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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RANDALL KOWALKE,

Plaintiff,

vs.

DAVID EASTMAN, STATE OF ALASKA, DIVISION OF ELECTIONS, and GAIL FENUMIAI in her official capacity as Director of Elections

Defendant.

Case No. 3AN-22-07404 CI

PLAINTIFF'S SUPPLEMENTAL BRIEF RE: ISSUES IDENTIFIED BY COURT

I. PRELIMINARY STATEMENT

On December 14, 2022, this Court requested supplemental briefing from the parties on the following two legal issues:

(1) Did the drafters of the Alaska Constitution intend for membership *alone* in "any party or organization or association which advocates . . . the overthrow by force or violence of the government of the United States or of the State" to suffice for disqualification of an individual from

holding public office under Article XII, § 4 ("Disqualification for Disloyalty clause")?; and

(2) Is something more than mere membership – such as a nexus between the member and unprotected conduct of the organization – required by the First Amendment, Fourteenth Amendment, or other provisions of the Alaska Constitution?

As shown below, the language of the Disqualification for Disloyalty clause is crystal clear and makes membership alone in an insurrectionary organization a sufficient basis for disqualification. The limited evidence of the drafters' intent corroborates the plain meaning of the Disqualification for Disloyalty clause.

As to this Court's second question, there is nothing in either the United States or the Alaska Constitutions that requires the showing of "something more" to enforce the Disqualification for Disloyalty clause.

Finally, to the extent a nexus between Rep. Eastman's membership in the Oath Keepers and the organization's unprotected conduct is for some reason required by this Court, the evidence establishes the required nexus.

II. ARGUMENT AND AUTHORITIES

A. Membership Alone in an Insurrectionary Organization Is Sufficient to Disqualify a Person Under Article XII, § 4 of the Alaska Constitution.

The Alaska Supreme Court applies "the basic principles of statutory interpretation" when construing the Alaska Constitution.[1] The "analysis of a constitutional provision begins with, and remains grounded in, the words of the provision itself. [Courts] are not vested with the authority to

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[1] *Citizens Coalition for Tort Reform v. McAlpine*, 801 P.2d 162, 169 (Alaska 1991).

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add missing terms or hypothesize differently worded provisions . . . to reach a particular result."[2] "Because of [the] concern for interpreting the constitution as the people ratified it, [courts] generally are reluctant to construe abstrusely any constitutional term that has a plain ordinary meaning."[3] Under the sliding scale approach used by the Alaska Supreme Court, the plainer the language of a provision, the more convincing the evidence of contrary intent must be.[4]

Here, the language of Article XII, § 4 of the Alaska Constitution is unambiguous. It provides that an individual who "belongs" to "any party or organization or association which advocates . . . the overthrow by force or violence of the government of the United States or of the State" is disqualified from holding public office. The ordinary meaning of the word "belong" is "to be in the relation of a member, adherent, inhabitant, etc." or "to have the proper qualifications, especially social qualifications, to be a member of a group."[5] Under either of these definitions, being a "member" of an organization is the equivalent of "belonging" to the organization. Thus, under the plain meaning of Article XII, § 4, mere membership in an insurrectionary organization is sufficient to trigger the Disqualification for Disloyalty clause.

Nor is there any evidence of contrary intent by the drafters (and, certainly, not the sort of *convincing* evidence needed to overcome the plain language of the provision). As the Division pointed out in its summary judgment motion, the Disqualification for Disloyalty clause was not extensively debated at Alaska's Constitutional Convention.[6] However, the following confirms that

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[2] *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (citation and quotation marks omitted).

[3] *Id.* (citation and quotation marks omitted).

[4] *Cf., e.g., Alaska Hous. Fin. Corp. v. Salvucci*, 950 P.2d 1116, 1121 (Alaska 1997).

[5] *See* https://www.dictionary.com/browse/belong.

[6] State Defendants' Motion for Summary Judgment at 10 & n.30.

the delegates intended for membership alone to suffice.

First, each of the delegates had to swear their own oath (administered by Judge Vernon D. Forbes) that they were "*not a member* of the Communist party or any subversive parties or affiliated with such parties . . . [nor] *a member* of . . . any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional method . . . ."[7] Given the similar language in the delegates' oath and the Disqualification for Disloyalty clause, it stands to reason that the delegates understood that membership alone was sufficient to disqualify individuals from public office.

Second, on February 3, 1956 (day 73 of the proceedings), the delegates debated whether the first comma in the Disqualification for Disloyalty clause should be deleted.[8] Delegate Sundborg explained why the comma was necessary:

> If you will notice, there is one [comma] after "advocates" on the first line and one after "advocates" on the third line. Now if we just left out the material in between the two commas, this section would read "no person who advocates the overthrow by force or violence" and so on. We set off the material in between those places off by commas because it is equivalent to the word advocates, "no person who advocates or who aids or belongs to any party or association which advocates." I believe it is necessary and I know it is the standard way of punctuating this identical phrase which is used in many state constitutions and in the federal document.[9]

The delegates thus intended that the language "in between the commas" in Article XII, § 4 – i.e., "or who aids or belongs to any party or organization or association which advocates" – was "equivalent

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[7] *Alaska Constitutional Convention Part 1, Proceedings: November 8 – December 12, 1955*, at 2 (emphasis added).

[8] *See id.* at 3893-94.

[9] *Id.*

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to the word advocates."[10] In other words, the delegates understood the language to mean that belonging to an organization which advocates the overthrow of the government by force or violence was functionally the same as personally advocating the overthrow of the government by force or violence.

Given the plain language of Article XII, § 4, and the corroborating evidence of intent, this Court should hold that membership alone in the Oath Keepers – an organization that has both advocated concrete action and engaged in actual action to overthrow the United States – is sufficient to disqualify Rep. Eastman. Any contrary interpretation, requiring the showing of "something more" than membership, would nullify the intent of the framers and would have the unprecedented effect of striking down an original provision of the Alaska Constitution.

B. Neither the U.S. Constitution Nor Other Sections of the Alaska Constitution Require the Showing of "Something More" than Membership to Enforce the Disqualification for Disloyalty Clause.

The Disqualification for Disloyalty clause, as its name implies, establishes one of the qualifications for holding public office in Alaska, in addition to the age, residency, and dual office holding provisions of the Alaska Constitution.[11] Because the right to seek and hold public office is not a fundamental constitutional right, such qualifications provisions do not compel close scrutiny.[12] "The First Amendment does not in terms confer a right to run for public office, and . . . it does not

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[10] *Id.* at 3893.

[11] *Cf. Greene v. Raffensperger*, 2022 U.S. Dist. LEXIS 70961, at *75 (N.D. Ga. Apr. 18, 2022) ("In short, Section 3 of the Fourteenth Amendment is an existing constitutional disqualification adopted in 1868 — similar to but distinct from the Article I, Section 2 requirements that congressional candidates be at least 25 years of age, have been citizens of the United States for 7 years, and reside in the states in which they seek to be elected.").

[12] *See Clements v. Fashing*, 457 U.S. 957, 963 (1982); *Boyer v. County of Ventura*, 33 Cal. App. 5th 49, 57 (Cal. App. 2019) ("Candidacy for public office is not a fundamental constitutional right to which a rigorous standard of review applies.").

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do so by implication either."[13]

A recent case involving Marjorie Taylor Greene is instructive. In *Greene v. Raffensberger*,[14] five voters challenged Greene's qualifications to run for Congress under Georgia's "Challenge Statute," which allows Georgia voters to "challenge whether individual candidates in their districts meet the requisite legal qualifications to run for their prospective positions via an administrative proceeding before Georgia's Office of State Administrative Hearings"[15] The voters alleged that Greene was ineligible under Section 3 of the Fourteenth Amendment,[16] because of her participation in the January 6 insurrection.[17] Greene filed a federal lawsuit and sought a preliminary injunction stopping the "government investigation" into her eligibility, alleging a violation of her First and Fourteenth Amendment rights.[18] The court denied the preliminary injunction, finding that Greene was not likely to prevail on her claims.[19]

The court held that "a candidate's right to appear on the ballot does not rise to the level of a fundamental constitutional right, nor does a challenge to a candidate's qualifications necessarily equate to a severe burden on that candidate's First Amendment rights."[20] The court explained that a

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13 *Bart v. Telford*, 677 F.2d 622, 624 (7th Cir. 1982); *see also Carver v. Dennis*, 104 F.3d 847, 850-51 (6th Cir. 1997) ("While the Supreme Court has held that the fundamental rights include freedom of speech, . . . and freedom of association, . . . the Court has never recognized a fundamental right to express one's political views through candidacy.").

14 2022 U.S. Dist. LEXIS 70961 (N.D. Ga. Apr. 18, 2022).

15 *Greene*, 2022 U.S. Dist. LEXIS 70961, at *3.

16 As discussed further below, Section 3 of the Fourteenth Amendment prohibits individuals who "have engaged in insurrection or rebellion against" the United States from holding state or federal public office. *See id.* at *5.

17 *See id.*

18 *See id.* at *15.

19 *See id.* at *45-86.

20 *Id.* at *48.

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candidate's interest in being able to run for office "certainly does not rise to the level of a citizen's interest in avoiding potential criminal jeopardy."[21] Finally, the court held that Georgia had a legitimate interest in ensuring "that only qualified candidates appear on the ballot."[22]

Similarly, here, the State of Alaska has a legitimate interest in ensuring that candidates for public office satisfy *all* of the applicable qualifications under the Alaska Constitution. This Court should enforce the Disqualification for Disloyalty clause as written, and should not impose any additional requirements – under the First Amendment or Fourteenth Amendment – that are not contained in the plain language of the provision.

Nor can it be the case that enforcing the Disqualification for Disloyalty clause, as written and without requiring "something more," would violate any other provision of the Alaska Constitution. The Alaska Constitution "must be regarded as one instrument, all of whose provisions are to be deemed of equal validity."[23] The various "provisions of the constitution are equally obligatory, and are to be equally respected."[24]

C. Even if this Court Requires Some Sort of Nexus, the Evidence Shows One.

For the reasons discussed above, this Court should not nullify the intent of the drafters of the Alaska Constitution by inserting additional requirements into the Disqualification for Disloyalty clause. However, if the Court is inclined to demand "something more," by requiring some sort of nexus between Rep. Eastman's membership and the Oath Keepers' efforts to overthrow the U.S. government, there are two potentially applicable standards for the Court to consider: (1) the

[21] *Id.* at *52.

[22] *Id.* at *64.

[23] *Prout v. Starr*, 188 U.S. 537, 543 (1903).

[24] *Cohens v. State of Va.*, 19 U.S. 264, 393 (1821).

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"engaged in insurrection" standard under Section 3 of the Fourteenth Amendment; or (2) the "specific intent" standard under the First Amendment.[25] Plaintiff has made the requisite showing under either standard.

1. The Fourteenth Amendment's "Engaged in Insurrection" Standard.

The federal counterpart of the Disqualification for Disloyalty clause is found in Section 3 of the Fourteenth Amendment. It provides:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, *or hold any office*, civil or military, under the United States, or *under any State*, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[26]

"Section Three imposes a qualification for public office, much like an age or residency

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[25] The First Amendment does not directly apply to states, but the "[r]ights secured by the First Amendment are protected against state interference by incorporation into the Due Process Clause of the Fourteenth Amendment." *Seward Chapel v. Seward*, 655 P.2d 1293, 1299 n.20 (Alaska 1982) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

[26] U.S. Const. amend. XIV, § 3 (emphasis added). "After the Civil War," a recent article about the Clause explains, "Congress recognized that its losers would continue to fight—if not on the battlefield, then in the political arena. So one condition for readmission into the Union was that confederate states needed to ratify the Fourteenth Amendment." Myles S. Lynch, *Disloyalty and Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 William & Mary Bill of Rights J. 153, 155 (2021). *"The oath to support the Constitution is the test*. The idea being that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress." *Worthy v. Barrett,* 63 N.C. 199, 204 (N.C. 1869), *appeal dismissed sub nom. Worthy v. Comm'rs,* 76 U.S. 611 (1869) (emphasis in original); *see also* Cong. Globe, 39th Cong., 1st Sess. 2532 (1866) (statement of Rep. Banks) ("An enemy to the Government, a man who avows himself an enemy of its policies and measures, who has made war against the Government, would not seem to have any absolute right to share political power equally with other men who have never been otherwise than friends of the Government."). "In the years after the passage of the Fourteenth Amendment, Section 3 was relied on to exclude both state and federal officials from office." *Greene*, 2022 U.S. Dist. LEXIS 70961, at *66.

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requirement. It is not a criminal penalty . . . ."[27] As a matter of law, conduct that violates Section 3 is *not* protected by the First Amendment.[28]

The term "insurrection," as understood by the framers of the Fourteenth Amendment, "referred to an (1) assemblage of persons, (2) acting to prevent the execution of one or more federal laws, (3) for a public purpose, (4) through the use of violence, force, or intimidation by numbers."[29] Indeed, the framers understood that an "insurrection" did not even have to "rise to the level of trying to overthrow the government or secede from the Union; resisting the government's authority to execute a single law sufficed."[30] Nor was the use of actual violence required; "intimidation by numbers sufficed."[31] "Nor did the nineteenth-century definition of insurrection depend on the truth or morality of the insurrectionists' cause: an uprising could be an insurrection even if the participants sincerely believed their cause was just."[32]

In *N.M.*, the court had little difficulty concluding, after a contested trial, that "the January 6, 2021 attack on the United States Capitol and the surrounding planning, mobilization, and incitement constituted an 'insurrection' within the meaning of Section Three of the Fourteenth

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27 *N.M. ex rel. White v. Griffin*, 2022 N.M. Dist. LEXIS 1, at *44 (N.M. Dist. Ct. Sep. 6, 2022).

28 *N.M.*, 2022 N.M. Dist. LEXIS 1, at *64-65 ("Section Three of the Fourteenth Amendment is just as much a part of the Constitution as the First Amendment. Griffin's 'unconstitutional constitutional amendment' theory has never succeeded in American courts and was specifically rejected by Section Three's drafters. . . . Even if a constitutional amendment could somehow be deemed unconstitutional as Mr. Griffin claims, Section Three poses no genuine threat to First Amendment rights; the two provisions can and must be harmonized.").

29 *N.M.*, 2022 N.M. Dist. LEXIS 1, at *47 (citations omitted).

30 *Id.* at *48.

31 *Id.*

32 *Id.* at *48-49.

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Amendment."[33] The court found that the "Stop the Steal movement," pushed by President Trump and his attorney, Dr. John C. Eastman, "successfully mobilized and incited thousands of people from across the country to form a violent mob in Washington, D.C. to intimidate Vice President Pence and Congress so that they would not certify the 2020 presidential election and thus block the lawful transfer of power. . . . The mob that arrived at the Capitol on January 6 was an assemblage of persons who engaged in violence, force, and intimidation by numbers . . . . The mob was unified by the common public purpose of opposing the execution of federal law—namely, the Twelfth and Twentieth Amendments and the Electoral Count Act."[34]

As for what it means to be "engaged in" insurrection, the framers of the Fourteenth Amendment created a low bar. "One need not personally commit acts of violence to engage in insurrection."[35] Rather, "knowledgeable nineteenth-century Americans understood that a person 'engaged in' insurrection whenever they were 'leagued' with insurrectionists—either by acting in concert with others knowing that the group intended to achieve its purpose in part by violence, force, or intimidation by numbers, or by performing an 'overt act' knowing that act would 'aid or support' the insurrection."[36] Engagement could include "non-violent overt acts or words in furtherance of the insurrection,"[37] *regardless of how much they actually contribute to the insurrection*.[38] For example, in *N.M.*, the court found that having "[o]ne more person closer to the Capitol" riot on

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[33] *Id.* at *50.

[34] *Id.* at *50-51.

[35] *Id.* at *55 (cleaned up).

[36] *Id.* at *54-55.

[37] *Id.* at *55.

[38] *Id.*

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January 6 was a sufficient overt act to constitute engagement in insurrection.[39]

Here, Rep. Eastman's conduct satisfies the "engaged in insurrection" standard under the Fourteenth Amendment and, by extension, should also be held to violate Article XII, § 4 of the Alaska Constitution. Rep. Eastman went to Washington, D.C. with the very same purpose as the Oath Keepers and the rest of the mob that was mobilized by the "Stop the Steal" movement to march to the Capitol on January 6, i.e., to seek to delay or stop the certification of the presidential election.[40] Indeed, as Rep. Eastman wrote in an article on the day before the insurrection: "Tomorrow, Congress is scheduled to count the votes and certify the winner of the presidential election. They should not do so. The election process that has been observed thus far by the American people has been abused to such a degree that, in my view, it can no longer be called an election. To call what the American people have observed an 'election', under the United States Constitution, would be fundamentally dishonest."[41]

Rep. Eastman has tried to explain to this Court that his trip to Washington, and his presence at the Capitol on January 6, was not driven by the Oath Keepers' "call to action."[42] Instead, Eastman claims that his presence in Washington on January 6 was in response to President Trump's request for all of his supporters to come to the "Stop the Steal" rally at the Ellipse on January 6.[43] This distinction is one without a meaningful difference: As the Congressional Select Committee to Investigate the January 6th Attack on the United States Capitol concluded on December 19, 2022,

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[39] *Id.*

[40] *Id.* at *50-51.

[41] David Eastman, *Trump Lost and Jeffrey Epstein Killed Himself* (Jan. 5, 2021), admitted as Exhibit 51.

[42] Exhibit 14.

[43] Exhibit AE.

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following months of hearings, President Trump (like the Oath Keepers) was himself engaged in "incit[ing]," "assist[ing]," or providing "aid and comfort" to the insurrection on January 6.[44] It was all part of the same concerted effort to "Stop the Steal" and to stop the transfer of presidential power

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[44] *See* Select Committee to Investigate the January 6th Attack on the United States Capitol, *Introductory Material to the Final Report of the Select Committee* (Dec. 19, 2022), at 83-85, available at: https://thehill.com/homenews/house/3780970-read-jan-6-panel-report-executive-summary/. The Committee found:

> President Trump was directly responsible for summoning what became a violent mob to Washington, DC, urging them to march to the Capitol, and then further provoking the already violent and lawless crowd with his 2:24p.m. tweet about the Vice President. Even though President Trump had repeatedly been told that Vice President Pence had no legal authority to stop the certification of the election, he asserted in his speech on January 6 that if the Vice President "comes through for us" that he could deliver victory to Trump: "if Mike Pence does the right thing, we win the election." This created a desperate and false expectation in President Trump's mob that ended up putting the Vice President and his entourage and many others at the Capitol in physical danger. When President Trump tweeted at 2:24 p.m., he knew violence was underway. His tweet exacerbated that violence.
>
> During the ensuing riot, the President refused to condemn the violence or encourage the crowd to disperse despite repeated pleas from his staff and family that he do so. . . . President Trump refused repeatedly, for multiple hours, to make a public statement directing his violent and lawless supporters to leave the Capitol. President Trump did not want his supporters (who had effectively halted the vote counting) to disperse. Evidence obtained by the Committee also indicates that President Trump did not want to provide security assistance to the Capitol during that violent period. . . .
>
> . . . . The Committee has developed significant evidence that President Trump intended to disrupt the peaceful transition of power . . . .
>
> Both the purpose and the effect of the President's actions were to mobilize a large crowd to descend on the Capitol. Several defendants in pending criminal cases identified the President's allegations about the "stolen election" as the key motivation for their activities at the Capitol. Many of them specifically cited the President's tweets asking his supporters to come to Washington, DC on January 6.

Id. at 83-85.

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from Trump to Biden.

For their part, the Oath Keepers were also directly involved in the "Stop the Steal" rally on January 6. Stewart Rhodes testified that the Oath Keepers were hired to provide security for the rally. Rhodes also admitted that he was in private communication with the organizers of the rally. Thus, the "Stop the Steal" rally – which directly led to the incitement of the insurrection at the Capitol – is the thread that connects the presence and purpose of the Oath Keepers and Rep. Eastman in Washington, D.C. on January 6, 2021.

During his speech at the "Stop the Steal" rally, Trump told the crowd at the Ellipse (including Rep. Eastman), in language that mirrored the rhetoric of Stewart Rhodes and Eastman's *Trump Lost* article, that the election was "rigged it like they've never rigged an election before."[45] He said "we're going to have somebody in [the White House] that should not be in there and our country will be destroyed and we're not going to stand for that."[46] Trump continued: "Now, it is up to Congress to confront this egregious assault on our democracy. And after this, we're going to walk down, and I'll be there with you, we're going to walk down, we're going to walk down."[47] Trump concluded his speech by again exhorting the crowd to "walk down Pennsylvania Avenue . . . to the Capitol," and to "fight like hell. And if you don't fight like hell, you're not going to have a country anymore."[48]

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[45] After watching portions of video of Trump's speech, Rep. Eastman agreed that President Trump had made these statements during his speech at the "Stop the Steal" rally. *See also* Associated Press, *Transcript of Trump's Speech at Rally Before U.S. Capitol Riot*, at https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-media-e79eb5164613d6718e9f4502eb471f27.

[46] *Id.*

[47] *Id.*

[48] *Id.*

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Rep. Eastman has **admitted** that he was at the "Stop the Steal" rally on January 6 and listened to the entirety of Trump's speech. His travel companion, Patrick Martin, admitted that he knew, even before going to Washington, that a large crowd would be gathering at the Capitol building on January 6. Martin also admitted to his awareness, even before traveling to Washington, of the possibility that violence might occur on January 6. In fact, he even brought a "ballistic backpack" with him to Washington for protection.

When Trump's speech concluded, Rep. Eastman has **admitted** that he followed President Trump's directives by going to the Capitol. In fact, he led Martin to the Capitol. During the time that the Capitol building was being attacked by the violent mob, Eastman was at the Grant Memorial, less than .25 miles away and with a direct line of sight to the Capitol building. Martin candidly admitted that it was immediately apparent to him, upon arriving at the Grant Memorial, that what was happening at the Capitol on January 6 was not a "lawful constitutional approach" to challenging the election results. Martin also testified that he soon learned from talking to people in the crowd that the Capitol building had been breached by the mob. Yet, Rep. Eastman remained near the Capitol building for approximately two hours, taking pictures with other Alaskans for social media. Rep. Eastman stayed at the Grant Memorial until he received notification that a curfew had been issued. After learning that the Congressional proceeding to certify the results of the presidential election had been delayed, Eastman finally left the Grant Memorial.

Meanwhile, as shown at trial, numerous other Oath Keepers – like Eastman – also went to the Capitol, as directed by Trump and their leader, Stewart Rhodes.[49] Two "stacks" of Oath Keepers

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[49] Rep. Eastman, and all other Oath Keepers who went to the Capitol on January 6, knew that the Oath Keepers had access to a large cache of weapons and ammunitions in Quick Reaction Force (QRF) locations just outside the city. For example, Michael Nichols, who received the same "call to

entered the Capitol building, wearing combat gear, paramilitary clothing, and Oath Keepers patches, and engaged in violence against the Capitol Police, terrorized Members of Congress, and had one goal: delaying or cancelling the certification of the election.[50]

While it is true that there is no evidence that Rep. Eastman personally engaged in violence on January 6, or was working with the two "stacks" of Oath Keepers, this detail is irrelevant: his admitted presence at the Grant Memorial added "one more person closer to the Capitol," and thus constitutes an overt act in support of the insurrection for purposes of Section 3 of the Fourteenth Amendment.

2. The "Specific Intent" Standard.

In certain contexts, the First Amendment "restricts the ability of [a] State to impose liability on an individual solely because of his association with another."[51] For example, in Smith Act prosecutions,[52] the Supreme Court has held that the government must prove that the individual "specifically intends to accomplish the aims of the organization by resort to violence."[53] Outside of the criminal context, the Supreme Court has applied a similar test when considering whether a student group could be denied recognition at a state-supported college;[54] the continued employment

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action" email as all members of the Oath Keepers, admitted during his testimony that he was aware of the presence of the weapons at the QRF locations.

[50] *See, e.g.,* Exhibit 23 at ¶¶ 39-40.

[51] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918-19 (1982).

[52] The Smith Act "among other things, makes a felony the acquisition or holding of knowing membership in any organization which advocates the overthrow of the Government of the United States by force or violence." *Scales v. United States*, 367 U.S. 203, 205 (1961) (citing 18 U.S.C. § 2385).

[53] *Id.* at 229 (cleaned up).

[54] *Healy v. James*, 408 U.S. 169, 186 (1972).

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of faculty members at a state university;[55] and bar admission for attorneys.[56] Where the "specific intent" standard applies, the Supreme Court has held that "[f]or liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims."[57]

That said, plaintiff is not aware of even a single case from anywhere in the country applying the "specific intent" standard in the context of reviewing legislative qualifications. Nor could Dr. John Eastman cite such a case during his testimony. And for good reason. As discussed above, the right to seek and hold public office is **not** a fundamental constitutional right.[58] As the United States Supreme Court has recognized, "a State may constitutionally require an oath to support the Constitution from its legislators which it does not require of its private citizens."[59]

Insofar as this Court is going to require the showing of a nexus to insurrection is required, the specific standard of Section 3 of the Fourteenth Amendment should control over the general standard of the First Amendment.[60] As Dr. Eastman admitted during his testimony, within the context of cases challenging an individual's eligibility for public office, courts have applied the Fourteenth Amendment standard rather than the "specific intent" standard of the First Amendment.

But, if this Court chooses to apply the "specific intent" standard, the evidence presented still

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55 *Keyishian v. Bd. of Regents*, 385 U.S. 589, 606-08 (1972).

56 *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 165-66 (1971).

57 *NAACP*, 458 U.S. at 920.

58 *See supra* n.12.

59 *Bond v. Floyd*, 385 U.S. 116, 135 (1966).

60 *See, e.g., Norville v. Carr-Gottstein Foods Co.*, 84 P.3d 996, 1004 (Alaska 2004) (noting principle of interpretation that "where one section deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is a conflict, the specific section will control over the general.").

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satisfies that standard. Evaluating "specific intent" requires this Court to consider Rep. Eastman's mental state. Alaska Criminal Pattern Jury Instruction 1.15 sets forth the relevant analysis:

> A person's mental state may be shown by circumstantial evidence. It can rarely be established by any other means. Witnesses can see and hear, and thus be able to give direct evidence of, what another person does or does not do. But no one can see or hear the mental state the person had at the time the person acted or did not act. Yet what a person does *or does not do* may indicate that person's mental state.
>
> You may consider any statements made and acts done *or not done* by the person and all other facts and circumstances in evidence when determining that person's mental state.

(Emphasis added).

Here, the evidence shows that Rep. Eastman knew, before traveling to Washington, that the Oath Keepers had called on "all patriots who can be in DC get to DC [on January 6] to stand tall in support of President Trump's fight to defeat the enemies foreign and domestic who are attempting a coup, through the massive vote fraud" and to "show Congress that we the people will not stand for the election being stolen to plan an imposter Chicom puppet in the White House";[61] that the Oath Keepers had called on all members to "[p]repare your mind, body, and spirit for battle";[62] President Trump had also called on his supporters to go to Washington on January 6 for the "Stop the Steal" rally;[63] Trump was "directly responsible for summoning what became a violent mob to Washington, DC, urging them to march to the Capitol, and then further provoking the already violent and lawless crowd";[64] according to Rep. Eastman, Trump's tweets were the catalyst for his trip to Washington; the Oath Keepers, Trump, and Eastman all shared the common purpose on January 6 of delaying or

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61 Exhibit 14.

62 *Id.*

63 Exhibit AE.

64 *See supra* n.44.

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stopping the certification of the presidential election; Rep. Eastman attended the "Stop the Steal" rally at the Ellipse and heard Trump's entire speech; after the rally, Eastman went very near the Capitol and was there when violence erupted and numerous individuals, including at least 33 Oath Keepers, illegally entered the Capitol building; it was obvious to anyone at the Grant Memorial during the afternoon of January 6 that what was transpiring in plain sight was not a lawful constitutional process; Eastman stayed in the vicinity of the Capitol until he was ordered to leave by the emergency curfew that was imposed; and **never**, from January 7, 2021 until today, has Eastman ever denounced the violent insurrectionist activities of the group of which he is a member. Indeed, even after the jury's conviction of Stewart Rhodes and Kelly Meggs on seditious conspiracy charges, and the guilty pleas of 3 other Oath Keepers to seditious conspiracy charges, Eastman still refuses to denounce the Oath Keepers organization, or any individual Oath Keepers, for their conduct on January 6 (while, at the same time, specifically calling out Antifa and equating the events of the insurrection with baseless and unproven allegations of election fraud).[65] Even after sitting through 6 days of trial in this case, Rep. Eastman refused to say that the Oath Keepers, or Rhodes, were among those who "planned and carried out" the January 6 attack of the Capitol.[66] Under the analysis set forth in Alaska Criminal Pattern Jury Instruction 1.15, this Court can and should find that Rep. Eastman had the specific intent of supporting the Oath Keepers' violent insurrectionist activities on January 6.

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[65] Exhibits AB, AG.

[66] Exhibit AG (calling for those who "planned and carried out" the January 6 attack to be "speedily identified and put before a jury").

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DATED: December 19, 2022

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CERTIFICATE OF SERVICE
I hereby certify that on 12/19/2022 a true and correct copy of the foregoing document was served via E-MAIL on:

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