No. 23-719

In the Supreme Court of the United States

DONALD J. TRUMP,
Petitioner,

v.

NORMA ANDERSON, ET AL.,
Respondents.

On Writ of Certiorari to the
Supreme Court of Colorado

BRIEF ON THE MERITS FOR ANDERSON RESPONDENTS

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QUESTIONS PRESENTED

After a five-day hearing, the trial court found that Donald Trump intentionally organized and incited an armed attack on the United States Capitol on January 6, 2021, in order to disrupt the peaceful transfer of presidential power. Properly framed, the questions presented are:

1. Does this conduct amount to "engag[ing] in insurrection" for purposes of Section 3 of the Fourteenth Amendment, and has Trump shown that the facts found by the trial court were clearly erroneous?

2. Does Section 3 apply to insurrectionist former Presidents?

3. May a state exclude from its presidential primary ballot a candidate who is constitutionally ineligible for the Presidency under Section 3?

4. Did Trump forfeit his Electors Clause challenge to the state courts' interpretation of the Colorado Election Code, and if not, was that interpretation so baseless as to amount to a usurpation of legislative power?

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INTRODUCTION

Section 3 of the Fourteenth Amendment provides that "[n]o person shall . . . hold any office," state or federal, if they have "engaged in insurrection" against the Constitution after previously swearing an oath to support the Constitution. The people ratified Section 3 after the Civil War because they believed oath-breaking insurrectionists could, if given power again, dismantle our constitutional system from within.

Section 3 disqualifies Donald Trump from public office. As President, Trump swore to preserve, protect, and defend the Constitution. He betrayed that oath. He refused to accept the will of the over 80 million Americans who voted against him. Instead of peacefully ceding power, Trump intentionally organized and incited a violent mob to attack the United States Capitol in a desperate effort to prevent the counting of electoral votes cast against him. Trump's followers injured over 140 law enforcement officers, left one dead, and forced Congress and Vice President Pence to flee for their lives from the House and Senate chambers. By spearheading this attack, Trump engaged in insurrection against the Constitution.

Trump identifies no plausible basis to evade disqualification under Section 3. His brief gives only perfunctory treatment to the central issue—whether he engaged in insurrection. He does not show why the detailed 150-paragraphs of trial court factual findings

were somehow clear error, and he fails to even acknowledge (much less to rebut) the most damning evidence against him. Section 3 does not give a free pass to insurrectionist Presidents; they are "officers" because they hold an "office." And states' broad authority to regulate presidential elections allows them to exclude constitutionally ineligible candidates from the ballot.

The thrust of Trump's position is less legal than it is political. He not-so-subtly threatens "bedlam" if he is not on the ballot. Petr. Br. 2. But we already saw the "bedlam" Trump unleashed when he was *on* the ballot and lost. Section 3 is designed precisely to avoid giving oath-breaking insurrectionists like Trump the power to unleash such mayhem again. And the Constitution provides a forum for any complaints about the political wisdom of Trump's disqualification. Section 3 allows the people's elected representatives in Congress to remove an insurrectionist's disability at any time and for any reason. U.S. Const. amend. XIV, § 3. Unless they do so, however, the Constitution is clear: Trump shall hold no office.

Nobody, not even a former President, is above the law. This Court should affirm.

STATEMENT OF THE CASE

A. Legal and Historical Background

Section 3 has been applied sparingly for the last 150 years because insurrection against the Constitution has been mercifully rare. But Section 3 is no anachronism. As its proponents in Congress emphasized, "[t]he language of [Section 3] is so framed as to disenfranchise from office the leaders of the past rebellion as well as the leaders of any rebellion hereafter to come." Cong. Globe, 39th Cong., 1st Sess. 3505-3536 (1866) (Sen. Henderson); *id.* at 2900 (Sen. Van Winkle) (Section 3 will "stand to govern future insurrections as well as the present").

Section 3 disqualifies from officeholding those who engaged in insurrection in violation of an official oath to support the Constitution. U.S. Const. amend. XIV, § 3. This disability may be lifted only by a two-thirds vote of each House of Congress. *Id.* In the congressional and public debates around the Fourteenth Amendment, proponents made three main points in support of Section 3.

First, Section 3 was a "measure of self-defense." Cong. Globe, 39th Cong., 1st Sess. 2918 (1866) (Sen. Willey). Those who had "proven themselves faithless" would be deprived of the political power to threaten the "future peace and security of the country." *Id.* By excluding oath-breaking insurrectionists from office, Section 3 gave "the Constitution a steel-clad armor to shield it and [the people] from the assaults of faithless

domestic foes in all time to come." Speech of Hon. John Hannah, *reprinted in Cincinnati Commercial* (Aug. 25, 1866) at 22.

Second, Section 3's oath requirement meant it would target insurrectionist leaders—"those who have heretofore held high official position, and who therefore may be presumed to have acted intelligently." Cong. Globe, 39th Cong., 1st Sess. 3036 (1866) (Sen. Henderson); *see also* Speech of John Bingham, *reprinted in Cincinnati Commercial* (Aug. 27, 1866) ("Bingham Speech"). Proponents of Section 3 argued that "the leaders of the rebellion" should be excluded from office, while "those who have moved in humble spheres" should be free to "return to their loyalty and to the Government." Cong. Globe, 39th Cong., 1st Sess. 2771 (1866) (Sen. Clark).

Third, Section 3 imposed no "punishment mean[t] to take away life, liberty, or property," but merely "fix[ed] a qualification for office." *Id.* at 3036 (Sen. Henderson); *see also id.* at 2901 (Sen. Trumbull) (comparing Section 3 to Natural-Born Citizen Clause); *id.* at 2916 (Sen. Morrill) (discussing the "obvious distinction" between a criminal "penalty" and a disqualification for office). John Bingham, a principal drafter of the Fourteenth Amendment, explained that while Section 3 would bar from office those who had "clothed themselves with perjury" through oath-breaking rebellion, it would otherwise allow them to "live" and "enjoy the equal protection of the laws." Bingham Speech, *supra*; *see also* Cong. Globe, 39th Cong., 1st Sess. 2901 (1866) (Sen. Sherman) (by

forgoing "punishment" in favor of a mere bar on officeholding, Section 3 offered "generous terms . . . to persons who had been engaged in insurrection").

The Fourteenth Amendment became effective in July 1868. Officials began enforcing it immediately, even before Congress enacted the first federal enforcement process in May 1870. JA567-JA569.[1] The Secretary of War informed General Ulysses S. Grant that, when ratified, the "effect" "will be at once to remove from office all persons who are disqualified by that amendment." Letter from Gen. Schofield to Gen. Grant, May 15, 1868, *reprinted in Evansville Journal* (June 4, 1868) at 1. State courts promptly began enforcing Section 3 through causes of action created by state law. *Worthy v. Barrett*, 63 N.C. 199 (1869) (disqualifying county sheriff); *In re Tate*, 63 N.C. 308 (1869) (disqualifying elected county attorney); *State ex rel. Downes v. Towne*, 21 La. Ann. 490 (1869) (determining Section 3 eligibility was "purely a judicial question" but evidence failed to show state judge had aided the rebellion); *see also* Fla. Const. of 1868, art. XVI (incorporating Section 3 into state constitution).

Even before it was ratified, ex-Confederates flooded Congress with requests to be granted amnesty by the requisite two-thirds vote. *See* Gerard N. Magliocca, *Amnesty and Section Three of the*

[1] Respondents called as a trial witness Professor Gerard Magliocca, a foremost expert on Section 3's history, to provide historical context for its adoption and early implementation. JA557-JA614.

Fourteenth Amendment, 36 Const. Comment. 87 at 112-113 (2021). While Congress first addressed amnesty through private bills, it eventually enacted general amnesty legislation that removed the disability of most rebels. *Id.* at 112, 119-120. However, consistent with Section 3's focus on rebel leaders, that amnesty excluded swaths of particularly notorious Confederates like Jefferson Davis. *Id.* at 119-120.

B. Factual and Procedural Background

1. "The desecration of the U.S. Capitol" by "a mob of insurrectionists" on January 6, 2021, will "forever stain our Nation's history." 135 Stat. 322, Pub. Law 117-132 (Aug. 5, 2021). Two months prior, over 150 million Americans had cast ballots for President. Courts across the country rejected legal challenges to the election results, and on December 14, 2020, the presidential electors certified by each State voted to elect Joe Biden. Pet. App. 216a-222a. In any other presidential election in recent memory, the electors' vote would have settled the matter. This time was different.

Trump refused to accept defeat. Instead, Trump summoned and incited an angry crowd to attack the Capitol and disrupt the certification of his electoral defeat. *See infra* § I.B. A mob, thousands-strong, broke through police lines outside the Capitol, infiltrated the building through shattered windows, and engaged law enforcement officers in hours of brutal combat. Pet. App. 230a-235a; JA1328-JA1331. The mob erected gallows in front of the Capitol to

chants of "Hang Mike Pence!" and prowled the halls of the Capitol calling for Speaker Nancy Pelosi. *Id.*; Tr. Ex. 94.[2]

In the end, reinforcements arrived from neighboring jurisdictions to put down the insurrection. JA1327. But not before over 140 law enforcement officers were injured, members of Congress and the Vice President were forced to abandon the electoral certification and flee the chambers, and the heart of America's democracy was choked in a cloud of noxious chemicals:

Tr. Ex. 133 at 37; Pet. App. 230a-235a; JA1327-JA1330; Tr. Exs. 15-20, 94 (videos of the attack).

[2] All exhibit citations are to the admitted trial exhibits lodged with the trial court on November 8, 2023.

2. On September 6, 2023, four Republican and two unaffiliated Colorado voters (here, "Respondents" for simplicity) sued Trump and the Colorado Secretary of State in state court. Pet. App. 185a, 208a. The petition explained that the Secretary would commit a "wrongful act" under the Colorado Election Code if she placed Trump on the 2024 Republican primary ballot because he is disqualified under Section 3 of the Fourteenth Amendment. *Id.* at 8a. The Colorado Republican Party intervened. *Id.*

Respondents were prepared to try the case within five days as provided in COLO. REV. STAT. § 1-4-1204(4), but Trump asked for more time. BIO Supp. App. 3a; JA53, JA80-JA81. To accommodate Trump, the court scheduled trial for October 30. JA1283. Throughout the trial court proceedings, Trump received nearly all the pretrial and trial process he requested. Pet. App. 42a-43a; JA1318 n.2.[3]

At the five-day trial, Respondents called eight witnesses, and Trump called seven. Pet. App. 14a,

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[3] Trump received fact and expert witness disclosures, expert reports, exhibit disclosures, and fact witness affidavits. JA1285-JA1286. He declined the trial court's invitation to depose Respondents' fact witnesses, never identified any unavailable witnesses he wanted to call, and never sought trial preservation depositions. JA1285-JA1286, 1313, 1318 n.2. The court resolved his motions to dismiss and motions *in limine*. Pet. App. 12a-15a, 185a-191a. It invited the parties to call witnesses remotely, out of order, and after the first five days of the hearing. *Id.* at 198a-199a n.6. Trump did not use all the time available to him at trial, nor ask for any additional time or processes to present his case. *Id.*; *see also id.* at 42a-43a.

199a-208a (summarizing testimony and assessing credibility). Among them were police officers, members of Congress, a chief of staff to another Congressman, a former member of the Trump administration, Ellipse rally organizers, an Ellipse rally attendee who then went to the Capitol, four expert witnesses, and a representative from the Secretary's office. *Id.* Trump chose not to testify. Neither the Secretary nor the Colorado Republican Party called witnesses. The trial court admitted 96 exhibits, including hours of video. Pet. App. 43a.

On November 17, the trial court issued its 102-page final order.[4] Although Respondents were required to prove their case only by a preponderance of the evidence, the court nevertheless found by clear and convincing evidence that the January 6 attack on the Capitol was an insurrection against the Constitution, and that Trump intentionally engaged in that insurrection. *Id.* at 243a, 249a-277a. Trump's words and deeds "were the factual cause of, and a substantial contributing factor to," the attack. *Id.* at 229a-230a.

The trial court issued over 150 paragraphs of detailed factual findings that Trump's brief largely

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[4] Contrary to Trump's assertion, Petr. Br. 9, the trial court met Colorado's requirement of a decision within 48 hours of the hearing, which remained open until closing arguments on November 15. Pet. App. 14a. Trump did not object to this process, instead representing that the 48-hour requirement either did not apply or was waivable and that he would waive it. BIO Supp. App. 14a-15a.

ignores, and which are described more fully below. *See infra* § I.B. In short, the trial court found:

(1) In the months before January 6, Trump "did everything in his power to fuel [his supporters'] anger with claims he knew were false" about supposed widespread fraud in the 2020 election. *Id.* at 214a-222a. This created an environment conducive to political violence, building on a years-long pattern of Trump intentionally encouraging and praising political violence by extremists. *Id.* at 209a-214a.

(2) In advance of January 6, Trump deliberately summoned to D.C. an angry and armed crowd who came ready to fight to overturn the certification of the election. *Id.* at 219a-221a.

(3) Trump's speech at the White House Ellipse on January 6 explicitly and implicitly incited the angry and armed crowd to imminent lawless violence. *Id.* at 222a-229a; 272a-276a.

(4) Throngs of people who attended Trump's speech then violently descended on the Capitol at Trump's direction. *Id.* at 230a-235a.

(5) After learning the Capitol was under attack and the mob was targeting members of Congress and the Vice President, Trump did nothing to stop it. *Id.* at 235a-238a. Instead, Trump at 2:24 pm tweeted vitriol targeting the Vice President while privately telling his advisors that perhaps Pence "deserved" to be hanged. *Id.* Trump's

tweet had the immediate effect of intensifying the violence at the Capitol. *Id.*

(6) As the attack was winding down, Trump praised the attackers, expressing his support for their cause. *Id.* at 238a-240a; and

(7) Trump "acted with the specific intent to incite political violence and direct it at the Capitol with the purpose of disrupting the electoral certification." *Id.* at 274a, 235a-240a.

In making these findings, the trial court carefully weighed witness credibility, *id.* at 199a-208a, and cited extensively from 46 exhibits that included scores of Trump's own tweets and video statements, photographs and videos of the January 6 attack, and multiple government reports. *Id.* at 209a-240a.

After ruling in Respondents' favor on every other factual and legal issue, however, the trial court ruled that Section 3 does not apply to insurrectionist Presidents or to insurrectionists seeking the office of the Presidency. *Id.* at 277a-283a.

3. Respondents and Trump each appealed to the Colorado Supreme Court. *Id.* at 9a-11a. The court reversed the legal ruling that Section 3 does not apply to Presidents or to the Presidency, *id.* at 61a-76a, and affirmed on everything else, *id.* at 9a-11a. It upheld the trial court's findings that Trump engaged in insurrection against the Constitution, *id.* at 83a-100a, that certifying a constitutionally disqualified candidate to the ballot would be a "wrongful act"

under the Colorado Election Code, *id.* at 18a-38a, and that states have constitutional power to enforce Section 3 through ballot access laws, *id.* 18a-38a, 45a-55a. The Colorado Supreme Court also held that this case does not present a non-justiciable political question (which no party here challenges).[5] Pet. App. 55a-61a.

The Colorado Supreme Court therefore held that Section 3 disqualified Trump and that placing him on Colorado's 2024 presidential primary ballot would be a "wrongful act" under the Colorado Election Code. *Id.* at 9a-10a. This Court granted Trump's petition for a writ of certiorari.

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[5] That ruling was correct. *See generally* Amicus Br. of Professors and Legal Scholars. States, not the federal political branches, have primary responsibility to decide Presidential qualifications at the ballot access stage. *See infra* § III. This Court has described Congress's Article I, § 5 power to "Judge" the "Qualifications of its own Members" as a "judicial function." *Barry v. U.S. ex rel. Cunningham*, 279 U.S. 597, 616 (1929). The Constitution does not contain any such express delegation to Congress of the "judicial function" of evaluating Presidential candidate qualifications. Nor does Section 3 give Congress the power to determine eligibility in the first instance, but only to remove by a supermajority vote a disability that already exists. *See infra* § III.B.

SUMMARY OF ARGUMENT

By spearheading a violent attack on the Capitol in violation of his sworn oath to defend the Constitution, Trump disqualified himself from holding public office. None of Trump's or the Colorado Republican Party's counterarguments have merit.

I. Trump gives short shrift to the central issue in this case—whether he engaged in insurrection—because he has no serious defense. He no longer disputes that the January 6 attack was an insurrection against the Constitution. The original public meaning of "engag[ing] in" insurrection extends to those who organize and incite it. While Trump takes issue with the trial court's factual findings, those detailed findings were based on overwhelming and largely unrebutted evidence that Trump's brief mostly ignores. Trump cannot prove that factual findings were clearly erroneous by disregarding the actual evidence.

II. Section 3 does not give a free pass to insurrectionist former Presidents. The Constitution says the Presidency is a federal "office." The natural meaning of "officer of the United States" is anyone who holds a federal "office." That plain meaning is confirmed by an opinion of Chief Justice Marshall, by authoritative attorney general opinions interpreting Section 3 at the time, and by consistent nineteenth-century usage of "officer of the United States" to include the President. And given Section 3's focus on insurrectionist leaders, it would make no sense to

read Section 3 as disqualifying all oath-breaking insurrectionists except the one holding the highest office in the land.

III. States have authority to enforce Section 3. The Constitution gives state legislatures near plenary authority to decide how to select presidential electors. U.S. Const. art. II, § 1; *id.* amend. X. That broad power allows state legislatures to limit the presidential ballot to candidates who are constitutionally eligible to hold the office. Like other constitutional qualifications for office, Section 3 has inherent legal force and states may enforce it through their own laws without awaiting federal legislation.

IV. Trump never raised, and thus forfeited, his Electors Clause challenge to the lower courts' interpretation of the Colorado Election Code. In any event, the state courts' interpretation of state law was correct, and came nowhere close to arrogating legislative power in a way that would infringe the Electors Clause.

ARGUMENT

I. Trump Engaged in Insurrection Against the Constitution

By intentionally inciting a violent attack on the Capitol to cling to power, Trump "engaged in insurrection" against the Constitution. From the standpoint of Section 3's original public meaning, the legal question "is not even close." *See* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section 3*, 172 U. Pa. L. Rev. (forthcoming 2024) at 63-104, 112-122. And the perfunctory five-page work of fiction Trump offers to distance himself from the attack (he did nothing more than call for "peaceful and patriotic protest," Petr. Br. 33) ignores the detailed 150 paragraphs of factual findings by the trial court and pretends damning facts don't exist. Trump shows no error, much less the clear error required for reversal.

A. The attack on January 6, 2021, was an insurrection against the Constitution

Trump has now abandoned his argument that the January 6 attack was not an "insurrection" against "the Constitution of the United States" for purposes of Section 3. Petr. Br. 33-38. For good reason.

As the Colorado Supreme Court correctly held, any plausible definition of that phrase "would encompass a concerted and public use of force . . . by a group of people to hinder or prevent the U.S.

government from taking the actions necessary to accomplish a peaceful transfer of power in this country." Pet. App. 84a-89a; *see also, e.g.*, *Case of Fries*, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800) (Chase, J.) ("insurrection" means "rising of any body of the people, within the United States, to attain or effect by force or violence any object of great public nature" or "to resist, or to prevent by force or violence, the execution of any statute of the United States."); *United States v. Hanway*, 26 F. Cas. 105, 127-128 (C.C.E.D. Pa. 1851) (similar); Noah Webster, *An American Dictionary of the English Language* (1857) (similar); *Prize Cases*, 67 U.S. 635, 666, 692 (1862) ("Insurrection against a government may or may not culminate in an organized rebellion," and can be "confined to a small district of the country"); Baude & Paulsen, *supra*, at 88-92 (discussing historical examples of "insurrection" that would have been familiar in 1868); JA569-JA575.

That is exactly what happened on January 6. Thousands of people broke through police lines and illegally breached the Capitol, many "armed with weapons" or "prepared for violence . . . bringing gas masks, body armor, tactical vests, and pepper spray." Pet. App. 254a; *id.* at 230a-234a. The attackers assaulted law enforcement officers in "hours of hand-to-hand combat" and with weapons including "tasers, batons, riot shields, flagpoles, . . . and knives." *Id.*; *see also* Tr. Exs. 94, 15-21 (videos); JA1328-JA1331. One witness, Officer Winston Pingeon, was nearly impaled by a sharpened flagpole stabbed within inches of his

eye. JA305-JA306. The mob brutally and repeatedly crushed another witnesses, Officer Daniel Hodges, in a metal doorframe while trying to breach an entrance to the Capitol:

JA227-JA229 & Tr. Ex. 20 (video of attack).

The mob was coordinated and had a clear purpose: "to obstruct the counting of electoral votes as set out in the Twelfth Amendment" and "to prevent the execution of the Constitution so that Trump remained the President." Pet. App. 254a, 234a-235a. Attackers roamed the building "chanting in a manner that made clear they were seeking to inflict violence against members of Congress and Vice President Pence." *Id.*; Tr. Ex. 94. And the mob forced the members of the Senate and the House to flee, stopping the certification of the electoral votes. Pet. App. 236a. At least 140 law enforcement officers were injured in

the attack and at least one died as a result. *See id.* at 232a; JA1330.

The most violent attack on our nation's Capitol since the War of 1812—an attack which obstructed the peaceful transfer of presidential power for the first time in American history—meets any plausible definition of "insurrection against the Constitution."

B. Trump engaged in the insurrection

1. The Court should decline Trump's invitation to re-weigh the facts concerning his involvement in the insurrection. This Court does not overturn plausible factual findings even if it is "convinced that [it] would have decided the case differently," particularly where, as here, "an intermediate court reviews, and affirms, a trial court's factual findings." *Glossip v. Gross*, 576 U.S. 863, 881-882 (2015) (quotations omitted); *see also Hernandez v. New York*, 500 U.S. 352, 366 (1991) (plurality opinion) ("[I]n the absence of exceptional circumstances, we would defer to state-court factual findings, even when those findings relate to a constitutional issue.") (collecting cases).

The trial court's factual findings are entitled to substantial deference. The trial court heard testimony of 15 witnesses, considered 46 exhibits (including many hours of video), and made detailed credibility findings. Pet. App. 199a-240a. "The great bulk of" this evidence "was undisputed at trial;" indeed, much of it

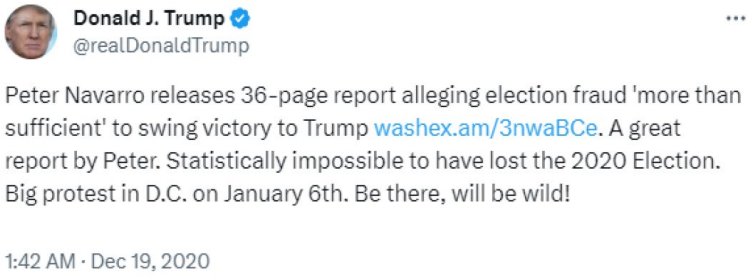
came from Trump's own words and his own witnesses. *Id.* at 99a, 199a-240a.

2. There was no error, much less clear error, in the trial court's findings that: Trump's conduct and words "were the factual cause of . . . the January 6, 2021 attack on the United States Capitol," Pet. App. 229a-230a; Trump "incited" his supporters on January 6 with words that "explicitly" and "implicitly" commanded violence, *id.* at 229a-230a, 235a-240a, 272a-277a; and Trump intended and supported the resulting violence, *see id.* Trump offers no reason to second-guess the 150 paragraphs of detailed factual findings supporting these conclusions. *Id.* at 199a-243a.

"[P]rior to the January 6, 2021 rally, Trump knew" that certain of his supporters "were angry and prepared to use violence" and "did everything in his power to fuel that anger" by repeatedly asserting accusations of election fraud that he knew were false. *Id.* at 214a-222a; JA1341-JA1405. State election officials targeted by Trump's fabricated fraud claims received a barrage of violent threats. Pet. App. 217a. When Georgia election official Gabriel Sterling issued a public warning to Trump to "stop inspiring people to commit potential acts of violence" or "someone's going to get killed," Trump responded directly to Sterling's message by doubling down on the "very rhetoric Sterling warned would cause violence." *Id.*; JA1357 (responding to Tr. Ex. 126).

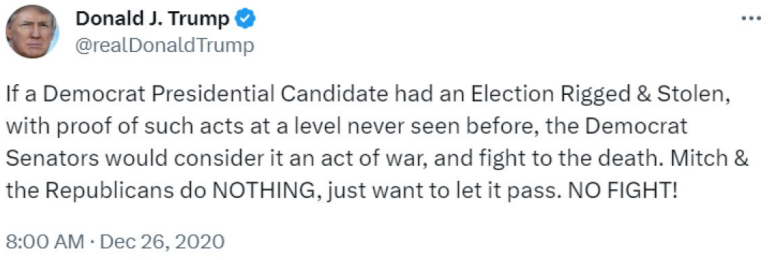
After his legal challenges (including in this Court) failed and the certified electors voted, Trump

only intensified his efforts. Pet. App. 214a-222a; JA1361-JA1369. He devised a scheme to submit a fraudulent slate of electors to Congress on January 6, falsely claiming that Vice President Pence had the authority to accept his fake electors instead of the real ones. Pet. App. 214a-222a; JA1404, 1409. And he began urging his supporters to come to Washington, D.C. on January 6 for a "wild" protest:



JA1370; *see also id.* at JA1379-JA1404 (repeatedly echoing such calls in the days that followed). Trump's December 19 tweet "focused the anger he had been sowing about the election being stolen," and was a "call to arms" for violent extremists who began planning for battle. Pet. App. 219a; JA405-JA412, JA423-JA424, JA1132-JA1134.

Trump kept inflaming his supporters in the weeks leading up to January 6:



JA1378; *see also* JA1373-JA1409 (dozens of tweets repeating election fraud lies). In the final days before, he issued a barrage of tweets targeting Congress and Vice President Pence and pressuring them to decertify the election. Pet. App. 221a; JA1403-JA1410. And he leveraged the size of the angry crowd he had assembled to intimidate lawmakers:

JA1405.

On January 6, Trump lit the fuse. Knowing the risk of violence and that the crowd was angry and armed, Pet. App. 220a-223a, 95a, Trump incited violence both explicitly and implicitly during his speech at the Ellipse. *See* Tr. Ex. 49 (video of speech).

"[E]xplicitly," Trump incited violence "by telling the crowd repeatedly to 'fight' and to 'fight like hell,' to 'walk down to the Capitol,' and that they needed to 'take back our country' through 'strength.'" Pet. App. 223a-230a. "[I]mplicitly," Trump incited violence "by encouraging the crowd that they could play by 'very different rules' because of the supposed fraudulent election." *Id.* He repeatedly claimed that the future of the country was hanging in the balance and that "we" (including the agitated crowd) had to do something about it. *E.g.*, *id.* ("We will never give up, we will never concede . . . You don't concede when there is theft involved"; "our country will be destroyed and we're not going to stand for that"; "we're just not going to let that happen"). And he repeatedly trained the mob's anger on Vice President Pence and members of Congress. *Id.*

The court concluded that Trump's speech was "intended as, and was understood by a portion of the crowd as, a call to arms" and that "Trump's conduct and words were the factual cause of, and a substantial contributing factor to . . . the attack on the United States Capitol." Pet. App. 229a-230a. During the speech, listeners shouted, "storm the Capitol!" and "invade the Capitol Building!" *Id.*; Tr. Ex. 166. Trump told the crowd to march to the Capitol (a plan he did not preview for law enforcement), claiming he would be there beside them. Pet. App. 221a, 223a-229a. As Trump's speech neared its end, the crowd began mobilizing from the Ellipse to the Capitol to join the attack that had just begun to unfold. Pet. App. 230a;

JA289-JA290, JA1323-JA1324. That day, Trump's former campaign manager dubbed the speech "a sitting president asking for a civil war." JA777; Tr. Ex. 263 at 76.

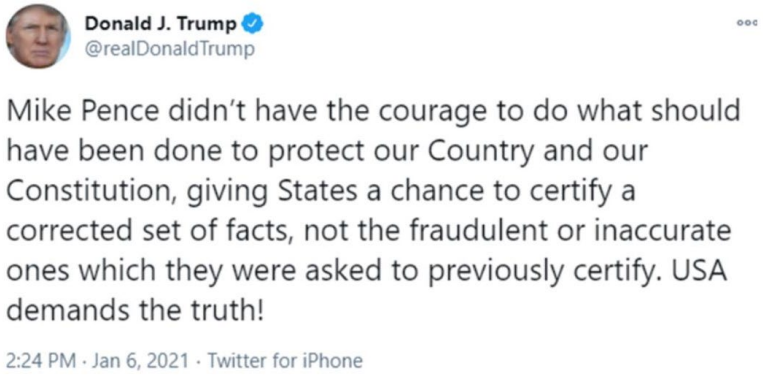
The most inflammatory parts of his speech were not in his prepared remarks; Trump added them. Pet. App. 227a-228a. Trump used this incendiary language intending that supporters would take his words not "symbolically" but as "literal calls to violence." *Id.* at 214a. Trump knew from experience "the power that he had over his supporters." *Id.* at 229a; Tr. Ex. 134. He also knew that a subset of "his supporters were willing to engage in political violence and that they would respond to his calls for them to do so." Pet. App. 272a; *id.* at 209a-214a.

Reinforcing his intent, Trump did nothing to stop the mob for nearly three hours. *Id.* at 235a-238a. He knew by 1:21 pm the Capitol was under siege, but he refused to coordinate any federal response or to tell the mob to disperse. *Id.* at 204a, 235a-238a; JA523-JA536.[6] "Trump ignored pleas to intervene and instead called Senators urging them to help delay the

[6] Trump cites a single sentence from a report, introduced at trial through a witness the trial court said lacked credibility, Pet. App. 204a; JA701, claiming that Trump told the Secretary of Defense the day before to "do what is required to protect the American people." Petr. Br. 34. But Trump never told anyone his plans for the next day, including that he planned to incite his supporters and call them to march on the Capitol. Pet. App. 221a. And the day of the attack itself, Trump took no action to reinforce the Capitol, instead continuing his incitement.

electoral count," while telling Rep. Kevin McCarthy, "I guess these people are more upset about the election than you are." Pet. App. 236a-237a. When told that the mob was chanting "Hang Mike Pence," Trump responded that "perhaps the Vice President deserved to be hanged." *Id.* Trump's abdication provided potent evidence of Trump's intent to incite the insurrection—because if he had incited it accidentally, he surely would have tried to stop it. *Id.* at 260a-261a.

Instead, Trump continued inciting the mob. At 2:24 pm—an hour after he learned the Capitol was under violent attack—Trump tweeted:



JA1412; Pet. App. 235a.

This tweet "encouraged imminent lawless violence by singling out Vice President Pence and suggesting that the attacking mob was 'demand[ing] the truth.'" *Id.* It "paint[ed] a target on the Capitol," causing the mob to surge violently and forcing lawmakers and Pence to flee. *Id.* at 235a-236a.

Video evidence shows a crowd stalled behind the police line at 2:23 pm:

that then broke through the line by 2:30 pm:

and overran the entire West Terrace by 2:54 pm:

Tr. Ex. 6; *see also* Tr. Exs. 15-18, 94; JA219-JA226, JA253-JA259. Given the trial court's emphasis on Trump's 2:24 pm tweet, Trump's failure to mention it anywhere in his brief confirms how divorced his narrative is from reality.

Trump finally told the mob to leave at 4:17 pm, in a message that praised the attackers and justified their actions. Pet. App. 238a-239a; Tr. Ex. 68. By that time, reinforcements from other agencies and nearby states had arrived at the Capitol, Pence and members of Congress had reached safety, and it was obvious the mob had delayed but would not stop the certification. *See* JA258-JA259, JA1327; Tr. Ex. 78 at # 331, 390-395.

Hours later, Trump celebrated the violence again:

JA1413; Pet. App. 239a. Even years later, Trump continued to insist that alleged 2020 election fraud justified "termination of all rules, regulations, and articles, *even those found in the Constitution*." JA1332 (emphasis added).

3. Trump contests almost none of this evidence. He complains mainly about the expert testimony of Professor Peter Simi. Petr. Br. 36-38. Simi is an expert in violent political extremism who provides training to law enforcement agencies across the country. JA366-JA367. He has spent thousands of hours doing fieldwork with political extremist groups, including those that were involved in the January 6 attack such as the Oath Keepers, Proud Boys, and the Three Percenters. Pet. App. 201a. Simi's testimony relied on this experience and on videos and tweets introduced at trial proving over a dozen examples—from Trump's own mouth—of Trump calling for, encouraging, or praising political violence by extremists. Pet. App. 209a-214a. Simi placed these statements in context,

showing the effect they had on mobilizing extremist groups. *Id.* He explained how, consistent with a common communication pattern of political extremists, Trump would make statements his supporters understood as a call to violence (and then he would praise the resulting violence)—all while sprinkling in language that left himself plausible deniability with broader audiences but that violent extremists would disregard as insincere. *Id.*; *see* JA358-JA442. The court credited this testimony, and Trump does not explain how that was somehow clear error. Indeed, "Trump did not put forth any credible evidence . . . to rebut Professor Simi's conclusions or to rebut the argument that Trump intended to incite violence." Pet. App. 214a.

Simi's testimony was also just one facet of the overwhelming and largely undisputed evidence presented at trial, including eyewitnesses to the events leading up to and on January 6; Trump's admission that he knew his "supporters 'listen to [him] like no one else'"; unrebutted evidence of Trump's intent while the mob attacked the Capitol and disrupted the peaceful transfer of power; Trump's own words inciting, encouraging, and praising the attack; and video evidence of the mob's response to Trump's incitement. *Id.* at 199a-240a.

Trump also cites a single flat-affect use of the word "peacefully" in his hour-long Ellipse speech, Tr. Ex. 49 at 14:43-16:55, as well as two misleading tweets he issued during the attack telling the already violent mob to "stay" or "remain" peaceful toward law

enforcement—without demanding the crowd stop the attack and leave the Capitol, JA1412-JA1413. The trial court considered these statements in context, including Trump's pattern of encouraging violence while leaving himself "plausible deniability," *id.* at 207a n.10, and concluded that "[w]hile Trump's Ellipse speech did mention 'peaceful' conduct in his command to march to the Capitol, the overall tenor was that to save the democracy and the country the attendees needed to fight," *id.* at 229a. It held that Trump sent the two later tweets to "remain" peaceful "despite knowing that [his supporters] were not peaceful," and because these tweets used such obviously inauthentic phrasing, they "predictably" had "no effect" on the crowd. *Id.* at 274a.

After reviewing all the evidence, the trial court found that "[a]t no point did Trump ever credibly condemn violence by his supporters but rather confirmed his supporters' violent interpretations of his directives." *Id.* at 213a. Trump's effort to place so much emphasis on one word in his speech—while ignoring the many calls to fight and the 2:24 pm tweet that day—confirms the trial court's conclusion that his use of "peaceful" was but a fig leaf.

4. Finally, Trump advances a perfunctory legal argument that he cannot have "engaged in" insurrection unless he personally committed violent acts. *See* Petr. Br. 35-36. That is wrong.

Andrew Johnson's Attorney General, Henry Stanbery, refuted Trump's argument in two authoritative opinions interpreting Section 3. He

wrote that "engaged in" does not require "actually lev[ying] war or tak[ing] arms," but covers any "direct overt act, done with the intent to further the rebellion." 12 U.S. Op. Att'y Gen. 141, 161, 164 (1867) (*Stanbery I*). While "[d]isloyal sentiments, opinions, or sympathies would not disqualify . . . when a person has, by speech or by writing, *incited others* to engage in rebellion, [h]e must come under the disqualification." 12 U.S. Op. Att'y Gen. 182, 205 (1867) (*Stanbery II*) (emphasis added). President Johnson (a notable *opponent* of Section 3) and his Cabinet approved these opinions while Section 3 was pending ratification by the states and instructed the Union army to implement them. James D. Richardson, A Compilation of the Messages and Papers of the Presidents, Volume VI, 528-531 (1897). The opinions were widely reprinted and informed public debates about ratification of Section 3.[7]

Early judicial opinions interpreting Section 3 similarly defined "engaged in" as any "voluntary effort to assist the Insurrection or Rebellion." *United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D.N.C. 1871); *accord Worthy*, 63 N.C. at 203. These holdings continued a long line of antebellum treason cases, which made clear that one could "levy war" by "inciting and encouraging others" to violence without personally taking up arms. *See In re Charge to Grand*

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[7] *See* John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 Brit. J. Am. Legal Stud. (Forthcoming), at 2 & n.9, available at https://ssrn.com/abstract =4440157 (collecting sources).

Jury, 30 F. Cas. 1032, 1033-1034 (C.C.S.D.N.Y. 1861); *accord In re Charge to Grand Jury-Treason*, 30 F. Cas. 1047, 1048 (C.C.E.D. Pa. 1851). "[A]ll those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." *Ex parte Bollman*, 8 U.S. 75, 126 (1807) (Marshall, C.J.).

Requiring the individual to personally commit violent acts would also defeat a core purpose of Section 3: to target leaders rather than foot soldiers. *See supra* 3-4. Leaders rarely take up arms themselves. It would make no sense to adopt a legal standard that gives a free pass to those—like Trump here—most responsible for an insurrection.

C. The First Amendment does not protect incitement to insurrection

Trump argues that the First Amendment's *Brandenburg* test protects him from disqualification even if he "engaged in insurrection" in violation of the Fourteenth Amendment. Petr. Br. 37. But the First Amendment does not somehow displace the disqualification rule in Section 3 of the Fourteenth Amendment—a constitutional provision of "equal validity." *Prout v. Starr*, 188 U.S. 537, 543 (1903); *see also Cole v. Richardson*, 405 U.S. 676, 680-682 (1972) (despite First Amendment's ban on compelled speech, Constitution may compel oaths as condition of holding office). Regardless, Trump's speech is unprotected because the trial court found that his words were

"directed to inciting or producing imminent lawless action and [were] likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *see* Pet. App. 222a-240a, 272a-277a.

Trump argues that his speech, even if intended to incite imminent lawless violence, was not "likely" to do so. Petr. Br. 37-38. That is clearly wrong. Trump summoned an angry and armed crowd that he had been inflaming for months and that he knew was prepared for violence. *See supra* § I.B. He told them the future of the nation was at stake and commanded them to imminent violence explicitly ("fight" and "fight like hell") and implicitly (urging the crowd to march to the Capitol and "go by a very different set of rules," and declaring "we are not going to let" the election results be certified). *Id.* He did so within striking distance of the Capitol, where Congress was certifying the election. He knew, based on a long history of prior interaction, that extremist supporters would take these words as a literal call to arms. *Id.* The crowd was shouting for violence against the Capitol during Trump's speech, and as it was ending, the crowd surged toward the Capitol and intensified the violence. *Id.* During the attack, Trump further incited violence with his 2:24 pm tweet. *Id.*

The idea that Trump's words were unlikely to incite imminent lawlessness, even though Trump intended them to do so and even though they in fact did so, fails even the most forgiving of red-face tests. For obvious reasons, the First Amendment does not protect mob bosses who deliberately incite violence

through thinly veiled language they know their audience will understand. *See, e.g.*, *United States v. White*, 610 F.3d 956, 960-961 (7th Cir. 2010). So too here.

Even sharp-edged political speech is protected by the First Amendment. But incitement is not, and the dividing line between the two depends on context. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 929 (1982) (earlier speech "could be used to corroborate" meaning of statements imminently preceding violence); *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (looking to "evidence or rational inference from the import of the language" to see if "words were intended to produce, and likely to produce, imminent disorder"). Words that might be protected if uttered in a sterile conference room lose protection when delivered in fiery tones to an agitated crowd that the speaker has spent months priming for violence.

Here, Trump intentionally gathered, agitated, and incited a mob, resulting in injury, death, and mayhem. The First Amendment does not protect such incitement to unlawful conduct.

II. Section 3 Applies to Insurrectionist Presidents

Section 3 excludes from "any office, civil or military, under the United States," those who engaged in insurrection after previously swearing an oath to support the Constitution as an "officer of the United States." This deliberately comprehensive language

admits no exceptions for any oath-bound federal officeholder, least of all the President. *See* Baude & Paulsen, *supra*, at 104-112.

1. Section 3 excludes insurrectionists from the Presidency because it is an "office, civil or military, under the United States." Pet. App. 62a-70a. Trump does not seriously challenge the Colorado Supreme Court's holding on this issue, which was correct.

The Constitution refers to the Presidency as an "office" roughly 20 times. *See* Petr. Br. 25-26 & nn.34-35. As both the head of the executive branch and as the Commander-in-Chief, the President holds an office that is both "civil" and "military." The office is "under the United States," a term Section 3 uses to distinguish federal offices from offices "under any State." U.S. Const. amend. XIV, § 3.

That Section 3 applies to the Presidency is also clear from the congressional and public debates over Section 3. They reveal a consensus among both supporters and opponents of the Fourteenth Amendment that Section 3's "office under" language disqualified rebel leaders like Jefferson Davis from being President unless they received amnesty from Congress. *See, e.g.*, Pet. App. 68a-69a (collecting sources);[8] Vlahoplus, *supra*, at 7-10 (same); JA594-JA595; Cong. Globe, 39th Cong., 1st Sess. 2899 (1866)

[8] Respondents submitted to the Colorado Supreme Court excerpts from eleven newspaper articles published between 1867 and 1872 making this same point. The articles are available at https://perma.cc/9MCS-9UEB.

(Sens. Morrill, Johnson); *id.* at 3210 (Rep. Julian).[9] And it would make no sense to say a provision designed for constitutional self-defense allows oath-breaking insurrectionists to hold no office *except* that of Commander-in-Chief.

2. Section 3 likewise applies to an insurrectionist former president because the holder of a federal office is an "officer of the United States." *See, e.g.*, John Bouvier, Law Dictionary (1856) ("Officer": "he who is lawfully invested with an office," and listing the President as an example); N. Bailey, An Universal Etymological English Dictionary (20th ed. 1763) ("officer": "one who is in an Office"). As Chief Justice Marshall explained:

> An office is defined to be 'a public charge or employment,' and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States.

United States v. Maurice, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823).

This plain meaning is confirmed by Section 3's symmetry in pairing barred offices with excluded individuals. Pet. App. 72a. For instance, "Senator or

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[9] To hold that the Presidency is not an "office under the United States" for constitutional purposes would also lead to absurdities: a sitting President could simultaneously serve in Congress or as a Presidential elector, an impeached officer could still be President, and the Presidents could accept bribes and titles of nobility from foreign sovereigns. Pet. App. 64a-66a.

Representative in Congress" (barred position) corresponds to "member of Congress" (excluded individual). Similarly, "any office, civil or military, under the United States" (barred position) corresponds to "officer of the United States" (excluded individual). While Trump tries to manufacture asymmetry, Petr. Br. 28-30, none exists once one considers that Section 3 only excludes individuals who have taken a constitutional oath.[10] The best understanding of Section 3's symmetry is that "officers" are synonymous with those who hold "offices" requiring an oath to support the Constitution. Baude & Paulsen, *supra,* at 106-107.

In his authoritative opinions of Section 3, Attorney General Stanbery rejected Trump's linguistic hair-splitting between "officer of" and "office under" the United States. He wrote that "Officers of the United States" includes, "without limitation," any "person who has at any time prior to the rebellion held any office, civil or military, under the United States, and has taken an official oath to support the Constitution of the United States." *Stanbery II*, 12 U.S. Op. Att'y Gen at 203. And he emphasized that the term was "used in its most general sense, and

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[10] For federal officers, the oath requirement extends to "Senators," "Representatives," and "executive" and "judicial" officers. U.S. Const. art. VI. This does not cover Presidential electors. Nor would it cover "officers of the House and Senate" or non-voting delegates in Congress (unless these individuals are "Senators" or "Representatives," in which case there's also no asymmetry).

without any qualification," to achieve "comprehensive" coverage of faithless federal officeholders. *Stanbery I*, 12 U.S. Op. Att'y Gen. at 158.

Trump argues that the Court should disapprove Stanbery's opinions, Petr. Br. 27-28, but that is tough sledding given their historical significance. *Supra* 28-29. Trump's objection is that the President and Vice President hold "office" but may not be considered "officers" in certain provisions of the original Constitution. Petr. Br. 27-28. That claim is wrong on its own terms, *see infra* 38-42, and misses the point. As Stanbery said, Section 3's structure confirms that it adheres to the plain *nineteenth-century* meaning of "officer of the United States," which covered *all* those who hold a federal office requiring an oath. And Section 3's use of that term "in its most general sense" eschews any alternative and esoteric meaning that might narrow it in other contexts. *Stanbery I*, 12 U.S. Op. Att'y Gen. at 158.

3. The President has been called an "officer of the United States" since the Founding. Vlahoplus, *supra*, at 17 (identifying contemporary references to George Washington as "the first executive officer of the United States"); The Federalist No. 69 (Hamilton) ("The President of the United States would be an officer elected by the people[.]"). This usage was deeply rooted by the time the Fourteenth Amendment was ratified. *See, e.g.*, Vlahoplus, *supra*, at 13-22 (collecting sources); Speech of Frederick Douglas, *The American Constitution and the Slave*, March 26, 1860

(referring to the President as "the executive officer of the United States").

The term "chief executive officer of the United States" was regularly used to refer to Presidents such as Jefferson, Jackson, Van Buren, Harrison, Polk, Taylor, Fillmore, Buchanan, Lincoln, Johnson, Grant, and Garfield. Vlahoplus, *supra*, at 17-20; JA591-JA593. Andrew Johnson referred to himself that way in presidential proclamations, and members of Congress did the same during his impeachment in 1868. JA592; Richardson, *supra*, at 312-331; Cong. Globe, 40th Cong., 2d Sess. 236, 513 (1868) (Rep. Evarts and Rep. Bingham). Members of the 39th Congress who enacted the Fourteenth Amendment repeatedly referred to the President as an officer. Mark Graber, *Section Three of the Fourteenth Amendment: Our Questions, Their Answers* (Oct. 2023) at 17-24 (collecting references).[11]

4. Judicial decisions spanning roughly 150 years have done the same. The year the Fourteenth Amendment was ratified, this Court said: "We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority." *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 676-677 (1868). Thirty years before that, a federal court declared that "[t]he President himself. . . is but an officer of the United States." *United States ex rel. Stokes v. Kendall*, 26 F. Cas. 702,

[11] Draft paper available at https://bit.ly/GraberS3.

752 (C.C.D.D.C. 1837). More modern cases are in accord. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 n.17 (1995) ("[T]he Constitution treats both the President and Members of Congress as federal officers"); *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) (the President is "the chief constitutional officer of the executive branch").

5. Trump acknowledges (as he did below) that "the President is an 'officer' in its ordinary meaning," but he claims the words "of the United States" convert the phrase to a special term of art limited to presidential appointees. Petr. Br. 24-25. That is wrong. *See Lucia v. SEC*, 138 S. Ct. 2044, 2056-2057 (2018) (Thomas, J., concurring). At the founding "the phrase 'of the United States' was merely a synonym for 'federal,' and the word 'officer' carried its ordinary meaning" as one who carries out "a continuous public duty." *Id.*; *see* James Heilpern and Michael Worley, *Evidence that the President is an Officer of the United States for Purposes of Section 3 of the Fourteenth Amendment*, at 13-17 (collecting founding-era linguistic evidence).[12] Anyway, ordinary parlance should prevail over "secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008).

Trump's argument relies primarily on provisions of the original Constitution. But taken together, these provisions rebut Trump's argument

[12] Draft paper available at https://bit.ly/HeilpernS3.

that "officer of the United States" is limited to those appointed and commissioned by the President.

Appointments Clause: This clause says the President "shall appoint" certain specified officers and "all other Officers of the United States, *whose Appointments are not herein otherwise provided for*[.]" U.S. Const. art. II, § 2 (emphasis added). This italicized phrase makes clear that there are "officers of the United States" that the President does not appoint, namely, those whose appointments are "otherwise provided for by the Constitution." The Federalist No. 69 (Hamilton); *see also NLRB v. Noel Canning*, 573 U.S. 513, 569 (2014) (Scalia, J., concurring in judgment) (officers of the United States must be appointed by the President "[e]xcept where the Constitution or a valid federal law provides otherwise"). The Constitution "otherwise provide[s]" for the "appointment" of the President and Vice President by the electoral college, and the Speaker of the House and President *pro tempore* of the Senate by Congress. *See, e.g.*, Heilpern, *supra*, at 19-28 (collecting Founding-era references referring to "appointment" of the President, and citing letter by Justice Scalia concurring that the President is an officer of the United States appointed in this manner).[13] Trump's interpretation cannot account for the "herein otherwise provided for" phrase.

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[13] Similarly, cases interpreting the President's power under the Appointments Clause to appoint "other Officers," Petr. Br. 22, in no way imply that the President is not *an* officer.

Article VI: Article VI requires "all executive and judicial Officers . . . of the United States" to swear an oath "to support" the Constitution. The President does exactly that, by means of the specific oath spelled out in Article II. *See infra* 42-44. And if "officers of the United States" were limited to presidential appointees, then the Vice President would be exempt from the oath—contrary to federal law since the founding. *Compare* 5 U.S.C. § 3331 *with* 1 Stat. 23–24, § 1 (June 1, 1789).

Impeachment Clause: The clause provides that "[t]he President, Vice President, and all civil Officers of the United States" may be impeached. U.S. Const. art. II, § 4. The specific enumeration of the President was likely designed to avoid any uncertainty engendered by the fact that military officers are not impeachable and the President's duties "are not confined to the civil or military department, but comprise both[.]" *See* 8 Annals of Congress, 5th Cong., 3d Sess. 2306. Same with the Vice President, who is next in line for Commander-in-Chief. *Id.*[14]

[14] In explaining why members of Congress were not "officers" subject to impeachment (because the Constitution says "no person holding any office" can also be a member of Congress, *see* U.S. Const. art. I, § 6), Joseph Story remarked in passing that the President is not an "officer of the United States." *See* Story, Commentaries on the Constitution of the United States, Volume I, § 791 (1833). But elsewhere, he says that the president "is an officer of the Union, deriving his powers and qualifications from the Constitution." *Id.* § 626.

Commissions Clause: The Commissions Clause says the President "shall Commission all the Officers of the United States." U.S. Const. art. II, § 3. But this clause, situated in a section and a paragraph conveying powers on the President, does not mean the President has a mandatory obligation to commission every single officer including himself—it means only that the President alone has the power to grant commissions. Edward S. Corwin, The President: Office and Powers 78 (4th ed. 1957). This clause does not suggest (contrary to the clear implication of the Appointments Clause) that the President is excluded from the class of "officers of the United States."

None of these provisions were intended to define "officers" or address the status of the Presidency, and so they shed little light on the issue here. But in any event, these provisions of the original Constitution, adopted 80 years before the Fourteenth Amendment, do not control the meaning of Section 3. It is the public meaning in 1868 that controls. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2127 (2022). By that time, the public clearly understood that the President was an "officer of the United States." *See supra* 34-38.

Giving Section 3 its plain meaning does not "hide elephants in mouseholes." Petr. Br. 33. Section 3 intended to cover *all* federal officeholders and *all* federal officials who broke a sworn oath. *See* 12 U.S. Op. Att'y Gen. at 158; *see also* Pet. App. 73a (citing historical references). Some, like Members of Congress or presidential Electors, hold no "office" and

are not "officers," so they needed to be specifically enumerated. *See, e.g.*, U.S. Const. art. I, § 6 (providing that "no person holding any office under the United States" may simultaneously be a member of Congress); *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890) (electors are like voters and are not "officers"). Section 3 then used broad words to cover everyone else—"any office" and all "officers." Nor are these catch-all terms intended to include only "low-ranking" officers, Petr. Br. 33; they extend even to justices of this Court, who like the President, hold "office" and swear an oath to support the Constitution. *See* U.S. Const. art. III, VI.[15]

5. Trump also claims that Section 3 does not apply to former Presidents because they do not swear an oath "to support" the Constitution. Petr. Br. 23. That is absurd. The President swears to "preserve, protect, and defend" the Constitution. U.S. Const. art. II, § 1. By definition, one who "defends" something "supports" it. Samuel Johnson, A Dictionary of the English Language (5th ed. 1773) ("defend": "to support"); Noah Webster, An American Dictionary of the English Language (1857) ("defend": "to support or maintain"). If anything, the President's oath is *more* demanding than mere "support." And nineteenth century Presidents repeatedly gave speeches

[15] Rather than listing positions in "descending order" of importance, Petr. Br. 33, Section 3 follows the constitutional order, with Congress first (Article I), then Presidential electors (Article II), then executive and judicial officers of the United States (Articles II and III), and finally state officers (Article IV).

acknowledging that their presidential oaths imposed a duty "to support" the Constitution. *See* Richardson, *supra*, Vol. 1 at 232, 467 (Adams, Madison); Vol. 2 at 625 (Jackson); Vol. 8 at 381 (Cleveland). In his January 6 speech, Trump himself acknowledged as much, declaring: "We're supposed to . . . support our Constitution, and protect our Constitution." Pet. App. 287a.

"Support" is not a magic word. Article VI requires *all* federal and state officers (including the President) to swear to support the Constitution, but nowhere dictates the wording of that oath. Indeed, some state Constitutions required state officeholders swear to "preserve, protect and defend" the U.S. Constitution rather than "to support" it. *See* S.C. Const. of 1790, art. IV; Fla. Const. of 1838, art. VI. Nobody thought these state officers were immune from Section 3. As one federal judge charged a grand jury in 1870, Section 3 does not require an oath containing the "precise words of the amendment: 'to support the Constitution of the United States.'" The Public Ledger, Dec. 2, 1870, at 3 (reprinting charge). Section 3 is about violation of a sworn duty, not about pedantic wordplay. *Id.*

6. Finally, Trump's interpretation cannot be squared with Section 3's overriding purpose. Section 3 sought to strike at high-ranking rebel leaders because they were seen as the most culpable and most dangerous. *See supra* 3-4. It would defy common sense to hold that Section 3 disqualifies every oath-breaking insurrectionist officer (down to postmaster or county

sheriff) except the most powerful one—a former Commander-in-Chief. Pet. App. 73a.

Worse yet, Trump's interpretation is not even a "former President" exception. It is a *Trump-only* exception, because every other President (except, of course, George Washington) had previously sworn a constitutional oath in some other federal or state capacity. *See* Pet. App. 283a n.20. There is no justification for this bizarre result, and the Court should not assume the framers made such a mistake. It is "of little significance" that the specific fact pattern here is "one with which the framers were not familiar"; the Court must give effect to the Constitution's "great purposes" and reject interpretations that "defeat rather than effectuate" those purposes. *United States v. Classic*, 313 U.S. 299, 316 (1941).

III. Courts May Adjudicate Section 3 Under State Ballot Access Laws

A. States may exclude from the presidential ballot constitutionally ineligible candidates

1. States have the power to enforce the U.S. Constitution, which is "supreme Law of the Land," U.S. Const. art. VI, and "as much the law of the several states as are the laws passed by their legislatures," *Haywood v. Drown*, 556 U.S. 729, 734 (2009). Trump cites no constitutional provision stripping states of the power to enforce constitutional

qualifications for the Presidency. *See* U.S. Const. amend. X. To the contrary, states' authority to do so falls squarely within their broad power to regulate presidential elections.

The Electors Clause provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for the election of the President and Vice President. U.S. Const. art. II, § 1. This clause gives the states "far-reaching authority" to run presidential elections, "absent some other constitutional constraint." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020); *see also id.* at 2334 (Thomas, J., concurring) (locating similar authority in states' Tenth Amendment reserved power); *McPherson v. Blacker*, 146 U.S. 1, 25 (1892) (Electors Clause "convey[s] the broadest power of determination" over who becomes an elector).[16]

Under the Electors Clause, state legislatures can (and historically did) dispense with presidential elections and appoint electors directly. *Chiafalo*, 140 S. Ct. at 2321. Similarly, a state's power to "appoint an elector (in any manner) includes the power to condition his appointment—that is, to say what the elector must do for the appointment to take effect." *Id.* at 2324. States may thus reject electors who refuse to

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[16] While Congress may override state rules about the "manner" of congressional elections, U.S. Const. art. I, § 4, it has no such power over presidential elections. There, Congress's role is limited to setting the "time of choosing electors" and the "day on which they shall give their votes." *Id.* art. II, § 1.

pledge that they will vote for the winner of the state's popular vote. *Id*. Just the same, states may reject electors pledged to candidates who are constitutionally barred from holding office.

This Court has also repeatedly upheld states' interests in developing ballot access rules. To ensure that "order, rather than chaos, is to accompany the democratic processes," states have developed "comprehensive" election codes regulating the "selection and qualification of candidates." *Storer v. Brown*, 415 U.S. 724, 730 (1974). "States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). And "a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Bullock v. Carter*, 405 U.S. 134, 145 (1972).

These "legitimate interest[s]" permit states "to exclude from the ballot [presidential] candidates who are constitutionally prohibited from assuming office." *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.); *see also Lindsay v. Bowen*, 750 F.3d 1061, 1064 (9th Cir. 2014) (affirming California's exclusion of 27-year old from presidential primary ballot); Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 Ind. L.J. 559, 602-607 (2015) (it "is wholly within state authority to evaluate the qualifications of presidential candidates" and collecting cases). For decades, states have done just

that, without appreciable controversy. *Id.* at 573-574. Indeed, already in this election cycle, seven states have excluded a naturalized citizen from their presidential primary ballots.[17]

2. Trump argues that because Section 3 prohibits "holding" office rather than "running for" it, states are powerless to keep oath-breaking insurrectionists off the ballot. Petr. Br. 40-46. The conclusion does not follow from the premise.

To begin, Section 3 imposes a *present* disqualification, as shown by the need for supermajorities of both houses of Congress to remove the disability. *See supra* 4-5 (discussing historical understanding that disqualification existed at the moment of the Fourteenth Amendment's adoption). To "remove" something necessarily implies taking away something that already exists. *Cawthorn v. Amalfi*, 35 F.4th 245, 258 (4th Cir. 2022). Trump has been disqualified since January 6, 2021. Nothing else needs to occur for his ineligibility to attach.

Section 3 is also not unique in prohibiting holding office rather than running for it. The Constitution provides that no person "shall be eligible to the Office of President" who does not meet its age, residency, and natural born citizen requirements, U.S. Const. art. II, § 1, and that someone who has been

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[17] Abraham Kenmore, *Long-shot presidential candidates tossed off South Carolina ballots sue*, Rhode Island Current (Jan. 8, 2024), https://perma.cc/SV75-XF3D (discussing exclusion of candidate Cenk Uygur).

impeached is disqualified "to hold" federal office, *id.* art. I, § 3. Under their power to regulate elections, states can and do refuse ballot access to candidates who flunk these requirements for *holding* office. *See supra* 46-47.

Enforcing Section 3 at the ballot access stage does not impose an additional qualification for office in violation of *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). The Court there invalidated a state constitutional amendment imposing an "additional qualification" (a term limit) for congressional candidates. *Id.* at 835-836. But the Court made clear it was not casting doubt on states' ability to enforce qualifications that are "part of the text of the Constitution," expressly including "§ 3 of the 14th Amendment." *Id.* at 787 n.2. Nothing in *Thornton* supplants states' ability to prevent candidates who are ineligible to *be* President from *running for* President. *See* Amicus Br. of U.S. Term Limits at 3-8.

Nor does *Thornton* map neatly onto presidential elector selection. *Id.* at 8-11. While a state has no power to add qualifications for the office of the Presidency itself, *Thornton*, 514 U.S. at 855 n.6 (Thomas, J., dissenting), its sweeping power over presidential electors allows the state to command who *its own* electors must vote for, *see Chiafalo*, 591 U.S. at 2324; *id.* at 2335 (Thomas, J., concurring). That broad power surely includes the lesser power to ensure the state's electoral votes are not wasted on a *currently* disqualified candidate based on a theoretical possibility of pre-inauguration amnesty.

Allowing states to enforce Section 3 at the ballot access stage also does not contravene Congress's amnesty power. Congress can grant it at any time. But in the meantime, Colorado has an election to run. And many ballot access rules, like signature requirements and filing fees, must be satisfied by the applicable state-law deadline. *See generally Storer*, 415 U.S. at 731-733. If an oath-breaking insurrectionist receives amnesty too late to qualify in this election cycle, they can run in the next, or seek some other office. Section 3's grant of amnesty power to Congress does not implicitly bestow on *presently* disqualified insurrectionists a constitutional right to run for any specific office in any specific election cycle in violation of state law. For obvious reasons, oath-breaking insurrectionists do not deserve that benefit of the doubt.[18]

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[18] Nor does the Twentieth Amendment suggest otherwise, as some of Trump's amici assert. That innocuous amendment was about cleaning up the lame duck period. Article II discusses contingencies for the President's death or incapacity. U.S. Const. art. II, § 1. Section 3 of the Twentieth Amendment simply extends those rules to Presidents-elect and Vice Presidents-elect who "die" or "fail to qualify" during the lame duck period prior to assuming office. U.S. Const. amend. XX; H.R. Rep. No. 72-345 at 6 (1932). This does not strip states of the ability to evaluate presidential *candidate* qualifications. The Amendment by its terms only applies after the electors have voted, when there is a "President elect." If a death (or presumably another disqualification) occurs before then, "[t]he electors, under the present Constitution, would be free to choose a [different] President." H.R. Rep. No. 72-345 at 5. Additionally, the

To hold that Trump's eligibility cannot be determined until after election day would be disastrous. Trump's own brief acknowledges as much, urging that the Court decide his qualifications now to avoid uncertainty about whether Congress might declare him ineligible after the election. *See* Petr. Br. at 2 n.2. To say that resolving Trump's eligibility must wait until tens of millions of Americans have voted would be a recipe for mass disenfranchisement, constitutional crisis, and the very "bedlam" Trump threatens. Petr. Br. 2; *see* Amicus Br. of Foley *et al*. at 12-20. Far better to respect the Framers' decision that the President is chosen by electors selected by the states in the manner the states choose. That will allow qualification issues to be addressed through state procedures before voters go to the polls—and to be subject, as in this case, to due process and judicial review.

3. Finally, the Colorado Republican Party has no First Amendment right to list constitutionally ineligible candidates on the ballot. Party Br. 28-30; *see* Pet. App. 38a-40a. "That a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights." *Timmons*, 520 U.S. at 359. After all, "[b]allots serve primarily to elect candidates, not as forums for political expression." *Id.* at 363. Thus, states do not infringe the First Amendment by

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Twentieth Amendment says nothing about who decides whether a President-elect or Vice President-elect has "failed to qualify."

denying ballot access to candidates who are "ineligible for office." *Id.* at 359. This applies equally in a primary election, which is "not merely an exercise or warm-up for the general election but an integral part of the entire election process[.]" *Storer*, 415 U.S. at 735.

B. Section 3 does not require federal enforcement legislation

1. While Trump addresses the issue only in passing, the Colorado Republican Party argues at length that Section 3 is not "self-executing." Party Br. 13-26. This argument is beside the point. Respondents have not sued directly under Section 3. Rather, they assert a claim under the Colorado Election Code, which allows voters to sue for enforcement of federal constitutional qualifications at the ballot-access stage. Pet. App. 31a-38a. Thus, the Colorado Republican Party must prove not only that Section 3 is not "self-executing," but that state laws to "execute" it are somehow *unconstitutional*.

No authority supports that remarkable proposition. As explained, states are empowered to enforce Section 3, including in presidential elections. *See supra* § III.A. And historically, states enforced Section 3 even before Congress enacted the first federal enforcement legislation in 1870. *See supra* at 4-5.

Of course, Congress also has power to pass laws enforcing the Fourteenth Amendment, including Section 3. *See* U.S. Const. amend. XIV, § 5. But this

language "neither explicitly precludes the states" from enforcing the Fourteenth Amendment "nor grants such authority exclusively to the federal government." *Goldstein v. California*, 412 U.S. 546, 560 (1973) (interpreting Copyright Clause). Because no federal law preempts state regulation here,[19] Colorado remains free to enforce Section 3 through its own laws. Indeed, the Supremacy Clause "charges [its] state courts with a coordinate responsibility to enforce" the Constitution under "their regular modes of procedure." *Howlett v. Rose*, 496 U.S. 356, 367 (1990).

2. In any event, the Fourteenth Amendment's plain text and this Court's precedent foreclose the claim that the amendment is inoperative without federal legislation. *See* Baude & Paulsen, *supra*, at 17-49; Amicus Br. of NAACP LDF at 7-13.

Section 3 imposes an unequivocal command: "No person *shall*" hold public office if disqualified. This mandatory language was understood to have immediate effect. *See supra* at 4-5. Other qualifications for Congress and for President use the

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[19] The criminal insurrection statute, 18 U.S.C. § 2383, does not implement Section 3, much less preempt state implementation. It was originally passed as the Second Confiscation Act six years *before* the Fourteenth Amendment, and it covers all insurrectionists rather than only oath-breakers. 12 Stat. 589, 590 (1862). Section 3 also deliberately *did not* depend on a criminal conviction; Andrew Johnson had already pardoned most ex-confederates by the time Section 3 was enacted. *See* Cong. Globe, 39th Cong., 1st Sess. 2463, 2900 (1866).

same "no person shall" formulation, and they are all operative without congressional legislation. *See, e.g.*, U.S. Const. art. I, §§ 2-3; art. II, § 1. Section 3's grant of power to Congress to "remove such disabilit[ies]" by a two-thirds vote reaffirms that the disqualification *already exists* by operation of the Constitution. Otherwise, there would be nothing to "remove." *Cawthorn*, 35 F.4th at 258. And to hold otherwise would eviscerate the supermajority requirement, allowing a simple majority of Congress to nullify Section 3 merely by repealing (or not passing) enforcement legislation.

This Court's controlling precedent confirms the Fourteenth Amendment's provisions "are self-executing." *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997). In *City of Boerne*, the Court characterized Congress's Section 5 power to enforce the Fourteenth Amendment as purely "remedial" rather than "substantive." *Id.* at 524-527. It made clear "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary," whether Congress has legislated or not. *Id.* at 524.[20] Similarly, the Fifteenth Amendment is self-executing despite also authorizing Congressional enforcement, *id.*, as is Thirteenth Amendment's ban on slavery, *see Civil*

[20] The Colorado Republican Party's sword/shield distinction fails. Party Br. at 15-16. This Court's decision in *Ex Parte Young* "sanctioned the use of the Fourteenth Amendment to the United States Constitution as a sword as well as a shield against unconstitutional conduct." *Juidice v. Vail*, 430 U.S. 327, 334-35 (1977).

Rights Cases, 109 U.S. 3, 20 (1883) ("[The Thirteenth] amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation"). Nothing in its text or history suggests Section 3 is somehow different in this respect from all other provisions of the Reconstruction Amendments.

3. Chief Justice Chase's non-binding opinion as a circuit judge in *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869), does not credibly support the claim that Section 3 is unenforceable here.

First, Griffin does not speak to the power of states like Colorado to enforce Section 3 under their own law. The case held that a convicted criminal defendant was not entitled to federal habeas corpus relief even though the state judge who presided over his trial was disqualified by Section 3. *Id.* at 23. There was no state law cause of action. Indeed, Virginia in 1869 was an "unreconstructed" territory under federal military control, *id.* at 11, and it lacked any operative state law that could have enforced Section 3, *id.* at 14.

Second, Chase's reasoning glossed over the mandatory language of Section 3, and his suggestion that Section 5 gives Congress *exclusive* power to enforce the Fourteenth Amendment does not survive this Court's controlling precedent in cases like *City of Boerne*. *See supra* 53-54.

Third, Chase later took a contradictory position in the treason prosecution of Jefferson Davis, where he agreed with Davis's counsel that Section 3 "executes itself" and "needs no legislation on the part

of congress to give it effect." *In re Davis*, 7. F. Cas. 63, 90, 102 (C.C.D. Va. 1871). These "contradictory holdings . . . draw both cases into question and make it hard to trust Chase's interpretation." *Cawthorn*, 35 F.4th at 278 n.16 (Richardson, J., concurring in the judgment).

Fourth, Chase rested his opinion mainly on the supposed "inconveniences" and "mischief" that would result from collateral challenges to convictions by sitting Confederate judges. *See Griffin*, 11 F. Cas. 7 at 24-26. But Chase's Supreme Court colleagues had already "unanimously concur[red]" that "a person convicted by a judge de facto acting under color of office, though not de jure" cannot collaterally attack his conviction on habeas. *Id.* at 27. Thus, these "inconveniences," which are not present here, could have been remedied by other doctrines without doing violence to Section 3's text. And "convenience" does not override constitutional command.

Finally, Chase worried about declaring an official disqualified "without trial" in a collateral habeas challenge to which the official was not a party. *Id.* at 26. That concern does not apply here, since Trump had a five-day trial with ample opportunity to present and rebut evidence.

IV. The Colorado Supreme Court Did Not Violate the Electors Clause

Finally, Trump invokes the Electors Clause, asking the Court to second-guess the Colorado

Supreme Court's interpretation of the Colorado Election Code. This argument is forfeited and meritless.

1. The Colorado Supreme Court never addressed Trump's Electors Clause argument because Trump never raised the issue. *See generally* Pet. App. 1a-114a; Trump's Opening-Answer Br. (Colo. Nov. 27, 2023). Nor did he lack opportunity. The trial court had held, just as the Colorado Supreme Court did, that the Colorado Election Code authorized this suit because it would be a "wrongful act" to place on the ballot a candidate disqualified by Section 3. *Compare* Pet. App. 243a-249a *with* 31a-37a. The two courts' reasoning did not meaningfully differ, *id.*—and certainly not enough to excuse failure to raise *any* Electors Clause challenge anywhere in state court.[21] Raising a related state-law issue is not good enough. *Howell v. Mississippi*, 543 U.S. 440, 442-445 (2005) (*per curiam*). This Court "has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court[.]" *Id*. at 443.

Trump also asks this Court to conduct *de novo* review of Colorado state law. Petr. Br. 49-50. That is

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[21] Contrary to Trump's assertion, the trial court also relied on COLO. REV. STAT. § 1-4-1203(2)(a). *See* Pet. App. 254a-249a. Like the Supreme Court, the trial court held the Secretary has no duty to exclude an ineligible candidate but it would be a "wrongful act" to certify him to the ballot if the court determined the candidate ineligible. *Id.*

outlandish. Under our federal system, this Court is "bound to accept the interpretation of [state] law by the highest court of the State," *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976), except in the rare case where the state court's interpretation would serve to "evade federal law," *Moore v. Harper*, 600 U.S. 1, 34 (2023).

2. In the context of federal elections, this Court's review of state-law issues is limited to extraordinary cases where the state court "so exceed[ed] the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures." *Id.* at 37. Nothing in the decision below comes close to this high bar. *See* Amicus Br. of Brennan Ctr. *et al.*, at 13-25.

The Colorado Election Code allows courts to hear "any challenge to the listing of any candidate on the presidential primary election ballot." COLO. REV. STAT. § 1-4-1204(4). In that context, voters may sue to prevent a "wrongful act" that the Secretary of State "has committed or is about to commit." *Id.* § 1-1-113. This provision "clearly comprehends challenges to a broad range of wrongful acts committed by officials charged with duties under the [election] code." Pet. App. 33a (quoting *Carson v. Reiner*, 370 P.3d 1137, 1141 (Colo. 2016)).

Reading the Election Code as a whole, and in light of its stated purpose to preserve the "purity of elections," the Colorado Supreme Court correctly concluded it would be a "wrongful act" to certify on the ballot a candidate who is constitutionally ineligible to

hold office. Pet. App. 31a-37a. Colorado law requires its presidential primaries to "conform to the requirements of federal law" and limits participation to political parties fielding a "qualified candidate." *Id.* at 21a-22a; COLO. REV. STAT. §§ 1-4-1201, 1-4-1203(2)(a). Major party candidates for a presidential primary must submit to the Secretary of State a notarized statement of intent, which requires certification that the candidate "meets all qualifications for office prescribed by law," including federal constitutional ones. *See* Pet. App. 21a-23a, 31a-32a; COLO. REV. STAT. § 1-4-1204(1). Other statutory provisions confirm the intent form's purpose is to ensure the candidate is "qualified to assume [the office's] duties if elected." Pet. App. 34a (citing COLO. REV. STAT. § 1-4-1101(1)). It would thus be "wrongful" to place on the ballot a candidate who is ineligible to assume the office. *Id.* at 34a-36a.

Trump argues that the Election Code imposes no duty on the Secretary to exclude unqualified candidates from the ballot so long as the candidate's party has at least *one* "qualified candidate." Petr. Br. 46-48 (citing COLO. REV. STAT. § 1-3-1203(2)(a)). But the Election Code allows suit for any "wrongful act," COLO. REV. STAT. § 1-1-113, which is "more expansive than a 'breach' or 'neglect of duty.'" Pet. App. 32a-33a (citing prior Colorado cases). Trump's sworn certification to the Secretary that he meets "all the qualifications for office prescribed by law," Tr. Ex. 158, was false, and it would thus be "wrongful" to place him on the ballot. Read as a whole, the Election

Code does not preclude a challenge to listing 16-year-olds, foreign-born citizens, or other unqualified candidates on a party's primary ballot merely because the party fields at least one qualified candidate. *See* Pet. App. 31a-37a.

There is no basis to disrupt the state court's interpretation of state law, which enforced rather than "circumvent[ed]" the Constitution. *Moore*, 600 U.S. at 35.

CONCLUSION

The Court should affirm.

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