No. 23-719

In the Supreme Court of the United States

DONALD J. TRUMP, *Petitioner*,

v.

NORMA ANDERSON, ET AL.

On Writ of Certiorari
to the Supreme Court of Colorado

BRIEF OF FORMER ATTORNEYS GENERAL EDWIN MEESE III, MICHAEL B. MUKASEY, AND WILLIAM P. BARR; LAW PROFESSORS STEVEN CALABRESI AND GARY LAWSON; AND CITIZENS UNITED AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

The decision under review is based on a misinterpretation of Section 3 of the Fourteenth Amendment, and would create a precedent with ruinous consequences for our democratic republic. Contrary to the Colorado Supreme Court's determination, Section 3 does not cover the office of President of the United States. It is also not self-executing. And even a cursory consideration of how such an interpretation could be applied in the future confirms how disastrous it would be to the United States' form of government. Thus, whatever one thinks of the behavior of former President Trump on January 6, 2021, the Colorado Supreme Court's decision should be reversed.

Proper interpretation of Section 3 is an issue of overriding importance to *amici curiae*. Edwin Meese III served as the seventy-fifth Attorney General of the United States after having served as Counselor to the President, and is now the Ronald Reagan Distinguished Fellow Emeritus at the Heritage Foundation. Michael B. Mukasey served as the eighty-first Attorney General of the United States and previously served as a judge on the U.S. District Court for the Southern District of New York. William P. Barr served as both the seventy-seventh and the eighty-fifth Attorney General of the United States, after

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amici curiae* or their counsel has made a monetary contribution toward the brief's preparation or submission. All parties were notified of the intent to file this brief.

having served as Deputy Attorney General, and prior to that the Assistant Attorney General of the Office of Legal Counsel. During their tenures as Attorney General, the Department of Justice steadfastly defended the rule of law with respect to the Fourteenth Amendment.

For their part, Professors Calabresi and Lawson are former Department of Justice officials as well as scholars of the original public meaning of the Constitution. Members of this Court have cited their work in the past. See, *e.g.*, *United States* v. *Vaello Madero*, 596 U.S. 159, 169 (2022) (THOMAS, J., concurring) (citing Calabresi); *id*. at 181, 185 n.1 (GORSUCH, J., concurring) (citing Lawson).

Finally, Citizens United and Citizens United Foundation are dedicated to restoring government to the people through a commitment to limited government, federalism, individual liberty, and free enterprise. They regularly participate as litigants (*e.g.*, *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310 (2010)), and *amici* in important cases in which these fundamental principles are at stake. Citizens United is a 501(c)(4) nonprofit social welfare organization, and Citizens United Foundation is a 501(c)(3) nonprofit educational and legal organization.

SUMMARY OF ARGUMENT

Whatever one thinks of the behavior of former President Trump in the wake of the 2020 election, Section 3 of the Fourteenth Amendment does not disqualify him from the presidential ballot, and it cannot do so based on the finding of a county court in Colorado that he "engaged" in an "insurrection" on or leading up to January 6, 2021.

I. Most fundamentally, Section 3 does not cover candidates for President of the United States. This is evident in Section 3's text, which omits the President, instead specifying certain offices such as Senator and Representative. Earlier versions of the proposed text included President and Vice President, but later versions excluded those offices, and instead disqualified presidential *electors* who would choose the occupants of the presidential and vice presidential offices.

Historical records, moreover, reveal that the Framers and ratifiers of the Fourteenth Amendment were not concerned that a Confederate leader could attain the presidency. They were, however, concerned that former Confederates might be elected to the House or Senate, which explains why those offices are enumerated in Section 3. Indeed, Confederate President Jefferson Davis served in the Senate until the beginning of the Civil War, and Confederate Vice President Alexander Stephens was elected to the House after the war. Winning offices in States of the former Confederacy was the only realistic risk, and Section 3 was tailored to address that concern. Media attention at the time was sufficient to ensure that

state ratifiers would be familiar with these congressional debates.

The text and structure of Section 3 confirm this reading. The text speaks to a hierarchy of public offices in descending rank order, and its reference to an "officer of the United States" low in that hierarchical list cannot include a President because an office "under the United States" and "officer of the United States" did not include the presidency as those terms were historically understood. The interpretive canons of *expressio unius* and *noscitur a sociius* buttress this conclusion, especially given the President's singular status among public offices. The descending hierarchical cascade in Section 3 also mirrors other lists of officers in the Constitution, reinforcing that, if the President were included, he would be listed first, instead of grouped with a catch-all phrase toward the bottom of the list. Congressional debates from 1799 through the Civil War show a consensus favoring this view.

II. Nor, in any event, is Section 3 self-executing.

Article II is relevant here by analogy: Article II's presidential qualifications are structured as self-executing provisions, but other Article II provisions are not, leaving textual clues as to which provisions require legislation and which do not.

The Fourteenth Amendment likewise contains both types of provisions. Several provisions, such as those in Section 1, do not require legislation for their operation, though Congress enacted legislation to expound those protections in statutes such as Title VII. But Section 3 is entirely dependent upon legislation passed pursuant to Section 5, suggested in

part by Section 3's reference to a supermajority vote needed to reverse the Section's effects.

Section 3's history also shows that it requires enabling legislation as authorized by Section 5. Debates by leading members in Congress such as John Bingham, Thaddeus Stevens, and Lyman Trumbull show a consensus view on that point, both before and after the Amendment's passage.

The only meaningful judicial pronouncement at the time took the same view: Chief Justice Chase in *Griffin's Case* wrote that only Congress could establish a framework to adjudicate Section 3 disability allegations.

And indeed, Congress did just that, passing a statute in 1870 that was partially repealed in 1894, but leaving in place the federal insurrection statute, 18 U.S.C. § 2383, which specifies that those convicted under it are disqualified from office. But President Trump has never even been charged with violating Section 2383, much less convicted under it. And, for any potential defendant, proceedings following such a charge would be governed by all the rights secured by the Fourth, Fifth, Sixth, and (for proceedings by a State) Fourteenth Amendments. Congress could also enact implementing statutes that would be civil rather than criminal, but has not done so.

III. For practical and institutional reasons, too, this Court should resist any interpretation of Section 3 that empowers partisan public officials to unilaterally disqualify politicians from the opposing party—and especially in this case, the current leader of the opposition party—from the ballot. The insurrection statute is on the books, and Congress has

not to date provided any alternative mechanism for disqualifying candidates.

The danger of the Colorado Supreme Court's approach becomes readily apparent when one considers a hypothetical in which the partisan shoe is on the other foot. If the Colorado decision were correct, the Georgia Secretary of State, a Republican, could unilaterally disqualify President Biden, a Democrat, from that swing State's ballot one day before the ballot certification deadline—perhaps finding that some of President Biden's policies were lawless in such a manner as to constitute, in the Secretary's view, an "insurrection." Other Republican officials are threatening to do just that. This Court should resist any understanding of Section 3 that permits such political gamesmanship, from either side.

ARGUMENT

I. Section 3 Does Not Disqualify Presidential Candidates from the Ballot.

The Colorado Supreme Court declared that former President Trump engaged in an "insurrection" because of his role in the events that led to the January 6, 2021, riot at the Capitol Building when the electoral votes from the 2020 presidential election were being counted, and that Section 3 therefore bars him from the presidential ballot. However, as shown below, Section 3's disqualification does not apply to someone seeking the office of President of the United States. Hence, even if the conclusion that he engaged in an insurrection were correct, President Trump cannot be

excluded from any presidential election ballot on that basis.[2]

A. Section 3's text and structure show that candidates for President are excluded from its reach.

Section 3 provides:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, 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.

U.S. Const. amend. XIV, § 3. Obviously, although the text specifies presidential "electors," as well as many other positions, as offices that one may not hold if one has "engaged in insurrection," the text does not expressly preclude such people from seeking the office of President or Vice President. Thus, if the exclusion in that Section applies to the office of President, it can

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[2] Portions of Part I of this brief, and many of the sources cited, are derived from Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteeenth Amendment* (Oct. 31, 2023, rev. Dec. 28, 2023), available at http://tinyurl.com/dykn27n2 (hereinafter "Lash").

only be because that office is deemed an "office *** under the United States." For several reasons, that reading of this phrase is not the best reading, if it is even plausible.

1. For one thing, the exclusionary text of Section 3 methodically applies in order from the highest specifically covered office to the lowest office: Section 3 first disqualifies insurrectionist Senators (which during that era, prior to the Seventeenth Amendment, were elected by state legislatures) and then Representatives in the House. Finally, Section 3 disqualifies all federally *appointed* civil or military officers who "engage" in "insurrection."

If the President were intended to be included, he naturally should be listed first and foremost. This is precisely how the President was included in the enumerated list of the early drafts of Section 3, such as those discussed in Part I.B., *supra*. Choosing not to mention the President explicitly is odd enough if the Framers meant to include him, but to do so in such a manner that he was buried indiscriminately well down the list is contrary both to political custom and (as we will see) to the drafting history of Section 3.

This careful hierarchy itself suggests that the phrase "or hold any office, civil or military, under the United States" does not apply to the President or Vice President, nor does "officer of the United States," but they instead apply only to appointed federal officers.

2. This conclusion is buttressed by the Appointments Clause of Article II, Section 2, which says the President "shall nominate, and by and with the advice and consent of the Senate shall appoint Ambassadors, other public Ministers and Consuls,

Judges of the Supreme Court, and *all* other Officers of the United States." (emphasis added). The President does not appoint himself, so obviously he cannot be an "officer of the United States" under the Appointments Clause.

The same is true of the Commission Clause of Article II, Section 3, which says that the President "shall"—*i.e.*, must, "Commission *all* the Officers of the United States" (emphasis added). No President has ever commissioned himself or his Vice President, either before or after the adoption of the Fourteenth Amendment. The President, therefore, is obviously not an "Officer of the United States" for purposes of the Commission Clause.

Finally, Article II, Section 4 provides that: "The President, Vice President and all civil Officers of the United States" shall be liable for impeachment. Note here that the text does not say, "The President, Vice President, and all *other* civil Officers of the United States." Once again, Article II does not treat the President and Vice President as being merely civil "officers," and it does not treat their positions as being merely "offices." Article II instead treats the offices of President and Vice President as a category separate and distinct from "civil Officers of the United States."

3. This conclusion is buttressed by the fact that, in 1866, the phrase "office *** under the United States"—the key phrase in Section 3—had long been a term of art. The language first appeared in the impeachment clause of Article I, § 3, cl. 7, which says that "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office *** under the United States."

That phrase was construed during the impeachment trial of U.S. Senator William Blount in 1799 by Senator Bayard, one of Blount's defenders, as follows: "The Government consists of the President, the Senate, and the House of Representatives, and they who *constitute* the Government cannot be said to be under it." *Impeachment Trial of Senator William Blount, 1799*, U.S. Senate (Speech of James Asherton Bayard, Sr., Chair of Mgrs., H. of Reps., at 2248 (Jan. 3, 1799) (emphasis added)), available at http://tinyurl.com/bdh3chwa. The Senate ultimately expelled Blount on July 8, 1797. *Expulsion Case of William Blount of Tenn. (1797)*, U.S. Senate, http://tinyurl.com/3tpm5nvu (last visited Jan. 17, 2024). However, the House also impeached Blount and the Senate held a trial, which ended in a dismissal for lack of jurisdiction. *Impeachment Trial of Senator William Blount, 1799*, U.S. Senate, http://tinyurl.com/ye22a6th (last visited Jan. 17, 2024). While the dismissal did not make clear whether it was because the Senate concluded it lacked jurisdiction over a former Senator versus whether a Senator is not subject to impeachment at all, see *id.*, "[t]he Senate voted to defeat a resolution that declared Blount was a 'civil officer' and therefore subject to impeachment," Cong. Rsch. Serv., *R46013, Impeachment and the Constitution* 17 (2023), http://tinyurl.com/ya485877 (citing 8 Annals of Cong. 2317-2318 (1799)).

Members of the Congress that wrote the Fourteenth Amendment in 1866 were still familiar with this 1799 speech by Bayard, as it had just recently been central to the floor remarks of a

prominent constitutional attorney in Congress. *Cong. Globe*, 38th Cong., 1st Sess. 329 (1863) (quoting Bayard) (remarks of Rep. Johnson). Whether or not Bayard was right that a Senator was not subject to the Article I Impeachment Clause (and thus could not be barred from holding the same office again), there is little doubt that the phrase "officer *** under the United States" was understood in 1866 *not* to include the office of President, since the presidency is one of the instrumentalities that itself "constitutes" the United States. And since the phrase "under the United States" was a legal term of art at the time, it must be given the same meaning today. See, *e.g., Roadway Exp., Inc.* v. *Piper*, 447 U.S. 752, 759 (1980); *Hamling* v. *United States*, 418 U.S. 87, 118 (1974).

4. The same conclusion follows from standard canons of textual interpretation. First is *expressio unius est exclusio alterius*: expressly including one item in a group is to exclude others not listed. *NLRB* v. *SW Gen., Inc.*, 580 U.S. 288, 302 (2017); see also Antonin Scalia & Bryan A. Gardner, *Reading Law: The Interpretation of Legal Texts* 107 (2012) (referring to this principle as the negative-inference canon). Here, Section 3 lists an array of offices, both specific and in groups, but the list does not specifically mention the President, suggesting the exclusion is deliberate.

Second is *noscitur a sociis*: under which "a word is known by the company it keeps." *Dubin* v. *United States*, 599 U.S. 110, 124 (2023). That is particularly relevant here, "'where a word is capable of many meanings in order to avoid the giving of unintended breadth.'" *Ibid.* (quoting *McDonnell* v. *United States*,

579 U.S. 550, 569 (2016)). Here, assuming the term "office *** under the United States" can reasonably bear multiple meanings, the specific enumeration of offices like Senator counsels against reading the nearly adjacent phrase "office *** under the United States" to include the higher but unenumerated office of President.

Such an interpretation would be all the more suspect because of the unparalleled role of the President in the life of the Nation. As this Court has previously emphasized, "the President's unique status under the Constitution distinguishes him from other executive officials." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 750 (1952). This Court has likewise acknowledged the "singular importance of the President's duties." *Clinton* v. *Jones*, 520 U.S. 681, 694 n.19 (1997). A structure that would single out a Senator or a Representative rather than address them together as "Congress," but then throw the President unceremoniously into a residual grab-bag phrase, is implausible. Both the President and the Vice President are *sui generis* and standalone officers in the American form of government, in some ways (for present purposes) similar to the King of England and the Prince of Wales in the British system.

All of this reinforces that the President is not an "officer under the United States." And thus it is not surprising that "no scholars [have] identified a *single example* of a ratifier describing Section Three as including the office of the President." Lash, *supra* note 2, at 5.

B. Prior drafts of Section 3 confirm that excluding the President was deliberate.

That conclusion is strongly reinforced by Section 3's drafting history.

1. For example, an early draft of Section 3 expressly listed President and Vice President as offices that would be off-limits to anyone found to have engaged in an insurrection:

> No person shall be qualified or shall hold *the office of President or vice president of the United States,* Senator or Representative in the national congress, or any office now held under appointment from the President of the United States, and requiring the confirmation of the Senate, who has been or shall hereafter be engaged in any armed conspiracy or rebellion against the government of the United States[.]

Cong. Globe, 39th Cong., 1st Sess. 919 (1866) (emphasis added).

But the words "President or vice president" were deliberately edited out of the final version of Section 3. This, together with the disqualification of presidential electors and vice-presidential electors who have engaged in "insurrection or rebellion," makes clear that the Framers of Section 3 did not intend for it to apply to those running for President or Vice President, even if they engaged in insurrection.

2. Moreover, even the author of the proposed version that named the President, when he compromised on language approaching the final version, admitted that the chief concern should be to preclude supporters of the Confederacy from "com[ing]

back and assum[ing] their places *here* again." *Cong. Globe*, 39th Cong., 1st Sess. 2505 (1866) (statement of Rep. McKee) (emphases added). That of course was a reference to serving in Congress, not to serving in the national offices of President or Vice President.

Indeed, former rebels could only realistically hope to win lower offices, predominantly in the eleven former Confederate States. The evidence does not show that any Framers or ratifiers of Section 3 were concerned that ex-Confederate President Jefferson Davis, for example, might one day successfully run for President of the United States on a nationwide ballot. See Lash, *supra* note 2, at 46-47 (collecting sources); see also, *e.g.*, *Cong. Globe*, 39th Cong., 1st Sess. 2537 (1866) (remarks of Rep. Fernando Beaman). But election as a Senator or Representative was another matter, which is why those two offices are specified in Section 3. Indeed, Jefferson Davis had previously served in Congress, concluding his service as a Senator from Mississippi in January 1861, only months before the beginning of the Civil War. See *Jefferson Davis: A Featured Biography*, U.S. Senate, available at http://tinyurl.com/yxncutuk (last visited Jan. 17, 2024).

This fear was especially understandable regarding the U.S. House of Representatives, now that the newly liberated Black Americans were rightly counted as full persons and not as three-fifths of a person. See U.S. Const. art. I, § 2, cl. 3. Consequently, the States of the former Confederacy would inevitably see an increase in representation in the House. And the concerns that Confederate leaders could find their way to Capitol Hill proved justified, as former Confederate Vice

President Alexander Stephens was elected to the House after the Civil War. See Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877*, at 196 (updated ed. 2014).

Elected lawmakers at the time knew well how dangerous such legislators could be on the floor of Congress. Republicans had recently proposed the Thirteenth Amendment to end slavery, which barely attained the required two-thirds in Congress, with most Democrats in the House ardently opposed to it. See House Vote No. 480, 38th Cong., 2d Sess. (Jan. 31, 1865), http://tinyurl.com/2p86mv96 (showing the vote tally for passage of S.J. Res. 16, a total of 119 to 56, with 84 Republicans unanimously in favor, but Democrats split with 14 in favor and 50 opposed). With this memory fresh in lawmakers' minds, and with many of the leading supporters of the Thirteenth Amendment such as Representative Thaddeus Stevens now on the Joint Committee to finalize language for a proposed Fourteenth Amendment, it was evident that the Republican majority in Congress would be intensely motivated to prevent the number of contrarian voices in Congress from increasing. That motivation would later rise to the level of a national imperative after the assassination of Republican President Abraham Lincoln, leaving Andrew Johnson—who was both a Southerner (from Tennessee) and a Democrat—as President.

Moreover, the extensive media coverage of the various drafts of Section 3 was such that the American people—and thus the state legislators who were the ratifiers of the Fourteenth Amendment—were well informed of the discussion surrounding the evolution

of the Amendment's text. Lash, *supra* note 2, at 41. This would include that some early drafts of Section 3 had mentioned barring covered individuals from becoming President, but the lawmakers who set the wording of the final version had abandoned that idea. See *ibid.* The ratifiers of the Fourteenth Amendment in the state legislatures were thus aware that "no framer had expressed any interest in binding the office of the President and no framer had described the text as having done so." *Ibid.* Instead, it was a sufficient check on the presidency that Section 3 barred rebels from casting certificates as part of the Electoral College to choose a future President. See *id.* & nn.180-181.

C. Criticism from the other side of the debate cannot withstand scrutiny.

The only evidence that the President is an "officer *** under the United States" is at best underwhelming.

First, during the Senate floor debate on Section 3, Senator (and former Attorney General) Reverdy Johnson questioned why insurrectionist Presidents are not covered by the Disqualification Clause. *Cong. Globe*, 39th Cong., 1st Sess. 2899 (1866). Senator Lot Morrill responded that the President was included within the phrase "any office, civil or military, under the United States." *Ibid.* "Perhaps I am wrong," replied Senator Johnson, adding, "I was misled by noticing the specific exclusion in the case of Senators and Representatives." *Ibid.*

This is an embarrassingly thin reed for the proponents of presidential disqualification, and if

anything, it cuts against those attempting to defend the Colorado court's decision. For one thing, Congress itself voted to strike the words "President or vice president" from Section 3. It has been decades since the Supreme Court started ignoring such floor colloquies, which are often staged for the benefit of the courts, in favor of the plain meaning of the legislative text. See, *e.g., Barnhart* v. *Sigmon Coal Co., Inc.*, 534 U.S. 438, 458 & n.15 (2002); *Bath Iron Works Corp.* v. *Director, Off. of Workers' Comp. Programs*, 506 U.S. 153, 166 (1993); see also Scalia & Garner, *supra*, at 56 (supremacy-of-text canon).

For another, Senator Johnson was speaking in a genteel fashion in a non-adversarial exchange with Senator Morrill. So for him to say, "*perhaps* I am mistaken," as he notes the "*specific* exclusion" Section 3 makes of Senator and Representative, would be a polite way of making the point that the President would likewise be explicitly mentioned for exclusion *if* the President were covered by Section 3 at all. Senator Johnson's "perhaps mistaken" comment should not be taken as supporting Senator Morrill's thoughts.

The second (and even weaker) argument is that the presidency is described in Article II as being "an office" and therefore that the President must be an "officer." But many people hold offices under the Constitution and statutes of the United States without being considered "officers of" or "under the United States." FBI agents for example hold an office and are officials, see 28 U.S.C. § 533, but they are not "officers of the United States." If they were, Congress could put them in the line of succession to the presidency. U.S. Const. art. II, § 1, cl. 6. It could also impeach them, and the

Senate could by a two-thirds vote remove them. *Id.* art. II, § 4. "Officers" of or "under the United States," and individuals who happen to hold an office, are two very different kettles of fish. The President is in the latter kettle—albeit with specific responsibilities and constraints identified in the Constitution—but not the former.

The third and weakest argument is that it would be absurd for the Disqualification Clause to disqualify all federal and state officers who engaged in insurrection or rebellion but not disqualify an insurrectionist President or Vice President. But the history cited above refutes that argument.

As noted earlier, the Framers of Section 3 were afraid of Democrat President Andrew Johnson appointing former rebels to federal executive branch offices, and they were afraid of former rebels being elected to the U.S. Senate or House of Representatives, or to being presidential or vice-presidential electors, and they were afraid of former rebels being elected to state offices. But there is no evidence they were afraid of a rebel winning a *national* presidential election, especially if insurrectionist presidential electors were disqualified. Section 3, as finally ratified, dealt precisely with the Framers' fear of pockets of rebel resistance in the South and not with a fear about what might happen in a nationwide presidential election.

For all these reasons, Section 3 simply does not apply to U.S. presidential elections.

II. Section 3 Requires Enabling Legislation Under Section 5, Such as 18 U.S.C. § 2383.

Even if the office of President were covered by Section 3, another reason the Colorado decision must be reversed is that Section 3 is not self-executing. Although several provisions in the Fourteenth Amendment are self-executing, Section 3 instead depends upon Congress' enacting enabling legislation, as Congress has done with one extant statute. But that statute has not been applied to President Trump, and so Section 3 cannot be invoked in the manner it was by the court below.

A. Article II's presidential qualifications do nothing to suggest that Section 3 is self-executing.

Some who seek to exclude President Trump from the 2024 ballot are quick to argue that Section 3 must be self-executing because other presidential requirements are. But Section 3's requirement of enabling legislation stands in sharp contrast, for example, to the Presidential Qualifications Clause of Article II, which requires no enabling legislation. That Clause requires a person to be thirty-five years old, a natural born citizen, and a fourteen-year resident of the United States, to be eligible for the presidency. U.S. Const. art. II, § 1, cl. 5. Each of those qualifications is self-executing.

But these qualifications can be readily distinguished from Clauses in Article II that *do* require legislation enacted either by Congress or state legislatures. *E.g.*, *id.* § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof

may direct ***"); *id.* § 1, cl. 4 ("The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes[.]"); *id.* § 1, cl. 6 (providing that if both the President and Vice President are unable to serve, "Congress may by law" determine presidential succession); *id.* § 2, cl. 2 (empowering the President, courts, or agency heads to appoint inferior officers as "established by law"). These provisions show that the Constitution's Framers—including the Framers of the Fourteenth Amendment—knew how to specify when a constitutional provision is self-executing.

As shown below, a careful study of the text and history of Section 3, and the structure of the Fourteenth Amendment as a whole, reveals that Section 3's prohibition should be read as dependent on Congress' passing enabling legislation, as authorized by Section 5.

B. The Fourteenth Amendment contains both provisions that are self-executing and those that require Congress to legislate.

As with Article II, even within the Fourteenth Amendment, some Sections are likewise self-executing, while others are not. For example, the Due Process Clause is self-executing. See, *e.g.*, *Caperton* v. *A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (due process requirements for a fair trial). So too is the Privileges or Immunities Clause. See, *e.g.*, *Saenz* v. *Roe*, 526 U.S. 489, 500-502 (1999) (right to interstate travel). Likewise, the Equal Protection Clause. See, *e.g.*, *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 230-231 (2023)

(*SFFA*) (right against racial preferences in college admissions). These oft-invoked rights—all situated in Section 1—are self-executing against state actors.

But the Framers wrote Section 5 into the Fourteenth Amendment for a reason. See *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997). And even provisions of the Fourteenth Amendment that are self-executing, such as the Section 1 provisions discussed above, can also be objects of congressional legislation. Congress' enacting Title VI to require private universities to abide by equal protection guarantees as a condition for eligibility to receive federal funding is one ready example. See *SFFA*, 600 U.S. at 230-231. Congress' 1972 amendments to Title VII, making it applicable to state employers by abrogating sovereign immunity, is another. See *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976).

One provision of the Fourteenth Amendment that unquestionably requires enabling legislation, however, is Section 3. Even the text of Section 3 proves that at least part of that Section requires congressional action, as it concludes by stating that, for anyone disqualified under it, "Congress may by a vote of two-thirds of each House, remove such disability."

C. Section 3's history reveals that it requires enabling legislation.

The history of Section 3 further confirms that it is not self-executing. Indeed, given the potential effects of a disqualification under Section 3, proponents of Section 3's self-executing character must bear the burden of showing that was the understanding of

those who wrote and ratified the Fourteenth Amendment. But they cannot do so.

1. Representative John Bingham of Ohio was the principal draftsman of Section 1 of the Fourteenth Amendment, Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1233 (1992), and a prominent constitutional lawyer in Congress at that time, see Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. Rev. 195, 217 (2009). And Bingham expressly raised a concern that Section 3 would be unenforceable without additional action by Congress. Lash, *supra* note 2, at 27. In response to Bingham's concern, one leading House Republican, Representative Thaddeus Stevens of Pennsylvania, agreed that there was a need for Congress to pass implementing legislation because Section 3 "will not execute itself." *Cong. Globe*, 39th Cong., 1st Sess. 2544 (1866). On the Senate side, Judiciary Committee Chairman Lyman Trumball concurred, publicly explaining that it "provides no means for enforcing itself." Lash, *supra* note 2, at 7 & n.29 (quoting remarks of Sen. Trumbull as reported in *The Crisis* at 2 (Columbus, Ohio), May 5, 1869)).

The congressional record, moreover, does not show any Member of the House or Senate disagreeing with Stevens' acknowledgement that Section 3 is not self-executing. Lash, *supra* note 2, at 27. And, although proponents of self-execution claim that this self-executing feature results from the words "No person shall be" in the Amendment itself, the version Stevens admitted was *not* self-executing contained similar

language, *i.e.,* "all persons *** shall be excluded." *Id.* at 28 (quoting multiple versions). The former is the functional equivalent of the latter, and thus neither denotes a self-executing character.

Nor was this an isolated remark subject to misinterpretation. Representative Stevens repeatedly acknowledged that Congress "must legislate to carry out many parts of" the Fourteenth Amendment, *Cong. Globe*, 39th Cong., 1st Sess. 2544 (1866), which is consistent with the idea that some provisions in the Amendment are self-executing, while others are not.

Neither was this assessment some sort of gamesmanship during the hurly-burly of congressional debate: Subsequent to Congress' proposing the Fourteenth Amendment, Representative Stevens reiterated the need for legislation to implement Section 3. 2 Kurt Lash, *Reconstruction Amendments: Essential Documents* 219 (2021).

2. This was also the assessment of the most significant judicial examination of the issue. Chief Justice Salmon Chase decided a case opining on the Fourteenth Amendment only one year after its ratification. In it, he brushed aside the idea of Section 3's being self-executing, reasoning that disqualifying a person from office by virtue of some random official issuing "a simple declaration" to that effect was "obviously impossible." *Griffin's Case*, 11 F. Cas. 22, 26 (C.C.D. Va. 1869). The Chief Justice did not consider it a close call.

To the contrary, in *Griffin's Case*, Chief Justice Chase held it was "indispensable" to implement Section 3 to have "proceedings, evidence, decisions,

and enforcements of decisions" that are "more or less formal." *Ibid.* However, the Chief Justice added that "these can only be provided for by congress," *ibid.*, undeniably concluding that Section 3 required enabling legislation pursuant to Section 5.

D. Congress enacted relevant legislation in 18 U.S.C. § 2383, but President Trump is not accused of violating that statute.

Indeed, Congress exercised its Section 5 authority when it passed enabling legislation for Section 3—in the Enforcement Act of 1870, ch. 114, 16 Stat. 140, 140-146. Congress then repealed part of that legislation twenty-four years later, as the concern of Confederate sympathizers from the Civil War injecting their agenda into congressional debates receded. See Act of Feb. 8, 1894, ch. 25, § 1, 28 Stat. 36, 36.

However, a version of one provision of the Enforcement Act of 1870 still exists today, codified in Section 2383 of Title 18. It is the federal criminal statute that defines and punishes insurrection. It reads:

> Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.

18 U.S.C. § 2383.

This statute looks exactly like what one would expect for legislation implementing Section 3. It

defines the elements of the pertinent crimes, sets forth the range of punishments, and commands that any person convicted under it be disqualified from holding an office "under the United States."

The big problem for those advocating for the Colorado decision is that President Trump has not been convicted of violating Section 2383. For that matter, he has never even been *charged* with violating Section 2383, although he has been indicted on a number of charges. One would think, given how often politicians and media pundits have bandied about the word "insurrection" over the past three years, that if the former President's adversaries believed they had sufficient evidence to convict him of that crime, they would have brought a prosecution under it. But he has not even been accused of insurrection under the only statute on point, much less convicted under it.

If he had been indicted for violating Section 2383, President Trump would also have had the benefit of the presumption of innocence, see *In re Winship*, 397 U.S. 358, 363 (1970); where the government must prove its case beyond a reasonable doubt, *id.* at 364; the right against double jeopardy (as opposed to facing repeated tribunals of various sorts), *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969); the right against self-incrimination, *Malloy* v. *Hogan*, 378 U.S. 1, 6 (1964); the right to a jury trial (instead of trial by media or by opposition-party politicians), *Baldwin* v. *New York*, 399 U.S. 66, 69 (1970); by an impartial tribunal (as opposed to partisan), *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968); the right to a speedy trial (as opposed to occurring when an election is imminent, or even underway), *Klopfer* v. *North*

Carolina, 386 U.S. 213, 221 (1967); the right to confront his accusers (as opposed to facing one-sided attacks with no meaningful opportunity to respond), *Coy* v. *Iowa*, 487 U.S. 1012, 1019-1020 (1988); and the right to challenge evidence (as opposed to having opponents cherry-pick "evidence" against the accused), *id.* at 1021. A defendant in a criminal proceeding would enjoy all these constitutional protections throughout the ordeal. And any person accused and found guilty of such a disqualification from office under 18 U.S.C. § 2383 would also then have the opportunity to appeal.

It is also plausible for Congress to establish a system for adjudicating Section 3 violations as a civil matter, rather than criminal. Perhaps the burden of proof would be a preponderance of the evidence, or clear and convincing evidence, instead of evidence beyond a reasonable doubt. And perhaps it would be decided by a majority of a jury, instead of a unanimous jury. There are other criminal procedural protections that might apply to a lesser degree, or not at all, in such a civil proceeding. But all those particulars would have to be worked out by Congress, and signed into law.

Either as a criminal prosecution or a civil matter, any would-be public official—including President Trump—would also be able to petition this Court to determine whether they are truly disqualified under Section 3 from holding a particular office. The voters would then be able to rely upon that final determination as they cast their votes.

That sort of orderly constitutional approach, governed by due process, would fully comport with

Section 3 of the Fourteenth Amendment. But that is obviously not what happened here. And that is yet another reason why President Trump cannot be found disqualified under Section 3.

III. It Would Be Highly Imprudent to Interpret Section 3 in Any Way that Empowers Partisan Officials to Unilaterally Disqualify Political Opponents from Public Office.

Whatever one thinks of President Trump's behavior on January 6, 2021, the stakes in this case are much larger than any one candidate or election. The overriding question is whether the Court will interpret Section 3 in a way that would henceforth empower partisan officials to unilaterally disqualify their political opponents from the ballot, especially the presidential ballot. For at least three reasons, such an interpretation would be ruinous for the Nation's tradition of free and fair elections.

First, without at least a definitive governing statute, it is a game that can easily be played by both sides, with virtually no substantive limits. Consider, for example, if with respect to the current presidential campaign the shoe were on the other foot—say, in Georgia. Georgia proved to be a swing State both in 2016, when President Trump was certified as the winner, and in 2020, when President Joe Biden was certified as the winner. Imagine if the Georgia Secretary of State were to unilaterally declare that President Biden's attempts to transfer countless billions of dollars of student loan debt from borrowers to other taxpayers, despite this Court's rejection of that policy, *Biden* v. *Nebraska*, 143 S. Ct. 2355 (2023), was an "insurrection or rebellion" against the United

States. Or perhaps the Georgia Secretary might conclude that President Biden's refusal to commit sufficient resources to the border with specific instructions that would seal the border against aliens entering without authorization, see *United States* v. *Texas*, 599 U.S. 670 (2023), was facilitating a foreign invasion, and is thus a form of insurrection, and on that basis disqualified Biden from the ballot in Georgia. Again, without a clear statutory definition, the types of presidential actions that might be deemed an "insurrection" are virtually limitless.

This is by no means hyperbole or scaremongering. The Missouri Secretary of State has floated the same idea. See Jane C. Timm & Amanda Terkel, *Republican Secretary of State Threatens to Kick Biden Off Ballot as Trump Payback*, NBC News (Jan. 5, 2024), http://tinyurl.com/rfd6jcht. And he is not alone. See, *e.g.*, Elizabeth Zavala, *Lt. Gov. Dan Patrick Threatens to Remove President Biden from the Texas Ballot*, Houston Chron. (Dec. 26, 2023), http://tinyurl.com/58j86yrc. One large swing State's taking such a move at the right moment might change the outcome of a presidential election, if the path followed in Colorado were implemented elsewhere.

Second, it's a game that could easily be played strategically, by both sides, in a manner that would bring even more chaos to future presidential elections. For example, suppose the Georgia Secretary, having declared President Biden an insurrectionist, declares him disqualified under Section 3 from being on the ballot in Georgia, and makes this pronouncement one day before the certification deadline for candidates to be certified for the ballot just before ballot printing

begins. One of President Trump's political opponents, Maine's Secretary of State, has taken just such unilateral action—and could easily have done so on the eve of the Maine primary. See Ruling of the Secretary of State, *In re: Challenges of Kimberley Rosen, et al. to Primary Nomination Petition of Donald J. Trump, Republican Candidate for President of the United States,* 2023 WL 9109758 (Dec. 28, 2023).

Such determined, strategic action could easily make it impossible for this Court or any other federal authority to effectively police the disqualification process—leading to further chaos in presidential elections.

Third, this is a game that could easily be played, not just by 51 Secretaries of State, but potentially by hundreds of state officials. Depending on state law, for example, the Secretary of State might have one interpretation, but the Attorney General might have another. County election officials might have a third interpretation, or even dozens more. Or a judge in any given county court might develop his own determination—as the Colorado trial judge did below—which would then need to be appealed through that State's judiciary in a race against the clock to the ballot certification deadline in that State.

In short, allowing individual state officials to disqualify a presidential candidate based on the official's own view of what constitutes an "insurrection," and whether a particular candidate has "engaged" in such an insurrection, is a recipe for chaos, with national implications that could be nothing short of ruinous. And that is a powerful practical reason to take seriously the possibility, either that Section 3

does not apply to presidential elections at all, or that it can be implemented only by a statute passed by Congress.

CONCLUSION

At least without an implementing statute passed by the people's representatives in Congress, Section 3 of the Fourteenth Amendment does not disqualify any American from running for the office of President of the United States. The judgment of the Supreme Court of Colorado must accordingly be reversed.

Respectfully submitted,

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