

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 22-5069
(Consolidated with 22-7030, 22-7031)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES BLASSINGAME and SIDNEY HEMBY,

Appellees,

v.

DONALD J. TRUMP,

Appellant,

On Appeal from the United States District Court for the District of Columbia
Consolidated Case Nos. 1:21-cv-858-APM, 1:21-cv-586-APM, 1:21-cv-400-APM

Hon. Judge Amit P. Mehta

BRIEF OF *AMICUS CURIAE* JARED HOLT IN
SUPPORT OF APPELLEES

COOLEY LLP
Kathleen R. Hartnett
Counsel of Record
David S. Louk
3 Embarcadero Center, 20th Floor
San Francisco, CA 94111
Telephone: (415) 693-2000
Facsimile: (415) 693-2222

Counsel for Amicus Curiae Jared Holt

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici Curiae

Pursuant to D.C. Circuit Rule 28(a)(1)(A), all parties, intervenors, and *amici* appearing before the district court are listed in the Brief of Appellees, as are all parties appearing before this Court other than any *amici* in support of Appellees, including *amicus curiae* Jared Holt.

B. Rulings under Review

References to the ruling at issue appear in the Brief of Appellees.

C. Related Cases

Related cases are listed in the Brief of Appellees. *Amicus* is not aware of any other related case pending before this Court or any other court.

Dated: September 30, 2022

/s/ Kathleen Hartnett
Kathleen R. Hartnett
Counsel for *Amicus Curiae*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*

Jared Holt is researcher at the Institute for Strategic Dialogue with expertise in political extremism. He has previously worked at DFRLab and Media Matters, and published reporting and analysis in many national publications, including *Washington Post*, *Columbia Journalism Review*, *The Daily Beast*, *GEN Magazine*, and *HuffPost*. Holt regularly provides analysis to relevant stakeholders, including nonprofit partners, media outlets, and government and law enforcement officials, including the U.S. House Select Committee to Investigate the January 6 Attack. His work has primarily focused on the overlap between the online world and real-world extremism and political violence, with a focus on extremist groups and extremist communities online.

CIRCUIT RULE 29 STATEMENT

No person or entity other than *amicus* and his counsel authored or made a monetary contribution to the preparation or submission of this brief. Counsel for all parties to this appeal have consented to the filing of this brief. *See* Cir. R. 29(b).

Amicus has specialized knowledge about the operation of extremist groups generally, and, specifically, extremist groups' ties to, and communications with, Defendant and his associates in this case. *Amicus* has published widely on this topic. Pursuant to Circuit Rule 29(d), undersigned counsel for *amicus curiae* certifies that a separate brief is necessary because *amicus* applies his specialized knowledge to critical events at issue in this case to show how divorced Defendant's actions were from his constitutional responsibilities, rendering presidential immunity unavailable.

INTRODUCTION

The sole issue on appeal is whether Former President Donald Trump can claim absolute presidential immunity from suit for his actions surrounding the January 6, 2021 attack on the United States Capitol that caused Plaintiffs and others grievous harm.¹ Plaintiffs' amended complaints allege Trump conspired with a group of personal associates to conduct a months-long disinformation campaign to question the 2020 Election results; to coordinate with extremist groups leading up to January 6; to pressure Vice President Mike Pence to slate an alternative slate of electors or send certification of the election back to the States; and, if all else failed, to unlawfully disrupt Congress's constitutionally mandated count of Electoral College votes on January 6, including through the foment of violence and the use of force that injured or endangered many.

The district court rightly concluded that Trump's alleged actions, if true, fall outside the "outer perimeter" of the President's official responsibilities protected by presidential immunity. *Thompson v. Trump*, No. 21-CV-00400 (APM), 2022 WL 503384, at *17-18 (D.D.C. Feb. 18, 2022). Trump contends on appeal that Plaintiffs' allegations warrant absolute immunity because they constitute either Trump speaking on a "matter of critical public concern" or "addressing the faithful execution of the constitutional and statutory order." Def.'s Br. 8, 28. But as

¹ "Plaintiffs" refers to all Plaintiffs in the related cases filed before the district court.

explained by *amicus*—an expert in domestic extremist movements and Trump’s and his associates’ ties to them—Trump’s alleged actions, particularly in the broader context of the coordinated effort to overturn the 2020 Election and prevent the peaceful transfer of power, cannot fall within any plausible outer perimeter of Trump’s presidential responsibilities. Rather, as further confirmed by recent testimony and documents provided to the U.S. House Select Committee to Investigate the January 6 Attack (“House Select Committee”), and evidence submitted in support of the U.S. Government’s prosecutions of January 6 Capitol rioters (“January 6 prosecutions”), Trump’s actions leading up to and on January 6 went well beyond speaking on a matter of public concern or taking care to faithfully execute the laws. Indeed, they sought to do the contrary: overturn the 2020 Election, with violence if necessary.

Based on Plaintiffs’ allegations, as confirmed by the public record to date, Trump is not entitled to absolute immunity from suit.

ARGUMENT

The January 6 attack on the Capitol was carried out by members of several violent extremist groups, including the Oath Keepers, the Proud Boys, and the Three Percenters. Publicly available documents, detailed below, indicate their actions were the direct result of an effort by Trump and his personal associates to overturn the 2020 Election and prevent the lawful transfer of power to the new administration.

As further revealed by the House Select Committee hearings and the January 6 prosecutions, Trump's actions included the development of baseless legal theories to block certification of the 2020 Election on January 6; a relentless pressure campaign on Vice President Pence to stop or subvert that certification; coordination with extremist groups ahead of the January 6 rally; and Trump's own efforts leading up to and on January 6 to encourage his supporters to violently storm the Capitol and "Stop the Steal." None of these alleged actions are plausibly within the outer perimeter of the President's official responsibilities.

I. TRUMP'S ALLEGED ACTIONS LEADING UP TO AND ON JANUARY SIXTH WENT WELL BEYOND ANY PLAUSIBLE "OUTER PERIMETER" OF OFFICIAL RESPONSIBILITY.

In *Nixon v. Fitzgerald*, a seminal case on presidential immunity, the Supreme Court held that the President "is entitled to absolute immunity from damages liability predicated *on his official acts*." 457 U.S. 731, 749 (1982) (emphasis added). Such acts, the Court explained, include his "enforcement of federal law," *id.* at 750, "the conduct of foreign affairs," *id.*, and "management of the Executive Branch," *id.* And, recognizing "the special nature of the President's constitutional office and functions," the Supreme Court has even extended that immunity to "acts within the 'outer perimeter' of his official responsibility." *Id.* at 756.

Plaintiffs allege behavior by Trump that stretches well beyond the "outer perimeter" of his official responsibilities to faithfully execute the laws. And even

under the standard articulated by Trump—based on nothing the Court said in *Fitzgerald*—his claim to immunity fails. Trump argues that if he spoke on a “matter of critical public concern,” or was “addressing the faithful execution of the constitutional and statutory order,” then he is immunized from suit. Def.’s Br. at 8, 28. But Plaintiffs allege much more.

Specifically, Plaintiffs allege Trump “*obstruct[ed]* the peaceful transfer of power” and “conspired to use violence and intimidation to *prevent* members of Congress from carrying out their constitutional duty to count Electoral College votes and certify” the election. Pls.’ Br. 1 (emphasis added). As the district court recognized, Plaintiffs allege Trump “expressly stated or implied that the rallies would help him remain President,” *Thompson v. Trump*, 2022 WL 503384, at *17; that Trump was involved in setting the January 6 date and in “decisionmaking about the speaking lineup and music selection,” *id.* at 18; and that he called during his speech for “the rally [to] include a march to the Capitol” even without a permit to do so, *id.* The district court rightly concluded that these alleged actions “involved no presidential function.” *Id.*

As shown by recent testimony and evidence (detailed below) produced before the House Select Committee and in support of the January 6 prosecutions, Trump and his personal associates in fact conspired with violent extremist groups to *prevent* the certification of the 2020 Election and use *physical force* to *obstruct* official

proceedings and prevent the peaceful transfer of power. Moreover, testimony from former White House officials reveals that these officials recognized that Trump's actions and behavior were extraconstitutional and that they had their own constitutional duty to *prevent* them. Extending presidential immunity to such egregious conduct would obliterate one of our legal tradition's oldest principles, *nemo est supra legem*—no person, not even the President, is above the law.

II. TRUMP AND HIS ASSOCIATES' NON-OFFICIAL EFFORTS TO SUBVERT CERTIFICATION OF THE ELECTION CULMINATED IN THE JANUARY 6 ATTACKS ON THE CAPITOL.

Both publicly and privately, Trump and his personal associates conspired in the weeks and months following the November 2020 election to ensure he would remain in power notwithstanding his loss of the election. These actions fall beyond the “outer perimeter” of any presidential responsibility, and thus cannot support presidential immunity from suit.

A. Trump and His Associates Plotted to Overturn the 2020 Election, Including by Prompting the January 6 Rally and Attack on the Capitol.

Prior to the 2020 Election through January 6, Trump and a network of personal associates plotted to overturn the election results by any means possible. Pls.' Br. 4–5. As the House Select Committee has shown, “Trump had a direct and personal role” in the effort to pressure state officials and institutions to overturn the 2020

Election. June 21 Hearing Tr. 07:00.²

Trump's efforts included those of two of his personal legal counsel, John Eastman and Sidney Powell, each of whom privately,³ and publicly,⁴ developed

² The House Select Committee has held eight hearings to date—on June 9, June 13, June 16, June 21, June 23, June 28, July 12, and July 21, 2022. Citations to “Hearing Tr.” refer to the C-SPAN transcripts of these hearings. *See* First Hearing, C-SPAN (June 9, 2022), <https://www.c-span.org/video/?520282-1/open-testimony-january-6-committee>; Second Hearing, C-SPAN (June 13, 2022), <https://www.c-span.org/video/?520804-1/hearing-investigation-capitol-attack>; Third Hearing, C-SPAN (June 16, 2022), <https://www.c-span.org/video/?520944-1/president-trumps-campaign-influence-vice-president-pence>; Fourth Hearing, C-SPAN (June 21, 2022), <https://www.c-span.org/video/?521075-1/fourth-hearing-investigation-january-6-attack-us-capitol>; Fifth Hearing, C-SPAN (June 23, 2022), <https://www.c-span.org/video/?521076-1/hearing-investigation-january-6-attack-us-capitol>; Sixth Hearing, C-SPAN (June 28, 2022), <https://www.c-span.org/video/?521387-1/sixth-hearing-investigation-january-6-attack-us-capitol>; Seventh Hearing, C-SPAN (July 12, 2022), <https://www.c-span.org/video/?521495-1/seventh-hearing-investigation-capitol-attack>; Eighth Hearing, C-SPAN (July 21, 2022), <https://www.c-span.org/video/?521771-1/eighth-hearing-investigation-january-6-attack-us-capitol>.

³ *See, e.g., Eastman v. Thompson*, No. 8:22-cv-00099-DOC-DFM, 2022 WL 894256, at *3-4 (C.D. Cal. Mar. 28, 2022) (describing evidence of Eastman's “[p]lan to disrupt [the] electoral count”).

⁴ After Powell publicly stated that Dominion Voting Systems' election machinery was rigged, Dominion sued her for \$1.3 billion over her false claims and alleged that the “violent mob” that stormed the Capitol was “[i]ncited by Powell's [d]isinformation [c]ampaign.” Compl. at 66, *US Dominion, Inc. v. Powell*, No. 1:21cv-00040 (D.D.C. Jan. 8, 2021), ECF No. 1. In defense, Powell argued that “no reasonable person would conclude that her statements were truly statements of fact.” *Id.*, Opp'n to Mot. to Dismiss at 1, ECF No. 39.

farfetched legal theories⁵ and frivolous lawsuits⁶ seeking to overturn the 2020 election results. Also aiding Trump's efforts to overturn the election were recently pardoned Michael Flynn (another of Powell's clients) and even more recently pardoned political strategist Roger Stone.⁷ In the weeks before and after the 2020 election, both Flynn⁸ and Stone⁹ worked to stoke anger and incite violence among

⁵ Eastman drafted a memorandum that laid out steps Vice President Pence should take to keep Trump in office. See John McCormack, *John Eastman vs. the Eastman Memo*, National Review (Oct. 22, 2021), www.nationalreview.com/2021/10/john-eastman-vs-the-eastman-memo/. It appears even Eastman did not believe his own theories. See June 16 Hearing Tr. 59:18.

⁶ During one such suit seeking to overturn Michigan's presidential election results, a federal judge sanctioned Powell for acting "in bad faith and for an improper purpose" by alleging fraudulent, unsupported allegations. See Opinion and Order at 1-2, 103, 109-110, *King v. Whitmer*, No. 2:20-cv-13134 (E.D. Mich. Aug. 25, 2021), ECF No. 172.

⁷ See generally Jacqueline Alemany et al., *Ahead of Jan. 6, Willard hotel in downtown D.C. was a Trump team 'command center' for effort to deny Biden the presidency*, Washington Post (Oct. 23, 2021), https://www.washingtonpost.com/investigations/willard-trump-eastman-giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff_story.html [<https://perma.cc/G4MB-V5B3>].

⁸ For example, Flynn expressed support for invoking martial law in a December 2020 *Newsmax* interview: "People out there talk about martial law like it's something that we've never done. . . . Martial law has been instituted 64 times." Gillian Brockwell, *Trump loyalists harboring martial law fantasies don't know their history*, Washington Post (Dec. 22, 2020), <https://www.washingtonpost.com/history/2020/12/22/martial-law-trump-flynn-history/> [<https://perma.cc/EV4A-NNCD>].

⁹ The day before the 2020 election, Stone was recorded saying, "Fuck the voting, let's get right to the violence. . . . Shoot to kill. See an antifa? Shoot to kill." See Ed Mazza, *'Shoot to Kill': Trump Ally Roger Stone Calls For Violence In Chilling Video*, HuffPost (Sept. 27, 2022), https://www.huffpost.com/entry/roger-stone-shoot-to-kill_n_63329011e4b04cf8f35ac500 [<https://perma.cc/NEU5-BWMX>].

Trump's supporters. These efforts alone proved insufficient to ensure Trump would remain in office after January 20, 2021; by one count, Trump lost 61 of the 62 federal lawsuits filed on his behalf following the 2020 Election.¹⁰ Thus, by the middle of December 2020, Trump and his personal associates turned their focus to the January 6 Joint Session of Congress, during which the U.S. Senate and House of Representatives vote to certify the electoral vote counts as prescribed by the Electoral Count Act. *See* 3 U.S.C. § 15.

On December 18, just weeks before the scheduled January 6 Joint Session, Trump led a covert, unscheduled White House meeting involving Sidney Powell, Michael Flynn, and Patrick Byrne, the former CEO of Overstock.com and an ardent campaign supporter. July 12 Hearing Tr. 37:07, 41:59. The heated meeting lasted over six hours—until White House officials learned of it—and eventually moved to Trump's personal residence, during which Trump listened to White House lawyers debunk Powell and Flynn's legal arguments for overturning the election. July 12 Hearing Tr. 42:54. Trump was unhappy with his lack of legal options when the meeting ended after midnight. So on December 19, at 1:42 a.m., Trump tweeted his

¹⁰ William Cummings et al., *By the numbers: President Donald Trump's failed efforts to overturn the election*, USA Today (Jan. 6, 2021), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/> [https://perma.cc/PPA4-CYU8].

unproven claim that it was “statistically impossible to have lost the 2020 election” and then called for a “[b]ig protest in D.C. on January 6th. Be there, will be wild!” JA-29–30.

Trump’s nocturnal tweet served as the rallying cry for the events that followed. During that same period, extremist groups like the Proud Boys, Oath Keepers, and Three Percenters were working with Trump allies, mainly Flynn and Stone, to stop the certification of the election. July 12 Hearing Tr. 1:13:23. For example, photos from December 12 show Flynn and Byrne guarded by Oath Keepers Roberto Minuta,¹¹ and Stewart Rhodes,¹² both later indicted for conspiracy to obstruct official proceedings and assaulting, resisting, and impeding officers on January 6.¹³ During that same period, Stone communicated with both the Proud Boys and the Oath Keepers regularly. The House Select Committee obtained

¹¹ On January 6, after breach of the Capitol, Minuta stated words to the effect of, “Now we’re talking, that’s what I came up here for!” Superseding Indictment, ¶ 109, *United States v. Rhodes*, No. 22-cr-15-APM (D.D.C. June 22, 2022), ECF No. 167. Minuta later live-streamed their conduct over Facebook, stating, “Patriots are storming the Capitol building; there’s violence against patriots by the D.C. police . . . fucking war in the streets right now . . . let’s go.” *Id.* ¶ 110.

¹² Rhodes, along with other Oath Keepers including Kelly Meggs, participated in a November 9, 2020, conference call during and outlined a plan to stop the lawful transfer of presidential power, including by use of force. *Id.* ¶ 19. On December 14, 2020, “Rhodes published a letter on the Oath Keepers website advocating for the use of force to stop the lawful transfer of presidential power.” *Id.* ¶ 25.

¹³ Rhodes and co-conspirators have been indicted for “plann[ing] to stop the lawful transfer of presidential power by January 20, 2021, which included multiple ways to deploy force.” *Id.* ¶ 4.

encrypted content from a group chat called “Friends of Stone,” or FOS, which included Stone, Rhodes, Enrique Tarrío (a defendant below and member of the Proud Boys),¹⁴ and Ali Alexander (a leader of Stop the Steal and a key mobilizer of Trump supporters) who registered Wildprotest.com, named after Trump’s tweet. *See* July 12 Hearing Tr. 1:14:21. On December 23, the same day Trump pardoned Stone,¹⁵ “Stone reactivated his Stop the Steal Web site, which began collecting donations for ‘security’ in D.C. on January 6.”¹⁶ On December 28, Stone posted on the social media app Parlor that he was with Trump and they had been discussing “Stop the Steal” strategies.¹⁷

¹⁴ Tarrío has been indicted and charged with, *inter alia*, seditious conspiracy. *See* Third Superseding Indictment, ¶¶ 25–26, *United States v. Nordean*, No. 1:21-cr-175-TJK (D.D.C. June 6, 2022), ECF No. 380.

¹⁵ Statement from the Press Secretary Regarding Executive Grants of Clemency, White House Archives (Dec. 23, 2020), <https://web.archive.org/web/20210120195351/https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-122320/> [<https://perma.cc/53FZ-VMPR>].

¹⁶ Luke Mogelson, *Among the Insurrectionists*, *New Yorker* (Jan. 15, 2021), <https://www.newyorker.com/magazine/2021/01/25/among-the-insurrectionists> [<https://perma.cc/N5K4-G69T>].

¹⁷ Patriot Takes (@patriottakes), Twitter (Dec. 28, 2020, 12:50 AM), <https://twitter.com/patriottakes/status/1343479434376974336> [<https://perma.cc/H9VN-4BFB>].

B. Trump’s Supporters, in Response to His Tweet, Descended on the Capitol to “Stop the Steal.”

Trump’s December 19 tweet served as a dog whistle to the extremist groups who would ultimately storm the Capitol on January 6.¹⁸ Marcus Childress, investigative counsel for the House Select Committee, summarized how extremist groups responded to Trump’s calls to attend the January 6th Rally: “Many of the witnesses that we interviewed were inspired by the President’s call and came to DC for January 6th, but the extremists, they took it a step further. They viewed this tweet as a call to arms.” June 9 Hearing Tr. 1:21:29. Women for America First, a pro-Trump organizing group that had previously applied for a rally permit for January 22 and 23 in Washington, DC, sought to move their permit to January 6 after the tweet. This rescheduling created the rally where Trump would eventually speak. July 12 Hearing Tr. 55:40.

Trump’s December 19 tweet also motivated two extremist groups that historically have not worked together to coordinate their activities. July 12 Hearing Tr. 1:12:20. The morning of December 19, Kelly Meggs, the head of the Florida Oath Keepers, declared an alliance with the Oath Keepers and the Proud Boys, as

¹⁸ For example, indicted Oath Keeper Kelly Meggs, who stormed the Capitol on January 6, posted on Facebook three days after Trump’s tweet, “Trump said It’s gonna be wild!!!!!! . . . He wants us to *make it WILD* that’s what he’s saying. He called us all to the Capitol and wants us to make it wild!!!” Fourth Superseding Indictment, ¶ 44a, *United States v. Caldwell*, No. 1:21-cr-28-APM (D.D.C. May 26, 2021), ECF No. 196 (emphasis added).

well as the Florida Three Percenters, another militia group, writing, “we have decided to work together and shut this shit down.” July 12 Hearing Tr. 1:12:46. Phone records obtained by the House Select Committee show that later that afternoon, Meggs called Proud Boys leader Tarrío, and they spoke for several minutes.¹⁹ July 12 Hearing Tr. 1:12:51.

Many of the individuals who participated in the January 6 attacks have stated that they came to Washington D.C. and marched on the Capitol at President Trump’s direction. For example, Jake Angeli—colloquially known as “the QAnon Shaman”—stated that he “drove to Washington, D.C. . . . at the request of the President that all ‘patriots’ come to D.C. on January 6, 2021.” Gov’t Br. iso Detention at 6, *United States v. Chansley*, No. 2:21-mj-05000-DMF (D. Ariz. Jan. 14, 2021), ECF No. 5; *see also, e.g.*, Statement of Facts at 10, *United States v. Bisignano*, No. 1:21-cr-00036 (D.D.C. Jan. 16, 2021), ECF No. 1-1 (defendant stated she “felt called upon by President Donald Trump to travel to D.C. to change the outcome of the election”).

Similarly, Robert Bauer and Edward Hemenway, two cousins prosecuted for violent entry and disorderly conduct at the Capitol on January 6, both “maintain[ed] that [they] went to the Capitol on January 6, 2021, because . . . Trump invited the

¹⁹ Meggs, alongside Rhodes, was among those seeking to stop the lawful transfer of presidential power by use of force. *See supra* n.12.

crowd to walk down Pennsylvania Avenue.” Gov’t Sentencing Memo. at 10, *United States v. Hemenway*, No. 1:21-cr-00049 (D.D.C. Oct. 6, 2021), ECF No. 32; *see also* Def.s’ Position on Sentencing at 3, *United States v. Bauer*, No. 1:21-cr-00049 (D.D.C. Oct. 6, 2021), ECF No. 38. Numerous others have stated the same. *See, e.g.*, Statement of Facts at 4, *United States v. Sanford*, No. 1:21-cr-00086 (D.D.C. Jan 13, 2021), ECF No. 1-1 (Robert Sanford stated to the FBI that he “had gone to the White House and listened to President Donald J. Trump’s speech and then had followed the President’s instructions and gone to the Capitol”); July 12 Hearing Tr. 2:03:03 (Stephen Ayres testifying that “the President got everybody riled up and told everyone to head on down” and he “follow[ed] what [Trump] said”).

III. TRUMP’S ACTIONS LEADING UP TO AND ON JANUARY 6 REFLECTED A KNOWING AND WILLFUL INCITEMENT OF VIOLENCE.

Not only did Trump prompt and urge on the events of January 6 but he did so knowing that violence was likely to occur.

A. Trump Continued to Stoke His Supporters on the Eve and Morning of the January 6 Rally, When the Prospect of Violence Was Apparent.

Ahead of the Joint Session, Trump determined that one of his best opportunities to overturn the election involved the Vice President. On January 4, Trump and his personal legal counsel Eastman invited Vice President Pence and his White House lawyer Greg Jacob to the Oval Office to discuss Eastman’s baseless

legal theory that the Vice President had only two choices on January 6: to reject the slates of electors, or to delay the count altogether. *Eastman*, 2022 WL 894256, at *3. During that meeting, Pence consistently held that he did not possess the authority to carry out Eastman's proposal. *Id.*

Cassidy Hutchinson, assistant to White House Chief of State Mark Meadows, testified before the House Select Committee that on January 5, Trump instructed Meadows to "contact both Roger Stone and Michael Flynn regarding what would play out the next day." June 28 Hearing Tr. 1:04:08. Encrypted chats obtained by the Committee indicate Meggs, the indicted leader of the Florida Oath Keepers, spoke directly with Stone about security on January 5 and 6. July 12 Hearing Tr. 1:16:31. In fact, Roger Stone was photographed with Oath Keepers serving as his security detail on January 5, and on January 6, Stone was guarded by two Oath Keepers who have since been criminally indicted for seditious conspiracy. *Id.* 1:16:44. One of them later pleaded guilty and, according to the Department of Justice, admitted that the Oath Keepers were ready to use "lethal force if necessary" against anyone who tried to remove Trump from the White House. *Id.* 1:16:53.

Trump also spoke to former Senior Counselor to the President Steve Bannon at least twice the night of January 5. Bannon said (on video): "*All hell is going to break loose tomorrow.* It's all converging and now we're on, as they say, the point of attack, right, the point of attack tomorrow." July 12 Hearing Tr. 1:33:17

(emphasis added). (Bannon had recently been permanently suspended from Twitter after suggesting that FBI Director Christopher Wray should be beheaded.)²⁰ At 5:05 p.m. on January 5, Trump tweeted that “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 hear you (and love you) from the Oval Office.” *See* JA-84–85. Later, at 10 p.m., Trump tweeted that Pence could “come[] through for us” by “decertify[ing] the mistake they made in certifying incorrect & even fraudulent numbers.” JA-98.

Hutchinson testified that the next morning, on January 6 at 10 a.m., during a White House meeting with Meadows and Secret Service Assistant Director Anthony Ornato, Ornato mentioned the presence of “knives, guns in the form of pistols and rifles, bear spray, body armor, spears, and flagpoles,” and his update on weapons present at the rally was relayed to Trump. June 28 Hearing Tr. 27:35. An anonymous security official also testified that the morning of January 6, Trump was aware of multiple reports of weapons in the crowd: “[W]e all knew . . . that this was going to move to something else if he physically walked to the Capitol. . . . I don’t know if you want to use the word insurrection, coup, whatever. . . . The President

²⁰ Curt Devine et al., *Twitter permanently suspends Steve Bannon account after talk of beheading*, CNN (Nov. 6, 2020), <https://web.archive.org/web/20201107074112/https://edition.cnn.com/2020/11/05/tech/steve-bannon-twitter-permanent-suspension/index.html> [<https://perma.cc/M25S-7H5E>].

wanted to lead tens of thousands of people to the Capitol.” July 21 Hearing Tr. 26:41.

B. Trump’s Actions During and After His January 6 Speech Stoked His Supporters to Resort to the Use of Force and Violence.

Trump’s words and actions stoking violence on January 6 make clear he was not acting within his official duties. On the morning of January 6, Trump—drafting and revising a speech he planned to give that day—inserted for the first time a line about Mike Pence, which was subsequently removed at the counsel of White House Special Assistant Eric Herschmann, and other attorneys. July 12 Hearing Tr. 1:43:27. But after Trump spoke to Pence by phone, Trump got heated and reinserted it. *Id.* Trump aide Hutchinson testified that there were “many discussions” that morning about the speech: Herschmann “had relayed that we would be foolish to include language . . . which had lines . . . to the effect of fight for Trump. We’re going to march the Capitol. I’ll be there with you. Fight for me. . . . [They] were urging the speechwriters to not include that language for legal concerns.” June 28 Hearing Tr. 39:59.

Hutchinson testified that moments before the speech, Trump expressed anger that supporters with weapons were not allowed in to hear him speak:

He was angry that we weren’t letting people through the mags with weapons I overheard the President say *I don’t effing care that they have weapons. They’re not here to hurt me. Take that effing mags away. Let my people in. They can march to the Capitol from here.*

June 28 Hearing Tr. 32:40 (emphasis added).

When Trump delivered the speech, he transformed a single scripted reference to Mike Pence into eight different mentions. July 12 Hearing Tr. 1:48:17. He likewise turned a single scripted reference to rally goers marching to the Capitol into four, with Trump adlibbing that he would be joining the protesters at the Capitol. *Id.* 1:48:21. Trump extolled his supporters, “You’ll never take back our country with weakness. You have to show strength and you have to be strong. . . . And if you don’t fight like hell, you’re not going to have a country anymore. . . . So let’s walk down Pennsylvania Avenue.”²¹ Trump’s former campaign manager, Brad Parscale, testified that he recognized the impact of Trump’s speech immediately. Parscale’s January 6 texts to Katrina Pierson, a former Trump campaign spokesperson and January 6 organizer, included: “This is about Trump pushing for uncertainty in our country . . . *A sitting President asking for civil war.*” July 12 Hearing Tr. 1:50:23 (emphasis added). Parscale later said he felt guilty about helping Trump win, adding that a woman had died and that “[Trump’s] rhetoric killed someone.” *Id.* 1:50:32. Even Trump’s close confidantes recognized that Trump’s actions, far from faithfully executing the laws, were violating them.

²¹ *Read Trump’s Jan. 6 Speech, a Key Part of Impeachment Trial*, NPR (Feb. 10, 2021), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial> [<https://perma.cc/2Y8V-XM9T>] (emphasis added).

During Trump's speech, it became clear that Capitol Hill security would not be sufficient. Hutchinson testified that she overheard Secret Service getting updates, and she also spoke to Ornato, who said to "make sure the Chief knows that they're—they're getting close to the Capitol. . . . Capitol Police officers were getting overrun at the security barricades outside of the Capitol building. And they were . . . short people to defend the building against the rioters." June 28 Hearing Tr. 36:55.

White House officials recognized the legal and actual dangers posed by Trump leading protestors to the Capitol and sought to prevent it. Hutchinson testified that on January 3, when the idea of going to the Capitol had first come up, she and White House Counsel Pat Cipollone had a "brief private conversation where he said to me we need to make sure that this doesn't happen. This would be a legally a terrible idea for us. . . . [W]e have serious legal concerns if we go up to the Capitol that day." June 28 Hearing Tr. 43:25. And on the morning of January 6, Hutchinson said she saw Cipollone, who reiterated his plea to ensure Trump did not go to the Capitol: "*We're going to get charged with every crime imaginable if we make that movement happen.*" *Id.* 44:30 (emphasis added). Hutchinson understood him to mean obstruction of justice as well as inciting violence. *Id.* at 45:09. Hutchinson testified, "*He was also worried that it would look like we were inciting a riot or encouraging a riot to erupt on the Capitol.*" *Id.* 45:30 (emphasis added). In fact, in

the middle of Trump's speech, Republican Leader Kevin McCarthy called Hutchinson, instructing that Trump should not come to the Capitol. *Id.* 48:14.

After the speech, Trump's security detail, Bobby Engel, told Trump that it was not possible to go to the Capitol, and Trump became violent. Hutchinson testified: "Tony described him as being *irate*. The president said something to the effect of *I'm the f'ing president, take me up to the Capitol now*, to which Bobby responded, sir, we have to go back to the West Wing." June 28 Hearing Tr. 53:38 (emphasis added). D.C. Police Sgt. Mark Robinson, assigned to the President's motorcade that day, testified that the President was "upset and adamant" about going to the Capitol. July 21 Hearing Tr. 28:56. Robinson testified he had never witnessed another discussion that heated, where the President was contradicting the Secret Service. July 21 Hearing Tr. 29:28.

After Trump was returned to the White House, there is not presently an official record of him receiving or placing a call between 11:06 a.m. and 6:54 pm.²² The Presidential Daily Diary is also silent about his activities. July 21 Hearing Tr. 33:44. At 1:49 p.m. on January 6, around the same time D.C. police declared a riot at the

²² Bob Woodward and Robert Costa, *Jan. 6 White House logs given to House show 7-hour gap in Trump calls*, Washington Post (Mar. 29, 2022), <https://www.washingtonpost.com/politics/2022/03/29/trump-white-house-logs/> [<https://perma.cc/LD9X-UR6H>].

Capitol, Trump tweeted a link to his rally speech.²³ JA-42. For most of the afternoon, Trump remained in the private dining room, watching television. July 21 Hearing Tr. 32:55. And, as White House Press Secretary Kayleigh McEnany testified: “[Trump] wanted a list of the Senators. And, you know, I left him at that point.” July 21 Hearing Tr. 37:34. When House Minority leader Kevin McCarthy reached the President by phone during the siege of the Capitol and “asked him to publicly and forcefully call off the riot,” Trump declined, responding, “*I guess these people are more upset about the election than you are.*”²⁴

Hutchinson also heard conversations in the Oval Dining Room about the “hang Mike Pence” chants at the Capitol. Specifically, Hutchinson overheard Cipollone say “They’re literally calling for the vice president to be f’ing hung. And Mark [Meadows] had responded something to the effect of, you heard him [Trump], Pat. *He thinks Mike deserves it. He doesn’t think they’re doing anything wrong.*” June 28 Hearing Tr. 1:14:24 (emphasis added). At 2:24 p.m., Trump tweeted: “Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution.” JA-107. This further riled up the crowd. Jessica

²³ *Capitol riots timeline: What happened on 6 January 2021*, BBC News (June 10, 2021) <https://www.bbc.com/news/world-us-canada-56004916> [<https://perma.cc/3QZG-6MS9>].

²⁴ Jaime Herrera Beutler (@HerreraBeutler), Twitter (Feb. 12, 2021, 6:45 PM), <https://twitter.com/HerreraBeutler/status/1360419828721401856> [<https://perma.cc/G2QG-FWN8>].

Watkins, an Oath Keeper, said: “It spread like wildfire that Pence has betrayed us. And everybody is marching on the Capitol, all million of us. It’s insane.” July 21 Hearing Tr. 59:37. Trump was later asked why he didn’t condemn the chants about hanging Pence, and he responded: “It’s common sense that you’re supposed to protect — how can you — if you know a vote is fraudulent, right, how can you pass on a fraudulent vote to Congress?” June 28 Hearing Tr. 1:15:57.

Sarah Matthews, Deputy Press Secretary for Trump’s Campaign testified:

[T]he situation at the Capitol was violent and escalating quickly[] [a]nd so I thought that the tweet about the Vice President . . . was essentially him giving the green light to these people, telling them that what they were doing at the steps of the Capitol and entering the Capitol was Ok, that they were justified in their anger. . . . I’ve seen the impact that his words have on his supporters. . . . [T]hey truly latch on to every word and every tweet that he says. . . . it was him pouring gasoline on the fire.

July 21 Hearing Tr. 1:03:07. Some indicated rioters expressly cited this as the reason for their actions at the Capitol.²⁵

Trump’s followers at the Capitol that afternoon knew precisely what Trump meant. Even at 2:38 p.m., when Trump tweeted: “stay peaceful[,]” JA-48, followed

²⁵ As indicted rioter Joshua Black explained, “Once we found out Pence turned on us, . . . the crowd went crazy. I mean, it became a mob. We crossed the gate.” Opp’n to Mot. to Reconsider at 7–8, *United States v. Black*, No. 1:21-cr-127-ABJ (D.D.C. Apr. 1, 2021), ECF No. 20.

at 3:13 by “remain peaceful,” they could read between the lines.²⁶ As an unidentified insurrectionist explained on CNN, “That’s saying a lot by what he didn’t say. He didn’t say not to do anything to the Congressmen. Well, he did not ask them to stand down.”²⁷

C. Government Officials Distanced Themselves From Trump, Recognizing The Illegality Of His Actions.

That Trump’s actions related to January 6 fall outside any outer perimeter of his official duties—and in no way served to “take care” faithfully execute the laws—is made abundantly clear by the cavalcade of high-ranking executive branch officials who immediately resigned in response to his role in fomenting the attacks on the Capitol. Within hours of Trump’s speech, numerous government officials resigned, expressing that after the “unconscionable” and “entirely avoidable” assault on the Capitol, they “can’t stay here.”²⁸ Shortly before resigning, Secretary of Education Betsy DeVos said to Trump, “There’s no mistaking the impact your rhetoric had on the situation, and it is the inflection point for me.” June 28 Hearing Tr. 1:19:41.

²⁶ *Capitol riots timeline: What happened on 6 January 2021*, BBC News, <https://www.bbc.com/news/world-us-canada-56004916> [<https://perma.cc/V7Q5-3KFN>].

²⁷ CNN Transcripts (July 22, 2022), <https://transcripts.cnn.com/show/nday/date/2022-07-22/segment/01> [<https://perma.cc/778D-4AZV>].

²⁸ *Here’s Who Resigned From Trump’s Administration After Riot at the Capitol*, Wall St. J. (Jan. 11, 2021), <https://www.wsj.com/articles/heres-who-resigned-from-trumps-administration-after-riot-at-the-capitol-11610061311> [<https://perma.cc/5R2D-TNYL>].

John Costello, Commerce Department Deputy Assistant Secretary for Intelligence and Security resigned, stating, “Yesterday’s events were an unprecedented attack on the very core of our democracy—incited by a sitting president.”²⁹ Deputy National Security Advisor Matt Pottinger, testified to the House Select Committee that he resigned because “I — I was disturbed and worried to see that the President was attacking Vice President Pence for doing his constitutional duty. . . . [I]t looked like fuel being poured on the fire.” July 21 Hearing Tr. 1:02:24. And on January 7, Senate Minority Leader Mitch McConnell publicly blamed Trump: “There’s no question, none, that President Trump is practically and morally responsible for provoking the events of the day. No question about it. The people who stormed this building believed they were acting on the wishes and instructions of their President.” July 21 Hearing Tr. 1:52:22.

IV. TRUMP’S ASSOCIATES CONTINUE TO RESIST COOPERATION WITH GOVERNMENT INVESTIGATIONS.

Nearly all of Trump’s associates with a hand in the January 6 events have been implicated in government investigations and/or prosecutions. That many of his close confidantes have been subpoenaed, indicted, and/or convicted for their involvement in Trump’s actions to subvert the certification of the 2020 Election only further illustrates that Trump’s conduct had no basis in the faithful execution of the laws.

²⁹ *See id.*

For instance, after **Sidney Powell** was subpoenaed by the House Select Committee for documents related to her efforts to disrupt or delay certification of the election,³⁰ she sued to block the release of her phone records.³¹ Her suit is on the verge of being dismissed for lack of prosecution.³² At the same time, Powell's nonprofit, Defending the Republic, is dedicated to funding the legal defense for several January 6 insurrectionists, including Kelly Meggs.³³

Michael Flynn, too, unsuccessfully resisted a Select Committee subpoena, *see* Order, *Flynn v. Pelosi et al.*, No. 21-cv-2956-MSS (M.D. Fla. Dec. 22, 2021), ECF No. 15, before eventually agreeing to speak to Committee members. When Flynn was asked under oath during his deposition whether the violence on January 6 was justified, he pleaded his Fifth Amendment right not to provide incriminating

³⁰ Letter from Bennie Thompson, Chairman to Sidney Powell (Jan. 18, 2022), https://january6th.house.gov/sites/democrats.january6th.house.gov/files/2022-1-18.BGT%20Letter%20to%20Powell_Redacted.pdf [https://perma.cc/5QYL-PD9Y].

³¹ Lexi Lonas, *Ex-Trump lawyer Sidney Powell sues Verizon to try to block Jan. 6 subpoena*, The Hill (Feb. 17, 2022), <https://thehill.com/homenews/house/594852-ex-trump-lawyer-sidney-powell-sues-verizon-to-try-to-block-jan-6-subpoena/> [https://perma.cc/7Y48-ZZRR].

³² *See* Docket, *Powell v. Verizon Commc 'ns*, No. DC-22-01819 (Dallas Cnty. Dist. Ct., Tex. Aug. 8, 2022).

³³ Dan Friedman, *An Infamous MAGA Lawyer Is Funding Wacky Legal Defenses for January 6 Suspects*, Mother Jones (May 20, 2022), <https://www.motherjones.com/politics/2022/05/sidney-powell-january-6-lawyers-kelly-meggs-jonathan-moseley-juli-haller/> [https://perma.cc/5EM8-RD59].

information about himself. June 28 Hearing Tr. 1:06:18.

Steve Bannon also resisted the Select Committee's subpoena, claiming that the documents the Committee seeks were protected by executive privilege. *United States v. Bannon*, No. 1:21-CR-00670 (CJN), 2022 WL 2900620, at *1 (D.D.C. Apr. 6, 2022). Bannon later was found guilty of two counts of contempt of Congress for failing to comply with the subpoena, and currently awaits sentencing.³⁴

John Eastman also refused to produce documents to the Committee, filing suit to prevent his former employer from producing his emails, claiming attorney-client privilege and attorney work product protections. *See* Compl., *Eastman v. Thompson*, No. 8:22-cv-00099 (C.D. Cal. Jan. 20, 2022), ECF No. 1. The district court held that the crime-fraud exception applied and concluded that Trump likely committed obstruction of an official proceeding and participated in a conspiracy to defraud the United States “by launching a pressure campaign to convince Vice President Pence to disrupt the Joint Session on January 6.” *Id.*, Order at 31-37, ECF No. 260. As the court explained, Trump and Eastman undertook numerous overt acts in furtherance of their conspiracy, finding that “this plan was a last-ditch attempt to secure the Presidency by any means. The illegality of the plan was obvious. Our

³⁴ Press Release, Dep't of Justice, *Stephen K. Bannon Found Guilty by Jury to Two Counts of Contempt of Congress* (July 22, 2022), <https://www.justice.gov/usao-dc/pr/stephen-k-bannon-found-guilty-jury-two-counts-contempt-congress> [<https://perma.cc/G8MK-RPGB>].

nation was founded on the peaceful transition of power,” and “[t]he plan spurred violent attacks on the seat of our nation’s government, led to the deaths of several law enforcement officers, and deepened public distrust in our political process.” *Id.* at 44.

CONCLUSION

If Plaintiffs’ allegations seem at times surreal, it is precisely because they are so unprecedented in their nature and in the history of this country’s two-centuries-long peaceful transfer of power. Those allegations—reinforced by the substantial public record—extend to far more than Trump speaking on “matters of public concern” or engaging the “faithful execution” of the law. Indeed, the facts alleged concern a conspiracy to overthrow this country’s democracy itself. This is not—and cannot be—a basis for presidential immunity, and the Court should reject Trump’s unfounded argument for reversal.

Dated: September 30, 2022

Respectfully Submitted,

COOLEY LLP

By: /s/ Kathleen Hartnett

Kathleen R. Hartnett

David S. Louk

3 Embarcadero Center, 20th Floor

San Francisco, CA 94111-4004

Telephone: (415) 693-2000

Facsimile: (415) 693-2222

khartnett@cooley.com

dlouk@cooley.com

Attorneys for *Amicus Curiae*

Jared Holt

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition is in compliance with Rules 29(a) and 32(a)(5-6) of the Federal Rules of Appellate Procedure. The brief contains 6,476 words, and was prepared in 14-point Times New Roman font using Microsoft Word 2010.

/s/ Kathleen Hartnett
Kathleen R. Hartnett
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Cir. R. 25(a), that on September 30, 2022, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

/s/ Kathleen Hartnett
Kathleen R. Hartnett
Attorney for Amicus Curiae

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