap knocked out of them, right?

A. These are positive cases of encouraging or promoting violence —

Q. I understand.

A. — not —

Q. And my point that I'm making, and I'm going through it bit by bit, is that every one of these was speech, and there was no video in any of these examples of actual violence occurring; is that correct?

A. These are positive cases of promoting violence, so of course not.

Q. So there's no violence that occurred in that video, “body slam,” after President Trump spoke in the video?

A. Yes, that's right.

Q. Okay.

A. Because these are about promoting violence, not committing violence.

Q. So it was all based on President Trump's

[p.234]

speech, correct?

A. These are all, you know, video clips that involve speech, yes.

Q. There's — you're not saying that President Trump actually waded into the audience on — in 2018 and body-slammed someone?

A. As it pertains to this list, it's a list of positive cases related to promoting violence. That's the specific —

Q. And —

A. — thing we're dealing with.

Q. And the promotion of violence is his speech, correct?

A. That is correct.

Q. Okay.

MR. GESSLER: That's all I have, Your Honor.

MR. OLSON: I'm sorry. Mr. Gessler made a gross mischaracterization of the record, and I'd like a chance to just show one thing to the witness.

If I may, Your Honor?

THE COURT: Yeah. Go ahead.

MR. OLSON: My apologies. My . . .

[p.235]

CONTINUED REDIRECT EXAMINATION

BY MR. OLSON:

Q. So, Professor Simi, we saw this. I don't want to replay it.

But on the left we see Trump telling someone to get roughed up, right?

A. That's correct.

Q. And on the right he's talking about the fact they — a person was roughed up, right?

A. That's correct.

Q. There's no doubt in anyone's mind that what they were talking about on the right was a person at a Trump rally getting roughed up, right?

A. That's correct.

Q. Okay.

MR. OLSON: Thank you, Your Honor.

THE COURT: So it's 2:25. I know we're breaking at 1:00 [sic]. So let's — who is the next witness, and how long do you anticipate they will take?

MR. GRIMSLEY: It's Professor Banks, Your Honor.

THE COURT: Okay. So he was going to be a short one?

MR. GRIMSLEY: Relatively short.

[p.236]

THE COURT: Okay. So it sounds like we can for sure get through him?

MR. GRIMSLEY: Depending on the cross-exam, yes.

THE COURT: Okay. Were you planning on then having another witness start, or do you think we're in a position that we don't need to use up all the time?

MR. GRIMSLEY: I don't think we need to use up all the time, Your Honor. We could have a witness start, but I think it would make more sense to have the witness start fresh tomorrow.

THE COURT: Are they here? Are they here?

MR. GRIMSLEY: They are here, Your Honor.

THE COURT: Okay.

MR. GRIMSLEY: It's — Professor Magliocca would be the next witness.

THE COURT: Do we need a bathroom break? Okay. I'm getting nods. So let's start — Mr. — is it Mr. Banks?

MR. GRIMSLEY: Professor Banks.

THE COURT: Professor Banks. Let's start with Professor Banks promptly at 2:40, and we'll

[p.237]

see how quickly it goes before we decide whether to start the other — the second, Magliocca, after that. But we will stop before regardless.

(Recess from 2:28 p.m. to 2:43 p.m.)

THE COURT: You may be seated.

MR. GRIMSLEY: Stand up, Professor Banks. She's going to swear you in.

THE COURT: I'm going to swear you in. Will you raise your right hand, please.

WILLIAM BANKS,

having been first duly sworn/affirmed, was examined and testified as follows:

THE COURT: Great. Thank you. And just make sure to speak into the microphone.

THE WITNESS: Sure. Thank you.

MR. GRIMSLEY: And not too fast.

THE WITNESS: Got it.

DIRECT EXAMINATION

BY MR. GRIMSLEY:

Q. Please introduce yourself to the Court, sir.

A. My name is William Banks.

Q. What do you do for a living?

A. I'm a law professor.

Q. Where are you a law professor?

[p.238]

A. I've been a law professor at Syracuse University in Syracuse, New York, since 1978.

Q. What do you teach at Syracuse?

A. I teach courses in constitutional law, national security law, counterterrorism law, the domestic role of the military, various seminars in subjects related to those areas.

JA518

Q. Now, in addition to teaching, do you do anything else at Syracuse?

A. Yes. I founded an institute in 2003 called the Institute for National Security and Counterterrorism, which was created to provide opportunities for graduate students and law students to engage in advanced study to enter careers in the national security field, primarily in the government and in military in Washington, D.C.

Q. Is there anything else you do related to national security issues? A. I've done a number of projects for the Department of Defense and civilian agencies in our government providing for emergency preparedness and response exercises, case studies, simulations, the like, where senior members have come to Syracuse or me to Washington to work through some scenarios, red teaming and the like, to better prepare for crisis

[p.239]
situations.

Q. What have you been asked to do in this case?

A. I've been asked to prepare a report and then provide testimony on the legal authorities that President Trump had at his disposal to quell the violence on January 6.

Q. And are you prepared to testify about that here today?

A. I am.

Q. Have you ever served in the military?

A. I have not.

Q. But have you worked for the military?

A. In those contract cases that I mentioned a moment ago. I've had several relationships with entities inside the Department of Defense over the years, yes.

Q. And have you ever advised the military?

JA519

A. With respect to emergency preparedness and response and follow-ups to those case studies and simulations, I have, yes.

Q. Well, if you never served in the military, how did you get interested in national security law?

A. Short story. Please indulge. .

[p.240]

1987. Presidents Reagan and Gorbachev were at one of their well-known summits in efforts to try to develop a framework for the reduction of the nuclear stockpile.

After a few of those meetings, they had become pretty friendly with one another. And they approached the dais to have a press conference after one such session, and they didn't realize that the microphones were on. And they were joking with one another about having their fingers on the nuclear button.

That happened to be a Saturday, and for reasons that I can't recall, I was in my office. And my phone rang. And it was a reporter, a national reporter from somewhere. And she asked could the President of the United States just do that? Could he whimsically launch nuclear weapons?

You know, thinking as quickly as I could, I said, "I don't think so, but I'm not sure why."

So on the basis of that gnawing concern that I had, I gathered with some other colleagues around the United States and American legal education, and we essentially created a new field of study of national security law, wrote a casebook which is now

[p.241]

in production and going into its eighth edition and used in more than 100 American law schools.

Q. What does your academic scholarship focus on?

JA520

A. It focuses on those same areas. I have nearly 200 books and articles and subjects of constitutional law, national security law, presidential power, counterterrorism law. In recent years, a fair number of pieces on cybersecurity.

Q. Have you written any books or articles on the topic you're here to testify on today, namely the President's authority to respond to domestic security threats?

A. The most prominent book is called "Soldiers on the Home Front: The Domestic Role of the American Military." It was published by Harvard University Press in 2016.

Q. Roughly how many articles and books do you think you've written related to the topic of the President's authority to deal with domestic security threats?

A. Somewhere between 30 and 40.

Q. Have you given any presentations or lectures on that topic?

A. Many around the United States and around [p.242]
the world, yes.

Q. Give me an estimate of how many you think.

A. 30.

Q. Are you a member of any professional organizations related to the topic you are here to testify about today?

A. Yes. I'm a member of the American Bar Association Standing Committee on Law and National Security. I just completed my second term as chair of that committee which was created by Justice Lewis Powell in 1962. It's the oldest standing committee of the ABA.

I'm also the past President of the Association of American Law Schools' Section on National Security Law.

Q. Where did you go to law school?

JA521

A. About four blocks from here at the University of Denver.

Q. When did you graduate from DU?

A. 1974, when the law school was still downtown.

Q. Did — I was going to say. Did you get any other degrees?

A. Yes. I stayed on at DU and took

[p.243]

a course of study called master of science in law and society. It was a post-law masters. It no longer is available here, I believe, but I achieved that degree in 1982.

Q. Now, when again did you start teaching at Syracuse?

A. 1978. So I was studying and teaching at the same time for a bit.

Q. When did you start teaching national security law and related topics?

A. After the Reagan-Gorbachev meeting. We started — I think my first class was 1989, and the book was first published in 1990.

Q. So before moving to your opinions, I wanted to ask you about any research you did specific to this case.

What, if anything, did you review regarding the January 6, 2021, attack and events leading up to it in coming to your opinions in this case?

A. I reviewed several documents, including the January 6 Committee report, the Department of Defense timeline surrounding the January 6 period, the Inspector General report the Department of Defense completed in the following year, provisions of the

[p.244]

District of Columbia code, provisions of the United States code, sections of the United States Constitution, general scholarly articles.

MR. GRIMSLEY: Your Honor, at this point we would like to tender Professor Banks as an expert in the U.S. President's powers to prevent or stop domestic attacks on the government and the authorities that President Trump had to call on to stop the attack on January 6.

MR. GESSLER: Your Honor, we'll renew our 702 objections that this is — he's testifying on an issue of law that the Court is better equipped to handle and that it's not appropriate to have legal opinions at — come in as expert reports — as expert testimony. Sorry.

THE COURT: I will, to the extent you're renewing your motion, deny the motion for the same reasons I did in my written ruling. And I will admit him as an expert on national security and the — I think it was the presidential powers to respond to a domestic attack.

MR. GRIMSLEY: Yes, Your Honor. So the President's authorities to respond to a domestic attack.

THE COURT: Correct.

[p.245]

Q. (By Mr. Grimsley) Now —

THE COURT: Can I ask you a question, though, before we —

THE WITNESS: Sure.

THE COURT: — go on? Where was the DU law school?

THE WITNESS: Across the street from the art museum.

THE COURT: Okay. No idea. I learn something new every day.

JA523

THE WITNESS: It was a pretty small structure. In fact, all the clinical programs had to be in downtown office buildings. And I did many of those, so I spent about half my time at the school and half in the clinics, which then was joined to a YMCA, I think.

THE COURT: Okay. A little trivia.

THE WITNESS: Yes.

Q. (By Mr. Grimsley) So I wanted to start with one of the findings from the January 6 Committee that I think you referenced in your report. And this is from page 577 of the January 6 report. And it — we've got it highlighted here.

It says "President Trump could have called top officials at the Department of Justice, the

[p.246]

Department of Homeland Security, the Department of Defense, the FBI, the Capitol Police Department, or the D.C. mayor's office to ensure that they quelled the violence."

Was that one of the findings in the January 6 report that you reviewed?

A. It was.

Q. What is your view of that finding?

A. I think the finding is correct.

Q. Why?

A. Well, the President had plentiful authority to respond to the January 6 attack, including by reference to all the departments that are included in that sentence that you just reviewed. In addition to that, as many here know, he's also the commander of the D.C. National Guard and had a very potentially important role.

Q. Let me stop you there. I want to start asking you some questions specific to the D.C. National Guard.

A. Yeah.

JA524

Q. What authority does the U.S. President have over the D.C. National Guard?

A. The President of the United States is in a unique position vis-a-vis the D.C. National Guard.

[p.247]

He's the commander — he's the commander notwithstanding any interest that the mayor or anyone else at the District may have, and he's been the commander of the D.C. National Guard since 1889. At the time when Congress confirmed that position by statute on the President, there was no local government in the District of Columbia.

As we know in every other state, the governor is the commander of the militia when they're going out in state capacity. Because there's no governor in D.C. and Congress has not seen fit, at least up to this time, to confer that status of command on the mayor, the President has been consistently in charge of the D.C. National Guard since 1889.

Q. Roughly how many members of the D.C. National Guard were there on January 6?

A. I'm told there were around 2,000, 1,100 or so who were activated by that day.

Q. And you talked about this a little bit, but how does the President's authority over the D.C. National Guard differ from his authority over National Guards in other states?

A. Yeah. It's uniquely different. There's a principle in American law called *posse comitatus*.

[p.248]

The Latin stands for power of the county, which was neither here nor there.

But the *posse comitatus* law was enacted after the Civil War to establish a baseline presumption that we

JA525

don't want members of the military enforcing civilian laws. We've always entrusted civilian law enforcement to civilians, and we, as a culture and a society, have wanted to keep it that way.

The exception to that principle are the National Guard to the various states and the District of Columbia. When those forces are called out by the governor — or in the case of D.C., by the President of the United States — they're what is called the militia capacity, active-duty state capacity, and posse comitatus does not apply.

So they may supplement law enforcement by their own force, and that force was available to the President on January 6.

Q. Well, let me ask you this, just backing up.

You had said that posse comitatus does not apply to the D.C. National Guard?

A. That's correct.

Q. So can the D.C. National Guard, then, be [p.249]

deployed to a major — to what would traditionally be law enforcement activities?

A. They may.

Q. And who has the authority to do that?

A. The President of the United States.

Q. Does the President, in order to deploy the D.C. National Guard, need the permission or a request from the mayor of D.C.?

A. He does not.

Q. Does he need permission or a request from anyone?

A. No, he does not.

Q. If President Trump, in the days leading up to January 6, had been concerned about the potential for violence, what could he have done regarding the D.C. National Guard?

JA526

MR. BLUE: Objection, Your Honor. He's leading the witness now.

THE COURT: Overruled.

Q. (By Mr. Grimsley) You can go ahead.

Do you need the question again?

If President Trump, in the days leading up to January 6, had been concerned about the potential for violence, what, if anything, could he have done with the D.C. National Guard?

[p.250]

A. He could have deployed them or arranged for them to be on call or ready to be deployed on January 6.

Q. Again, what sort of permission or request would he have needed from the mayor?

A. He would have needed no request or permission from any other official.

Q. Once President Trump knew that a mob, a violent mob, was attacking the Capitol on January 6, what, if anything, could he have done with the D.C. National Guard?

A. He could have immediately ordered them to report to the Capitol.

Q. Would he have needed any request or permission from the mayor?

A. No.

Q. Now, put aside January 6, and let's go back in time a little bit.

Have you seen any evidence of President Trump deploying the D.C. National Guard in Washington, D.C., prior to the November 2020 election?

A. In the summer of 2020, I believe it was early June, the President deployed the National Guard and various law enforcement personnel in the wake of the protests surrounding the murder of George Floyd.

[p.251]

Q. Did the President need any permission to do that?

A. He did not.

Q. Do you recall if there was a request from the mayor's office for him to do that?

A. There was not.

Q. Now, there's been some suggestion already in this case that prior to January 6, President Trump authorized 10- to 20,000 National Guard troops to be available at the Capitol.

Is that even possible?

A. It would have been very difficult to envision. I see no — nothing in the record that indicates that that order by the President was ever issued.

The reason I say it would have been difficult is that the National Guard, when federalized by the President of the United States — he certainly has the legal authority to do that, call the National Guard from anywhere and federalize them — they then are subject to the posse comitatus principle and could not engage in direct law enforcement in D.C.

If he's going to rely on National Guard from the governors of adjoining states, for example, he may well do that, and they, then, are not subject

[p.252]

to posse comitatus. But then they're subject to the command of their governor, not the command of the President of the United States.

Q. So I want to break that down. So there's the 10- to 20,000 number.

How many, roughly, D.C. National Guard over which the President had authority were there?

JA528

A. There were up to about 100. About 340 had been prepositioned on that day for duties unrelated to law enforcement.

Q. If the President had, in fact, authorized far more than that, he would have had to go through governors?

A. Yes.

Q. If the President had, in fact, authorized 10- to 20,000 National Guard troops to be available on January 6, what type of documentation would you expect to have seen?

A. We would have seen —

MR. BLUE: Excuse me, Your Honor. This is way beyond his expert report. And if I remember correctly, you had said that because we weren't doing depositions that the experts would be limited to their expert reports.

THE COURT: That is absolutely true.

[p.253]

But give —

MR. GRIMSLEY: I was just going to bring up where it is.

THE COURT: The first full paragraph or —

MR. GRIMSLEY: It's — this is — we served a supplemental expert report, Your Honor, and this is on page 3 of that supplemental expert report. And this is addressed right there.

THE COURT: Okay.

MR. BLUE: Can you give me a few minutes, Your Honor?

THE COURT: A few minutes to find it?

MR. BLUE: Yep. Well, in my documents.

THE COURT: It's clearly there, so I'm going to —

MR. BLUE: What page are we looking at?

MR. GRIMSLEY: It's page 3 of the supplemental report.

THE COURT: It's the first sentence of the first full paragraph.

MR. GRIMSLEY: Yeah. It's actually a full paragraph on this topic that carries over to page 4.

MR. BLUE: Okay. Thank you, Your Honor.

[p.254]

THE COURT: Objection overruled.

Q. (By Mr. Grimsley) What documentation would you have expected to see if there had, in fact, been authorization of 10- to 20,000 National Guard troops to be available on January 6?

A. We would have seen documentation inside the Department of Defense, and we would have also seen documentation from the National Guard Bureau for any forces that came from adjoining states.

Q. Why would you expect to see documentation if 10- to 20,000 troops had been authorized?

A. Because that's a significant number. They're not D.C. National Guard. They're either going to be federalized, again, in which case posse comitatus would prevent them from law enforcement, or they're coming from adjoining states, probably Maryland and Virginia, and the governors of those states and the command in those states would have had to issue orders for their force.

Q. Did you review documents in this case to see whether there were, in fact, records of authorization of 10- to 20,000 troops?

A. I did review the Inspector General's report of the — of the Department of Defense that was

[p.255]

compiled during the year after the January 6 events, and I also reviewed the January 6 Committee report extensively. And in neither case did I see any indication

of an order for that size or magnitude of force from anyone.

Q. I want to show you what's been submitted as Exhibit T-V. It's one of President Trump's exhibits.

MR. GRIMSLEY: And we would move to admit it. I assume there will be no objection.

MR. BLUE: T-V?

MR. GRIMSLEY: It was the three-page Department of Defense timeline.

MR. BLUE: It's been renumbered.

MR. GRIMSLEY: Okay. So I'm going to call it T-V for the moment. I'll let you know, Your Honor, we have no objection to it being admitted.

THE COURT: Okay.

Q. (By Mr. Grimsley) So I'm going to show this to you, Professor.

Do you recognize what's marked here as Exhibit T-V?

A. I do. It's the Department of Defense timeline on the days surrounding January 6.

Q. Is there anything — well, who put [p.256]

together that timeline?

A. The Pentagon.

Q. Anything in that timeline reflecting the presidential authorization of 10- to 20,000 National Guard troops?

A. There is not.

Q. What does that suggest to you?

A. That it never happened.

Q. What other documents, if any, did you review to determine if there was an authorization of 10- to 20,000 troops?

A. Again, I read carefully through the DOD Inspector General report that was compiled later that year, and that made no reference to such a decision by the President.

JA531

Q. What about the January 6 report?

A. Likewise, extensively reviewed, and no mention of such an authorization.

Q. Now, I want to go to an entry on January 3, 2021.

Do you see that?

A. Yes.

Q. And there's a bullet point, the third bullet point. And what I learned from doing this is the military really likes acronyms. So I'm going to

[p.257]

spell them out, and correct me if I'm wrong.

The third bullet point says "Acting Secretary of Defense and Chairman of the Joint Chiefs of Staff meet with the President. President concurs an activation of the D.C. National Guard to support law enforcement."

Could that be an authorization of 10- to 20,000 troops?

A. It could not. You see a couple of things about that bullet point. One is the reference there is to the D.C. National Guard, not to any forces. And there weren't 10- or 20,000 D.C. National Guard personnel available for deployment on that day.

And second, if we look back up the timeline, you see that the Sunday, January 3, bullets are partially in response to a request by Mayor Bowser and the Homeland Security Chief Rodriguez from December 31 requesting a modest number of National Guard personnel to perform traffic duties, Metro enforcement, and a few other things on that day, totaling about 340 personnel.

Q. So I want to ask you about that in just a second.

MR. GRIMSLEY: Your Honor, a housekeeping matter. It's Exhibit 1027.

[p.258]

THE COURT: And no objection, Mr. Blue?

MR. BLUE: No, Your Honor.

JA532

THE COURT: 1027 is admitted.

(Exhibit 1027 admitted into evidence.)

Q. (By Mr. Grimsley) Now, you said earlier there was no reflection of an authorization of 10- to 20,000 troops in this timeline put together by the Department of Defense.

But is there a discussion of some much smaller number of troops —

A. Yes.

Q. — in this?

A. That's the 340 now that you're going to highlight on the — Monday the 4th of January. This was Mayor Bowser's request that you see there, traffic control, two shifts of 90; Metro station support, two shifts of 24; so-called WMD Civil Support Team, which was about 20; and then command and control personnel, 52. And then on top of that, there was authorized a quick reaction force of 40 which would be staged at Joint Base Andrews available for deployment if needed.

Q. So the 340, were those deployed in the Capitol — meaning Washington, D.C., not at the Capitol building — on January 6?

A. Not the 40 that remained at Andrews.

[p.259]

Q. The 340.

A. Of the remaining, that 300— those 300 personnel, yes, they were deployed. And, again, they were in two shifts, so they weren't all there at one time. But about half of them would have been at either a traffic control point or at a Metro station or at a command control center during — during the entire day.

Q. And that's my fault. It's 300 around the city and then 40 at Andrews Air Force Base?

A. That's correct.

JA533

Q. So what were the 40 at Andrews Air Force Base doing?

A. Well, they were waiting instruction to move to the District because they were simply there to respond to a disturbance —

THE STENOGRAPHER: A disturbance what?

THE WITNESS: A disturbance if one broke out. Sorry.

Q. (By Mr. Grimsley) What, if anything, could President Trump have done on January 6 with regard to the 300 troops stationed around the city and the 40-troop quick reaction force at Andrews Air Force Base once he knew that the Capitol was under attack?

A. Once he learned that that force had

[p.260]

already been deployed outside the District and he could see from his own video screen that violence was breaking out at the Capitol, he could have redeployed them from their existing stations to the Capitol with the time — a limited amount of time needed to get there and then also to be equipped with riot gear. Riot gear was apparently stored at convenient places near their present places of deployment.

Q. In your review of the documents, did you see any evidence that President Trump did that?

A. No.

Q. We talked about what he could have done with the D.C. National Guard.

Is there anything that he could have done with regard to the Virginia or Maryland National Guard units once he knew the Capitol was under attack?

A. He could have spoken with the governors of those respective states or either one of them and approve their

JA534

deployments of their forces to the Capitol as quickly as possible.

Q. Now, that would have taken longer, right?

A. That would have taken longer. There is the time to get from Maryland to Virginia to the Capitol, and there's also the communication that would

[p.261]

have to go on between the Pentagon and those National Guard officials.

Q. In your review of the evidence in this case, did you see anything that suggests that President Trump deployed that authority?

A. He did not.

Q. Now, we've discussed what President Trump could have done with the National Guard. Was that the only law enforcement entity that he could have called on that day?

A. No. He could have called on other executive branch agencies to deploy personnel.

Q. Let me show you what's been marked as Plaintiffs' Exhibit 148 at — sorry — page 77.

And do you see a tweet there?

A. Yes.

Q. Who is that tweet from?

A. From then-President Trump.

Q. What date was that tweet sent?

A. January 5, 5:25 p.m.

Q. The night before the January 6 attack?

A. Yes.

Q. And what does Mr. Trump say?

A. He's warning Antifa to stay out of Washington. And he says "law enforcement is

[p.262]

watching," and then he tags various executive branch entities including the Pentagon, the Justice Department,

the Department of Homeland Security — actually, the Department of the Interior — that’s Secretary Bernhardt — and the Secret Service. Of course, the FBI’s part of Justice.

Q. How, if at all, do those tagged entities relate to the law enforcement authorities that President Trump could mobilize on January 6 when he saw that the Capitol was under attack?

A. Particularly, the first three — or the first — the second — the Justice Department and DHS have personnel that could have been brought to the Capitol from headquarters very quickly on that day, rapid response teams that could have deployed to the Capitol on the order of the President.

Q. What could he have done with the Department of Homeland Security?

A. They, likewise, have a rapid response team that could have deployed in a matter of minutes from headquarters to the Capitol.

Q. You said Secretary — Secretary Bernhardt was the Secretary — or was the Secretary of the Interior.

What relevance does the Secretary of the
[p.263]

Interior have to law enforcement personnel that could have been mobilized on January 6?

A. That department includes the National Park Service. And, of course, the President’s speech earlier that day was from the Ellipse, which is on the territory for which the National Park Service is responsible.

Q. And what about the Secret Service?

A. They have, of course, a protective detail, a large segment of protective personnel, who could have been instructed either by the secretary of DHS or by the President himself to respond to the crisis.

JA536

Q. How about the FBI?

A. Likewise, the Department of Justice, they would have been among the first personnel that the attorney general would have contacted if there was a call from the President.

Q. What authority does the President of the United States have over all of those entities?

A. The simplest and most direct authority is his responsibility as chief executive under Article II of the Constitution to take care of all the laws being faithfully executed. That includes faithfully executing the transition and the counting

[p.264]

of electoral votes on the day appointed.

Q. And do all of those entities report up, ultimately, to the President?

A. They do.

Q. What, if any, evidence have you seen that President Trump took any action to deploy any of these entities on January 6?

A. I've seen no such evidence.

Q. Who else in the world had all of those authorities at their disposal on January 6?

A. No one.

MR. GRIMSLEY: No further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. BLUE:

Q. Good afternoon, Professor Banks. How are you today?

A. I'm well. Thank you.

Q. We met briefly earlier.

A. Yes, we did.

JA537

Q. So I want to talk a little bit about your qualifications. You've been a professor in national security for a while, you said, and you've had some contract experience with the military.

Have you — what's your experience in
[p.265]
advising governors or Presidents in national security issues?

A. I've never advised a governor or a President.

Q. And have you ever — so you've never actually advised a President on actually declaring an emergency or activating the National Guard; is that correct?

A. Only in a war-game scenario with hypothetical players.

Q. And so your advice — your testimony today is, frankly, not about practicality, but more about what the law says; isn't that correct?

A. Well, it's about what the law says in a practical situation of crisis.

Q. Well, but you've never been in that kind of crisis, so you wouldn't really know how the laws would actually interact in that situation, would you?

A. I've simulated those crises many times over —

Q. But you've never actually been in one, correct?

A. I have not. That's right.

THE COURT: Mr. Blue —

MR. BLUE: I went over him again, right?

[p.266]

THE COURT: Yeah. Just both of you try not to talk over each other —

THE WITNESS: I'm sorry.

THE COURT: — for the court reporter.

MR. BLUE: Sorry, Your Honor.

And sorry to the court reporter.

JA538

If we could pull up Exhibit 1045, please.

MR. GRIMSLEY: What exhibit?

MR. BLUE: 1045.

MR. GRIMSLEY: Thank you.

Q. (By Mr. Blue) Professor Banks — sorry, I was spacing on your name for a second — this is a letter from June 4 from Mayor Bowser to President Trump, correct?

A. Yes.

Q. Have you seen this letter before?

A. I have.

Q. And you've read it, but you did not consider this letter in your expert report because it wasn't listed as one of the things you thought you looked at, is it?

A. That's correct.

Q. And if you would look at the last sentence of the first paragraph. And could you

[p.267]

read — starting with "Therefore." Could you read that, please, out loud.

A. "Therefore, I'm requesting that you withdraw all extraordinary federal law enforcement and military presence from Washington, D.C."

Q. Thank you. And now, I know earlier you testified that the President has sole authority, whatever.

Are you aware about how that authority has been delegated?

A. Yes.

Q. And could you explain to the Court what that is?

A. In a 1969 executive order, President Nixon actually delegated to the Secretary of Defense and then to the Secretary of Army by memorandum of the day-to-day authority over deployment decisions with regard to the National Guard.

JA539

Q. Thank you. And you had testified earlier that this letter came from the summer during the Black Lives Matter protests and riots, correct?

A. That's correct.

Q. And are you aware of whether Mayor Bowser approved of the deployment of National Guard at that time?

[p.268]

A. I have seen nothing to indicate that she did.

Q. Do you — have you seen anything to indicate that she did not approve of it?

A. I have not.

Q. So this is the only document we have that referred — references that, correct?

A. Yes. So far as I know.

Q. And isn't it true that once President Trump received this letter, the National Guard was removed from Washington, D.C., at the time?

A. I believe that's true. I didn't study those incidents carefully.

Q. And if you could read the last sentence of the third paragraph, please.

A. Yes. "The deployment of federal law enforcement personnel and equipment are inflaming demonstrators and adding to the grievances of those who, by and large, are peacefully protecting" — "protesting for change and the reference to the racist and broken systems that are killing Black Americans" — "reforms" — I'm sorry — "to the racist and broken systems that are killing Black Americans." I'm failing my vision test here this afternoon.

MR. GRIMSLEY: Could you zoom in a

[p.269]

little bit?

THE WITNESS: There you go.

JA540

MR. BLUE: Yeah. I can't, but Joanna can.

MR. GRIMSLEY: Thank you.

Q. (By Mr. Blue) So the reason I want to talk about this letter for a moment is there — well, there may not be — well, there's formal authorities, correct?

A. (Nodding head.)

Q. There are also informal relationships and informal authorities involved in the governmental process, correct?

A. That's certainly always been my experience.

Q. And President Trump and Mayor Bowser are the two people who have authority in Washington, D.C., correct?

A. But only the President has authority on —

Q. I didn't ask that question. I appreciate that.

A. Yeah.

Q. But they're the ones with the authority in Washington, D.C., correct?

[p.270]

A. Yes.

Q. And while President Trump may have actual legal authority, he has to work with Mayor Bowser going forward, correct?

A. Yes, he does.

Q. And when you were giving your opinion, it doesn't appear that you considered at all the political ramifications or that relationship between President Trump and Mayor Bowser?

A. I was giving real opinion, I think, regarding the authorities of the President and the mayor, if any, during that period.

Q. All right. If we could go to Exhibit 148, please. And we're going to be going to page 6. And we're going to talk about the May 30 tweet, please.

JA541

And you used the — you reference this tweet in your report, didn't you?

A. Yes.

Q. And why did you reference this tweet?

A. It's an indication that President Trump was familiar with the uses of the National Guard for national security.

Q. And are you aware of how the National Guard ultimately was deployed into Minneapolis?

[p.271]

A. I don't know the details of that incident, no.

Q. So you don't know — in fact, you did not address in your report or here that President Trump did not unilaterally order the National Guard into Minneapolis, did he?

A. He did not. I believe that was the governor's deployment decision.

Q. Right. Okay. So — and that was the governor's decision, correct?

A. Yes.

Q. In your report, you also mention the fact that President Trump should have activated the National Guard on January 5, right?

A. Yes.

Q. And —

A. Not — January 5, no. I — my determination was that he should have activated the National Guard in response to the violence that broke out on January 6.

MR. BLUE: Can you — where's my . . .

MR. BLUE: Excuse me, Your Honor. I apologize. I did not expect to have to find this in the report.

THE COURT: No worries.

[p.272]

Q. (By Mr. Blue) Well, let's do this a different way. So leading up to — leading up to January 6—

JA542

MR. BLUE: If we could go to Exhibit 156, please.

Q. (By Mr. Blue) And Exhibit 156 is a tweet from Mayor Bowser that includes a letter that she sent to President Trump, correct?

Not to President Trump, but to the United States Attorney General, the Acting Secretary of Defense, and the Secretary of the Army, correct?

A. Yes.

Q. And remind us who actually had command authority of the D.C. National Guard through the delegation of authority?

A. President Trump delegated to the acting secretary at the time and the Secretary of the Army.

Q. So the Secretary of Defense who then delegated on down to the Secretary of the Army, right?

A. Yes.

Q. So this letter was to the two individuals who had been delegated the authority by President Nixon, and that delegation was still in effect at the time, correct?

[p.273]

A. That's correct.

Q. Right. And if you read the tweet from Mayor Bowser, she talks about that she's not requesting any other federal law enforcement personnel and discourages any additional deployment without notification or consultation, correct?

A. Yes.

Q. So she was making it very clear on the day before January 6 that she didn't want National Guard, didn't she?

A. That's right. She was not anticipating a violent attack on the Capitol, however.

JA543

Q. Well, and that's true. And is it your testimony today that President Trump was anticipating a violent attack on the Trump — on the Capitol?

A. I do not know whether the President was anticipating —

Q. Okay.

A. — such an attack.

Q. And if in the letter — and you've read this letter before, correct?

A. Yes, I have.

Q. And the letter says basically the same thing, doesn't it?

A. It does.

[p.274]

Q. And so you're not — your testimony is not that he should have actually deployed National Guard — not just the 300 or the 340, but the 1,100 who were available — you're not saying that he should have had them ready to go on January 5 to deploy on January 6?

A. No.

Q. Okay.

MR. BLUE: Just a minute, Your Honor.

Q. (By Mr. Blue) So are you aware of any warnings that suggested that maybe there was going to be violence at the Capitol?

A. I am not.

Q. Is it your testimony today that even if Mayor Bowser said that President Trump should not deploy troops that he should have done it anyway?

A. Yes.

Q. So he — you think that he should ignore the elected official in Washington, D.C., if he disagrees with her on this issue?

JA544

A. He should respond to his constitutional responsibilities to protect the national security of the United States when there's an assault on our democratic process.

Q. Okay. And are you aware this — of any
[p.275]

other national politician who said that he should not be deploying troops to Washington, D.C.?

A. No.

Q. Like, say, if Senate Majority Leader Mitch McConnell said, "Do not deploy troops," he shouldn't listen and he should just do it, correct?

A. I'm not familiar with Secretary — with Mr. McConnell's —

Q. Well, no. I'm saying if he did it.

THE STENOGRAPHER: And a little bit slower and one at a time, please.

Q. (By Mr. Blue) If Senate Majority Leader McConnell said, "Do not deploy troops into Washington, D.C.," President Trump should ignore him, correct?

A. That's correct.

Q. And if Nancy Pelosi said that, you're also — she — he should ignore it and go forward?

A. Once the violence broke out, yes.

Q. So on January 6, you say that he should have deployed the National Guard, correct?

A. Yes.

Q. At what point?

A. As soon as he was aware that violence had broken out at the Capitol, sometime after 1:00 p.m. that day.

[p.276]

Q. Okay. So there's violence at the Capitol and there's police forces there. And — but at that point in that process should he be thinking, Okay, now I need to get the

JA545

National Guard in; they're not going to be able to take care of this problem.

A. My recollection of the specific minutes in those hours may not be exact, but I believe some — around 1:34, the mayor and the chief of police at the Capitol placed a call to the White House seeking support, seeking more law enforcement support. And they repeated that call. I think it was at 1:49.

So there were at least two calls before 2:00 p.m. that day that should have alerted the President what he was already seeing on his television screen, that there was a violent attack going on at the Capitol.

Q. And are you aware specifically of what Donald Trump — what President Trump knew and when he knew it?

A. I am not.

Q. All right. Let's move to Exhibit 22.

This is "Examining the U.S. Capitol Attack: A review of the Security, Planning, and Response Failures on January 6," okay? And this is the staff report from the Senate that was a bipartisan report.

[p.277]

Have you read this report?

A. I have.

Q. Okay. But you did not take this report into account when you were giving your opinion today, did you?

A. I did not.

Q. And so you did not include any of the statements in this report in your expert report or your opinion, correct?

A. That's correct.

Q. And would you agree that there was not — that there was a lack of consensus about the gravity of the threat that was going to be posed on January 6?

A. I read that in several sources, yes.

JA546

Q. Okay.

MR. BLUE: If we could go to page 46. Yeah. Page 46 of the report. And then I think I have the right page. Yep. And if you could blow up the first paragraph under Section C.

A. Yes, I see it.

Q. (By Mr. Blue) And I want to focus on the first sentence.

A. Okay.

Q. And could you read that first sentence.

[p.278]

A. "Inconsistencies between intelligence products and within the January 3 special assessment led to a lack of consensus about the gravity of the threat posed on January 6, 2021."

Q. And so what that sentence is saying is that this committee found that there really wasn't — it was really unclear about what was going on on January 6 and — about the threats on that — coming forth from the right wing; is that correct?

A. That's my understanding, yes.

MR. BLUE: And if we could go to page 48. I should go there too.

Q. (By Mr. Blue) And we'll look at the first paragraph.

A. Okay.

Q. And, again, we have Mr. Irving. And Mr. Irving, I will represent, was the House Sergeant at Arms, right? And he told the committees "Every Capitol police daily intelligence report from January 4 to January 6, including on January 6, forecasts the chance of civil disobedience and arrests during the protests as remote to improbable."

Again, highlighting the fact that this was an unprecedented and unexpected event, correct?

A. Correct.

[p.279]

Q. And if you go down just to the next paragraph it says “Months following the attack on the U.S. Capitol, there is still no consensus among the USCP” — which is the United States Capitol Police, right?

A. Yes.

Q. — “officials about the intelligence report threat analysis ahead of January 6,” correct?

A. Correct.

Q. So, again, we’re highlighting the fact that there just was no — the intelligence reports weren’t clear and weren’t being presented that suggested that this kind of event could happen, correct?

A. Yes.

Q. All right. And if we could move to Exhibit 1031, please. And Exhibit 1031 is the Inspector General’s report regarding January 6, correct?

A. Yes.

Q. And you referenced this earlier in your testimony today, didn’t you?

A. I did.

Q. So you’ve read this document?

A. I have.

[p.280]

Q. And if you — if we could turn to page 18 of the — of the PDF. I have the right page this time. And you’ll look at where it says January 3, the one, two — the fourth block down, the fourth row.

A. Yes.

Q. And it says the President asked Mr. Miller and General Milley about election protests preparations, correct?

A. Yep. Yes.

JA548

Q. And he was informed “We’ve got a plan, and we’ve got it covered,” correct?

A. Correct.

Q. So the President at that point was informed that a plan was in place to take care of things, correct?

A. Yes.

Q. Is there any reason that you would think that he would not believe that?

A. No.

Q. Now, you have given us a number of options that the President had legally, correct?

A. Yes.

Q. And you haven’t identified a single instance where the President has actually activated

[p.281]

the National Guard in a way that did not coordinate with the local political officials, correct? So he — you can’t identify a time where he’s activated the National Guard in Washington, D.C., without Mayor Bowser’s approval?

A. He —

Q. Without the mayor of Washington, D.C.’s approval, correct?

A. We’re going to have to rewind the question a bit. I’m a little confused.

I think in June of 2020 he called out those units on his own volition without a request from the mayor.

Q. Well, earlier you said that she — you had no idea if he — if she agreed with it or not, correct?

A. He did this unilaterally, did it on his own authority in June or late May or whatever it was in 2020 in response to the Floyd protests.

Q. Okay. Well, when we were talking about this earlier, I asked if you knew if she approved it or if they

JA549

talked about it or if they had a conversation, and you said you did not know —

A. I don't know.

Q. — is that correct?

[p.282]

A. Yes.

Q. So you do not know whether she actually was communicating with him about that —

A. No, I don't.

Q. — correct? And I can't remember. Did you say that the President could have declared a national emergency?

A. I —

Q. Is that something you said?

A. It's in my report. I don't believe I testified to it this afternoon.

Q. Are you aware of a President declaring a national emergency within two or three hours of a riot starting?

A. Oh, yes. Many times.

Q. Oh, really?

A. Historically, yes.

Q. Okay.

A. Yeah.

Q. Like what?

A. Little Rock, 1950s. Birmingham, early 1960s.

Q. Okay.

A. Los Angeles, 1984.

Q. Within three hours?

[p.283]

A. Oh, yes.

Q. Okay. And are you aware of any debates that were going on inside the White House regarding a response to the riots on January 6?

A. No.

JA550

Q. So you have no idea about whether — why the decisions were being made not to — for the President not to actually do the things that you've said?

A. No.

Q. You don't know if he considered doing them, do you?

A. I do not.

Q. You're just saying that these are things that he possibly could have done; isn't that correct?

A. That's correct.

MR. BLUE: All right. Your Honor, that's all I have. But I would like to admit five exhibits we talked about today: 1031, 1045, 148, 156, and 22.

THE COURT: Okay. Do you have any objections to any of them?

MR. GRIMSLEY: No.

THE COURT: Okay. Did you get the numbers?

[p.284]

THE CLERK: No.

THE COURT: Can you repeat it one more time?

MR. BLUE: I tried to go slow. Apparently I have to go even slower.

1031, 1045, 148, 156, 22.

What? I'm sorry, it's 1056.

Are you sure? Because it's 156 on here.

Hold on. Let me look at my notes.

It's 156, not 1056.

THE COURT: And it's 148, not 1048?

MR. BLUE: 1034, 1045, 148—

THE COURT: 156.

MR. BLUE: —156, 22.

THE COURT: Okay. (Exhibits 1031, 1045, 148, 156, and 22 admitted into evidence.)

MR. GRIMSLEY: It sounds like tax forms.

JA551

THE COURT: Redirect?

MR. GRIMSLEY: Briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. GRIMSLEY:

Q. You were asked a number of questions about whether in the lead-up to January 6 there wasn't a consensus about whether there might be violence that

[p.285]

day. Do you recall that?

A. Yes.

Q. As of 1:30 in the afternoon on January 6, was there consensus about whether there was violence?

A. Yes.

Q. What was that consensus?

A. Violence was breaking out at the Capitol.

MR. BLUE: Objection, Your Honor. I'm not sure what the basis of that statement is other than what he saw on TV.

THE COURT: Overruled.

Q. (By Mr. Grimsley) Did you review the January 6 report in coming to the opinions in your — in this case?

A. I did.

Q. I want to show you a few. The first one is Finding 316. Oops. Sorry. It's not hooked up. Finding 316 says "By 1:21 p.m., President Trump was informed that the Capitol was under attack."

Do you see that?

A. Yes.

Q. What, if anything, did you see the

[p.286]

President or any evidence of the President doing prior to 4:17 with regard to exercising his authorities to deploy either the National Guard or the federal law enforcement personnel we discussed earlier?

JA552

A. Absolutely nothing.

Q. Do you recall what the January 6 report said about what President Trump was doing during that nearly three-hour period of time?

A. I believe he said he was watching the television screen and tweeting.

Q. Now, you were asked about whether, perhaps, Senator McConnell or House Speaker Pelosi had said they don't want the D.C. National Guard at the Capitol.

Did you see anything to suggest they were saying that as of 1:30 p.m. —

A. No.

Q. — on January 6?

A. No. Those statements were prior to the outbreak of the violence.

Q. And finally, you were asked some questions about whether there was even consensus the morning of January 6 as to whether there might be violence.

Do you recall that?

[p.287]

A. Yes.

Q. Have you seen any evidence that the President told any of those individuals that he was going to ask them to march down to the Capitol?

A. No.

Q. Did you see any evidence that the President told any of those individuals that there were people refusing to go through magnetometers —

A. No.

Q. — before his speech?

A. No.

Q. Did you see any evidence that President Trump told any of those authorities what he was going to say?

A. No.

MR. BLUE: Objection. Your Honor, he's leading again.

THE COURT: You can rephrase.

Q. (By Mr. Grimsley) What evidence, if any, did you see that President Trump told any of those security officials what he was going to say on the Ellipse that day?

A. I saw no such evidence.

MR. GRIMSLEY: No further questions.

THE COURT: And I —

[p.288]

MR. BLUE: Your Honor, I have no recross.

THE COURT: And I apologize. I forgot — I didn't ask the Colorado Republican Party or the Secretary of State about Professor Simi, whether you wanted to do anything. But I'm assuming you would have shouted at me if I had not. But I will give you the opportunity now.

Do you have any questions for Professor Banks?

MS. RASKIN: We have no questions, Your Honor.

MR. KOTLARCZYK: No questions, Your Honor. Thank you.

THE COURT: Great. So for all of you with young kids, I'm sure you'll be happy to hear we're going to recess. Please, though, I know that people have a lot going on with Halloween, if not going trick-or-treating, but distributing candy.

Can we please, though, make sure to let us know who the live witnesses are going to be tomorrow? We need to know that today.

So with that, we will go off the record on Case Number 2023-CV-32577, and we will reconvene at 8:00 a.m. tomorrow.

[p.289]

* * * * *

JA554

WHEREUPON, the foregoing deposition was concluded at the hour of 3:38 p.m. on October 31, 2023.