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 OF *AMICI CURIAE* PROFESSORS DAVID M. DRIESEN, MALCOM M. FEELEY, GÁBOR HALMAI, ANDREA SCOSERIA KATZ, KARL MANHEIM, AND ROGERS M. SMITH IN SUPPORT OF RESPONDENTS

PROFESSOR DAVID M. DRIESEN
Counsel of Record
SYRACUSE UNIVERSITY COLLEGE OF LAW
Dineen Hall
950 Irving Avenue
Syracuse, NY 13244
(315) 443-4218
ddriesen@syr.edu
Counsel for Amici Curiae

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are scholars and teachers of comparative and domestic constitutional law with substantial expertise in understanding democratic institutions and their vulnerability to pressures from elected heads of state not loyal to constitutional democracy. They share an interest in preserving constitutional democracy in the United States.

David M. Driesen is a constitutional law scholar and teacher at Syracuse.[1] He is the thirteenth University Professor in Syracuse University's history, the highest rank available at that university. His latest book, *The Specter of Dictatorship: Judicial Enabling of Presidential Power* (2021), shows how elected autocratic heads of state undermine democracy.

Malcolm F. Feeley is the Clair Sanders Clements Professor Emeritus at the University of California, Berkeley School of Law. Professor Feeley taught at NYU, Yale, and Wisconsin before moving to Berkeley in 1984, where he taught courses on the Supreme Court and the legal process. He is the author or editor of fifteen books, and numerous articles. He has received many honors and awards, including the Harry Kalven Award from the Law and Society Association, for an accumulation of distinguished scholarship; the

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[1] No counsel or party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Syracuse University made a monetary contribution to the brief's preparation or submission.

Lifetime Achievement Award from the Law & Courts Section of the American Political Association; and election to the American Academy of Arts and Sciences. Two of his books have received outstanding book awards from the American Bar Association.

Gábor Halmai is a part time professor at the Robert Schuman Centre for Advanced Studies at European University Institute (EUI) in Florence and an emeritus professor at the Eötvös Loránd University in Budapest. He has published extensively in the area of comparative constitutional law, including work on illiberal constitutional theories and developments in Eastern Europe. He also has served as chief advisor to the President of the Hungarian Constitutional Court.

Andrea Scoseria Katz is an Associate Professor of Law at Washington University in Saint Louis. She teaches and writes about constitutional law with a focus on presidential power. Her work has appeared in the Columbia Law Review, the Texas Law Review, and other leading law reviews. She received a Ph.D. in political science from Yale University and a J.D. from the Yale Law School. She clerked at the European Court of Human Rights in Strasbourg and for Judge Michael A. Posner in Massachusetts.

Karl Manheim is an emeritus professor at Loyola Law School in Los Angeles who taught constitutional law for 30 years there and as a visiting professor at UCLA and USC law schools.

Rogers M. Smith is the Christopher H. Browne Distinguished Emeritus Professor of Political Science

at the University of Pennsylvania. He taught constitutional law courses for 42 years at Penn and at Yale. His book, *Civic Ideals: Conflicting Visions of Citizenship in US History*, discusses the Fourteenth Amendment at length and was a finalist for the 1998 Pulitzer Prize in History. He is a member of the American Academy of Arts and Sciences, the American Philosophical Society, and the American Academy of Political and Social Sciences, and a past President of the American Political Science Association.

This brief reflects *amici*'s views and not those of their institutions.

SUMMARY OF ARGUMENT

The judicial duty to enforce the Fourteenth Amendment proscription of oath-breaking insurrectionists[2] holding public offices constitutes perhaps the most important and disturbing obligation that a judge must fulfill. Thankfully, the need to perform this duty arises rarely.

Section Three's architects deliberately decided to limit voters' choices in individual election so that our system of constitutional democracy would survive. They insisted on especially vigorous enforcement of Section Three against those who resisted election results and sought to discourage voting. Judicial failure

[2] This brief uses the term "insurrectionists" to refer to those who "have engaged in insurrection or rebellion" against the United States or "given aid or comfort" to enemies of the United States Constitution. U.S. Const. amend. XIV, § 3.

to enforce Section Three would put all future elections at risk for the sake of appeasing a group of voters in a single election. Section Three reflects a constitutional judgment that those who swear a solemn oath to obey the Constitution and then rise up against it pose a special danger because they are especially untrustworthy. The risk to the system of constitutional democracy reaches its apogee when an oath-breaking insurrectionist candidate who has resisted previous election results and has a substantial following runs for President. *Cf.* Jack Nicas, *Brazil Bars Bolsonaro From Office for Election-Fraud Claims*, N.Y. Times, June 30, 2023 (Brazil's top electoral court barred former President Bolsonaro from running for President until 2030 because he falsely claimed electoral fraud).

The Founders of the original Constitution recognized that an elected President not loyal to constitutional values could destroy the republic. They sought to ensure presidential loyalty to the Constitution by prohibiting voters from electing a foreign-born President, requiring an oath of fealty to the Constitution, and by prohibiting acceptance of any valuable from a foreign government.

The history of democracy loss in other countries shows that elected Presidents not loyal to the constitutional system destroy democracies and that prior participation in insurrection predicts authoritarianism. Hitler, Mussolini, Hugo Chávez, and Juan Perón sparked political violence, won elections, and then established authoritarian rule. Elected heads of state not loyal to democracy persecute political enemies while

protecting allies, subdue opposition media, and make elections unfair to entrench themselves in power.

The need to vigorously enforce Section Three to protect the Constitution becomes especially urgent when an oath-breaking insurrectionist presidential candidate has a substantial following and has shown that he does not accept election results. Thus, the Court's responsibility to protect the constitutional system supports affirmance of the Colorado Supreme Court's ruling.

ARGUMENT

I. Section Three Protects Constitutional Democracy from Risks to its Survival by Limiting Who Voters Can Elect After an Insurrection

When a former officer of the United States participates in or supports insurrection, something much more is at stake than a potential judicial failure to fully enforce an ordinary constitutional norm in an individual case. For judicial failure to enforce Section Three threatens the Constitution's very survival.

The bar on insurrectionist officeholders represents a constitutional judgment by those who had lived through the greatest threat our Constitution had then faced—the Civil War—that preserving the Republic for the long-term is more important than giving the voters an unlimited choice in each and every election. *See* Gerard N. Magliocca, *Amnesty and Section Three of the*

Fourteenth Amendment, 36 Const. Comment. 87, 92 (2021) (Section Three reflects a decision not to allow "public opinion of the masses of the South" to govern elections because doing so would foster "a spirit of oligarchy adverse to republican institutions").

A. Section Three, Like Other Qualification Clauses, Protects the Constitution by Limiting Voters' Choices

Section Three, like other qualification provisions in the Constitution, does not allow voters' choices to govern when they wish to elect those lacking basic constitutional qualifications. Instead, it limits electoral choice to ensure that the Constitution survives for the long term. *See* Speech of the Hon. John Hannah, *Cincinnati Commercial*, Aug. 25, 1866, at 22 (Section Three shields "the Constitution . . . from the assaults of faithless domestic foes in all time to come").

Passionate as people are about the policy choices presented in elections, the Constitution can survive bad policy. Important as electoral judgment about character is, the Constitution can survive officeholders with some defects in character. As disturbing as judicial interference with elections is, the Constitution can survive rare judicial interference with electoral choices. But Section Three reflects a judgment that constitutional democracy probably cannot survive a government led by officeholders who are not loyal to the constitutional system—who will not peaceably acquiesce in electoral results or otherwise refuse to abide by our laws.

Disqualification of insurrectionist candidates leaves voters free to elect other candidates who espouse the same policies as the insurrectionists. It leaves them free to choose people with some of the same character traits they find appealing in an insurrectionist candidate. But the Constitution does prohibit the election of those who break their oaths of office to participate in an insurrection. If voters wish to impair or destroy constitutional democracy, they must do so by persuading a super majority to adopt a constitutional amendment, not by securing a win in the Electoral College, which does not always reflect the views of a majority of voting citizens. *See generally* U.S. Const. art. V; *Chiafalo v. Washington*, 140 S. Ct. 2316, 2320-21 (2020).

Therefore, a judge who fails to enforce Section Three because she fears interfering with the electorate's choices endangers the constitutional system. To broaden voters' choices in one election, she places all future elections at risk of being stolen or rigged (*e.g.*, through persecution of political opponents, suppression of opposition media, and creation of electoral rules aiming to limit electoral competition). And she risks having the rule of law under the Constitution subverted.

B. Section Three Reflects a Judgment That Those Who Swear an Oath to the Constitution and then Rise up Against it Cannot Be Trusted to Obey the Constitution

In spite of enormous concern about insurrectionists impairing the Constitution, Section Three's architects restricted its applicability to those who had previously sworn an oath "to support the Constitution of the United States." U.S. Const. amend. XIV, § 3. They singled out those who had solemnly sworn to protect the Constitution and then participated in insurrection as particularly dangerous because especially unworthy of trust. J.A. 567 (those who broke oaths of office to participate in insurrection were considered "untrustworthy to hold office again"); *United States v. Powell*, 27 F. Cas. 605, 607 (C.C.D.N.C. 1871) (Congress thought that "[T]hose who have been once trusted to support the power of the United States, and proved false to the trust reposed, ought not . . . be entrusted with power again. . . .").

C. Congress and the States Adopted Section Three to Protect Multiracial Democracy and the Rule of Law

The creators of Section Three sought to safeguard multi-racial democracy by limiting whom voters may elect. *See* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024) (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751 (Section

Three sought to safeguard reconstruction from subversion by elected confederates). Voters might desperately want to elect a former officeholder who had participated in insurrection, but the Constitution would henceforth prohibit that. *See* Magliocca, *supra*, at 91 (the immediate impetus for Section Three came from the almost universal election of "notorious and unpardoned rebels"). The Fourteenth Amendment does not authorize judges to limit Section Three's reach, instead only empowering Congress to waive this crucial constitutional safeguard. *Id*. at 94-95. And even with respect to Congress, those who crafted and ratified the Fourteenth Amendment viewed protection of the Republic from subversion by insurrectionists as so important that they only authorized Congress to waive its disqualification requirement with a 2/3 majority vote. U.S. Const. amend. XIV, § 3.

Congress created this protection to preserve multiracial democracy, which was then threatened by mob rule. *See* Eric Foner, *Reconstruction: America's Unfinished Revolution: 1863-1867* 119-22, 261-62, 273-75, 290, 316, 340-41 (2014); *cf.* Liz Cheney, *Oath and Honor: A Memoir and a Warning* 131 (Kindle ed. 2013) (explaining that threats of violence made Republican members of Congress fear that voting for President Trump's second impeachment would put them and their families in danger). Before the Fourteenth Amendment's ratification Congress enacted legislation that permitted freedmen to vote, producing enormous black turnout and the election of numerous black and Republican officials. Michael J. Klarman, *From Jim Crow to*

Civil Rights: The Supreme Court and the Struggle for Racial Equality 10 (2004) ("the Reconstruction Act of 1867 . . . enfranchised blacks for the first time" producing "hundreds of black officials"). Southern Democrats resisted interracial democracy by threatening, beating, and killing black freedmen and their white allies. Foner, *supra*, at 341-42 (discussing Ku Klux Klan terror against Republican leaders beginning in 1866). They violently displaced elected black citizens and other Republicans, refusing to accept electoral results. *E.g.*, *id*. at 342, 550, 559-62.

Congress enforced Section Three with special vigor against insurrectionists who refused to abide a fair election's result. Congress "kicked Georgia out of Congress" in 1869 after it expelled newly elected black state legislators and replaced them with ineligible rebels. Magliocca, *supra*, at 99.

Later, as the threat from Ku Klux Klan terrorism accelerated, Congress demanded strict enforcement against "ineligible officials who might be obstructing black voting." *Id*. at 108. Thus, Section Three's architects passed it to preserve constitutional democracy and insisted on its strict enforcement when white Southerners aligned with the Democratic Party sought to overcome electoral results and limit voting.

After Congress waived various applications of Section Three, as Congress alone has the right to do, multiracial democracy, already under siege, perished in the South. *Id.* at 87-88 (discussing amnesty statutes that allowed former confederates to join first state and then

federal government); Br. for Professors Orville Burton Butler et al., as *Amici Curiae* 23 (those granted amnesty "participated in snuffing out Black voting"). The combination of legal impediments to voting and terrorism quickly ended majority rule by disenfranchising black majorities in Louisiana, Mississippi, and South Carolina. Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 Harv. C.R.-Civ. Lib. L. Rev. 65, 92-94 (2008). And the terror and voter suppression unleashed with the end of reconstruction eventually disenfranchised black citizens throughout the South, including five additional states where they made up between 40% and 50% of the electorate. Klarman, *Jim Crow, supra*, at 28-32 (black citizens making up 40% or more of the voting population in eight southern states during reconstruction were largely disenfranchised through fraud, intimidation and violence). With the vast majority of Republicans unable to vote, the Democratic party undemocratically dominated the South until the 1960s. *See id.* at 135 (voting restrictions and intimidation led to Democratic party domination). But no insurrectionist defied Section Three by running for President and the federal government did not become a dictatorship at that time. Section Three safeguarded democracy for a time, but after Congress waived it, democracy basically perished in the South. Tom Ginsburg & Aziz Huq, *How to Save a Constitutional Democracy* 37-38 (2018) (the South was "functionally indistinguishable from a one-party authoritarian state" after 1900).

II. The Judicial Duty to Enforce Section Three Applies with Special Force to Presidential Candidates, Because an Insurrectionist President Poses an Especially Severe Risk to our Democratic Experiment

A. The Founders Recognized the Danger of Despotism and Sought to Ensure Presidential Loyalty to the Constitution Partly by Limiting Voters' Choices

The framers and ratifiers of the original Constitution (the founders) understood that an elected President could destroy the Republic by inciting popular passions and abusing his powers. *See generally* Julian Mortenson, *The Executive Power Clause*, 168 U. Pa. L. Rev. 1268, 1298-1302 (2020) (the framers sought to balance the need for vigorous law execution with the need to restrain "presidential abuse"). Alexander Hamilton recognized in the Federalist Papers that most men "who have overturned the liberties of republics . . . beg[an] their career[s] . . . [as] demagogues." *The Federalist* No. 1 (Alexander Hamilton). Hamilton later explained in a letter to George Washington what this demagoguery looked like:

> When a man unprincipled in private life desperate in his fortune, bold in his temper, possessed of considerable talents, . . . —despotic in his ordinary demeanour—known to have scoffed . . . at the principles of liberty—when such a man is seen to mount the hobby horse of popularity—to join in the cry of danger to liberty—to take every opportunity of embarrassing the General Government & bringing

> it under suspicion—to flatter and fall in with all the nonsense of the zealots of the day—It may justly be suspected that his object is to throw things into confusion that he may 'ride the storm and direct the whirlwind.'

Letter from Alexander Hamilton to George Washington (Aug. 18, 1792), Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Hamilton/01-12-02-0184-0002. Echoing Hamilton's remarks about the "cry of danger," Justice Jackson suggested that the framers knew that a President with emergency power might "kindle emergencies" to create a "pretext for usurpation" of power. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring). Similarly, this Court recognized just after the Civil War that "wicked men, ambitious of power, with hatred of liberty and contempt of law" may become President. *Ex Parte Milligan*, 71 U.S. 2, 125 (1866).

The fears of a demagogue undermining the republic among the ratifiers famously motivated the framers of the pre-Civil War Constitution to introduce impeachment provisions. U.S. Const. art. I, § 2, cl. 5; § 3 cls. 6-7. Knowing that this might not suffice, they introduced additional checks and balances, such as the requirement for Senate confirmation of presidential appointees. *See Freytag v. C.I.R.*, 501 U.S. 868, 883 (1991) (characterizing the power to unilaterally appoint as "the most insidious and powerful weapon of 18th century despotism"); *NLRB v. SW General, Inc.*, 580 U.S. 288, 317 (2017) (Thomas, J., concurring) (the framers "recognized the serious risk for abuse posed

by permitting one person to fill every office [of] the government"); *NLRB v. Noel Canning*, 573 U.S. 513, 579 (2014) (Scalia J., concurring) (describing the Senate's role in appointments as "critical protection against despotism"). But they also knew that dishonorable officials not loyal to the Constitution could evade constitutional mechanisms designed to prevent despotism. *E.g.* Letter from Thomas Jefferson to Adamantios Coray (Oct. 31, 1823), Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Jefferson/98-01-02-3837 [https://perma.cc/KV2Q-X3EY] (doubting that impeachment would prove an effective check); *cf.* David M. Driesen, *Making Appointment the Means of Presidential Removal of Officers of the United States*, 26 Lewis & Clark L. Rev. 315, 316-19, 335-40 (2022) (showing that President Trump's evasion of Senate confirmation requirements through appointment of acting officials to lead DHS components facilitated paramilitary attacks on individual liberty in Portland, Oregon and faithless law execution).

Accordingly, the framers introduced measures to prohibit voters from electing Presidents likely to prove disloyal to the Constitution and to ensure the loyalty of those who did get elected. They forbade a President from accepting anything of value from a foreign government without congressional approval, lest he become corrupted by foreign despots. *See Blumenthal v. Trump*, 949 F. 3d 14, 16 (D.C. Cir. 2020) (the Foreign Emoluments Clause seeks to prevent "foreign influence and corruption") (quoting 1 *The Records of the*

Federal Convention in 1787 289 (Max Farrand ed. 1911)); Butler et al. Br. at 11-12.

They demanded that the President swear an oath to protect and defend the Constitution. U.S. Const. art. II, § 1, cl. 8. They intended this swearing of allegiance to the Constitution to enlist the President's sense of religious obligation and general honor to ensure his loyalty to the Constitution. *See* Thomas C. Grey, *The Constitution as Scripture*, 37 Stan. L. Rev. 1, 18 (1984) (the Oath Clause sought to establish allegiance to the Constitution in much the same way as religious oaths sought to establish allegiance to a church); David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 Fordham L. Rev. 71, 85 (2009) (the President's obligation to "protect" the Constitution "has a lot in common" with other official's obligation to "support" it, including an obligation to obey the Constitution). They did this at a time when severe social sanctions would deter oath breaking, as an accusation of violating an oath suggested such disgrace that a gentleman accused of oath breaking would demand satisfaction, sometimes in the form of a duel. Driesen, *Duty-Based Theory*, *supra*, at 105. At the time of the Fourteenth Amendment's adoption, society still regarded the presidential oath as adding "a religious sanction" to presidential duty and "bind[ing] his conscience against any attempt to . . . overthrow the Constitution." *Milligan*, 71 U.S. at 31 (Milligan's argument).

Finally, the founders restricted voters' choices in a presidential election by disqualifying from the presidency those who might not prove loyal to his oath of

office. Surrounded by monarchies hostile to democratic principles, they were concerned about authoritarian foreign influence over the presidency. Joseph Story, 3 *Commentaries on the Constitution* § 1473 (1833) (the Natural Born Citizenship Clause cuts off "corrupt" foreign influences, "which have inflicted . . . serious evils" upon Europe's "elective monarchies"). Accordingly, they limited voter choice for President by disqualifying foreign-born citizens and those who had not resided in the United States for 14 years. *Schneider v. Rusk*, 377 U.S. 163, 177 (1964) ("only the native born may become President"); *see* Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 Yale L. J. 881, 888 (1988) (this qualification aimed to provide "some guarantee of allegiance to the United States" and probably sought to prevent a foreign prince from becoming President). Even though many foreign-born naturalized citizens or citizens living abroad probably would obey an oath of office, the founders would not leave this question of constitutional loyalty to the whims of voters. They chose instead to limit democracy at the moment to ensure the continuation of democracy free of foreign influence over time and to guard against voters electing a President not loyal to the Constitution.

B. Many Countries Have Lost Democracies After Electing Heads of State not Loyal to Democratic Values

Many countries have since lost their democracies entirely or largely after electing heads of state not loyal to democratic values. History has vindicated the constitutional judgment reflected in Section Three, showing that electing insurrectionists threatens the extinction of constitutional democracy. The Court should give this history's implications substantial weight. *Cf. Youngstown*, 343 U.S. at 651-52 (Jackson, J., concurring) (the history of democracy loss abroad supports the denial of implied emergency powers): *Milligan*, 71 U.S. at 125 (considering that "the history of the world" told the founders that "unlimited power" during wartime was "hazardous to free men").

1. Insurrectionist Heads of State Have Destroyed Democracies

Politicians who spark or countenance violent attacks against a democratic government, history shows, prove fatal to democracies if allowed to become the head of state. *See* Steven Levitsky & Daniel Ziblatt, *How Democracies Die* 20-21 (2018) (those who spark violent attacks on the government are "easily recognized" as authoritarians). Before becoming Chancellor and abolishing the Weimar Republic, Adolf Hitler led "a surprise evening strike in which his group of pistol-bearing loyalists took control of several buildings and a Munich beer hall where Bavarian officials were meeting." *Id.* at 13-15. Mussolini's "black shirts,"

engaged in political violence, which Mussolini encouraged, before he rose to power. *Id.* at 21; Michael R. Ebner, *Ordinary Violence in Mussolini's Italy*, 26-27, 41 (2011). Argentine dictator Juan Perón led a coup before becoming elected as head of state. Levitsky & Ziblatt, *supra*, at 21. Venezuela's Hugo Chávez led an unsuccessful coup attempt. *Id.* at 17. When it became clear that Chávez's coup had failed, he told his supporters to lay down arms and that their mission had failed "for now." *Id*. at 16. All of these leaders destroyed existing constitutional systems when those with the power to stop them from becoming heads of state failed to exercise it. *Id.* at 13 (political elites' efforts to contain autocrats by "handing over the keys of power to an autocrat-in-the-making" have "backfired"); *cf.* Tom Ginsburg & Aziz Huq, *Democracy's Near Misses*, 29 J. Democracy 16, 24-26 (2018) (the Columbian constitutional court successfully protected threatened Columbian democracy by enforcing a constitutional term limit on the presidency).

Section Three only requires restraint of a subset of those most "easily recognized" as not loyal to constitutional democracy—insurrectionists who violate their oaths of office. Authoritarians, including those lacking a telltale history of triggering political violence, have often displayed their disloyalty to constitutional democracy by verbally attacking their political opponents in virulent terms, portraying the press as enemies of the people, and tolerating violence by their supporters without actually leading an uprising or breaking an oath. *See* Levitsky & Ziblatt, *supra*, at 22-24, 75-76; *cf.*

Hamilton, *supra* (referring to an "unprincipled" man taking "every opportunity" to bring the government "under suspicion"). Elected heads of state lacking loyalty to their democracies, including most obviously insurrectionists, have entrenched themselves in power by persecuting political rivals, limiting or eliminating opposition media, and tilting electoral rules in their favor.

2. Elected Heads of State not Loyal to Democracy Have Persecuted Political Opponents and Protected Their Supporters

Heads of state not faithful to the rule of law undergirding democracy perpetuate their grip on power by protecting their political supporters from prosecution while persecuting their political opponents. David M. Driesen, *The Specter of Dictatorship: Judicial Enabling of Presidential Power* 107 (2021); *cf.* David M. Driesen, *The Unitary Executive in Comparative Context*, 72 Hastings L. J. 1, 43-44 (2020) (discussing President Trump's attempts to discourage prosecution of Republicans and encourage prosecution of prominent Democrats); *compare* Nik Popli, *Here's What We Know About Sam Bankman-Fried's Political Donations*, Time (Dec. 14, 2022), https://time.com/6241262/sam-bankman-fried-political-donations (the Biden Justice Department indicted Sam Bankman-Fried, the second largest donor to Democratic party campaigns in 2022); Aditi Sangai, *Attorney General Appoints Hunter Biden Special Counsel*, CNN Politics (Aug. 11, 2023),

https://www.cnn.com/politics/live-news/special-counsel-hunter-biden/index.html (discussing the Biden Administration's authorization of a special counsel to investigate Hunter Biden). The tactics used to persecute political opponents vary across countries losing democracy. After Turkey elected Recep Tayyip Erdogan as head of state, its government prosecuted political opponents (but not supporters) for frequently committed but usually overlooked crimes, like violations of tax laws and building codes. Ozan O. Varol, *Stealth Authoritarianism in Turkey*, *in Constitutional Democracy in Crisis?* 344-45 (Mark Graber et al., eds. 2018). After consolidating power for over a decade, however, Erdogan's government became the leading jailer of journalists in the world and began prosecuting people for criticizing the government. Driesen, *Specter of Dictatorship, supra*, at 107-08. Hungary's Viktor Orbán uses different tactics to sideline political opponents. His prosecutors accuse political opponents of corruption on the eve of elections, only to withdraw the charges after the election is over, thereby depriving the judiciary of a chance to vindicate those falsely accused. *Id*. at 107; *cf.* Isaac Arnsdorf et al., *Trump and Allies Plot Revenge, Justice Department Control in a Second Term*, Wash. Post, Nov. 5, 2023 (Trump told advisers and friends that he wants the Justice Department to investigate William Barr, John Kelly, Mark Milley, Ty Cobb and others).

3. Elected Heads of State not Loyal to Democracy Have Limited Opposition Media

Authoritarian leaders prepare the public for suppression of opposition media by accusing the media of lying. *See generally* Michael Klarman, *The Supreme Court 2019 Term: Foreword: The Degradation of American Democracy—and the Court*, 134 Harv. L. Rev. 4, 13 (2020) (authoritarians "seek to undermine the credibility of traditional media"). They then use a variety of tactics to limit or destroy opposition media. They may bring libel actions, buy off or encourage allies to purchase critical media, use fines and licensing to eliminate or intimidate unfriendly outlets, deprive media relying on government funding of the money they need to operate, and imprison critical journalists or media owners. *See* Ginsburg & Huq, *Constitutional Democracy, supra*, at 69-70, 107-13 (providing examples and analysis); Levitsky & Ziblatt, *supra*, at 81-85 (same).

4. Elected Heads of State not Loyal to Democracy Have Made Elections Unfair

Leaders willing to hang on to power regardless of the cost to democratic institutions tilt the electoral playing field in their favor and can remain in power without majority support for a long time. *See* Klarman, *supra*, at 12 (authoritarian leaders often manipulate electoral rules to entrench their position); *cf. Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565, 2574-76

(2019) (the Trump administration used a pretext to add a citizenship question to the census, which could change the balance of political representation). For example, Hugo Chávez's Venezuelan government keeps "polling stations open longer when it helps the government," pressures "state employees and welfare recipients to vote for the ruling party," "harasses voters at the polls," threatens to withdraw funds from unsupportive municipalities, purges voting lists, and makes last-minute changes in polling locations to lock itself in power. Ginsburg & Huq, *Constitutional Democracy, supra*, at 113-14. Viktor Orbán's government combines national gerrymandering with facilitation of voting by ethnic Hungarians living near Hungary (who tend to support Orbán's Fidesz party), complication of voting for Hungarian citizens in western Europe (who tend to oppose Orbán), and other measures to entrench itself in power. *See* Driesen, *Specter of Dictatorship*, *supra*, at 110. Ruthlessly combining many election-tilting techniques, including many of the worst practices found in working democracies, Orbán obtained a supermajority in parliament (enough to pass constitutional amendments) while winning only 45% of the popular vote in 2014. *Id.*; Kim Lane Scheppele, *Autocratic Legalism*, 85 U. Chi. L. Rev. 545, 565-67 (2018). Thus, history shows that insurrectionists and other heads of state not loyal to democracy imperil constitutional democracy, entrenching themselves in power by oppressing political opponents, shutting down opposition media, and slanting electoral rules.

C. The President's Power to Impair or Destroy Constitutional Democracy Creates a Judicial Duty to Vigorously Enforce Section Three, Especially when an Oath-Breaking Insurrectionist Presidential Candidate Has a Substantial Following

This case seems unusual because no United States President has engaged in insurrection in the past. *Cf.* Pet. App. at 86a (narrowly holding that an insurrection includes "a concerted public use of force or threat of force by a group of people" to prevent the "peaceful transfer of power"); 91a (defining engagement as requiring an "overt . . . act done with the intent of . . . furthering the common unlawful purpose"). But the prohibition against oath-breaking insurrectionists taking power is more important than citizenship or age requirements, because participation in insurrection by those who swore an oath to protect the Constitution constitutes such a strong predictor of risks to the constitutional system.

This is especially true in the case of presidential elections, because of the power a President has to destroy or greatly impair democracy. *See Youngstown*, 343 U.S. at 653-54 (Jackson, J., concurring) (because of erosion of state power, "modern methods of communication," and "party loyalties" the President can "cancel[]" the "effectiveness," of checks and balances). He can use his power to execute law to persecute opponents and protect supporters. *See* R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, Apr. 1,

1940 (characterizing a prosecutor's power to "choose his defendants" as "dangerous" because the prosecutor can go after those whose "real crime" is "being attached to the wrong political views"). He can abuse his power to call out the militia to suppress peaceful protests and thwart free and fair elections. U.S. Const. art. II, § 2; *see generally* William C. Banks & Stephen Dycus, *Soldiers on the Home Front: The Domestic Role of the American Military* 7 (2016) (discussing the founders' combating "internal threats to domestic security" without threatening "civil liberties"). And he can abusively use almost all of the powers the executive branch possesses to reward allies and freeze out and intimidate opposition.

The need to enforce Section Three disqualification becomes especially important when an insurrectionist presidential candidate has strong popular support, for two reasons. First, he might win and therefore place the Constitution in peril (*e.g.*, by refusing to leave if he loses a subsequent election). *Cf.* Lawrence Douglas, *Will He Go? Trump and the Looming Election Meltdown in 2020*, at 5 (2020) (predicting, before the 2020 election, that President Trump would not accept the results). Second, if he loses, he can falsely claim that his opponents stole the election from him, thereby galvanizing a potent second insurrection. *Cf. id.* at 11 (President-elect Trump lost the popular vote in 2016 but refused to accept *that* result); Cong. Globe, 39th Cong. 1st Sess., app. 227 (1866) (Hon. J. H. Dufrees) (supporting Section Three because "every precaution should be taken to prevent a recurrence of those scenes through

which we have just passed"). Ironically, disqualification *seems* most undemocratic precisely at the moments when its enforcement is most vital to preserving stable and permanent democracy. *Cf.* Hamilton, *supra* (demagogues "mount the hobby horse of popularity").

By enforcing Section Three according to its agreed upon public meaning as understood by those at the time of its enactment the Court, however, does not make itself the final arbiter of who gets to run. For Congress can remove the disqualification. U.S. Const. amend. XIV, § 3. Our elected representatives can decide through a 2/3 vote that President Trump does not pose such a threat to the democratic system that he must be barred from office or that allowing him to run would best handle the threat he represents in spite of his history of rejecting unfavorable election results. Section Three, however, does not permit this Court to make that sort of political judgment.

The Court's narrow but important responsibility is simply to determine whether to permit Section Three's enforcement against a presidential candidate who engaged in insurrection after swearing an oath to protect and defend the Constitution. Holding that Section Three does not reach the most important office in the land would place the Republic in peril not only to the extent one sees a threat in ex-President Trump, but from any future President or presidential candidate who attempts to overthrow the government, no matter how obvious the plot and how clear that candidate's desire and ability to end the American democratic experiment. *Cf.* Baude & Paulsen, *supra*, at 5 (describing

the January 6 events as an insurrection posing the most serious threat to "the American constitutional republic" since the Civil War). Declaring Section Three unenforceable without an act of Congress amounts to a blanket judicial amnesty grant for all state and federal officials, which Section Three does not permit. *Cf. American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 407-09 (1950) (invoking the principle that the Constitution is not a "suicide pact" in upholding legislation forcing out union leaders who believe in the overthrow of the government by force). And reversing the Colorado Supreme Court on some narrower ground subjects constitutional democracy to precisely the sort of grave danger Section Three was designed to avoid. The Court should construe the Constitution, if any construction is necessary, to protect constitutional democracy's survival. *Cf. Milligan*, 71 U.S. at 125-27 (construing the Constitution to prohibit trial by military commission during a threatened invasion based in part on concerns about the possibility of presidential despotism); *Youngstown*, 343 U.S. at 650-53 (Jackson, J., concurring) (construing the Constitution as not authorizing implied presidential emergency power in light of the possibility that approving such power could lead eventually to dictatorship); Driesen, *Specter of Dictatorship*, *supra*, at 25-26 (courts should interpret the Constitution to protect democracy in light of the founding-era consensus about the need to avoid despotism).

The Constitution is designed to "endure for ages" and therefore to address the "*crises* of human affairs."

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis in the original). The Court must not disable it from addressing one of the clearest threats it can face—selection of a President who has already demonstrated by engaging in insurrection that he will not comply with his oath to "preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, § 1, cl. 8; amend. XIV, § 3.

CONCLUSION

We ask the Court to perform its duty under Section Three. It should protect the Constitution from assault by holding that Section Three applies to oath-breaking insurrectionists running for President and affirm the Colorado Supreme Court's judgment.

Respectfully submitted,

PROFESSOR DAVID M. DRIESEN
Counsel of Record
SYRACUSE UNIVERSITY COLLEGE OF LAW
Dineen Hall
950 Irving Avenue
Syracuse, NY 13244
(315) 443-4218
ddriesen@syr.edu

Counsel for Amici Curiae

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