knowing or reckless falsehoods in connection with some "other legally cognizable harm," including "protect[ing] the integrity of Government processes").

In pretrial motions, Mr. Trump moved to dismiss the original indictment based on the First Amendment. *See* ECF No. 113 at 4-18. The Office filed an opposition brief, ECF No. 139 at 29-34, and the district court denied the motion, finding that the indictment "properly alleges Defendant's statements were made in furtherance of a criminal scheme," ECF No. 171 at 33. As the court explained, Mr. Trump was "not being prosecuted for his 'view' on a political dispute; he [was] being prosecuted for acts constituting criminal conspiracy and obstruction of the electoral process," *id.* at 34, and the fact that his "alleged criminal conduct involved speech does not render the Indictment unconstitutional," *id.* at 32. Because he was "not being prosecuted simply for making false statements, but rather for knowingly making false statements in furtherance of a criminal conspiracy and obstructing the electoral process," there was "no danger of a slippery slope in which inadvertent false statements alone are alleged to be the basis for criminal prosecution." *Id.* at 36 (citation omitted); *see generally id.* at 32-37 (rejecting other First Amendment claims).

E. Other Charges

The Office considered, but ultimately opted against, bringing other charges. One potential charge was 18 U.S.C. § 2383, sometimes referred to as the Insurrection Act, which provides that "[w]hoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States." 18 U.S.C. § 2383. Section 2383 originated during the Civil War, as part of the Second Confiscation Act of 1862. *See* Act of July 17, 1862, ch. 195, § 2, Pub. L. No. 37-160, 12 Stat. 589, 590.

Cases interpreting Section 2383 are scarce and arose in contexts that provided little guidance regarding its potential application in this case. *See, e.g.*, *United States v. Greathouse*, 26 F. Cas. 18, 23 (C.C.N.D. Cal. 1863) (construing the original version of the act to encompass treason, consisting of arming a vessel to commit hostilities against United States vessels, in the context of the rebellion by the confederate states); *United States v. Cathcart*, 25 F. Cas. 344, 345 (C.C.S.D. Ohio 1864) (rejecting legal argument that treason against the United States was legally impossible in the context of the rebellion by the confederate states); *In re Grand Jury*, 62 F. 834, 837-838 (S.D. Cal. 1894) (grand jury charge describing offense in the context of a labor dispute involving interference with transportation of the mail); *In re Charge to Grand Jury*, 62 F. 828, 829-830 (N.D. Ill. 1894) (grand jury charged that "[i]nsurrection is a rising against civil or political authority" and requires "such a number of persons as would constitute a general uprising in that particular locality" in the context of offense of obstructing the mails). It does not appear that any defendant has been charged with violating the statute in more than 100 years.

To establish a violation of Section 2383, the Office would first have had to prove that the violence at the Capitol on January 6, 2021, constituted an "insurrection against the authority of the United States or the laws thereof," and then prove that Mr. Trump "incite[d]" or "assist[ed]" the insurrection, or "g[ave] aid or comfort thereto." 18 U.S.C. § 2383.

Courts have found or described the attack on the Capitol as an insurrection. In *Anderson v. Griswold*, 543 P.3d 283, 329 (Colo. 2023), *rev'd on other grounds sub nom. Trump v. Anderson*, 601 U.S. 100 (2024) (per curiam), the Colorado Supreme Court found that Mr. Trump engaged in an insurrection as that term is used in Section Three of the Fourteenth Amendment. Federal courts in the District of Columbia have also used the term "insurrection" to describe the attack on the Capitol, but did so in cases where there was no criminal charge under Section 2383.

See, e.g., *United States v. Chwiesiuk*, No. 21-cr-536, 2023 WL 3002493, at *3 (D.D.C. Apr. 19, 2023) ("As this Court and other courts in the United States District Court for the District of Columbia have stated previously, what occurred on January 6, 2021 was in fact an insurrection and involved insurrectionists and, therefore, the terms to which Defendants object are accurate descriptors."); *United States v. Carpenter*, No. 21-cr-305, 2023 WL 1860978, at *4 (D.D.C. Feb. 9, 2023) ("What occurred on January 6 was in fact a riot and an insurrection, and it did in fact involve a mob."); *see also United States v. Munchel*, 991 F.3d 1273, 1279, 1281 (D.C. Cir. 2021) (using the term "insurrection" in a case that did not involve Section 2383). These cases, however, did not require the courts to resolve the issue of how to define insurrection for purposes of Section 2383, or apply that definition to the conduct of a criminal defendant in the context of January 6.

The Office recognized why courts described the attack on the Capitol as an "insurrection," but it was also aware of the litigation risk that would be presented by employing this long-dormant statute. As to the first element under Section 2383—proving an "insurrection against the authority of the United States or the laws thereof"—the cases the Office reviewed provided no guidance on what proof would be required to establish an insurrection, or to distinguish an insurrection from a riot. Generally speaking, an "[i]nsurrection is a rising against civil or political authority[]—the open and active opposition of a number of persons to the execution of law in a city or state." *In re Charge to Grand Jury*, 62 F. at 830; *see also Insurrection*, MERRIAM-WEBSTER 649 (11th ed. 2020) ("an act or instance of revolting against civil authority or an established government"); *Insurrection*, AMERICAN HERITAGE DICTIONARY 909 (4th ed. 2000) ("The act or an instance of open revolt against civil authority or a constituted government."); *Insurrection*, 7 THE OXFORD ENGLISH DICTIONARY 1060 (2nd ed. 1989) ("The

action of rising in arms or open resistance against established authority or governmental restraint[.]"). Some sources distinguish an "insurrection" from a "'rout, riot, [or] offense connected with mob violence by the fact that in insurrection there is an organized and armed uprising against authority or operations of government, while crimes growing out of mob violence, however serious they may be and however numerous the participants, are simply unlawful acts in disturbance of the peace which do not threaten the stability of the government or the existence of political society.'" BLACK'S LAW DICTIONARY (12th ed. 2024) (quoting 77 C.J.S. *Riot; Insurrection* § 29, at 579 (1994)); *see also Anderson*, 543 P.3d at 329-336 (noting Mr. Trump's argument that "an insurrection is more than a riot but less than a rebellion" and agreeing that "an insurrection falls along a spectrum of related conduct").

In case law interpreting "insurrection" in another context, one court has observed that an insurrection typically involves overthrowing a sitting government, rather than maintaining power, which could pose another challenge to proving beyond a reasonable doubt that Mr. Trump's conduct on January 6 qualified as an insurrection given that he was the sitting President at that time. *Cf. CITGO Petroleum Corp. v. Starstone Ins. SE*, No. 21-cv-389, 2023 WL 2525651, at *13 (S.D.N.Y. Mar. 15, 2023) ("[I]n every case over the course of over sixty years to find the existence of an insurrection within the meaning of an insurance policy, the insurrection has occurred against—not by—the established, effective and de facto government.") (citation and quotations omitted); *Pan Am World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1017 (2d Cir. 1974) ("The district court held that the word insurrection means (1) a violent uprising by a group or movement (2) acting for the specific purpose of overthrowing the constituted government and seizing its powers.") (citation and quotations omitted); *accord, e.g.*, *Home Ins. Co. of New York v. Davila*, 212 F.2d 731, 738 (1st Cir. 1954) (noting that if Puerto

Rican extremists had a "maximum objective" to "overthrow of the insular government" on the island, that group's uprising would constitute insurrection); *Hartford Fire Ins. Co. v. W. Union Co.*, 630 F. Supp. 3d 431, 435-437 (S.D.N.Y. 2022) (a Russian-backed separatist group's attack on a plane in service of overthrowing the current government in eastern Ukraine was an insurrectionary act); *Younis Bros. & Co., Inc. v. CIGNA Worldwide Ins. Co.*, 91 F.3d 13, 14-15 (3d Cir. 1996) (applying *Davila* in finding that, where individuals outside of the Liberian government "led their respective armies in a violent uprising" "against the Liberian government," damage to properties fell within an insurance contract's insurrection clause). The Office did not find any case in which a criminal defendant was charged with insurrection for acting within the government to maintain power, as opposed to overthrowing it or thwarting it from the outside. Applying Section 2383 in this way would have been a first, which further weighed against charging it, given the other available charges, even if there were reasonable arguments that it might apply.

As to the second element under Section 2383, there does not appear to have ever been a prosecution under the statute for inciting, assisting, or giving aid or comfort to rebellion or insurrection. The few relevant cases that exist appear to be based on a defendant directly engaging in rebellion or insurrection, but the Office's proof did not include evidence that Mr. Trump directly engaged in insurrection himself. Thus, however strong the proof that he incited or gave aid and comfort to those who attacked the Capitol, application of those theories of liability would also have been a first. *See* Alexander Tsesis, *Incitement to Insurrection and the First Amendment*, 57 WAKE FOREST L. REV. 971, 973 & n.6 (2022) ("The likelihood of conviction under the federal incitement to insurrection statute, 18 U.S.C. § 2383 . . . is fraught with uncertainty because no federal court has interpreted it.").

The Office determined that there were reasonable arguments to be made that Mr. Trump's Ellipse Speech incited the violence at the Capitol on January 6 and could satisfy the Supreme Court's standard for "incitement" under *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that the First Amendment does not protect advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action"), particularly when the speech is viewed in the context of Mr. Trump's lengthy and deceitful voter-fraud narrative that came before it. For example, the evidence established that the violence was foreseeable to Mr. Trump, that he caused it, that it was beneficial to his plan to interfere with the certification, and that when it occurred, he made a conscious choice not to stop it and instead to leverage it for more delay. But the Office did not develop direct evidence—such as an explicit admission or communication with co-conspirators—of Mr. Trump's subjective intent to cause the full scope of the violence that occurred on January 6. Therefore, in light of the other powerful charges available, and because the Office recognized that the *Brandenburg* standard is a rigorous one, *see, e.g.*, *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 902, 927-929 (1982) (speech delivered in "passionate atmosphere" that referenced "possibility that necks would be broken" and violators of boycott would be "disciplined" did not satisfy *Brandenburg* standard); *Brandenburg*, 395 U.S. at 446-447 (reversing conviction where Ku Klux Klan leader threatened "revengeance" for "suppression" of the white race), it concluded that pursuing an incitement to insurrection charge was unnecessary.

By comparison, the statutes that the Office did charge had been interpreted and analyzed in various contexts over many years. The Office had a solid basis for using Sections 371, 1512, and 241 to address the conduct presented in this case, and it concluded that introducing relatively untested legal theories surrounding Section 2383 would create unwarranted litigation risk.

Importantly, the charges the Office brought fully addressed Mr. Trump's criminal conduct, and pursuing a charge under Section 2383 would not have added to or otherwise strengthened the Office's evidentiary presentation at trial. For all of these reasons, the Office elected not to pursue charges under Section 2383.[193]

F. Co-Conspirator Liability

As described in the factual recitation above, Mr. Trump was charged with participating in crimes with at least six co-conspirators, and the Office's investigation uncovered evidence that some individuals shared criminal culpability with Mr. Trump. Following the original indictment on August 1, 2023, the Office continued to investigate whether any other participant in the conspiracies should be charged with crimes. In addition, the Office referred to a United States Attorney's Office for further investigation evidence that an investigative subject may have committed unrelated crimes.

Before the Department concluded that this case must be dismissed, the Office had made a preliminary determination that the admissible evidence could justify seeking charges against certain co-conspirators. The Office had also begun to evaluate how to proceed, including whether any potential charged case should be joined with Mr. Trump's or brought separately.

[193] The Office also considered, but decided not to pursue, charges under certain other federal criminal statutes, including 18 U.S.C. § 2101 (the Anti-Riot Act) and 18 U.S.C. § 372 (Conspiracy to Impede or Injure an Officer of the United States). The Office was aware that courts have struck down and limited various prongs of the Anti-Riot Act, *see United States v. Rundo*, 990 F.3d 709, 716-717 (9th Cir. 2021) (per curiam); *United States v. Miselis*, 972 F.3d 518, 535-539 (4th Cir. 2020). And as to Section 372, the Office had strong evidence that Mr. Trump and his co-conspirators agreed to use deceit to defeat the government function of collecting, counting, and certifying the results of the election, to obstruct the certification, and to injure the right of citizens to vote and have their votes counted. Further, as explained above, the Office also had strong evidence that the violence that occurred on January 6 was foreseeable to Mr. Trump, that he caused it, and that he and his co-conspirators leveraged it to carry out their conspiracies. But because the investigation did not develop proof beyond a reasonable doubt that the conspirators specifically agreed to threaten force or intimidation against federal officers, the Office did not pursue a charge under Section 372. After considering the facts, the law, and the Principles of Federal Prosecution, the Office concluded that the charges ultimately pursued would fully address Mr. Trump's criminal conduct, allow the Office to present the full scope of that conduct to a jury, and avoid unnecessary litigation. As a result, the Office decided not to seek any of these other potential charges.