

No. 23-719

IN THE
Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

NORMA ANDERSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

**BRIEF FOR *AMICI CURIAE* FORMER
REPUBLICAN MEMBERS OF CONGRESS
IN SUPPORT OF RESPONDENTS**

FAITH E. GAY
Counsel of Record
TEMIDAYO AGANGA-WILLIAMS
BABAK GHAFARZADE
MASHA SIMONOVA
ADAM GOULD
ANNA NABUTOVSKY
SELENDY GAY PLLC
1290 Avenue of the Americas
New York, NY 10104
(212) 390-9000
fgay@selendygay.com

*Counsel for Amici Curiae Former
Republican Members of Congress*

327116



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. Congress’s Constitutional Role Is to Effectuate
the Peaceful Transition of Presidential Power ... 5

II. Trump Engaged in Insurrection Against the
U.S. Constitution 11

 A. The Trial Record Established that Trump
 Engaged in Insurrection..... 12

 B. There is Bipartisan Agreement that Trump
 Engaged in Insurrection..... 14

III. Disqualification is a Democratic Remedy for
Insurrection..... 18

IV. Post-election Disqualification of the President-
elect Would Create Chaos and Invite Another
Insurrection..... 21

 A. Post-election Enforcement of Section 3
 Would Disenfranchise Millions of Voters
 and Lead to Chaos 23

B. Post-election Enforcement of Section 3 by Congress Would Make It a Target of Political Violence	24
CONCLUSION	26

TABLE OF AUTHORITIES

	Page(s)
 Cases	
<i>Chiafalo v. Washington</i> , 140 S. Ct. 2316 (2020).....	11
<i>Trump v. Thompson</i> , 20 F.4th. 10 (D.C. Cir. 2021), <i>cert.</i> <i>denied</i> , 142 S. Ct. 1350 (2022).....	4
<i>U.S. Term Limits, Inc. v. Thornton</i> , 514 U.S. 779 (1995).....	19
 Constitution	
U.S. CONST. amend. XII	9, 11
U.S. CONST. amend. XIV, § 3	1, 5, 12, 18, 19, 20, 21, 22, 23, 24, 26
U.S. CONST. art. 2.....	9, 11
 Statutes	
3 U.S.C. § 15(b)(1)	9
3 U.S.C. § 15(d)(2)(B)(ii).....	9

Other Authorities

167 Cong. Rec. H172 (daily ed. Jan. 13, 2021) (statement of Rep. McCarthy)	17
167 Cong. Rec. S26 (daily ed. Jan. 6, 2021) (statement of Sen. Romney)	18
167 Cong. Rec. S31 (daily ed. Jan. 6, 2021) (statement of Sen. Graham)	17
167 Cong. Rec. S729 (daily ed. Feb. 13, 2021) (statement of Michael Van der Veen).....	14
167 Cong. Rec. S735 (daily ed. Feb. 13, 2021) (statement of Sen. McConnell)	17
<i>About Traditions & Symbols Washington’s Farewell Address, U.S. SENATE, https://www.senate.gov/about/traditions-symbols/washingtons-farewell-address.htm.....</i>	<i>7</i>
Cong. Globe, 39th Cong. Sess. 2918 (May 31, 1866).....	20

<i>Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by Members of Congress, CONG. RSCH. SERV.</i> (updated Dec. 8, 2020), https://sgp.fas.org/crs/misc/RL32717 . pdf.....	10
<i>Democrats Challenge Ohio Electoral Votes, CNN (Jan. 6, 2005),</i> https://www.cnn.com/2005/ALLPOLITICS/01/06/electoral.vote.1718/	10
Final Report, Select Comm. to Investigate the January 6th Attack on the United States Capitol, H.R. Rep. No. 117-663, 117th Cong., 2d Sess. (2022).....	15
<i>General George Washington Resigning His Commission, ARCHITECT OF THE CAPITOL,</i> https://www.aoc.gov/explore-capitol-campus/art/general-george-washington-resigning-his-commission	6

George Washington, <i>Farewell Address</i> (1796), NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/historic-document-library/detail/george-washington-farewell-address-1796	7
H.R. 503, 117th Cong. § 3(1) (2021).....	15
<i>Inaugural Address: Jan. 20, 1981</i> , REAGAN FOUND., https://www.reaganfoundation.org/media/128614/inaguration.pdf	8
Peter Stone, 'Openly Authoritarian Campaign': <i>Trump's Threats of Revenge Fuel Alarm</i> , GUARDIAN (Nov. 22, 2023), www.theguardian.com/us-news/2023/nov/22/trump-revenge-game-plan-alarm	25
Sara Georgini, <i>How John Adams Managed a Peaceful Transition of Presidential Power</i> , SMITHSONIAN MAG. (Dec. 7, 2020), https://www.smithsonianmag.com/history/how-john-adams-managed-peaceful-transition-presidential-power-180976451/	8

Staff Rep. of S. Comm. on Homeland Sec. & Govt'l
Affs. & S. Comm. on Rules & Admin., Examining
the U.S. Capitol Attack: A Review of the Security,
Planning, and Response Failures on January 6,
117th Cong. (2021)..... 15

Thomas Fleming, *The Most Important Moment in
American History*, HIST. NEWS NETWORK,
<https://historynewsnetwork.org/article/42438> 6

U.S. Gov't Accountability Off., *Capitol Attack: Fed-
eral Agencies Identified Some Threats, But Did
Not Fully Process and Share Information Prior to
January 6, 2021* 16

INTEREST OF AMICI CURIAE¹

Amici curiae are former Republican members of Congress who swore solemn oaths to support and defend the U.S. Constitution against all enemies, foreign and domestic.

Reflecting their experience, *amici* have an interest in ensuring that the unprecedented attack on Congress on January 6, 2021 is correctly viewed as an insurrection against the Constitution; that this shameful aberration from Congress's historic role in the peaceful transfer of power does not repeat itself; that the Constitution, with all of its requirements, is enforced; and that Congress is not made the target of further political violence.

Upholding the rule of law and defending Congress from future insurrections requires enforcing Section 3 of the Fourteenth Amendment without fear or favor and disqualifying all oath-breaking insurrectionists from holding office.

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*'s counsel made a monetary contribution to its preparation or submission.

Amici are as follows:

Rod Chandler served as the United States Representative from Washington's 8th Congressional District from 1983 to 1993.

Tom Coleman served as the United States Representative from Missouri's 6th Congressional District from 1976 to 1993.

David F. Emery served as the United States Representative from Maine's 1st Congressional District from 1975 to 1983.

Wayne Gilchrest served as the United States Representative from Maryland's 1st Congressional District from 1991 to 2009.

Jim Greenwood served as the United States Representative from Pennsylvania's 8th Congressional District from 1993 to 2005.

Bob Inglis served as the United States Representative from South Carolina's 4th Congressional District from 1993 to 1999 and from 2005 to 2011.

John LeBoutillier served as the United States Representative from New York's 6th Congressional District from 1981 to 1983.

Scott Rigell served as the United States Representative from Virginia's 2nd Congressional District from 2011 to 2017.

Reid Ribble served as the United States Representative from Wisconsin's 8th Congressional District from 2011 to 2017.

Peter Smith served as the United States Representative from Vermont's at-large Congressional District from 1989 to 1991.

Dave Trott served as the United States Representative from Michigan's 11th Congressional District from 2015 to 2019.

Joe Walsh served as the United States Representative from Illinois's 8th Congressional District from 2011 to 2013.

SUMMARY OF THE ARGUMENT

On January 6, 2021, a violent mob mounted an unprecedented attack not just on the U.S. Capitol building and members of Congress, but on the Constitution itself. The attack marked the first time in U.S. history that the peaceful transfer of presidential power according to law was disrupted by violence inspired, incited, and encouraged by the defeated incumbent

president himself.² It also “marked the most significant assault on the Capitol building since the War of 1812.” *Trump v. Thompson*, 20 F.4th. 10, 18–19 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 1350 (2022). The mob threatened to kill government officials, including Vice President Mike Pence (then acting as president of the Senate) and House Speaker Nancy Pelosi, and forced all members of Congress to halt their constitutional duty to certify results of the 2020 presidential election. If the mob had achieved its ultimate goal of keeping Trump in office beyond the end of his term, it would have thrown the nation into a constitutional crisis and brought an end to the American experiment in democratic self-government.

This is not a partisan issue. The mob threatened violence against Republicans and Democrats alike. In the wake of the attack, leaders from across the political spectrum condemned the events of January 6 as

² The *amicus curiae* brief of Professors Akhil Reed Amar and Vikram David Amar describes an 1860–61 attempt by high-level federal officials to seize the Capitol and prevent Abraham Lincoln’s inauguration. See generally *Amicus Curiae* Brief of Akhil Reed Amar and Vikram David Amar in Support of Neither Party, at 6–14. Unlike Trump, there is no indication then-President James Buchanan played any role in that attempt and, unlike the January 6 insurrection, it did not ultimately disrupt the transfer of presidential power.

an insurrection and sought to hold Trump responsible. This was an attack on the Constitution itself.

As time has passed and new election cycles have begun, some have tried to rewrite the history and significance of the insurrection on January 6. But any reasonable, good faith consideration of the events surrounding January 6 necessitates the conclusion that Trump encouraged an armed, violent mob to prevent Congress from taking an essential step in the transition of presidential power. As a result of his own actions, Trump is not qualified to serve as president or in any other role proscribed by Section 3 of the Fourteenth Amendment.

ARGUMENT

I. Congress's Constitutional Role Is to Effectuate the Peaceful Transition of Presidential Power

The peaceful transition of power from one president to the next has been a hallmark of this country since its founding—up until January 6, 2021. Before he served as the nation's first president, George Washington demonstrated the importance of relinquishing power by resigning his commission as commander in chief of the Continental Army in 1783. Members of Congress are reminded every day of Washington's commitment to limits on power when

they pass John Trumbull's iconic painting *General George Washington Resigning His Commission*, which hangs in the Capitol Rotunda.³ As historian Thomas Fleming wrote about Washington:

The man who could have dispersed a feckless Congress and obtained for himself and his officers riches worthy of their courage was renouncing absolute power to become a private citizen. He was putting himself at the mercy of politicians over whom he had no control and in whom he had little confidence.⁴

As president, Washington again demonstrated his commitment to democracy and the rule of law above personal ambition when, despite his popularity, he declined to run for a third term. In his 1796 farewell address—which is now read aloud on the Senate floor

³ *General George Washington Resigning His Commission*, ARCHITECT OF THE CAPITOL, <https://www.aoc.gov/explore-capitol-campus/art/general-george-washington-resigning-his-commission>.

⁴ Thomas Fleming, *The Most Important Moment in American History*, HIST. NEWS NETWORK, <https://historynewsnetwork.org/article/42438>.

every year on his birthday⁵—Washington cautioned against the dangers posed by the newly created parties. Presciently, Washington noted that the rotation of factions in power would create “disorders and miseries” which would “gradually incline the minds of men to seek security and repose in the absolute power of an individual; and sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation, on the ruins of public liberty.”⁶ Washington even foresaw that extreme party division could lead to “riot and insurrection.”⁷

Just four years later, in the election of 1800, the Federalists and Republicans ran bitterly opposed presidential campaigns. Nonetheless, the incumbent president, John Adams, heeded the spirit of Washington’s words, conceding defeat and stepping aside after

⁵ See *About Traditions & Symbols | Washington’s Farewell Address*, U.S. SENATE, <https://www.senate.gov/about/traditions-symbols/washingtons-farewell-address.htm>.

⁶ George Washington, *Farewell Address (1796)*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/historic-document-library/detail/george-washington-farewell-address-1796>.

⁷ *Id.*

he lost the election to Thomas Jefferson.⁸ The precedent set by Adams—peacefully ceding presidential power to one’s electoral opponent—survived for 220 years. Ronald Reagan commemorated this tradition in his first inaugural address in 1981:

To a few of us here today, this is a solemn and most momentous occasion, and yet, in the history of our nation, it is a commonplace occurrence. The orderly transfer of authority as called for in the Constitution routinely takes place as it has for almost two centuries, and few of us stop to think how unique we really are. In the eyes of many in the world, this every-4-year ceremony we accept as normal is nothing less than a miracle.⁹

Trump put an end to this miracle on January 6, 2021.

⁸ See Sara Georgini, *How John Adams Managed a Peaceful Transition of Presidential Power*, SMITHSONIAN MAG. (Dec. 7, 2020), <https://www.smithsonianmag.com/history/how-john-adams-managed-peaceful-transition-presidential-power-180976451/>.

⁹ *Inaugural Address: Jan. 20, 1981*, REAGAN FOUND., <https://www.reaganfoundation.org/media/128614/inaguration.pdf>.

The Constitution assigns to Congress the role of effectuating the peaceful transfer of presidential power. Pursuant to Article II, as modified by the Twelfth Amendment in 1804, presidential electors cast their votes, which they must then “transmit sealed to the seat of the government of the United States, directed to the President of the Senate.” U.S. Const. amend. XII. The vice president, acting as president of the Senate, then “shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for President, shall be the President.” *Id.* Thus, the fundamental role of the vice president is merely to count the votes before Congress at the January 6 joint session.

The Electoral Count Reform Act of 2022 has since codified this long-standing understanding, adding, *inter alia*, the following to the Electoral Count Act of 1887: “the role of the President of the Senate while presiding over the joint session shall be limited to performing solely ministerial duties.” 3 U.S.C. § 15(b)(1).

While the Electoral Count Act and its amendment provide for a written objection process during a joint session, there are only two circumstances where an objection is proper: when the electors “were not lawfully certified under a certificate of ascertainment of appointment of electors,” or when “[t]he vote of one or more electors has not been regularly given.” *Id.*

§ 15(d)(2)(B)(ii). Since the codification of the Electoral Count Act of 1887, there have only been two instances of members of Congress invoking this procedure before January 6, 2021, in 1969 and 2005.¹⁰ And neither of those instances—nor any other joint session of Congress, for that matter—involved violence.

In 1969, a representative and senator objected in writing to counting the vote of a “faithless elector” from North Carolina. Each chamber considered the objection and voted to reject it, because North Carolina did not bind its electors to vote for the candidates to whom they had pledged.¹¹

Some of the *amici* participated in the joint session the second time the objection process was invoked in 2005. There, a representative and senator objected in writing to the electoral votes from Ohio. At the time, these members of Congress made clear that their objection was not designed to overturn the election results.¹² Each chamber withdrew from the joint session

¹⁰ See *Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by Members of Congress*, CONG. RSCH. SERV., at 6–7 (updated Dec. 8, 2020), <https://sgp.fas.org/crs/misc/RL32717.pdf>.

¹¹ *Id.*

¹² *Democrats Challenge Ohio Electoral Votes*, CNN (Jan. 6, 2005), <https://www.cnn.com/2005/ALLPOLITICS/01/06/electoral.vote.1718/>.

to consider the objection, and then both chambers rejected the objection. Each chamber considered the objection in an orderly fashion, much as the participating *amici* disagreed with it, before reconvening the joint session. There were no attempts to shut down the joint session or subvert the ultimate result. As this Court noted in the faithless elector context, Congress had “no ground for reversing the vote of millions of its citizens.” *Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020). Abiding by the vote of the electors maintains “the trust of a Nation that here, We the People rule.” *Id.*

As detailed below, Trump’s engagement in insurrection on January 6, 2021 was a direct attack on the constitutionally mandated transfer of presidential power under Article II and the Twelfth Amendment. The events of that day greatly damaged one of our core traditions in place since the nation’s founding.

II. Trump Engaged in Insurrection Against the U.S. Constitution

In a desperate effort to hold the presidency by force beyond his term, Trump sowed false doubts about the election results, assembled an armed mob near the White House, incited the mob to lay siege to the U.S. Capitol and interfere with the official counting of electoral votes by Congress, and encouraged the mob’s efforts despite its ongoing violence. Trump did this

despite taking an oath to preserve, protect and defend the Constitution. This conduct amounted to insurrection against the Constitution, and it disqualifies Trump from serving as president or in any other role proscribed by Section 3 of the Fourteenth Amendment.

A. The Trial Record Established that Trump Engaged in Insurrection

The Colorado Supreme Court correctly concluded “that any definition of ‘insurrection’ for purposes of Section Three would encompass a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish a peaceful transfer of power in this country.” Trump Pet. App. 86a.

The trial record below demonstrates that Trump engaged in an insurrection as contemplated by Section 3 of the Fourteenth Amendment. *See id.* at 87a (“We have little difficulty concluding that substantial evidence in the record supported each of these elements [concerning insurrection] and that, as the district court found, the events of January 6 constituted an insurrection.”). Millions of Americans watched in real-time the “concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish a peaceful transfer of power in

this country.” *Id.* at 86a. In great detail, the District Court explained Trump’s methodical ploy to undermine his supporters’ confidence in the integrity of the 2020 election and to goad them into stopping the peaceful transfer of power. Trump commanded his supporters to “show strength,” to fight “harder,” and to “confront” what he determined was an “egregious assault on democracy.” *Id.* at 97a. He lied to his supporters that they could “go by very different rules,” and impressed upon them that this was a “matter of national security.” *Id.* Trump framed the peaceful transfer of power as an existential threat to America: if his supporters did not “fight like hell,” they would not “have a country anymore.” *Id.*

His supporters listened. In an attack reminiscent of a medieval siege, “a large group of people forcibly entered the Capitol” in a wave “so formidable” that it overran law enforcement’s ability to control it. *Id.* at 87a. The heavily armed mob was hellbent on inflicting violence upon members of Congress and Vice President Pence all in a ploy to stop the certification of the presidential election. *Id.* at 87a-88a. The mob forced its way towards the House and Senate chambers, where Vice President Pence and members of Congress were in the process of certifying the election, a “necessary” constitutional step in the peaceful transfer of power. *Id.* at 88a. For a fleeting moment, it appeared that the mob had the upper hand: the “breach caused

both the House and the Senate to adjourn, halting the electoral certification process.” *Id.* at 88a. But make no mistake: the Constitution and democracy endured, and later that night, Vice President Pence and Congress were able to successfully complete the certification of the election.

These facts cannot be seriously disputed, recast as a peaceful protest, or chalked aside as a product of partisan gamesmanship. Trump’s own impeachment counsel conceded that “everyone agrees” there was “a violent insurrection of the Capitol” on January 6.¹³ The attack on the Capitol unfolded in real-time on social media and television screens across the nation. The American people heard Trump’s call-to-arms and watched a sea of insurrectionists ransack the people’s branch of government. And the American people were left with the inescapable conclusion that, for the first time in our nation’s history, the American tradition of the peaceful transfer of power had been broken.

B. There is Bipartisan Agreement that Trump Engaged in Insurrection

Moments of bipartisan consensus on Capitol Hill are few and far between. But when the bedrock principles of American democracy were shaken to their

¹³ 167 Cong. Rec. S729 (daily ed. Feb. 13, 2021) (statement of Michael Van der Veen).

core, Democrats and Republicans in both chambers of Congress banded together to investigate the events surrounding the January 6 attack. *See* H.R. 503, 117th Cong. § 3(1) (2021); Final Report, Select Comm. to Investigate the January 6th Attack on the United States Capitol, H.R. Rep. No. 117-663, 117th Cong., 2d Sess. (2022) (“House Report”); Staff Rep. of S. Comm. on Homeland Sec. & Gov’t Affs. & S. Comm. on Rules & Admin., Examining the U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on January 6, 117th Cong. (2021) (“Senate Report”).

Congressional investigations are not something members of Congress take lightly. They command and rightfully deserve significant time, attention, and resources. And, most importantly, they serve an invaluable purpose. They allow members of Congress and their staff to develop a thorough and detailed assessment of the issues that affect the American people. Critically, this allows members of Congress to evaluate whether and how to develop corresponding legislation. In short, they are an invaluable tool for members of Congress to help better the lives of the American public.

Thus, it is telling that bipartisan committees in both chambers of Congress recognized that the attack on the Capitol was a violent assault on democracy and the Constitution. *See* House Report at 469, 653

(explaining that the mob, “[i]ncited by President Trump,” delayed the “peaceful transfer of power”); Senate Report at 1 (stating that January 6 was a “violent and unprecedented attack on the U.S. Capitol, the Vice President, Members of Congress, and the democratic process” and that the attackers were “intent on disrupting the Joint Session, during which Members of Congress were scheduled to perform their constitutional obligation to count the electoral votes”).

The nonpartisan Government Accountability Office also recognized that the mob “disrupt[ed] the peaceful transfer of power and threaten[ed] the safety of the Vice President and members of Congress.” U.S. Gov’t Accountability Off., *Capitol Attack: Federal Agencies Identified Some Threats, But Did Not Fully Process and Share Information Prior to January 6, 2021*, GAO-23-106625, at 1 (“Over the course of about 7 hours, more than 2,000 protesters entered the U.S. Capitol on January 6, disrupting the peaceful transfer of power and threatening the safety of the Vice President and members of Congress.”).

And while the horrors of January 6 were still fresh in the minds of members of Congress and the American people, many of our fellow Republicans rightfully spoke out against Trump’s grave assault on the Constitution. Senator Lindsay Graham made clear, “If you are a conservative, this is the most offensive concept in the world that a single person could

disenfranchise 155 million people.”¹⁴ Then-House Republican Minority Leader Kevin McCarthy urged Trump to “accept his share of responsibility” for the “attack on Congress by mob rioters.”¹⁵ Senate Minority Leader Mitch McConnell expressed, “There is no question—none—that President Trump is practically and morally responsible” for the attack on the Capitol.¹⁶ McConnell added, “This was an intensifying crescendo of conspiracy theories orchestrated by an outgoing President who seemed determined to either overturn the voters’ decision or else torch our institutions on the way out.”¹⁷ The mob attacked the Capitol, McConnell stated, “because they had been fed wild falsehoods by the most powerful man on Earth, because he was angry he lost an election.”¹⁸ Senator Mitt Romney also unequivocally stated, “What happened here today was an insurrection that was incited by the President of the United States. Those who choose to continue to support his dangerous gambit by objecting to the results of a legitimate and democratic election

¹⁴ 167 Cong. Rec. S31 (daily ed. Jan. 6, 2021) (statement of Sen. Graham).

¹⁵ 167 Cong. Rec. H172 (daily ed. Jan. 13, 2021) (statement of Rep. McCarthy).

¹⁶ 167 Cong. Rec. S735 (daily ed. Feb. 13, 2021) (statement of Sen. McConnell).

¹⁷ *Id.*

¹⁸ *Id.*

will forever be seen as being complicit in an unprecedented attack against our democracy.”¹⁹

What was clear to Republicans and Democrats alike directly after the attack remains just as true today—former President Trump engaged in an insurrection against the Constitution. Unfortunately, partisan obfuscation by some of *amici*’s fellow Republicans has dampened the moral clarity that so many had after the attack. By rightfully enforcing Section 3, the Court can renew this moral clarity and send the message that the United States is a country of laws and not lawlessness.

III. Disqualification is a Democratic Remedy for Insurrection

Trump and others have argued that he should not be removed from the ballot because voters should be able to choose an otherwise unqualified candidate. *See* Brief of Petitioner at 1. This argument wrongfully conflates improper voter disenfranchisement with the enforcement of the Constitution adopted by the American people. While Trump may contend that “restrictions on eligibility for office are inherently undemocratic,” the Constitution’s “Framers did not

¹⁹ 167 Cong. Rec. S26 (daily ed. Jan. 6, 2021) (statement of Sen. Romney).

share this view.” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 878 (1995) (Thomas, J., dissenting).

Our founding fathers recognized that our nation’s journey to a more perfect union would be subject to fluctuations in political tides. They saw the danger in allowing any of those tides to carry our nation outside the democratic process. This is at the very core of the Constitution. Moreover, to support and defend the democratic will of the people is to enforce the laws enacted on their behalf. There is no more significant or literal embodiment of “We the People” than the Constitution itself. Section 3 of the Fourteenth Amendment is the result of democratic action—a permanent safeguard to prevent those that have betrayed their oath to support the Constitution from having the opportunity to do so again.

As Senator Waitman Willey argued in Congress as Section 3 was being debated in 1866:

[Section 3] is a measure of self-defense. ... [L]ooking to the future peace and security of this country, I ask whether it would be just or right to allow men who have thus proven themselves faithless to be again intrusted with the political power of the State. I think not; and upon that ground I think this exclusion is wise ... [W]e would be faithless to our trust if

we allowed the interests of the country and its future peace and welfare to be again disturbed by men who have shown themselves faithless in the past ... [through] their insane efforts to destroy this Government. ... Shall we again trust men of this character, who, while acting under the obligation of the oath to support the Constitution of the United States, thus betrayed their country and betrayed their trust?²⁰

The safeguard that is Section 3 is no more anti-democratic than the many other qualifications that the Constitution imposes on who can be president, including term limits, an age limit, and a natural-born citizenship requirement. While these limits prevent certain individuals from becoming president, they do not do so at the cost of democracy. Instead, these limits are the result of the democratic will. Through Section 3, the will of the people was, in part, to prevent those that have betrayed their oaths and violently attacked their own nation's government from again being placed in a position of trust.

There is no more democratic result than to fairly interpret and enforce the laws equally against all

²⁰ Cong. Globe, 39th Cong., 1st Sess. 2918 (May 31, 1866).

people and to do so without fear or favor. To disregard the Constitution under the guise of deferring to the ballot box would not only be dangerous, but it would also be unlawful and undemocratic.

The January 6 insurrection posed a unique threat to the continuation of American democracy. If we fail to address it using the rules of our own Constitution, as the Colorado Supreme Court outlined, we risk repeating it. Trump showed the world that he believes he is unmoored from the obligations of the Constitution and our most storied tradition: the peaceful transfer of power. When he unleashed the violent mob on the Capitol, Trump made the choice to put himself above the Constitution. Now, as a consequence of his own doing, the Constitution forbids him from holding the presidency. But enforcement of Section 3 is not merely about preventing Trump from assuming office again. It is about preserving our democracy by permanently safeguarding our elections against all similar threats for years to come. Those who defile the most sacred principles of our nation lose the privilege of leading it. That is American democracy at work.

IV. Post-election Disqualification of the President-elect Would Create Chaos and Invite Another Insurrection

Trump argues, *inter alia*, that (1) Section 3 cannot be used to deny a constitutionally disqualified

presidential candidate access to the ballot (therefore preventing pre-election disqualification), and (2) only Congress (and not States) can disqualify a presidential candidate. Brief of Petitioner at 39–42. As a result, Trump contends, Congress could only consider a presidential candidate’s disqualification under Section 3 *after* that candidate has won the election but before the start of the presidential term. In short, Congress would need to hold a post-election vote to consider whether the president-elect was an oath-breaking insurrectionist.

The Colorado Supreme Court correctly rejected these arguments, finding that States have the authority to assess the qualifications of a presidential candidate before an election. Pet. App. 30a–32a; 61a–66a.

Amici are in full agreement that States may prohibit those who are ineligible to hold office from appearing on ballots before an election and that such authority is not delegated solely to Congress. Trump’s argument that Section 3 may be enforced only after the election and only by Congress is not only legally wrong but also dangerous. If the Court accepts Trump’s argument, Congress would be faced with the choice of disenfranchising millions of voters shortly after an election with limited process protections or allowing an insurrectionist to assume the most powerful office in our nation. Chaos would only be the beginning of what would come next.

A. Post-election Enforcement of Section 3 Would Disenfranchise Millions of Voters and Lead to Chaos

Post-election enforcement would disenfranchise millions of voters who, having cast their vote without knowing that their preferred candidate was disqualified, would have their vote belatedly cast aside. Pre-election determination ensures that voters consider candidates which they are confident are constitutionally qualified to assume the office of the presidency. Moreover, pre-election determination ensures that voters can cast a ballot for a different candidate if their preferred candidate is not qualified for office.

Requiring post-election enforcement has no basis in law and would gratuitously thrust the country into a historically unprecedented situation where the rules of the road are gravely unclear. Inviting this kind of chaos into our political system, in the election immediately after one marred by insurrection, runs the risk of eroding a fragmented public's trust in the electorate process, in one another, and in the institution of U.S. democracy. Trump understands just how precarious a posture of post-election enforcement would be for Congress. Indeed, he has run his political campaigns by engaging in fearmongering about the dangers of the political process, contending that it is stacked against him, and instructing his supporters that their votes have and will be overridden.

Consequently, as former members of Congress, *amici* believe that, in asking for post-election enforcement of the Section 3 disqualification clause, Trump is attempting to back Congress into a corner where enforcement of the Constitution against him seems untenable. For the sake of our democracy, this Court should not allow Trump to force Congress into such a precarious position.

B. Post-election Enforcement of Section 3 by Congress Would Make It a Target of Political Violence

Barring pre-election enforcement of the disqualification clause also invites a repeat of January 6, and risks making Congress a target of political violence. At its core, the disqualification clause serves as a safeguard against individuals who have already shown that they will disregard their oaths and do violence to the Constitution and our democracy. To allow such individuals to avoid answering for their conduct until after they win an election would be disastrous for the country.

Post-election enforcement of the Section 3 disqualification clause would seem like an act of political retribution to the ordinary American. And, to a lay voter, the semantics of constitutional interpretation would not outweigh the seemingly contradictory fact that a candidate who has been platformed for months as

legitimate is suddenly barred from assuming office. Public resentment at this seeming erosion of the democratic process would only be propelled by the vitriol of a candidate who has already shown himself capable of violence against our democratic system. This is the perfect recipe for a repeat of January 6.

In the case of the 2024 election, if Trump were allowed to remain on the ballot, there is no reason to expect he would behave differently than he did in 2020 if he again loses a free and fair election. On the contrary, Trump is not backing away from threats of violence and intimidation against his political opponents. In recent months Trump has, for instance, described his political opponents as “vermin” who need to be “rooted out”; stated at a conservative gathering “I am your warrior. I am your justice”; called the 2024 election “the final battle”; and expressed a desire to investigate his critics, including former Attorney General William Barr, former Chief of Staff John Kelly, and former Chairman of the Joint Chiefs of Staff General Mark Milley.²¹ One can only conclude that if Congress is tasked with deciding Trump’s political fate after an election, he will not hesitate to turn his sights, and his mob, on Congress once more. The ongoing threats of

²¹ See Peter Stone, ‘*Openly Authoritarian Campaign: Trump’s Threats of Revenge Fuel Alarm*’, GUARDIAN (Nov. 22, 2023), www.theguardian.com/us-news/2023/nov/22/trump-revenge-game-plan-alarm.

violence and intimidation against political opponents emanating from Trump only heightens the necessity of pre-election enforcement to the perceived legitimacy of the American political process.

If Trump is not held to account now, a repeat of the January 6 insurrection is just one threat the country faces. Trump has no remorse for breaking his sacred oath to defend the Constitution. This Court can have full confidence that if he is not held accountable under Section 3 of the Fourteenth Amendment and wins re-election, he would only be emboldened to continue to disregard the fundamental underpinnings of American democracy and the Constitution. The Constitution must apply to everyone regardless of the stakes. But when the stakes are at the highest, the American people must be able to turn to this Court and the Constitution.

CONCLUSION

The decision of the Colorado Supreme Court should be affirmed.

Respectfully submitted,

FAITH E. GAY

Counsel of Record

TEMIDAYO AGANGA-WILLIAMS

BABAK GHAFARZADE

MASHA SIMONOVA

ADAM GOULD

ANNA NABUTOVSKY

SELENDY GAY PLLC

1290 Avenue of the Americas

New York, NY 10104

(212) 390-9000

fgay@selendygay.com

*Attorneys for Amici Curiae
Former Republican Members of Congress*