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 *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Landmark Legal Foundation ("Landmark") is a national public-interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution, and defending individual rights and responsibilities. Landmark is particularly concerned with efforts to irrevocably alter the electoral process by weaponizing sections of the Constitution to be used to disenfranchise millions of voters. Specializing in constitutional history and litigation, Landmark submits this brief in support of Petitioner Donald J. Trump.

INTRODUCTION AND SUMMARY OF ARGUMENT

If the Court permits the Colorado Supreme Court's standard of insurrection to stand, it will effectively allow a state trial court to disenfranchise millions of voters and erode trust Americans have in the electoral process without affording a political candidate adequate due process of law. Occupation of government buildings and the prevention of officials from conducting government business will be disqualifying events under Section Three of the Fourteenth

[1] No counsel for a 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 *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Amendment. Common political activism and civil disobedience, like occupying congressional offices, federal courts, and state capitols would inevitably result in civil actions in state courts in which a candidate's political opponents could have an individual declared an insurrectionist. Not only would many prominent political figures be covered by this standard, but those who only provided verbal encouragement could be treated as inciters. Empowering state officials to make these determinations would allow partisan actors to declare their political opponents constitutionally disqualified from office. Members of Congress who disrupt votes by pulling fire alarms will be ineligible to serve. And Senators who give vitriolic speeches on the steps of the U.S. Supreme Court could be forced from office. Opening this Pandora's box means Vice President Kamala Harris, Senator Chuck Schumer, Congressman Jamaal Bowman have arguably committed insurrection and should immediately vacate their offices.

The Colorado Supreme Court's decision deprived the people of Colorado the opportunity nominate a former president to serve as his political party's presidential nominee. It concluded that Section Three of the Fourteenth Amendment provides authority. It is incorrect for at least two reasons. First, Section Three of the Fourteenth Amendment is not self-executing, and Congress has not enacted legislation providing a private cause of action. The text, history, and structure of the Amendment– as well as controlling precedent – all support this conclusion.

Second, the Colorado Supreme Court incorrectly accepted a contorted interpretation of facts that do not, by any evidentiary standard, establish that Donald Trump incited others to engage in rebellion or insurrection. In short, the facts do not establish that Donald Trump's actual speech and words uttered on January 6th fall outside the constitutional protections of the First Amendment. At no point on January 6, 2021, or in the days before it, did then-President Trump expressly advocate for insurrection, violence, or lawlessness.

The Court should therefore reverse the Colorado Supreme Court's decision.

ARGUMENT

I. THE COLORADO SUPREME COURT'S BROAD INTERPRETATION OF SECTION THREE WOULD ENABLE PARTISAN OFFICIALS TO DISQUALIFY POLITICAL OPPONENTS BY UNILATERALLY DECLARING THEM INSURRECTIONISTS.

The Colorado Supreme Court concluded that individuals who occupied the Capitol on January 6, 2021, prevented Congress from fulfilling its obligations. It noted that the district court had concluded that "an insurrection as used in Section Three of the Fourteenth Amendment is (1) a public use of force or threat of force (2) by a group of people (3) to hinder or prevent execution of the Constitution of the United States."

Appendix at 85a (quoting *Anderson v. Griswold*, 2023 Colo Dist. LEXIS 362, *91 at ¶ 240. It also noted that the evidence before the district court "sufficiently established that the events of January 6 constituted 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 action necessary to accomplish the peaceful transfer of power. . . ." Appendix at 87a. These actions were enough to trigger Section Three of the Fourteenth Amendment's disqualification provision.

The Colorado Supreme Court also ruled that then-President Donald Trump's actions and words on January 6, 2021, and in the days before it incited individuals to engage in insurrection rendering him ineligible to serve as President. Joint appendix at 100a. Under this broad interpretation of Section Three, an insurrection has thus occurred under the Fourteenth Amendment when: (1) the U.S. Capitol is seized and (2) Congress is prevented from fulfilling its constitutional duties. Further, under this theory, support uttered by public officials that could be linked to inciting this conduct is enough to disqualify those officials from serving in the federal government.

Allowing this broad interpretation to stand would result in electoral chaos. Multiple incidents have occurred as recently as November 2023 that could be labeled an insurrection (or incitement to insurrection).

These include:

1. Vice President Harris supports Black Lives Matter (BLM) protests.

In June 2020, then-Senator Kamala Harris, during an interview discussing the Black Lives Matters protests occurring, stated, "it's not just a moment, it's a movement." She continued, "[t]hey're not gonna stop, and everyone, beware . . . they're not gonna stop before election day in November and they're not gonna stop after election day . . . they're not gonna let up and they should not, and we should not." Kamala Harris, *Late Show with Stephen Colbert*, YouTube (June 18, 2020), https://www.youtube.com/watch?v=NTg1ynIPGls.

Over the course of the summer of 2020, BLM protestors destroyed millions of dollars' worth of property across the country. On May 30, 2020, five BLM protestors damaged a federal courthouse in Las Vegas, Nevada, and threatened to attack a federal law enforcement officer. David Ferrara, *5 charged with damaging federal buildings during BLM protest*, Las Vegas Review-Journal (Sept. 17, 2020), https://www.reviewjournal.com/crime/courts/5-charged-with-damaging-federal-buildings-during-blm-protest-2123868/. In July 2020, BLM protestors barricaded law-enforcement inside a federal courthouse in Portland and attempted to burn down the building, chanting "Feds go home." Lia Eustachewich, *Portland protesters barricade courthouse with federal officers inside, then try to set it on fire*, NY Post (July 22, 2020), https://nypost.com/2020/07/22/

portland-protesters-barricade-courthouse-with-federal-officers-inside/.

Then-Senator Harris did not offer a condemnation of violent riots and protests until the end of August 2020, stating "It's no wonder people are taking to the streets, and I support them. We must always defend peaceful protest and peaceful protestors. We should not confuse them with those looting and committing acts of violence, including the shooter who was arrested for murder." Reuters, *Fact check: Kamala Harris said she supports protests, not 'riots', in Late Show clip* (Oct. 29, 2020), https://www.reuters.com/article/uk-factcheck-kamala-harris-late-show-rio-idUSKBN27E34P/.

Black Lives Matter protestors damaged a federal building and threatened to attack federal law-enforcement officers. They interfered with judicial operations by barricading law-enforcement inside a federal courthouse. Then-Senator Harris appeared to encourage them with statements made in June 2020. Under the Colorado Supreme Court's standard, then-Senator Harris may have incited an insurrection.

2. Representative Bowman pulls a fire alarm before a vote.

On September 30, 2021, Congressman Jamaal Bowman pulled a fire alarm on Capitol Hill as Congress worked to approve a stopgap spending bill to avoid a government shutdown. Representative Bowman claimed he believed pulling the alarm might open a door in the Cannon Office Building and pled guilty to

a misdemeanor offense on October 25, 2021. See Kaniska Singh, *US Representative Bowman pleads guilty to triggering fire alarm at Capitol*, Reuters (Oct. 26, 2023), https://www.reuters.com/world/us/us-representative-bowman-pleads-guilty-triggering-fire-alarm-capitol-2023-10-26/.

Video captures Congressman Bowman at 12:05 pm trying an exit, before walking up to the alarm and activating it, before trying other doors. He stated he was not trying to disrupt congressional proceedings. Ginger Gibson and Rebecca Kaplan, *Rep. Bowman under investigation for pulling fire alarm as McCarthy compares it to Jan. 6*, NBC News (Sep. 30, 2023), https://www.nbcnews.com/politics/congress/jamaal-bowman-pulled-fire-alarm-rcna118230. At the time, however, his party was attempting to stall a vote on a stopgap bill proposed by the opposition party to buy time to read it. Id. Congressman Bowman's office originally sent a memo to members of his party on how to defend him for pulling the alarm, saying they should tell the opposition to "instead focus their energy on the Nazi members of their party before anything else." Sara Dorn, *Rep. Bowman Backtracks After Office Slams GOP 'Nazis' In Memo Defending Fire Alarm Pull*, Forbes (Oct. 2, 2023), https://www.forbes.com/sites/saradorn/2023/10/02/rep-bowman-backtracks-after-office-slams-gop-nazis-in-memo-defending-accidental-fire-alarm-pull/?sh=a0ea1426b6e4.

Representative Bowman committed a crime to arguably interrupt the official proceedings of Congress.

Under the Colorado Supreme Court's standard, Representative Bowman may have engaged in insurrection.

3. Senator Schumer warns individual justices on the steps of the U.S. Supreme Court.

On March 4, 2020, Senator Chuck Schumer made the following statement in a pro-abortion speech outside the Court: "Republican legislatures are waging a war on women, all women . . . I want to tell you [Justice] Gorsuch, I want to tell you [Justice] Kavanaugh. You have released the whirlwind, and you will pay the price. You won't know what hit you if you go forward with these awful decisions." Katherine Fung, *Schumer Telling Brett Kavanaugh He'll 'Pay the Price' for Roe Resurfaces*, Newsweek (June 8, 2022), https://www.newsweek.com/chuck-schumer-brett-kavanaugh-roe-v-wade-pay-price-comment-1713964.

Chief Justice Roberts criticized the statements as "dangerous" and "inappropriate." Schumer in turn issued a statement criticizing the Chief Justice for playing into "right wing" hysteria about his comments. He also later claimed his statements were referring to consequences for Republicans if these justices made these decisions. Pete Williams, *In rare rebuke, Chief Justice Roberts slams Schumer for 'threatening' comments*, NBC News (Mar. 4, 2020), https://www.nbcnews.com/politics/supreme-court/rare-rebuke-chief-justice-roberts-slams-schumer-threatening-comments-n1150036.

On June 8, 2022, U.S. Marshals detained an armed individual near the home of Justice Kavanaugh. This individual allegedly informed investigators "that he'd decided to target Kavanaugh because he was angry about the possibility that the Supreme Court will overturn *Roe v Wade*. . . ." Rebecca Shabad, *Man with a gun outside Kavanaugh's home told 911, 'I need psychiatric help'*, NBC News (June 9, 2022), https://www.nbcnews.com/politics/supreme-court/man-gun-kavanaughs-home-told-911-need-psychiatric-help-rcna32871.

Again, Senator Schumer arguably threatened sitting Supreme Court Justices and his words possibly inflamed an individual to target Justice Kavanaugh. Under Colorado's standard, Senator Schumer may have engaged in insurrection.

4. Congresswoman Rashida Talib urges on Pro-Palestinian protestors who later disrupted Congress and injured police.

Three times in the last 100 days, pro-Palestinian protestors have been involved in illegal activity that could be labeled insurrection under Petitioners' theory. First, on October 18, 2023, Pro-Palestinian protestors from Jewish Voice for Peace marched on the U.S. Capitol and engaged in a sit-in in the Rotunda, demanding a ceasefire in the Israel-Hamas war. While at first peaceful, the event turned violent, and several demonstrators were arrested for assaulting police officers. Congresswoman Rashida Talib spoke to the crowd before the event, stating, "I think the White House and

everyone thinks we're just gonna sit back and let this just continue to happen. No!" Ryan King, *Chaos erupts as pro-Palestinian protesters demand ceasefire at the Capitol; at least 3 allegedly assault cops*, NY Post (Oct. 18, 2023), https://nypost.com/2023/10/18/chaos-erupts-as-pro-palestinian-protesters-take-to-the-capitol-at-least-three-arrested/.

Second, on November 6, 2023, pro-Palestinian demonstrators marched in Washington D.C., before vandalizing statues and property around the city. They also vandalized the front gates of the White House, and videos have circulated of Palestinian protestors scaling the fence of the White House. See American Military News, *Videos: White House vandalized by left-wing protesters* (Nov. 6, 2023), https://americanmilitarynews.com/2023/11/videos-white-house-vandalized-by-left-wing-protesters/.

Finally, on November 15, 2023, 150 pro-Palestinian protestors clashed with U.S. Capitol Police outside of Democrat National Committee headquarters. Lawmakers and staff were evacuated from the headquarters and the Capitol was placed on lockdown. Six U.S. Capitol Police officers were injured, and one protestor was arrested for assault. One unnamed Democrat lawmaker stated it "scared me more than January 6." Andrew Solender, *House offices locked down as lawmakers are evacuated from DNC protest*, Axios (Nov. 16, 2023), https://www.axios.com/2023/11/16/dnc-lawmakers-evacuated-house-offices-lockdown-israel-hamas-war-protest. Congressman Brad Sherman tweeted after the fact "Thankful to the police officers who stopped

them and for helping me and my colleagues get out safely." Id.

Again, under the standard set by Colorado, Congresswoman Talib's speech could be construed as inciting insurrection.

5. Protestors interfere with Justice Kavanaugh confirmation proceedings.

Several times during the confirmation process for U.S. Supreme Court Justice Brett Kavanaugh, protestors engaged in activity interrupting or interfering with government processes. When Senator Jeff Flake announced he would vote for Kavanaugh, several protestors prevented him from moving in an elevator and yelled in his face. CBS News, *Sen. Jeff Flake confronted by protesters over Kavanaugh vote*, YouTube (Sept. 28, 2018), https://www.youtube.com/watch?v=3GnSn21ykWs.

On October 4, 2018, protestors took over the Hart Senate Office Building, chanting for Justice Kavanaugh to be blocked from confirmation. MSNBC (@MSNBC), X (Oct. 4, 2018), https://twitter.com/MSNBC/status/1047935416182235136.

On October 6, 2018, protestors crossed police lines at the Capitol and the Supreme Court, proceeding to yell and pound on the doors of the latter. Police arrested hundreds of protestors for "crowding, obstructing, or incommoding." Some protesters entered the Senate galley and began to yell during the final confirmation vote, halting proceedings. Kylee Griswold,

8 Times Left-Wing Protesters Broke Into Government Buildings And Assaulted Democracy, The Federalist (Jan. 7, 2022), https://thefederalist.com/2022/01/07/8-times-left-wing-protesters-broke-into-government-buildings-and-assaulted-democracy/.

These are just several events that have occurred in the recent past. Under the standard established by the Colorado Supreme Court, private parties could sue to force state courts to declare these individuals and elected officials associated with this conduct as ineligible to serve under Section Three. Adopting this interpretation would invite partisan actors to treat their political opponents as constitutionally disqualified and would undermine public trust in the electoral system.

II. THERE IS NO PRIVATE CAUSE OF ACTION TO ENFORCE THE DISQUALIFICATION CLAUSE.

The Colorado Supreme Court erred when it concluded that Section Three is self-executing. The text and structure of the Amendment as well as case law and tradition all support this conclusion.

A. The text of the Fourteenth Amendment suggests Section Three is not self-executing.

Section Five provides the first evidence that Section Three is not self-executing. It provides, "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const.

amend. XIV, § 5. Congress – not the individual states – has authority to enact legislation to enforce the terms of the Fourteenth Amendment. The text of the Amendment itself suggests the drafters intended Congress to pass laws that would provide the authority for those seeking to enforce its provisions. If it were evident that Section Three was self-executing, what purpose would Section Five serve?

B. History, case law, and congressional action all demonstrate that Section Three is not self-executing.

At the time of its drafting, Representative Thaddeus Stevens (a member of the Amendment's drafting committee) noted that Congress would have to pass enabling legislation since the Joint Committee's draft of Section Three "will not execute itself." Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, (Dec. 29, 2023), https://ssrn.com/abstract=4591838 (quoting Globe, 39th Cong., 1st Sess., at 2544). Further, "Once Congress had finalized the language of Section Three, Stevens again noted the need for Congress to pass enabling legislation." Id. (citing Globe, 39th Cong., 1st Sess., at 3148).

Next, Chief Justice Salmon P. Chase's ruling in *Griffin's Case*, 11 F. Cas. 7 (C.C.D. Va. 1869), is directly on point. Rendered within a year of Section Three's ratification, Chase held that Section Three is not self-executing and that a party could only seek relief provided a federal statute had authorized it. He stated, "Taking

the third section then, in its completeness with this final clause, it seems to put beyond reasonable question the conclusion that the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, *and to be made operative in other cases by the legislations of congress in its ordinary course*." Id. at 21 (emphasis added).

Efforts to treat *Griffin's Case* as bad law fall short. It was recognized as guiding precedent for decades. Professor Seth Barret Tillman has explained that, in the years after Chief Justice Chase's ruling, there was "no hint that any court thought [it] was anything but settled law." Brief for *Amicus Curiae* Professor Seth Barrett Tillman in Support of Intervenor-Appellant/Cross Appellee, *Anderson v. Griswold*, 2023 CO 63, 2023 Colo. LEXIS 1177. Years later, *Griffin's Case* continued to be cited "favorably, on-point, and as good law." Id. See, for example, *Ex parte Ward*, 173 U.S. 452, 454-455 (1899).

Consistent with this interpretation, Congress enacted laws to enforce provisions of Section Three. Shortly after ratification, Congress enacted legislation enforcing the Disqualification Clause when it passed the Enforcement Act of 1870 which provided, in relevant part:

> . . . whenever any person shall hold office, except as a member of Congress or of some State legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United

> States, it shall be the duty of the district attorney of the United States for the district in which such persons shall hold office, as aforesaid, to proceed against such person, by writ of *quo warranto*. . . .

Ch. 114, 16 Stat. 140, 143 (1870) (emphasis added). This established a *quo warranto* action to be brought by federal authorities in federal courts to remove officials from office. As noted by Professors Blackman and Tillman, "Congress could have responded to *Griffin's Case* by enacting a statute saying that Section 3 was self-executing. And Congress could have given the States a role in these or analogous removal or election processes." Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 Tex. Rev. L. & Pol. 350 (forthcoming 2024) (manuscript at 422), https://ssrn.com/abstract=4568771. They continue, "But instead, Section 14 expressly delegates Section 3-enforcement to a federal prosecutor – and critically, only the federal courts (and not state courts) play a role in that process." Id.

The Enforcement Act also criminalized actions that would render someone ineligible under Section Three:

> . . . any person who shall hereafter knowingly accept or hold any office under the United States, or any State to which he is ineligible under the third section of the fourteenth article of amendment of the Constitution of the United States, or who shall attempt to hold or exercise the duties of any such office, shall be

> deemed guilty of a misdemeanor against the United States. . . .

Ch. 114, 16 Stat. 140, 143-144 (1870). Indeed, cases were brought shortly after passage of the Act. See *United States v. Powell*, 27 F. Cas. 605 (C.C.D. N.C. 1871).

Passage of the Enforcement Act clarifies Congress had concluded that Section Three was not self-executing and that additional laws needed to be passed to enforce its provisions.

Current congressional practice supports the idea that Section Three is not self-executing. House Resolution 1405 was introduced in the 117th Congress on February 26, 2021. Its purpose is "[t]o provide a cause of action to remove and bar from holding office certain individuals who engage in insurrection or rebellion against the United States." H.R. 1405, 117th Cong. (2021). Like the Enforcement Act of 1870, this legislation proposes that "The Attorney General of the United States may bring a civil action for declaratory judgment and relief. . . ." The action would be brought in federal court requiring clear and convincing evidence. Id. Though not enacted, such actions support arguments consistent with the plain meaning of Section Five – that actions to enforce Section Three's provisions must be authorized by Congress.

Along these lines, Congress has enacted a criminal statute that prohibits rebellion or insurrection. 18 U.S.C. § 2383. As noted by at least one court, this "demonstrates an intention that only the government,

and not private citizens, must be the party initiating the action." *Hansen v. Finchem*, 2022 Ariz. Super. LEXIS 5, 10 (Case No. 2022-004321).

C. Construing Section Three as self-executing also contradicts the intent and purpose of the Fourteenth Amendment as a tool to increase federal power.

In short, concluding that a *private party* could bring a cause of action in *state court* means state actors would wield tremendous power. This interpretation would "transform Section Three into a states'-rights superpower." Brief of *Amici Curiae* Republican National Committee, National Republican Senatorial Committee, and National Republican Congressional Committee in Support of Intervenor-Appellant/Cross Appellee at 5, *Anderson v. Griswold*, 2023 CO 63, 2023 Colo. LEXIS 1177.

State courts would thus have "the power to decide the most sensitive political questions about loyalty and legitimacy, and then decide on that basis who may stand for election to the most important position in the *national* government." Id. (emphasis in original). The Colorado Supreme Court's decision flouts the purpose of the Reconstruction Amendments as they "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome v. United States*, 446 US 156, 179 (1980).

An argument can also be made that even Section One of the Fourteenth Amendment is not self-executing

in *all cases*. Some scholars contend that Section One is self-executing only to the extent that parties are seeking to assert its provisions as a set of defenses in court. See Blackman & Tillman, *Sweeping and Forcing the President into Section 3* at 389.

Supporters of the argument that Section One *is* self-executing rely, in part, on *Ex parte Young*, 209 U.S. 123 (1908). According to them, "the Supreme Court concluded [in *Ex parte Young*] that the presence of constitutional claims under Section 1 of the Fourteenth Amendment, when coupled with federal question jurisdiction, was enough all by itself to support a federal court's entertaining a 'positive' constitutional challenge to Minnesota's confiscatory rates." Mark Brown, *Trump and Section 3 of the Fourteenth Amendment: An Exploration of Constitutional Eligibility*, Jurist (Oct. 12, 2023), https://www.jurist.org/features/2023/10/12/trump-and-section-3-of-the-fourteenth-amendment-an-exploration-of-constitutional-eligibility/. They note that in *Ex parte Young*, "No statutory vehicle, like section 1983, was discussed. None was needed." Id.

Ex parte Young's application, however, is limited to times when private parties who act in compliance with federal law use it "as a *shield* against the enforcement of contrary (and thus preempted) state laws." *Mich. Corr. Org. v Mich. Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014). As noted by the Sixth Circuit, this position aligns with the U.S. Supreme Court's action in *Brunner v. Ohio Republican Party*, 555 U.S. 5 (2008), where the Court rejected plaintiff's lawsuits because no private cause of action supported it. In *Brunner*, a private

party (the Ohio Republican Party) sued the Ohio Secretary of State seeking to compel the Secretary to enforce provisions of the Help America Vote Act. Id. A state officer suing in his official capacity and seeking prospective injunctive relief was not enough to trigger *Ex parte Young* – an underlying statute was still needed to provide a private cause of action. *Mich. Corr. Org.*, 774 F.3d at 906.

While not dispositive, this analysis at least raises a question about whether Section One is self-executing in all cases. Further reinforcing this argument is the simple fact that Congress has repeatedly acted to ensure a private cause of action under Section One. See 42 U.S.C. § 1983 which establishes a private cause of action "to enforce provisions of the Fourteenth Amendment. . . ." *Scheuer v. Rhodes*, 416 US 232, 243 (1974) (quoting *Monroe v. Pape*, 365 US 167, 171-172 (1961)).

Finally, those opposing the Petition may argue that Colorado and other states must enforce Section Three under this Court's precedent in *Testa v. Katt*, 330 U.S. 386 (1947). They may contend that if a state "open[s] its courts to a cause of action, it must apply federal law evenhandedly to that cause of action." William Baude & Michael Stokes Paulson, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024) at 25. Colorado was therefore correct in concluding that Section Three was self-executing and Colorado courts had a duty to enforce its provisions. In short, they argue that *Testa* compels "state courts being open to federal causes of action purportedly provided in the *U.S. Constitution*, in the absence of federal legislation."

Blackman and Tillman, *Sweeping and Forcing* at 457 (emphasis in original).

Accepting this argument would be a misreading of *Testa's* limited findings. *Testa* obligates state courts of competent jurisdiction to "be open to federal statutory causes of action created by Congress if the state court is already open to analogous causes of action under state law." Id. In *Testa*, the Court considered whether an individual could bring a cause of action under a federal emergency price control statute in state court. *Testa v. Katt*, 330 U.S. at. 387. In contrast, there is no federal cause of action empowering private parties in Colorado to bring an action in state court to disqualify Donald Trump under Section Three.

There is even a significant argument to be made that *Testa's* precepts go too far. Blackman and Tillman, *Sweeping and Forcing* at 457, citing *Haywood v. Drown*, 556 U.S. 729, 752 (2009) (Thomas, J., dissenting) ("[T]he Constitution did not impose an obligation on the States to accept jurisdiction over such claims. . . . The Constitution instead left the States with the choice – but not the obligation – to entertain federal actions." (internal citations omitted); id. at 752.

The text, case law, tradition and recent practice all support the argument that Section Three is not self-executing. To sustain a private claim, there needs to be a specific law empowering a party to bring the cause of action. The argument that Section Three alone provides a private cause of action in state court is a bridge too far and would invite political chaos. Hundreds, if

not thousands, of individual cases could be brought in every county alleging a given individual is ineligible. And these courts would – according to the Colorado Supreme Court – have jurisdiction to decide them.

D. There is no conflict between the relief requested by Donald J. Trump and *Hassan v. Colorado.*

In *Hassan v. Colorado*, then-Judge Gorsuch noted that it is " a state's legitimate interest in protecting the integrity and practical functioning of the pollical process" that "permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." 495 F. App'x 947, 948 (10th Cir. 2012). The Colorado Supreme Court relied on this finding when it concluded that it could exclude ineligible candidates from presidential ballots. Appendix at 30a-31a. The Tenth Circuit's holding in *Hassan* is distinguishable from this case – *Hassan* applies to eligibility under Article II which uses language distinct from the language of both Article I and Section Three.

In *Hassan*, the Tenth Circuit considered an individual's eligibility to serve under Article II, § 1, cl. 5, "[n]o person except a natural born Citizen . . . shall be eligible to the Office of President." This language contrasts with both Article I and Section 3's language, "no person shall be. . . ." Using the term "eligible" distinguishes Article II from both Article I and Section Three. As noted by Blackman and Tillman, "the Article II eligibility standards would take effect at the time of

the election, and not at the start of the president-elect's constitutional term or when the president-elect chooses to take his oath after the start of this term." Blackman and Tillman, *Sweeping and Forcing* at 461. Thus, they conclude, "[W]hen we are dealing with a Section 3 disqualification, as applied to the presidency, we are not dealing with Article II's *eligibility* language: rather, Section 3's language tracks Article I's language: *No person shall be*. And those requirements kick in much later." Id. (emphasis in original). Under this interpretation, permitting former-President Trump to appear on the primary ballot would not violate *Hassan*.

III. THEN-PRESIDENT TRUMP DID NOT INCITE JANUARY 6TH PROTESTORS TO ENGAGE IN INSURRECTION.

The Colorado Supreme Court erred in concluding that former President Trump engaged in insurrection. Then-President Trump's words and actions on January 6, 2021, do not rise to the level of incitement to engage in insurrection because, on their face, his words did not advocate imminent violence. The Court should reject efforts to reduce the rigorous and applicable standard established in *Brandenberg v. Ohio*, 395 U.S. 444 (1969).

First, *Brandenburg* applies because Section Three's consequences are punitive. Chief Justice Chase noted as much in *Griffin's Case*, stating that Section Three was the "only punitive section" of the Fourteenth Amendment. 11 F. Cas. at 25. Further, *Brandenburg's*

standard applies because the conduct allegedly giving rise to Petitioners' claims depend on a public speech given by then-President Trump on January 6, 2021, and public communications made by the President in the days before that speech.

Under the *Brandenburg* test, speech can be punished only if three factors are met. The speech must (1) "[advocate] the use of force or of law violation," (2) is "directed to inciting or producing imminent lawless action," and (3) is "likely to incite or produce such action." *Brandenberg*, 395 U.S. at 447. Establishing that the speaker's words advocated the use of actual force or of law is thus necessary to establish the words fall outside the protections of the First Amendment. Incitement or likelihood are not enough to "forfeit the First Amendment's protections." *Nwanguma v. Trump*, 903 F.3d 604, 611 (6th Cir., 2018).

Then-President Trump's speech on the Ellipse falls short of actual incitement to insurrection. At no point did he call for any laws to be broken. At no point did he encourage violence. In arguments last year, a federal circuit judge in Washington D.C. stated, "you just print out [Trump's January 6, 2021] speech . . . and read the words . . . it doesn't look like it would satisfy the [Brandenburg] standard." Tr. of Argument at 64:5-7 (Katsas, J.) *Blassingame v. Trump*, No. 2023 U.S. App. LEXIS 31780 (D.C. Cir. Dec. 7, 2022). Another judge remarked, "the President didn't say break in, didn't say assault members of Congress, assault Capitol Police, on anything like that." *Blassingame*, No. 22-5069, Tr. of Argument at 74:21-25 (Rogers, J.).

In fact, former President Trump sent tweets on the afternoon of January 6, 2021, encouraging protestors on Capitol Hill to "remain peaceful" and "stay peaceful" and asking the mob to not hurt law enforcement. Jenni Fink, *Jan. 6 Capitol Riot Timeline: From Trump's First Tweet, Speech to Biden's Certification*, Newsweek (Jan. 6, 2022), https://www.newsweek.com/jan-6-capitol-riot-timeline-trumps-first-tweet-speech-bidens-certification-1665436. He also directed protestors to "support our Capitol Police." Id. Later, he released a video calling on his supporters "to go home now" and "go home in peace." Id.

The actual language used by Trump on January 6, 2021, does not rise to the level of language the U.S. Supreme Court already considered protected in other cases. For example, in concluding that a speech featuring the words "we're gonna break your damn neck" did go beyond the First Amendment's protections, the Court concluded that "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902, 928 (1982). It continued, "[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. Id. at 928.

Nothing former President Trump said on that day or in released communications leading up to that day amounts to actual advocacy under *Brandenberg*.

CONCLUSION

For these reasons, the Court should reverse the decision of the Colorado Supreme Court.

Respectfully submitted,

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