No. 23-719

In The
Supreme Court of the United States

DONALD J. TRUMP,
Petitioner,
v.
NORMA ANDERSON, ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF OF AMICI FLOYD ABRAMS, BRUCE ACKERMAN, MARYAM AHRANJANI, LEE C. BOLLINGER, ERWIN CHEMERINSKY, ALAN CHEN, KENT GREENFIELD, MARTHA MINOW, AND GEOFFREY R. STONE SUGGESTING AFFIRMANCE

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INTERESTS OF THE *AMICI*[1]

Amici are Constitutional and First Amendment scholars and practitioners who have an interest in protecting democracy against the exercise of state power by individuals who, by engaging in violent insurrection against the authority of the United States Constitution, have violated their oath to uphold that Constitution. Amici likewise oppose the misuse of the First Amendment as a cover for insurrectionist violence.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

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I. Summary of Argument[3]

This brief responds to arguments that provoke needless conflict between two constitutional provisions vital to democracy—the speech clause of the First Amendment and Section 3 of the Fourteenth Amendment. Those arguments assert that the First Amendment conflicts with, and must prevail over, Section 3, even though the two provisions work together in harmony to protect democracy.

Specifically, petitioner Donald J. Trump and amicus curiae James Madison Center for Free Speech ("JMC") argue that invoking Section 3 of the Fourteenth Amendment to disqualify Trump from appearing on the 2024 Colorado primary ballot would violate his First Amendment speech rights. And various

[3] Throughout this brief, unless otherwise indicated, emphases were added to quotations, while internal citations, footnotes, brackets, ellipses, and the like were omitted from them.

political-party-related amici likewise allege that Trump's disqualification would violate their First Amendment right of association.

Those arguments fail for two principal reasons.

First, they ignore the fact that Section 3 is a constitutional provision of high importance but exceedingly narrow scope and effect. Because it is a constitutional provision of high importance, the First Amendment cannot simply ride roughshod over it. Instead, the two provisions must be harmonized.

That should not be difficult: Because Section 3 is of exceedingly narrow scope and effect, it poses little threat to First Amendment speech rights. It is merely an additional qualification for office, affecting a small category of people who voluntarily assumed the burdens associated with taking an oath to support the Constitution, and who then violated that oath by lending their energies to an extraordinarily rare event—an insurrection against the Constitution of the United States. Such persons and occasions are few. And this Court's First Amendment precedents provide at least three long-recognized exceptions that avoid a needless clash between the two provisions—namely, the exceptions for incitement, speech integral to illegal conduct, and "true threats."

Second, each of the proffered First Amendment arguments calls for a dramatic and unwarranted revision of longstanding precedent. Trump's and JMC's speech arguments would strip courts of their ability to view speech in context when determining whether that speech amounts to engagement in insurrection

(the Section 3 inquiry) or was intended and likely to incite imminent lawless action (the *Brandenburg* inquiry). This sea change in the law would conveniently prevent courts from considering Trump's conduct before and after his Jan. 6 speech—and even the fact of the attack on the Capitol—when determining whether he may again seek and hold public office. Meanwhile, the political-party-related amici push the implausible notion, equally hostile to this Court's precedent, that a political party has an absolute right to place whomever it wants on the ballot, even if that means overriding explicit constitutional qualifications for holding office—not just the Section 3 qualification, but all the others as well.

Put that way, this debate may sound technical, even sterile. In truth, it concerns our nation's commitment never to repeat a dark and bloody chapter in its history. In the aftermath of a Civil War that nearly terminated the American experiment, the Fourteenth Amendment's drafters considered limiting constitutional disqualification to officials who had sided with the Confederacy. Instead, they looked to the future, when a new generation of faithless officeholders might forsake their oath to support the Constitution. The drafters made provision for that future in Section 3 of the Amendment; and the people, through their legislatures, ratified the drafters' judgment. Yet Trump and his amici ask this Court to reforge the First Amendment into a sword for eviscerating Section 3.

Both provisions are vital to the survival of free and democratic self-government, even though the First Amendment does its work every day while the

need for Section 3 arises only rarely and only in the most extreme and dire circumstances. Both provisions "have sanction in the Constitution, and it should, therefore, be the anxiety of the law to preserve both—to leave to each its proper place." *Burdick v. United States*, 236 U.S. 79, 93–94 (1915). The Court therefore should rebuff Trump's demand that one be sacrificed in favor of the other.

II. Argument

The Court should reject Trump's argument that his constitutional disqualification from appearing on the Colorado primary ballot violates his constitutional speech rights, and likewise should reject arguments by political-party-related amici that Trump's constitutional disqualification violates their constitutional rights of association.

As discussed below, those arguments fail both because they ignore Section 3's unique constitutional status and narrow scope and because they seek unwarranted and ill-advised alterations to longstanding First Amendment doctrines.

A. Constitutional disqualification will not violate Trump's First Amendment speech rights.

Trump and JMC argue that Trump's constitutional disqualification under Section 3 of the Fourteenth Amendment violates his constitutional right to engage in core political speech under the First Amendment. For all the reasons stated below, their arguments fail.

1. The Guiding Principle: Section 3 is a constitutional provision of high importance but exceedingly narrow scope.

Before addressing Trump's and JMC's arguments, it's important to consider the implications that flow from the fact that section 3 is a **constitutional provision** of **high importance** but **exceptionally narrow scope and effect**—a fact we refer to as "the Guiding Principle."

Constitutional provision. Because Section 3 imposes a *constitutional* qualification on office-holding, its impact on First Amendment rights cannot be analyzed the same way that courts analyze the speech impact of a mere statute, ordinance, or official action. Rather, Section 3 stands on an equal footing with the First Amendment—and this makes all the difference, as it suggests that the conventional exceptions to First Amendment coverage, while potentially adequate to resolve Trump's speech defense, cannot describe the outer limits of constitutional disqualification.

Trump has asserted that, regardless of its intention or effect, the entirety of his Jan. 6-related conduct constituted "core political speech"[4] that is entitled to the highest degree of First Amendment protection and that therefore cannot trigger Section 3 disqualification. But that contention effectively negates Section 3 in the vast majority of its applications—all those in

[4] Trump Br. 37.

which someone plans, foments, assists, or conspires to mount an insurrection by means that include political speech. Indeed, how could insurrectionist speech ever be deemed "***a***political"? Trump's defense therefore hinges on the unstated premise that Section 3 is itself an *unconstitutional constitutional amendment*. In another variant of that argument, Trump argues, or at least implies, that Section 3 lacks constitutionally mandated due-process protections, which can be supplied only through congressional enforcement legislation.[5]

To the extent that Trump's First Amendment defense rests on the premise that Section 3 is itself unconstitutional, it invokes a theory that American courts have never accepted and that Section 3's congressional drafters specifically rejected. "Whether on procedural or substantive grounds, the Supreme Court has rejected all claims that a duly passed constitutional amendment can be unconstitutional under the United States Constitution." Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 ARK. L. REV. 217, 243 (2016) [hereinafter *American Exceptionalism*]; *see also id*. at 243–45 (discussing those rulings). Instead, this Court has explained that "[t]he Constitution must be regarded as one instrument, all of whose provisions are to be deemed of equal validity." *Prout v. Starr,* 188 U.S. 537, 543 (1903). In other words, "provisions of the constitution are equally obligatory, and are to be equally respected." *Cohens v. State of Va.*, 19 U.S. 264, 393 (1821).

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[5] *See* Trump Br. 40.

The argument that a constitutional amendment can itself be unconstitutional was considered and soundly rejected by Section 3's congressional drafters and proponents. Opponents of Section 3 (Democrats and the most conservative Republicans in Congress) argued that, although the provision was designed to become part of the Constitution, it was *itself* an unconstitutional bill of attainder.[6] *See* Mark A. Graber, *Their Fourteenth Amendment, Section 3 and Ours*, JUST SECURITY (Feb. 16, 2021) [hereinafter *Their Fourteenth Amendment & Ours*].[7] "Their arguments anticipated what has become known as the basic structure doctrine. Contemporary courts in India and Germany ha[ve] declared that constitutional amendments are valid only when consistent with the fundamental principles of the constitution. White supremacists made the same argument in 1866." *Id*. Leading Democrats similarly maintained that "the constitutional commitment to procedural justice forbade Americans from passing a constitutional amendment that authorized bills of attainder," even if that amendment was properly passed using the Article V amendment procedures. *Id*.

But Republicans "rejected the notion of unconstitutional amendments." *Id*. Missouri Senator John Henderson "pointed out that nothing in the Constitution prohibited Americans from ratifying amendments making exceptions to the Constitution's ban on

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[6] *See* U.S. Const. art. I, § 9, cl. 3 (prohibiting bills of attainder); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977).

[7] *Available at* https://www.justsecurity.org/74739/their-fourteenth-amendment-section-3-and-ours/.

bills of attainder and ex post facto laws." *Id*. "He asserted, 'They tell us that it is a bill of attainder. Suppose it were: are the people in their sovereign capacity prohibited from passing a bill of attainder? . . . It is said that the law is ex post facto in its character; what if it is? Have not the people the right, by a constitutional amendment, to enact such a law?'" *Id*.[8]

High importance. Though merely a qualification for office and not in any sense penal, Section 3 is a qualification of the utmost importance. "After the Civil War," a scholar explains, "Congress recognized that its losers would continue to fight—if not on the battlefield, then in the political arena. So one condition for readmission into the Union was that confederate states needed to ratify the Fourteenth Amendment"—including Section 3. Myles S. Lynch, *Disloyalty and Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WILLIAM & MARY BILL OF RIGHTS J. 153, 155 (2021) [hereinafter *Disloyalty*].

Section 3 was one of the "most heavily debated" provisions of the Fourteenth Amendment during the Thirty-Ninth Congress. *Disloyalty* at 155. In the course of that debate, "what began as a temporary

[8] One reason why American courts reject the theory that amendments can be unconstitutional if they violate the Constitution's "basic structure" is that this safeguard against constitutional erosion simply isn't needed here, where Article V makes amending the Constitution so difficult. *See generally* Yaniv Roznai, *Unconstitutional Constitutional Amendments—the Migration and Success of a Constitutional Idea,* 61 AM. J. COMP. L. 657, 670–73 (2013); *American Exceptionalism* at 245–46.

disenfranchisement of every disloyal Southerner eventually became permanent disqualification from holding public office for those who betray their oath to uphold the Constitution of the United States." *Id.*; *see also Their Fourteenth Amendment and Ours*. "The oath to support the Constitution is the test. The idea being that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress." *Worthy v. Barrett*, 63 N.C. 199, 204 (emphasis omitted), *appeal dismissed sub nom. Worthy v. Comm'rs*, 76 U.S. 611 (1869).

And although Trump and JMC try to pit the two provisions against each other, in truth the First Amendment and Section 3 share the same all-important objective of fostering democracy—the former by ensuring that "debate on public issues" remains "uninhibited, robust, and wide-open," *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964),[9] and the latter by preventing oath-breakers with a proven hostility to constitutional government from holding the reins of governmental power.

Exceptionally narrow scope and effect. Section 3's inherent narrowness ensures that it poses no meaningful threat to protected speech and expression. Its scope is limited to persons who **(1)** "previously [took] an oath" as an officeholder "to support the Constitution of the United States," but instead

[9] *See also Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (observing that First Amendment is "essential to our democratic form of government" and "furthers the search for truth.").

(2) either "engaged in insurrection or rebellion against" that Constitution's authority or gave aid or comfort to its enemies. Insurrections are so rare, and this category of persons so circumscribed, that between the end of Reconstruction and 2022, Section 3 was successfully invoked only twice.[10]

Moreover, Section 3 affects only a category of persons who have chosen their status *voluntarily*. Even if they have never held the singular office of President of the United States, they are not just ordinary citizens. An oath of constitutional support represents an affirmation by individuals who are "assuming public responsibilities" that they "will endeavor to perform [their] public duties lawfully." *Cole v. Richardson*, 405 U.S. 676, 682 (1972). By taking that oath, they voluntarily restrict their own freedom to take actions, whether through conduct or speech, that could endanger the constitutional order in a moment of extreme crisis.

Section 3's *effect* is correspondingly narrow, affecting only the right to hold office. That right is and always has been a qualified one; and a state has a "legitimate interest" in "exclud[ing] from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.). Candidacy has always been limited by qualifications—including the age, citizenship, and residency qualifications that the Constitution itself imposes on the president and

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[10] *See Disloyalty* at 155–56; *Griffin v. White*, No. 22-0362 KG/GJF, 2022 WL 2315980 (D.N.M. June 28, 2022) (disqualifying county official under Section 3).

members of Congress,[11] and the Twenty-Second Amendment's prohibition on third presidential terms.

Indeed, Section 3's Congressional proponents themselves observed that, unlike an unconstitutional bill of attainder, which "impose[s] *punishments*," Section 3 "merely changed the *qualifications* for public office." *Their Fourteenth Amendment and Ours*. One Senator "pointed out that preexisting constitutional bans on officeholding were not punishments. 'Does, then, every person living in this land who does not happen to have been born within its jurisdiction undergo pains and penalties and punishment all his life,' he queried, 'because by the Constitution he is ineligible to the Presidency?'" *Id.*

* * *

As applied here, the Guiding Principle calls into play several rules that govern conflicts between legal provisions of equal rank in the hierarchy of authority.

1. Courts should try to harmonize constitutional provisions to the extent that they conflict. Because no constitutional amendment can be dismissed as being itself unconstitutional, courts are obligated to *harmonize* conflicting amendments, giving effect to each whenever possible. The obligation to harmonize constitutional provisions whenever possible is well established. To resolve conflicts between constitutional provisions, this Court and state

[11] *See* U.S. CONST., art. I, § 2, cl. 2; *id.*, art. I, § 3, cl. 3; *id.*, art. 2, § 1, cl. 5; *Disloyalty* at 153 (referring to Section 3 as "the other qualifier" for "holding any public office").

courts "have resorted to a number of canons of statutory and constitutional interpretation, including the tenet[] that the courts must harmonize conflicting constitutional provisions[.]"[12] Conflicting provisions "must be kept in accommodation," as "[b]oth have sanction in the Constitution, and it should, therefore, be the anxiety of the law to preserve both—to leave to each its proper place." *Burdick*, 236 U.S. at 93–94.

Accordingly, where two constitutional provisions are in genuine "tension" with each other, this Court "attempts to strike a balance between the values implicated by the two clauses," *United States v. Woodley*, 751 F.2d 1008, 1020–21 (9th Cir. 1985) (en banc) (Norris, J., concurring), with the objective of "harmonizing constitutional provisions which appear, separately considered, to be conflicting." *Reid v. Covert*, 354 U.S. 1, 54 (1957). Because "[i]t cannot be presumed that any clause in the constitution is intended to be without effect," *Marbury v. Madison*, 5 U.S. 137, 174 (1803), the court's duty is "to construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other." *Cohens*, 19 U.S. at 393.

In this context, harmonization entails the following steps:

Decide whether the conflict is real. That means looking to *all* existing "exceptions" to First Amendment protection to see whether applying any

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[12] Recent Case, *Constitutional Interpretation—Guinn v. Legislature of Nev., 71 P.3d 1269*, 117 HARV. L. REV. 972 (2004).

of them could avoid the conflict. Recent judicial applications of Section 3, including Colorado's, have looked exclusively to the *Brandenburg* exception; but at least two other exceptions—for speech integral to illegal conduct and "true threats"—have the potential to "solve" this case. *See* Part II.A.3., below.

Avoid using the First Amendment to gut Section 3. The Guiding Principle compels the recognition that some speech that might be protected in other contexts may be unprotected when that speech amounts to "engag[ing] in insurrection" under Section 3 and was made by a person who previously swore an oath of office to support the Constitution.

Accordingly, when applying First Amendment doctrines in a Section 3 case, a court should look not only to the contours of those doctrines but also to the Guiding Principle to ensure that the proposed application of First Amendment law does not undermine Section 3's democracy-preserving purpose. And this Court's vigilance should be heightened where—as here—a party proposes major alterations to First Amendment law in an apparent bid to evade Section 3 disqualification. The Guiding Principle thus operates as a check on the Court's First Amendment analysis, and as a tie-breaker when the Court is in doubt about whether to accept a claimed First Amendment defense to disqualification.

2. Where harmonization is impossible, courts may give precedence to later-enacted and more-specific provisions. In the unlikely event that harmonization fails to resolve the case,

Section 3 is likely to prevail under either or both of two interpretive canons:

A later enactment prevails over a conflicting earlier one. "[I]t is in the very nature of constitutional amendments" that new provisions "supersede, displace, qualify, adjust, correct, or simply must be considered to satisfy earlier constitutional rules." William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 1, 49 (2024) (forthcoming) [hereinafter *Sweep and Force*].

A specific provision prevails over a general one.[13] Section 3 is of exceptionally narrow scope and effect. This means not only that Section 3 is less worrisome from a speech perspective but also that, in the event of a genuine and irreconcilable conflict with the First Amendment, Section 3 should prevail.

2. To give proper effect to both Section 3 and the First Amendment, the Court should reject Trump's and JMC's novel arguments for rewriting the *Brandenburg* exception.

Trump and JMC propose novel alterations to the *Brandenburg* exception as a way to neutralize Section 3. Under the Guiding Principle, and for all the other reasons stated below, the Court should reject those alterations.

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[13] *See Fourco Glass Co. v. Transmirra Prod. Corp.,* 353 U.S. 222, 228–29 (1957).

a. Speech and conduct occurring before and after the impugned speech must be considered under Section 3 and *Brandenburg*.

Under *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), the First Amendment does not protect speech that is both "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action." *Id*. at 447.

Trump and JMC both assail the CSC's use of "context" when applying *Brandenburg*. Trump argues that the Court should ignore what occurred immediately ***after*** the Jan. 6 speech—namely, the attack on the Capitol—because "[t]he *Brandenburg* standard does not turn on whether violence actually occurs in response to a person's speech."[14] Likewise, Trump and JMC both argue that the Court ***also*** should ignore what occurred ***before*** the Jan. 6 speech—including Trump's "statements and tweets leading up to the events of January 6, 2021,"[15] his "history of courting extremists and endorsing political violence as legitimate and proper," and "his efforts to undermine the legitimacy of the 2020 election results and hinder the certification of the Electoral College results in Congress."[16] And Trump adds that courts may examine evidence of the speaker's intent only for the purpose of *rebutting* liability.[17]

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[14] Trump Br. 37.

[15] Trump Br. 36.

[16] Pet.App.106a (partially quoted in JMC Br. 23).

[17] Trump Br. 38.

It's easy to see why Trump and JMC want to strip Trump's Jan. 6 speech of any context, because that context—what happened in the months before the speech and in the hours afterward—is what confirms that Trump engaged in an insurrection.[18]

The Guiding Principle makes short work of Trump's contention that it doesn't matter whether violent action followed on the heels of his Jan. 6 speech. That violence, coupled with Trump's broader efforts to overturn the election, is what *constituted* the requisite "insurrection" under Section 3. Without recourse to facts about post-speech violence, a court would have no way to assess the core issue whether Trump engaged in an insurrection. And if *Brandenburg* somehow blocked courts from considering such facts in constitutional-disqualification cases, the First Amendment would completely overwhelm and effectively expunge Section 3. That's not harmonization—it's obliteration, and it's not how this Court approaches purported conflicts between constitutional provisions.

In fact, however, Section 3 and *Brandenburg* are easily harmonized, because *both* require a searching review of the full context surrounding Trump's Jan. 6 speech. As this Court explained just last year,

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[18] That also appears to be the thinking behind JMC's argument that the CSC took the inciting language in Trump's Jan. 6 speech out of context while ignoring its peaceful, patriotic language. JMC Br. 24–28. That argument, too, hinges on ignoring the speech's broader context, including Trump's "will be wild!" tweet beforehand, the violence that followed the speech, and Trump's unwillingness for several hours to do anything about it.

incitement under *Brandenburg* "inheres in *particular words used in particular contexts*[.]" *Counterman v. Colorado*, 600 U.S. 66, 76 (2023). Accordingly, this Court has "not permitted the government to assume that every expression of a provocative idea will incite a riot, but [has] instead *required careful consideration of the actual circumstances surrounding such expression*[.]'" *Texas v. Johnson*, 491 U.S. 397, 409 (1989). Indeed, this Court once characterized *Brandenburg* as a decision "*reviewing the circumstances surrounding* [a] rally and speeches by [the] Ku Klux Klan." *Id.*

That characterization was accurate. The defendant in *Brandenburg* was prosecuted under Ohio's criminal-syndicalism law for giving two incendiary speeches at Ku Klux Klan meetings. Both speeches denigrated Blacks and Jews and advocated sending them back to Africa and Israel, respectively. One speech advocated taking "revengeance" if Congress and the Supreme Court continued to "suppress the white, Caucasian race," and announced plans for the Klan to march on Congress and elsewhere. 395 U.S. 446–47.

Those were the only actual words reported in the Court's decision; and if Trump and JMC were right about the law, no other facts need have been recited. But the decision instead placed those words in context by relating other facts about the setting, what the participants were doing, and even what clothes the defendant wore:

- The defendant had telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to Ku Klux

Klan "rally" to be held at a farm in Hamilton County, Ohio (where, presumably, no targets of the Klan's racist ire were likely to be present and vulnerable to immediate attack).

- A film of the first speech showed 12 hooded figures, some armed, gathered around a large wooden cross that they ritually burned.

- The defendant was wearing Klan regalia as he spoke.

- In a film of the second speech, some of the six hooded figures carried weapons, but the speaker did not. 395 U.S. at 446.

Viewing the defendant's words in that context, the court concluded that his speech did not qualify as unprotected advocacy "directed to inciting or producing imminent lawless action and likely to incite or produce such action." *Id*. at 447–48.

This Court's post-*Brandenburg* incitement cases have continued to examine the full context, not merely the words, of the speech in question. In *N.A.A.C.P. v. Claiborne Hardware Co*., 458 U.S. 886 (1982), white merchants sued the N.A.A.C.P., its Field Secretary Charles Evers, and others for damages allegedly arising from a civil-rights boycott of their businesses. *Id*. at 889–92. Judgment was entered against the N.A.A.C.P. based on speeches made by Evers, who told an assembly of Black people on April 1, 1966 that "they would be watched," that "blacks who traded with white merchants would be *answerable to him*," and that "any 'uncle toms' who

broke the boycott would 'have their necks broken' by their own people." *Id.* at 900 n.28 (emphasis in original). On April 19, 1969, Evers gave another speech stating that "boycotters would be 'disciplined' by their own people and warn[ing] that the Sheriff could not sleep with boycott violators at night." *Id.* at 902. And two days later, Evers gave yet another speech in which he stated, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.*

Again, if Trump's and JMC's view of the law were correct, Evers' words would have been all the Court needed to describe when analyzing whether Evers' speech fell within the *Brandenburg* exception.

Instead, the Court observed that, as part of its "special obligation" to "examine critically the basis on which liability was imposed," it must "examine for [itself] the statements in issue *and the circumstances under which they were made*" to see whether they warranted First Amendment protection. *Id.* at 915 & n.50. While noting "the passionate atmosphere in which [Evers'] speeches were delivered," the Court ultimately relied on the *absence of subsequent violence* to conclude that "[t]he emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in *Brandenburg*." *Id.* at 928. The Court observed that, *"[i]f that language had been followed by acts of violence*, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct." *Id.* at 928. But the facts showed that any violence "occurred weeks or months after the April 1, 1966 speech," while none occurred after the 1969 speeches.

Id. In addition, the Court's decision featured page after page of background detail concerning the circumstances in which Evers' words were uttered. *See id*. at 898–906; *see also Hess v. Indiana*, 414 U.S. 105, 106, 109 (1973) (concluding, based on "events leading to" speaker's conviction, that "he was [not] advocating . . . any action").

In light of these precedents, Trump's and JMC's arguments for barring consideration of prior and subsequent speech and conduct are insupportable.

b. The Colorado Supreme Court's references to expert testimony furnish no basis for reversal.

In yet another assault on the use of "context," Trump contends that the Colorado Supreme Court ("CSC") botched its *Brandenburg* analysis by relying on Professor Peter Simi's expert testimony to plumb the subjective "intent" behind Trump's speech.[19]

But the CSC *didn't* disqualify Trump based solely on the subjective intent behind his speech. Nor did the CSC rely solely on Professor Simi's testimony to determine that intent. Rather, the CSC cited to Simi's testimony as evidence of what Trump's words *objectively meant* to his Jan. 6 audience—a different inquiry. The objective meaning of speech to an audience obviously is relevant to determining whether someone "engaged," by means of that speech, in an "insurrection" within the meaning of Section 3.

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[19] Trump Br. 37–38.

Under *Brandenburg*, too, evidence of the objective meaning of speech obviously can be relevant in determining whether the speech was "likely" to incite imminent lawless action—and that's exactly the purpose for which the CSC used Professor Simi's testimony.[20] Trump cites no authority holding that a court is constitutionally prohibited from using expert testimony to help it determine the objective meaning of speech for purposes of applying *Brandenburg*, and we know of no such authority. Courts of course look to expert evidence of special meanings all the time—e.g., to clarify a "usage of trade" in a contract or the meaning that a patent's technical terms would have for a person of skill in the relevant art.

Moreover, the CSC did not slavishly adopt Simi's interpretation but also relied on the trial court's independent analysis of Trump's words and of the context in which the words were spoken.[21] And the trial court found all the facts, including the meaning of Trump's words, by "clear and convincing evidence."[22]

Trump and JMC also argue without authority that under *Brandenburg*, evidence of intent only works in one direction—to the defendant's benefit.[23] Again, they're wrong. In *United States v. White*, 610 F.3d 956 (7th Cir. 2010), for example, the court held that under *Brandenburg*, the jury in a criminal-solicitation case would be entitled to infer—based on

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[20] *See* Pet.App. 112a.

[21] *See* Pet.App. 113a.

[22] *See* Pet.App. 8a, 14a, 16a n.2, 243a.

[23] Trump Br. 38; JMC Br. 21.

evidence about a neo-Nazi website's readers and their relationship with the defendant—that the defendant's website post "was a specific request [for violent action] to [his] followers who understood that request and were capable and willing to act on it." *Id*. at 962.

Trump also faults Professor Simi's testimony for focusing improperly on Trump's "identity."[24] Here the Guiding Principle again sheds light. Identity is an *inherent aspect* of applying Section 3. To be disqualified, an individual must possess a very specific and narrowly defined "identity": He or she must be someone who "previously [took] 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." Few can claim that identity; indeed, whether Trump himself qualifies as an "officer of the United States" is an issue before this Court. If *Brandenburg* somehow banished any consideration of the speaker's "identity" in constitutional-disqualification cases, it would, again, effectively obliterate Section 3.

Under *Brandenburg*, too, the speaker's identity may well be relevant, as it could influence whether the speech in question was "likely" to incite imminent lawless action. Can anyone doubt that Trump's "identity" as President of the United States (and as the candidate whose reelection was allegedly stolen) made an imminent and lawless response to his speech far more "likely"? Indeed, *who else* could have stirred the crowd

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[24] Trump Br. 37–38.

to such action? To say, as Trump does, that his words would have been viewed as "entirely benign" had they come from any other person[25] is to miss the point that *his identity as the President* **(a)** brought him within the narrow ambit of Section 3 and also **(b)** made his speech far more "likely" to incite imminent lawless action and thus to fall within the *Brandenburg* exception. Trump's complaint that he is being penalized for his "identity" echoes his rhetorical cries of political and personal victimization more than it supports any analysis of Section 3 or the First Amendment.[26]

c. Trump's and JMC's speech arguments, taken together, would cripple the courts' ability to adjudicate incitement cases.

It's dismaying to consider the combined effect that Trump's and JMC's speech arguments would have if accepted. Both assert that a court can't consider *speech by the speaker* that *preceded* the impugned speech. Trump additionally asserts that a court can't consider any *lawless action* that *followed* the impugned speech. And both assert that a court can't consider *expert testimony* to help interpret what the impugned speech meant to its intended audience.

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[25] Trump Br. 38.

[26] If Trump is arguing that Professor Simi's testimony constituted improper "character evidence," that argument fails for the same reason: Simi testified about the objective meaning that Trump's audience attributed to his words, not about Trump's character.

The collective import of all this advice is clear: When deciding whether speech either constitutes engagement in an insurrection for Section 3 purposes or falls within the *Brandenburg* exception, courts should put on blinders, view that speech in isolation, and forgo some of the most powerful tools for determining what the speech meant and whether it was directed to inciting, and likely to incite, imminent lawless action.

The thoroughly decontextualized *Brandenburg* standard that Trump and JMC propose would result in absurdity. Consider this hypothetical: A white nationalist (let's call him "Dolph") likes to end his public speeches with the admonishment, "Remember: When you leave here, don't be mean, use your words—*all 14 of them!*" Each time he says this, a violent racist attack immediately ensues, because Dolph's audiences know something that most people do not—namely, that the phrase "14 words" is shorthand for the white-supremacist motto "we must secure the existence of our people and a future for white children." White-nationalist chat rooms soon fill up with memes superimposing the words "don't be mean, use your words!" on pictures of concentration camps, burning synagogues, and the like.

Thirty days before giving another speech, Dolph posts: "Come hear me talk about the Jews at 1:30 pm on February 28th at 110 High Street . . . ***right next door to Temple Beth Israel.*** And as always, remember: Don't be mean, ***use your words!***" A month later, Dolph delivers an antisemitic conspiracy-theory speech that, though devoid of literal calls for violence, ends with the words, "Now remember: When you

leave here, don't be mean—*use your words!*"; and immediately afterwards, rampaging audience members damage and deface Temple Beth Israel.

Under Trump's and JMC's view of the law, a court initially can *only* look at the literal words of Dolph's speech, devoid of any context. The court then may consider the history of violent reactions to his speeches *only* if it concludes that the advice "don't be mean, use your words," when delivered as part of an antisemitic speech otherwise devoid of calls to violence, nevertheless encouraged the use of violence. And the court is likewise barred from using expert evidence to clarify what "don't be mean—use your words!" has come to mean in white-nationalist circles.

That is preposterous. This doctrinal overhaul would shrink the *Brandenburg* exception to the vanishing point by extending First Amendment protection to speech that, viewed properly in context, is plainly a direct call for immediate violence. And it would make it nearly impossible to prosecute such speech as long as the speaker lets others commit the violence. Relatedly, this doctrine could eviscerate a number of federal statutes that punish crimes committed by means of speech. *See* Part II.A.3.a., below.

3. Trump's course of conduct and speech also lack First Amendment protection under the integral-speech and true-threat exceptions.

When harmonizing Section 3 and the First Amendment by avoiding needless conflicts between them, the Court also should consider the long-

recognized First Amendment exceptions for "speech integral to illegal conduct" ("the integral-speech exception") and "true threats."

a. Trump's speech was "speech integral to illegal conduct."

Under the integral-speech exception, "[s]pecific criminal acts are not protected speech even if speech is the means for their commission." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). That exception applies here, depriving Trump of a First Amendment defense to Section 3 disqualification.

"Speech intended to bring about a particular unlawful act has no social value; therefore, it is unprotected." *United States v. Hansen*, 599 U.S. 762, 783 (2023). This Court has long rejected "the contention that conduct [that is] otherwise unlawful is always immune from state regulation [merely] because an integral part of that conduct is carried on by" means of speech. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). Instead, it repeatedly has held that making a "course of conduct" illegal "has never been deemed an abridgment of freedom of speech . . . merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Cox v. L.A.*, 379 U.S. 559, 563 (1965). Thus, "[i]t rarely has been suggested that the constitutional freedom for speech . . . extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *N.Y. v. Ferber*, 458 U.S. 747, 761–62 (1982). "Put another way, speech is not protected by the First Amendment when it is the very vehicle of the crime

itself." *United States v. Rowlee*, 899 F.2d 1275, 1278 (2d Cir. 1990).

"[W]hile one must use some caution about unduly expanding [the integral-speech exception], conspiracy and solicitation are at its core." *Sweep & Force* at 59. Thus, "efforts to steal elections, to pressure state officials to manufacture votes, to pressure other officials (such as the Vice President) to violate their constitutional duties in service of a constitutional coup—would all be unprotected by the First Amendment." *Id*. "To the extent that those activities are swept up by Section 3, there would be no conflict." *Id*.

Conspiracy and solicitation "in service of a constitutional coup" inevitably invite violence. That was the case here, where Trump's electoral machinations culminated in a violent attack on the Capitol. Fortunately, a variety of federal criminal statutes outlaw speech that encourages, induces, or furthers a conspiracy to take, violent action.[27] Such speech garners no First Amendment protection, as demonstrated by the fact that courts have upheld federal criminal-conspiracy and criminal-solicitation statutes against First Amendment challenges similar to Trump's. *See, e.g., United States v. Rahman*, 189 F.3d 88, 114–15 (2d Cir. 1999). "Words of this nature—ones that instruct, solicit, or persuade others to commit crimes of violence—violate the law and may be properly prosecuted regardless of whether they are uttered in

[27] *See* 1 SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 10.35, at 10-42.30–10-42.31 (2021) (listing crimes employing speech).

private, or in a public speech," or even "in administering the duties of a religious ministry." *Id*. at 117.

As the *Rahman* court observed, numerous federal criminal statutes pass muster under the First Amendment despite describing crimes "characteristically committed through speech," *Rahman*, 189 F.3d at 117, including the use of "conspiratorial or exhortatory words" to facilitate "preparatory steps towards criminal action." *Id*. at 116. *See, e.g.*, 18 U.S.C. §§ 2(a), 37, 241*, 371*, 373(a), 1512(c)(2) & (k)*, 1751(d), 1951 & 2384; 21 U.S.C. § 846.[28]

The CSC's decision recites copious evidence capable of supporting a finding that Trump's speech is speech integral to one or more federal crimes of established constitutionality.[29] Accordingly, the First Amendment never comes into play, and Trump has no First Amendment defense.

b. Trump's speech was a "true threat."

Speech that triggers Section 3 disqualification also may fall within the "true threat" exception, which denies First Amendment protection to "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359–60 (2003).

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[28] Asterisks denote statutes that Trump has been charged with violating. *See* https://www.courtlistener.com/docket/67656604/united-states-v-trump/.

[29] *See* Pet.App. 106a–110a.

To prove up this exception, the government must show that the defendant "consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Counterman*, 600 U.S. at 69.

Trump left no doubt that he "mean[t] to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"[30]—namely, that he intended at a minimum to incite his supporters to prevent legislators, through threats of violence, from voting to certify the presidential election. In view of the events of Jan. 6, legislators "who hear[d] or read the threat [could] reasonably consider that an actual threat ha[d] been made." *United States v. Wheeler*, 776 F.3d 736, 743 (10th Cir. 2015). For example, the trial court found that Trump's tweet at 2:24 pm on Jan. 6, stating that the Vice President "didn't have the courage to do what should have been done," was interpreted by Congressman Eric Swalwell as "painting a 'target' on the Capitol and threatening the Vice President and their 'personal safety and the proceedings' to certify the election."[31]

There can be equally little doubt that Trump "consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Counterman*, 600 U.S. at 69. For example, the trial court found that on Jan. 6, Trump not only delivered a speech that "was intended as, and was

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[30] *Virginia*, 538 U.S. at 359–60.

[31] Pet.App. 235a.

understood by a portion of the crowd as, a call to arms,"[32] but thereafter "ignored pleas to intervene and instead called Senators urging them to help delay the electoral count. When told that the mob was chanting 'Hang Mike Pence,' Trump responded that perhaps the Vice President deserved to be hanged. . . . Trump also rebuffed pleas from Leader McCarthy to ask that his supporters leave the Capitol[.]"[33]

Trump's violent, incendiary speech calling on others to violate the law is not the kind of speech afforded First Amendment protection. Nothing in the First Amendment should inhibit this Court from carrying out its constitutional duty to disqualify Trump from appearing on Colorado's 2024 Republican presidential-primary ballot.

B. Constitutional disqualification cannot violate a political party's First Amendment right of association.

Several political-party-affiliated amici argue that they have a First Amendment associational right that overrides Section 3's constitutional qualification for holding office and thus requires Colorado to place Trump on the primary ballot. Specifically, these amici argue that the CSC's decision violates the associational right of political parties to place whomever they want on the ballot and of voters to vote for whomever they wish.

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[32] Pet.App. 229a.

[33] Pet.App. 237a.

The Guiding Principle settles this issue: Section 3 is a constitutional provision of high importance. Here, any burden that the CSC's decision imposes on the Republican Party's associational rights is not one merely deemed necessary by a state legislature but one inscribed in the national constitution itself and of equal dignity with the First Amendment. If the First Amendment associational rights of political parties and voters could override the constitutional candidate qualification of Section 3, it likewise could override all the other constitutional qualifications for holding the office of president—i.e., the requirements that the individual was born in the United States, has resided here for 14 years, and has not previously served two terms as President.

No party has an associational "right" to ignore these constitutional requirements. And it would be completely dysfunctional to hold that a party has an associational or expressive right to mislead voters by placing an ineligible candidate on the ballot who, after winning the election, would be constitutionally barred from taking office.

Guiding Principle aside, this Court ended amici's associational-rights argument decades ago in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), where it held that a political party's First Amendment right of association could not prevail over a state's interest in protecting ballot integrity.

The candidate in question was barred by Minnesota's "anti-fusion law" from being listed on the state's primary ballot as a candidate of the New Party, because he already had registered to be listed as a

candidate of a different party. The Court upheld the law, concluding that the burden that the law imposed on the New Party's associational rights was "not severe," as the law did not "directly limit the party's access to the ballot" (the party could nominate someone else) or seek to regulate parties' "internal structure, governance, and policymaking." *Id.* at 363.[34] The Court rejected the notion that a party is "absolutely entitled to have its nominee appear on the ballot as that party's candidate," because, among other things, "[a] candidate might be ***ineligible for office***[.]" *Id.* at 359.[35] And in weighing the state's asserted interests against the New Party's associational rights, the Court acknowledged that "[s]tates certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes" and "may prevent frivolous or fraudulent candidacies." *Id.* at 364–65.

For all these reasons, amici's associational-rights arguments fail.

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[34] By contrast, amici cite cases striking down state laws that *did* seek to regulate the internal structure, governance, policymaking, and political expression of political parties or that limited their access to the ballot. *See, e.g., Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214 (1989); *Tashijian v. Republican Party of Conn.*, 479 U.S. 208 (1989).

[35] The Court's use of the phrase "ineligible for office" refutes any attempt to distinguish *Timmons* on the ground that, unlike here, the New Party's preferred candidate remained on the ballot, albeit in association with a different party. A candidate "ineligible for office" cannot appear on the ballot in association with ***any*** party.

III. CONCLUSION

For all the reasons stated above, the Court should hold that Donald Trump has no First Amendment defense to constitutionally mandated disqualification from appearing on the 2024 Colorado Republican presidential-primary ballot.

Respectfully submitted,

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