Nos. 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 OF *AMICUS CURIAE* THE HONORABLE PETER MEIJER IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Honorable Peter Meijer is a former Republican Congressman who represented Michigan's Third Congressional District from 2021 to 2023. Days after taking the oath of office and beginning his work as a congressman, Mr. Meijer was inside the Capitol building when the riots broke out on January 6, 2021, and was hastily evacuated with his colleagues from the House Floor. Mr. Meijer voted for the impeachment of former President Donald J. Trump for his activities related to January 6, one of only ten House Republicans to do so. Mr. Meijer therefore has a unique and demonstrable interest in this case.

Mr. Meijer believes that the United States Constitution and democratic process should prioritize the will of the voters—not judges and partisan Secretaries of State. Mr. Meijer submits this brief in support of Petitioner Donald J. Trump, because the Colorado Supreme Court's extra-constitutional opinion is an affront to the very democracy it purports to protect. In excluding President Trump from the ballot—and effectively concluding state courts and partisan state election officials across the country may do the same—the Colorado Supreme Court disclaims the Fourteenth Amendment's clear entrustment of Section Three determinations to Congress and centuries of precedent to instead meddle in political questions that have been clearly assigned to the legislative branch.

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1. No counsel for any party authored this brief in whole or in part and no entity or person, other than amicus curiae or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Untethered from any binding precedent, the Colorado Supreme Court has inserted itself into a political process that Congress created and continues to control. This was error for a host of reasons, and this Court should reverse the opinion to protect the political process and ensure the survival of elections that are central to our democracy.

Basic to the judicial branch's understanding of its limited role, and out of respect for the separation of powers that is fundamental to our government, courts have wisely avoided weighing in on inherently political questions. *Baker v. Carr*, 369 U.S. 186, 210 (1962). In particular, courts do not exercise jurisdiction (even when there is otherwise a justiciable controversy) when the issue has been wholly dedicated to another political branch or when the existing body of law lacks a judicially discoverable and manageable standard to resolve the issue. *Id.* at 211. This case fails in both instances, despite the Colorado Supreme Court's insistence otherwise.

Further, if the Colorado Supreme Court's opinion stands, political chaos will swiftly ensue. Not only does the opinion ensure the untenable and undemocratic result of excluding former President Trump from consideration as a presidential candidate on some States' ballots but not others, the opinion also charts a clear path for arbitrary political pretexts to remove political candidate options from consideration by voters, both in this election with respect to former President Trump, and in countless future elections against candidates on both sides of the aisle.

"Confidence in the integrity of our electoral process is essential to the functioning of our participatory democracy," *Purcell v. Gonzalez*, 549 US 1, 4 (2006), and our democracy relies on the ability of voters, not judges or partisan election officials, to determine their leaders of choice. Because the Colorado Supreme Court's opinion, and the consequences that necessarily will result from it, are fundamentally irreconcilable with these deeply entrenched principles of democracy, Mr. Meijer respectfully urges this Court to grant the relief requested by Petitioner Donald J. Trump.

ARGUMENT

1. The Colorado Supreme Court Wrongfully Decided A Non-Justiciable Political Question

Absent any binding precedent, and only after straining to find new meaning in a 150-year-old Reconstruction Era constitutional amendment, the Colorado Supreme Court has for the first time in American history struck a leading candidate's name from a state ballot. It is difficult to conceive of a more dramatic or consequential state court decision, particularly given the flimsy ground upon which it stands. Rather than permitting voters to determine the identity of our next president, the Colorado Supreme Court has, on an expedited basis, prohibited the current Republican frontrunner from consideration as a candidate by voters. The Colorado Supreme Court's decision cannot stand, because it is an improper exercise of power striking at a political question.

Article III, Section 2 of the United States Constitution confers power to the judicial branch to hear cases that

arise under the Constitution, U.S. law, and any treaties. U.S. Const., art. III, § 2 ("The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . ."). While this grant of power is expansive in many ways, this Court has wisely limited that power in areas that involve a political question in order to honor the separation of powers between the three branches of government. *Baker*, 369 U.S. at 210. Our republic has been guided from the very beginning by a deep reverence for the separation of powers:

> But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; *and in the next place oblige it to control itself.*

The Federalist No. 51 (James Madison) (emphasis added).

Recognizing the wisdom of the founders, our judicial system has a long history of "controlling itself" by exercising restraint and refraining from reaching into matters that have "in any measure been committed by the Constitution to another branch of government" or where there is a "lack of judicially discoverable and manageable standards for resolving [an issue]." *Baker*, 369 U.S. at 211, 217. To that end, courts have routinely

found that this power rests with Congress because the qualifications of presidential candidates are non-justiciable political questions. *See, e.g.*, *Berg v. Obama*, 563 F.3d 234, 238 (3d Cir. 2009); *Grinols v. Electoral College*, No. 2:12–cv–02997–MCE–DAD, 2013 WL 2294885, at *5-7 (E.D. Cal., May 23, 2013).

The political question doctrine is particularly important where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. Here, "the vast weight of authority," including Section Three itself, shows that "the Constitution commits to *Congress and the electors* the responsibility of determining matters of presidential candidates' qualifications." *Castro v. New Hampshire Sec'y of State*, No. 23-CV-416-JL, 2023 WL 7110390, at *9 (D.N.H. Oct. 27, 2023), aff'd sub nom. *Castro v. Scanlan*, 86 F.4th 947 (1st Cir. 2023) (holding that application of Section Three of the Fourteenth Amendment to former President Trump's 2024 candidacy is a non-justiciable political question) (emphasis added).

The Colorado Supreme Court decision is fundamentally flawed because it fails to appreciate courts' extremely limited role during the election process. *Anderson v. Griswold*, No. 23SA300, 2023 WL 8770111, at *23-*26 ¶¶ 107-126 (Colo. Dec. 19, 2023). Despite ample authority to the contrary, the court held that there was no text committing to the legislative branch the question of qualifications for president. *Id.* at *23 ¶ 112. And although the only hint as to the meaning of "insurrection" is the historical context from which Section Three arises, the court nevertheless held that there were sufficient discoverable and manageable standards that enable judicial review. *Id.* at *25-*26 ¶¶ 122-25.

The court's legal reasoning cannot be permitted to stand. The legislature is the only branch of government with authority to determine the requirements for the office of President of the United States. The plain language of Section Three confirms the legislature's authority by explicitly (and exclusively) giving Congress the ability to remove any disqualification, making Section Three unlike any other requirement for president. Because the "disability" can be removed by Congress, it is illogical that a court can *a priori* disqualify a candidate from the ballot, particularly when all objective criteria have been fulfilled. To the extent that the disability is not removed, the legislature has provided mechanisms to ensure that the individual found to be disqualified does not take office. Further confirming the impropriety of involvement from the judicial branch, there are simply no judicially discoverable and manageable standards for resolving these issues.

a. Determining The Requirements For The Presidency Is Exclusively Within The Purview Of The Legislature

Outside of the proscribed qualifications in the Constitution, the power to create and determine qualifications for any federal office—including the presidency—rests firmly with Congress. When the founders first conceived of the presidency, recognizing its importance, they gave three easily determinable requirements: that the president be a natural born citizen, have been a resident of the United States for 14 years, and have attained 35 years of age by the time the president-elect takes the oath of office. U.S. Constitution, art. II, § 1, cl. 5.

At issue in this case is a Reconstruction Era amendment that prohibits insurrectionists or rebels from holding certain federal or state offices, the Fourteenth Amendment. The section at issue, Section Three, states:[2]

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

Congress bears the responsibility of determining presidential qualification, and is the only branch of government capable of enforcing Section Three. This is true for at least two independent reasons. First, the plain language of Section Three mandates that only Congress has the power to remove any disqualification that may have attached to a particular presidential candidate. Second, the legislature has retained its power to determine whether a presidential candidate qualifies via statutes and constitutional amendments that govern presidential elections.

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2. This brief assumes purely *arguendo* that Section Three applies to the presidency.

i. The Plain Language Of Section Three Confirms That Congress Alone Has The Power To Determine If A Person Is Disqualified From Holding Office Under Section Three

When enacting statutes and constitutional provisions alike, "Congress says . . . what it means and means . . . what it says." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)) (cleaned up). In turn, a court's "sole function" is to read those words and enforce them according to their plain terms. *Id.* Despite any ambiguity in Section Three, one thing is certain: there is not a single word in the Fourteenth Amendment to support the Colorado Supreme Court's position that a state court has the power to determine whether a presidential candidate should be omitted from a primary ballot based on purported "insurrection" or "rebellion."

A plain reading of the Amendment confirms that Congress retains the power to make qualifications under Section Three. In a basic sense, the first sentence of Section Three gives instruction as to "who" is disqualified from "what." Much of the litigation in this case focused on the "who," including whether the events of January 6, 2021 and former President Trump's actions leading up to that harrowing day constitute "insurrection." But there has been little discussion regarding "what" he is prohibited from. The Colorado Supreme Court (and many others) have simply assumed that the analysis ends with whether former President Trump is an insurrectionist. Under the Colorado Supreme Court's construction, if the answer to that question is yes, then his name cannot appear on any

ballot as a candidate for president. *Anderson*, 2023 WL 8770111, at *51 ¶ 257.

In so holding, the majority of the Colorado Supreme Court dismisses a critical word in Section Three. *Id.* at *14 ¶ 66 ("We perceive no logical distinction between a *disqualification* from office and a *qualification* to assume office."). That is an overly simplistic view that overwrites the words that Congress chose—and to which the state legislatures that ratified Section Three agreed. Making no reference to candidates or elections, Section Three only prevents a person who has engaged in insurrection from "holding" office. Not running for, campaigning for, raising money for, or appearing on a ballot for office—but *holding* office. This distinction is crucial because it lays out the timeline and procedure for Section Three determinations. By limiting the prohibition to "hold[ing]" office in conjunction with Congress's power to remove the disability, the text is clear that Congress is exclusively entrusted with the power to make Section Three determinations once a person has been elected. Thus, blocking former President Trump from the ballot at this stage is premature, and the Colorado Supreme Court's reading of this section erroneously ignores the specific word that the legislature chose. *See id.* at *14 ¶ 67

The majority failed to honor the unique nature of Section Three by ignoring the implications of its second sentence of Section Three. Congress, by a two-thirds vote, has the ability to "remove such disability" imposed after a person engaged in an insurrection or rebellion. There is no similar power granted in Article I of the Constitution that would permit Congress to remove any of the other requirements for the presidency such as age, residency,

or status as a natural born citizen. Accordingly, there is no similar political question for those "neutral candidacy qualification[s]." *See Bates v. Jones*, 131 F.3d 843, 847 (9th Cir. 1997) (en banc); *Lindsay v. Bowen*, 750 F.3d 1061, 1063 (9th Cir. 2014); *Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1201 (D. Colo.), aff'd, 495 F. App'x 947 (10th Cir. 2012). But here, the second sentence of Section Three places this particular qualification for the presidency squarely (and exclusively) within the purview of Congress.

Further, as Justice Samour described in his dissent, "the most concerning misstep" by the majority was finding that Section Three is self-executing. *Anderson*, 2023 WL 8770111, at *56 ¶ 278 (Samour, J., dissenting). As a Reconstruction Amendment, the Fourteenth Amendment was designed as an expansion of federal power, not an expansion of state power. *See* City *of Rome v United States*, 446 US 156, 179 (1980) (The Civil War Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty."); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 255 (1995) (Stevens, J., dissenting) ("The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States."). By ignoring the historical context, the majority's interpretation collides with the framers' intent of empowering Congress to make Section Three determinations to safeguard attempts to undermine the United States government. A state court or state official cannot bypass clear constitutional delineation of power even, as the majority puts it, "when presented with a proper vehicle (like section 1-1-113)." *Anderson*, 2023 WL 8770111, at *19 ¶ 88 (Samour, J., dissenting). Thus, without federal enforcement legislation, there is no private right of action or remedy provided by Section Three. *See Cale*

v. City of Covington, 586 F.2d 311, 316 (4th Cir. 1978) ("[The] third section of the Fourteenth Amendment, concerning disqualifications to hold office, was not self-executing absent congressional action."). By making its own determination that former President Trump engaged in insurrection and then going so far as to strike his name from the state primary ballot, the Colorado State Court has usurped Congress's constitutionally-mandated power. If the decision is left untouched, Congress will have been stripped of its power to "remove [any] disability" that may block former President Trump from becoming president again, because Colorado has already determined that his name will not appear on the ballot.

ii. A Basic Understanding Of The Electoral Process Reinforces Congress's Role in Guarding the Presidency Against Unqualified Candidates

In addition to the plain language of Section Three, a basic understanding of the electoral process confirms that there is only one political body capable of permitting the president to "hold" office: the legislative branch. Indeed, there are both constitutional and statutory mechanisms in place giving Congress—and Congress alone—the power to block any person who does not qualify for president.

Once American citizens have voted and the states' respective electors have met to vote for the president, those votes are transmitted to Congress to be counted. U.S. Const., Amend. XII. After an initial count, legislators can lodge written objections. 3 U.S.C. § 15. If for any reason the president elect does not qualify, then Congress crafted the Twentieth Amendment to provide a solution:

"if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified." U.S. Const., Amend. XX. Congress has enacted additional statutes to provide a line of succession in case both a President and a Vice President do not qualify for office. *See* 3 U.S.C. § 19. Just as the legislature has the power to place a president in office, so too does it have the power to remove them. Congress enacted the 25th Amendment to deal with the death or incapacity of a president. U.S. Cont., Amend XXV. Perhaps infamously, when a president has engaged in "treason, bribery or other high crimes and misdemeanors," a majority of the House of Representative can impeach a president and the Senate can remove a president on those impeachment articles by a two-thirds supermajority vote. U.S. Const., art. 2, § 4.

No matter the statute or constitutional provision, the legislative branch has retained the sole authority to place a president in—or, in extreme circumstances, remove a president from—office.[3] The majority fails to meaningfully discuss any of these safeguards. The opinion below does not even mention legislators' ability to object during the count of the electoral college votes, and summarily dismisses the Twentieth Amendment simply because it applies post-election. *Anderson*, 2023 WL 8770111, at *25 ¶ 119. But it is not the role of a state court to opine on the elegance of the process the legislature has enacted in

3. The only legislation in recent memory that could have given courts the power to consider a cause of action arising under Section Three was introduced in 2021. H.R. 1405, 117th Cong. (2021). Despite being introduced by a member of the majority, it did not have requisite support to receive a vote in committee, let alone consideration before the full House.

accordance with the Constitution. Accordingly, the court erred.

b. The Contours of Disqualification under Section Three are Murky and Give no Manageable Standards for Courts to Apply.

Unlike objective questions of arithmetic (for age and duration of residency) or geography (to determine whether the person is a natural born citizen), the contours of Section Three are murky. To quote Justice Samour's dissent below, "[i]t doesn't require much process, procedure, or legal acumen to determine whether a candidate is barred by the binary and clerical requirements" as compared to the "substantial procedural and normative mechanisms" needed to determine whether a person is disqualified from holding office under Section Three. *Anderson*, 2023 WL 8770111, at *66 ¶ 327 (Samour, J., dissenting). While the majority attempts to inject meaning to the word "insurrection" by casting a wide net to irrelevant statutes, dictionary definitions, and legislative reports, the only true resource available to this Court is the historical context of Section Three's enactment, which is not sufficient to justify any court's interference on this issue.

The Fourteenth Amendment was drafted and ratified more than 150 years ago on the heels of a Civil War, during which over 300,000 Union soldiers died to keep this country united. With that in mind, the legislature enacted Section Three specifically to ban former Confederate officials from future state or federal government service. *In re Griffin*, 11 F Cas 7 (CC Va, 1869) ("[I]t can hardly be doubted that the main purpose [of Section Three] was to inflict upon the leading and most influential characters

who had been engaged in the Rebellion, exclusion from office as a punishment for the offense.").

Section Three is thus the remnant of a calculated move by the legislature intended to keep those who had violated their oaths to the Constitution by taking up arms from holding positions of power in the future. That is the meaning of "insurrection" and "rebellion"—not lesser riots or civil unrest, even if such unrest takes a particularly ugly or shameful form. While the Constitution does not define "insurrection or rebellion," or aiding "enemies," Congressional history and cases analyzing related statutes reveal that those crimes equate to treason. *See* 37 Cong Globe 2173 (1862) (Sen. Howard) (calling insurrection or rebellion "nothing more nor less than treason"); *United States v Greathouse*, 26 F Cas 18, 21 (CCND Cal 1863) (insurrection or rebellion "amount[s] to treason within the meaning of the constitution").

Likewise, the Constitution does not define "engaging in" as it applies to insurrection or rebellion. Reviewing the Section Three determinations from Congress illustrates that "engaging in" necessarily means more than mere speech or encouragement. *See* 41 Cong. Globe 2d Session, 5445-46 (1870) (finding a Representative-elect was not disqualified under Section Three for voting for a resolution to "resist invasion of the soil of the South at all hazards"). Historically, the phrase "engaging in" did encompass, however, those who served as an officer in the Confederacy, as well as those who actively participated in the Confederacy. *See Worthy v Barrett*, 63 NC 199, 204 (1869) (finding serving as an officer in the Confederacy met the prohibition in Section Three).

The Colorado Supreme Court's interpretation of Section Three of the Fourteenth Amendment transforms the prohibition from one that disqualifies individuals who served in an organization akin to the Confederacy, to one that punishes on a much larger scale, for much smaller offenses. Indeed, the majority's interpretation could be easily applied to indirect or inchoate offenses, such as mere speech, "attempted insurrection or rebellion, conspiracy to commit insurrection or rebellion, or accessory liability (before- or after-the-fact) in relation to insurrection or rebellion." Josh Blackman and Seth Barrett Tillman, *Sweeping and Forcing the President Into Section 3: A Response to William Baude and Michael Stokes Paulsen*, 28 Tex. Rev. L. & Pol. 350 (forthcoming 2024) (manuscript at 509), available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4568771.

2. The Colorado Supreme Court's Decision, If Allowed To Stand, Will Create Political Chaos

Just as concerning, if not more so, than the fundamental errors in the majority's opinion, are the weighty consequences that will result from those errors. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). In repackaging a Reconstruction Era prohibition, aimed clearly at preventing Confederate rebels and their ilk from holding office, now in order to deny Colorado voters a choice of their preferred presidential candidate at the ballot box, the Colorado Supreme Court has acted in a manner irreconcilable with this foundational principal of democracy.

The inevitable disorder that will result from the Colorado Supreme Court's opinion is multi-faceted. First, the opinion burdens state courts and election officials with an unrealistic task: as Chief Justice Boatwright observed in dissent, unlike qualifications that are "characteristically objective, discernible facts," such as age and place of birth, "an application of Section Three requires courts"—and election officials—"to define complex terms, determine legislative intent from over 150 years ago, and [in the case of Colorado,] make factual findings foreign to [Colorado's] election code." *Anderson*, 2023 WL 8770111, at *52 ¶¶ 261-62 (Boatwright, C.J., dissenting); *see also id.* at *66 ¶ 327 (Samour, J., dissenting). Second, permitting state courts to intervene in making Section Three determinations (particularly when the purported engagement in insurrection falls far outside the historical context of the provision) will lead to a tit-for-tat application that will unravel the fabric of our democracy.

a. States Will Continue to Unevenly Apply Section Three to Former President Trump

These questions will—and already have—lead to an uneven application of Section Three as each state reaches different conclusions on the exact same set of facts. In Maine, the Secretary of State declared on her own authority that former President Trump's primary petition was invalid because "he is not qualified to hold the office of the President under Section Three." *In re: Challenges of Kimberley Rosen, et al.*, Ruling of the Secretary of State of Maine (Dec. 28, 2023), https://www.maine.gov/sos/news/2023/Decision%20in%20Challenge%20to%20Trump%20Presidential%20Primary%20Petitions.pdf (last visited January 3, 2023). But other courts have

reached the exact opposite conclusion, holding that the issue is a non-justiciable political question. *See Trump v. Benson*, No. 23000151-MR, slip op. at 24 (Mich. Ct. Cl. Nov. 14, 2023), *aff'd sub nom. Davis v. Wayne Cnty. Election Comm'n*, No. 368615, 2023 WL 8656163 (Mich. Ct. App. Dec. 14, 2023) (determining that President Trump's appearance on the primary ballot constitutes a non-justiciable political question because "there are . . . many answers and gradations of answers").

Then, there is the Colorado Supreme Court's decision, which reaches far outside of the judicial branch's wheelhouse to resolve political questions with sweeping constitutional implications. Justice Samour aptly captures this issue in his dissent, noting the "vital need for definitional counsel on questions such as who is an 'officer of the United States'? What is an 'insurrection'? What does it mean to 'engage[] in' the same? Does 'incitement' count?" *Anderson*, 2023 WL 8770111, at *66 ¶ 327 (Samour, J., dissenting). As discussed above, the majority's capacious definition of insurrection, which includes, *inter alia*, citation to authority defining insurrection for purposes of an insurance policy exclusion, *id.* at *38 ¶184 (citing *Home Ins. Co. of N.Y. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954), hardly provides a manageable standard to be uniformly or predictably applied by other courts or election officials. Nor should, for example, a secretary of state (or a district court) now be tasked with determinations such as what entity constitutes an enemy of the United States as the term is used in Section Three—a determination some have described as requiring "tantamount to a declaration of war"[4], a power constitutionally granted to

4. As Justice Samour's dissent presciently notes, the majority's opinion also fails to explain what should happen if

Congress. *Cf. generally, e.g.*, Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 Wm. & Mary Bill Rts. J. 153, 219 (2021) (noting, in the context of analyzing a hypothetical example of whether Iran constitutes an enemy of the United States for purposes of a Section Three determination, that "'declaring a nation or a group to be an "enemy" is tantamount to a declaration of war' and 'raises thorny questions of foreign relations'" (quoting Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. Pa. L. Rev. 863, 920-21 (2006)).

The fact that the Colorado Supreme Court reached its conclusions despite the reality that no federal court has found, nor is the Justice Department even alleging, that President Trump is guilty of anything close to insurrection or rebellion, further highlights the unwieldy discretion state courts and partisan state officials will have over such plainly non-justiciable questions. *Cf. generally Anderson*, 2023 WL 8770111, at *56 ¶ 276, *64 ¶¶ 319-320 (Samour, J., dissenting) (noting former President Trump was never charged with, nor convicted of, violating 18 U.S.C. § 2383, which is the only "federal legislation [that] arguably enables the enforcement of Section Three"). The majority opinion, if allowed to stand, will also create "the potential chaos wrought by an imprudent, unconstitutional, and standardless system in which each state gets to adjudicate Section Three disqualification cases on an ad

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nobody challenges a candidate whom a secretary of state believes previously engaged in insurrection after taking the prerequisite oath. *Anderson*, 2023 WL 8770111, at *66 ¶ 329 n.8 (Samour, J., dissenting).

hoc basis" noted in Justice Samour's dissent, which "is an enlargement of state power [that] is [surely] antithetical to the framers' intent" in crafting Section Three. *Id.* at *70 ¶ 348 (Samour, J., dissenting).

Indeed, the majority itself recognized the inconsistencies that will arise amongst the states, noting that, for example, the differences between Colorado and Michigan election laws rendered it "unsurprising that the Michigan Court of Appeals recently concluded that the Michigan Secretary of State had no discretion to refrain from placing President Trump on the presidential primary ballot once his party identified him as a candidate." *Id.* at *18 ¶ 86 n.10 (citing *Davis v. Wayne Cnty. Election Comm'n*, No. 368615, 2023 WL 8656163, at *16 (Mich. Ct. App. Dec. 14, 2023) (unpublished order)). As Justice Samour noted in dissent, "because most other states don't have the Election Code provisions [Colorado does], they won't be able to enforce Section Three. That, in turn, will inevitably lead to the disqualification of President Trump from the presidential primary ballot in less than all fifty states, thereby risking chaos in our country," which "can't possibly be the outcome the framers intended." *Id.* at *55 ¶ 274 (Samour, J., dissenting).

Such inconsistencies are particularly problematic because "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest," because "the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983). And because "the impact of votes cast in each State is affected by the votes cast for the various candidates in other States, . . .

in a Presidential election a State's enforcement of more stringent ballot access requirements . . . has an impact beyond its own borders." *Id.* at 795; *cf. Green Party of Georgia v. Georgia*, 551 F. App'x 982, 984 (11th Cir. 2014) (unpublished) ("[A] ballot access restriction for presidential elections requires a different balance than a restriction for state elections." (quotation marks omitted)). In other words, by restricting Americans who reside in Colorado from exercising the same rights as Americans in other states in determining who will lead the executive branch of the federal government, the Colorado Supreme Court (and other states that may reach the same conclusion) is essentially blocking those citizens from exercising their rights.

b. If the Majority Opinion Stands, Section Three Will Be Ripe for Leveraging as a Tool to Strike Political Opponents from the Ballot

Further, the majority charts a clear path for political abuse. The Colorado Supreme Court's application of Section Three was only made possible after the majority patched together legal meaning through an amalgam of unrelated and, at times, irrelevant sources. In the end, the court's definition of "insurrection" as a "concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking [action]" is vague at best. *Anderson*, 2023 WL 8770111, at *39. The inevitable result of such a generalized and unworkable definition is that it enables courts (and secretaries of state) to loosen its meaning until cries of "insurrection" become as common as negative advertisements and smear campaigns that are near-ubiquitous in our current political discourse.

The majority's interpretation will be far more damaging in the long term than whatever former President Trump's opponents think they might prevent, because "Section 3 is powerful and facially vague, making it an especially attractive cudgel for political warfare." Lynch, supra, at 220. Broadening the Fourteenth Amendment understanding of insurrection from the bloodshed of a civil war or equivalent catastrophe will open the floodgates to tit-for-tat challenges without predictable standards, a particularly concerning result when coupled with the Colorado Supreme Court's lack of concern about adequate enforcement procedures. Section Three will transform from a tool intended to disqualify from office Confederate soldiers and their ilk who *actually engaged* in armed rebellion against the United States into a tool of election interference to be used against political opponents.

If President Trump's rhetorical culpability for January 6 qualifies, the slippery slope of challenges against politicians that will inevitably result is not difficult to imagine. Left untouched, the Colorado Supreme Court majority opinion will open the door to widespread elimination of candidates for federal and state offices, so long as courts or secretaries of state can plausibly call that candidate's previous activities as engaging in (or even providing aid or comfort to the participants of) insurrection.

i. Representative Tlaib

To start, take the recent actions of Representative Rashida Tlaib. It has already been argued that her actions on October 18, 2023—when she participated in an anti-Israel demonstration at the Capitol—amounted to an

"insurrection or rebellion" under Section Three.[5] That day, Representative Tlaib spoke at a rally, and in her remarks she criticized Israeli military actions and falsely accused Israel of an attack on a civilian hospital several days prior. Hundreds of anti-Israel protestors gathered both inside and outside of the U.S. Capitol, and then engaged in a massive disruption inside a House office building, which forced Capitol Police to maintain order and to ensure that lawmakers could safely conduct business by arresting approximately 300 people.[6] Based on her rhetoric and participation with the protest, Representative Tlaib was censured by the House of Representatives in a bipartisan vote. H.R. 845, 118th Cong. (2023).

Given these facts, if the Colorado Supreme Court's loose definition of insurrection is permitted to stand, Representative Tlaib's political opponents could file suit on the theory that Tlaib incited a coordinated effort to illegally obstruct Congressional action in an effort to stop the government from supporting Israel. In fact, Representative Tlaib was censured by the House of Representatives. H.R. 845, 118th Cong. (2023). That censure explicitly recognized that "Israel is a critical ally to the American people and to our strategic national

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5. Farnoush Amiri, *House votes to censure Rep. Rashida Tlaib over her Israel-Hamas rhetoric in a stunning rebuke*, AP News, Nov. 8, 2023, https://apnews.com/article/congress-house-censure-resolution-tlaib-8085189047a4c40f2d44ada4604aa076.

6. Rebecca Shabad & Rebecca Kaplan, *Rep. Marjorie Taylor Greene files censure resolution accusing Rep. Rashida Tlaib of inciting an insurrection*, NBC News, Oct. 26, 2023, https://www.nbcnews.com/politics/congress/rep-marjorie-taylor-greene-files-censure-resolution-accusing-rep-rashi-rcna122329.

security interests the Middle East," and that nevertheless, Representative Tlaib had engaged in the following activities: (1) "knowingly spread the false narrative that Israel intentionally bombed the Al-Ahli Arab Hospital on October 17"; (2) "published on social media a video containing the phrase 'from the river to the sea', which is widely recognized as a genocidal call to violence to destroy the state of Israel and its people to replace it with a Palestinian state extending from the Jordan River to the Mediterranean Sea"; and (3) "doubled down on this call to violence by falsely describing [that phrase] as 'an aspirational call for freedom, human rights, and peaceful coexistence'"; and (4) "calling for the destruction of the state of Israel and dangerously promoting false narratives." H.R. 845, 118th Cong. (2023).

The language in Representative Tlaib's censure could thus support the notion that she gave aid or comfort to an enemy to the United States, in violation of Section Three of the Fourteenth Amendment. Armed with these facts (and if accomplished within the confines of Michigan election law), Representative Tlaib could be prevented from appearing on any future ballot.

ii. President Biden and Vice President Harris

Similarly, state officials could be called upon to grapple with whether President Biden and Vice President Harris engaged in insurrection or rebellion for their encouragement and support of the Black Lives Matter ("BLM") riots in 2020. However spurious this argument may appear at first glance, it is true that the riots led to an

assault on the White House,[7] the injury of Secret Service agents,[8] murders at the hands of rioters, and the storming of government buildings.[9] It could be argued that this "Biden-Harris rebellion" also led to "autonomous zones," where insurrectionists declared independence from the United States Government. And according to the majority opinion, all of these issues could be sufficiently litigated in a truncated election proceeding.

This issue becomes even more acute when one considers the potential overlay of the Insurrection Act, 10 U.S.C. §§ 251– 255, which permits the president in times of insurrection to engage the U.S. military against its own citizens. During the BLM riots, if former President Trump had decided to invoke those provisions, could that have been used to bolster the claim that President Biden and Vice President Harris were disqualified from running for reelection? Applying the Colorado Supreme Court's flimsily evidentiary standard and expansive

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7. *See, e.g.*, John Bowden, *Trump was rushed to White House bunker due to breach of temporary barricades: report*, The Hill, Jun. 3, 2020, https://thehill.com/homenews/administration/501028-trump-was-rushed-to-white-house-bunker-due-to-breach-of-temporary/.

8. *E.g.*, David Marcus, *Meet The Rioting Criminals Kamala Harris Helped Bail Out Of Jail*, The Federalist, Aug. 31, 2020, https://thefederalist.com/2020/08/31/meet-the-rioting-criminals-kamala-harris-helped-bail-out-of-jail/.

9. *E.g.*, Mairead McArdle, *Biden Staff Donates to Group Paying Bail for Minneapolis Rioters*, National Review, June 1, 2020, https://www.nationalreview.com/news/george-floyd-protests-joe-biden-staff-donates-to-group-paying-bail-for-minneapolis-rioters/.

definition of what constitutes "engaging in insurrection," it appears it likely. *Anderson*, 2023 WL 8770111, at *39. It follows that the invocation of the Insurrection Act could be weaponized as a pretext to set up a political opponent for disqualification under the Fourteenth Amendment.

iii. Governor Whitmer

The career of Michigan Governor Gretchen Whitmer provides an additional illustration of how political opponents could reach back decades to pull the rug out from under incumbent politicians—all within the confines of Section Three as contrived by the Colorado Supreme Court. Governor Whitmer has spent decades in office, including as a Michigan State Senator. In 2022, a Republican gubernatorial challenger called Governor Whitmer "Michigan's Original 'Insurrectionist'" and argued that back in 2012, then-Senator Whitmer had engaged in an insurrection by aiding a massive protest to a Republican-led effort to pass a right to work law.[10]

Again, a clever recitation of the facts—and a faithful application of the majority opinion—supports a claim that Governor Whitmer is not eligible for office under Section Three. In an effort to halt government business in passing a right to work law, then-Senator Whitmer championed the protestors. Based on actual events, her political opponents could claim (and have claimed) that when the protestors could not get inside of the building, Whitmer "opened her ground-floor Capitol office window to let

10. *See* @TudorDixon, X (Jan. 6, 2022, 11:44AM), https://twitter.com/TudorDixon/status/1479161986781003780, (video at 1:12)

them in."[11] The protests were not peaceful. Because of the size and unruly behavior of the crowd that then-Senator Whitmer purportedly aided, the state Capitol building went under lockdown.[12] Because the demonstrators, or "insurrectionists," would not relent, police had to use force and "chemical munitions" to disburse and subdue the mob. Eight people were arrested.[13]

Given these events, if Section Three means what the Colorado Supreme Court claims, Governor Whitmer could be excluded from the ballot due to "insurrectionist" activities, based on a purported attempt to halt government proceedings with the force of a mob. *Anderson*, 2023 WL 8770111, at *39.

iv. The Potential Application of Section Three is Endless

Ultimately, applying the Colorado Supreme Court's sweeping and capacious definition to this example demonstrates the absurd ramifications of allowing the Colorado Supreme Court's decision to stand—it would morph Section Three of the Fourteenth Amendment into a tool for strategic gamesmanship, ever ripe for political abuse. The fact that the secretary of state position, typically charged with administration of elections in the

11. *Id.*, videoclip at 0:17.

12. Vignesh Ramachandran, *Protesters fill Michigan state Capitol over right-to-work legislation*, NBC News, Dec. 6, 2012, https://www.nbcnews.com/news/us-news/protesters-fill-michigan-state-capitol-over-right-work-legislation-flna1c7476747.

13. *Id.*

states, is a partisan position makes this concern all the more tangible. *See, e.g.*, *In re Challenges of Kimberly Rosen, et. al.*, at 4-5 (summarily denying President Trump's motion to disqualify based upon bias, despite evidence submitted by President Trump that Ms. Bellows had already concluded President Trump engaged in insurrection long before the submission of evidence or argument).

These concerns come full circle to where this brief began: "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy," *Purcell*, 549 U.S. at 4, and our democracy relies on the ability of voters, not judges or partisan election officials, to determine their leaders of choice. "The people are the best judges [of] who ought to represent them. To dictate and control them, to tell them who they shall not elect, is to abridge their natural rights." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 794-95 (internal quotation marks omitted). The unilateral authority of one election official, or state court, to strip citizens of the state of the ability to vote for their Presidential candidate of choice—in an inconsistent manner nationwide—is antithetical to the underlying principles of our democracy. The Colorado Supreme Court's attempt to restrict ballot access and prevent voters from electing the nominee of their choosing would burden "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). These rights are foundational and "rank among our most precious freedoms." *Id.*

CONCLUSION

The Colorado Supreme Court's opinion is an affront to the very democracy it purports to protect, and Mr. Meijer respectfully urges this Court to grant the relief requested by Petitioner.

Respectfully submitted,

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