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* STATES OF INDIANA, WEST VIRGINIA, TWENTY-THREE OTHER STATES, THE ARIZONA LEGISLATURE, AND THE LEGISLATIVE LEADERSHIP OF NORTH CAROLINA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

Occasionally, a case comes along that threatens to upend our constitutional order. Perhaps a decision erases Congress's role in making some essential decision. Or maybe a court has construed our Constitution in a way that endangers the President's ability to perform some critical work. Or perhaps a decision invites chaos in our elections, undermining the ability of voters to pick those who lead them. Or maybe a case thrusts courts into places where they don't belong. Any one of these outcomes—standing alone—would be unacceptable.

This case presents not just one of those troubling outcomes, but all four. In declaring that former President Donald Trump is ineligible to run for President in the coming election, the Colorado Supreme Court has effectively reordered the roles of all the relevant players in presidential elections. Section 3 of the Fourteenth Amendment requires Congress to act before an individual can be disqualified as an insurrectionist. But Colorado chose to act on its own. The same section was proposed and ratified against a legal and historical backdrop where Congress and the President had decided what acts rise to that level. But here again, Colorado chose to take that task up for itself. And because of these choices, voters across the country now face serious uncertainty and trouble in picking their next president.

The Court must now act to fix the four-fold damage the Colorado decision has done. Ultimately, the "Constitution's design … leave[s] the selection of the President to the people, through their legislatures, and to the political sphere." *Bush v. Gore*, 531 U.S. 98,

111 (2000) (per curiam). Yet the Colorado court's decision ignores that design. And by doing so, the decision will lead many to question whether our elections are genuine reflections of the national will or base political games won through gamesmanship and lawfare. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). The Court can restore order and integrity here. The Court can and should reverse.

SUMMARY OF ARGUMENT

I. The Fourteenth Amendment anticipates that Congress will decide whether a particular person is qualified to hold office under Section 3 (or at least determine the process for making that decision). The structure of the Constitution, relevant history, and authority from this Court confirm as much. Congress has not enacted any enabling legislation that would apply here. Yet the Colorado court went ahead and acted on its own. That choice was wrong.

II. In deciding that former President Trump engaged in insurrection, the Colorado court fashioned a definition of "insurrection" that is standardless and vague. The best available evidence suggests that insurrection equates with rebellion—a more demanding standard than the Colorado Court settled on. But what constitutes insurrection under Section 3 is not a question courts should answer at all. The Colorado court should have stayed its hand.

III. The practical consequences of affirming the Colorado decision confirm what the text already shows: Colorado must have had it wrong. Altogether, the Colorado decision undermines every branch of

government in deeply problematic ways: threatening the power of a President, seizing choices that would otherwise be left to Congress, forcing courts into outcomes that will necessarily undermine their own legitimacy, and imperiling the individual States' rights to give their citizens' votes actual meaning. Faced with effects like these, the Court cannot affirm.

ARGUMENT

I. Section 3 cannot be used to disqualify a person from holding office unless Congress first acts.

The Colorado court's decision strikes a serious blow to "the Constitution's structural separation of powers." *Freytag v. Comm'r*, 501 U.S. 868, 873 (1991). Only Congress can disqualify a person from holding office under Section 3. At least to this point, Congress has not seen fit to do so as to the events of January 6. The Colorado decision overrides that choice.

The Fourteenth Amendment provides that "[n]o person shall … hold any office … who, having previously taken an oath … as an officer of the United States … to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same." U.S. Const. amend. XIV, § 3. But it then stresses that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const., amend. XIV, § 5. And it specifies that "Congress … by a vote of two-thirds of each House" may "remove [the] disability" imposed by the Insurrection Clause. U.S. Const. amend. XIV, § 3. Thus, the Fourteenth Amendment charges Congress with deciding whether and how the Insurrection Clause will be enforced. *See Kerchner v. Obama*, 669

F. Supp. 2d 477, 483 n.5 (D.N.J. 2009) (detailing constitutional provisions that show qualifications of a President are not to be resolved by courts).

Just months after the Fourteenth Amendment's ratification, Chief Justice Salmon P. Chase (while riding circuit in Virginia) reached that very conclusion. *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869). Although the Colorado court refused to engage with *Griffin*'s specific reasoning, it rejected it as unpersuasive. *See* App. 52a–53a. But the Colorado court should have read it again. Examining the text, the Chief Justice in *Griffin* explained that the Fourteenth Amendment's "fifth section qualifies the third." 11 F. Cas. at 26. Section 5 "gives to congress absolute control of the whole operation of the amendment," and hence "legislation by congress is necessary to give effect to [Section 3's] prohibition." *Id.*

Practical considerations, Chief Justice Chase explained, "very clearly" underscored the need for legislation. *Griffin*, 11 F. Cas. at 26. To give effect to Section 3, "it must be ascertained what particular individuals" are subject to a disability. *Id.* But "only … congress" may "provide" the "proceedings, evidence, decisions, and enforcements of decisions" required to "ascertain[] what particular individuals are embraced by the definition" and "ensure effective results." *Id.*; *cf. Cawthorn v. Amalfi*, 35 F.4th 245, 275–82 (4th Cir. 2022) (Richardson, J., concurring) (explaining why only Congress may decide whether its own members are disqualified under Section 3 of the Fourteenth Amendment). No wonder, then, that Congress at one point did pass (later-repealed) enabling legislation; Congress, like Chief Justice Chase and those who pushed the Fourteenth Amendment in the first place,

recognized that this portion of "[t]he Constitution provides no means for enforcing itself." Kurt Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment* 46 (Working Paper Dec. 28, 2023), https://bit.ly/3RfwVS8 (quoting Sen. Lyman Trumbull).

In requiring that "two-thirds of each House" agree to remove the disability (and requiring Congress to implement it in the first place), the Fourteenth Amendment aligns with other means to determine a President's legal qualifications or otherwise bar him from office. The Twenty-Fifth Amendment says, for instance, that if the Vice President and certain officers find that the President is unable to perform the duties of his office, "Congress shall decide the issue [of ability] … by two-thirds vote of both Houses." U.S. Const. amend. XXV. "[O]therwise, the President shall resume the powers and duties of his office." *Id.* An unable President is one who lacks the ability or the legal qualifications to discharge his office. *See Grinols v. Electoral Coll.*, No 2:12-CV-02997, 2013 WL 2294885, at *6 (E.D. Cal. May 23, 2013). So the Twenty-Fifth Amendment gives Congress the ultimate power to decide whether an official is legally unqualified to serve. Likewise, Congress wields the "sole power" to remove a president by impeachment and conviction. U.S. Const. art I, §§ 2, 3. Conviction again comes only upon a two-thirds vote from the Senate. *Id.* § 3. And if the Electoral College doesn't give us an answer in an election, then the House and the Senate once more decide—by a majority vote of a two-thirds quorum—who will serve as President and Vice President, respectively. U.S. Const. amend. XII; *see also* U.S. Const. amend. XX (empowering Congress to decide what happens when "neither a President

elect nor a Vice President elect shall have qualified"). So the Constitution stresses that Congress is the last arbiter of who can serve as President. Yet the Colorado court ignored that instruction by declaring that local officials and courts are to make that call instead.

In reality, voters "are the best judges [of] who ought to represent them," *Powell v. McCormack*, 395 U.S. 486, 541 n.76 (1969) (quoting Robert Livingston as quoted in 2 *Debates on the Federal Constitution* 292–93 (J. Elliot ed. 1876)), and they should be the first to decide whether former President Trump is legally qualified to be reelected as President. Sovereignty, after all, resides with the people. It "confers on [them] … the right to choose freely their representatives to the National Government." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 794 (1995). So "[a]rguments concerning qualifications or lack thereof can be laid before the voting public before the election," as they already have been. *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008). If the voters find former President Trump qualified, and Congress concurs, then the Constitution does not contemplate a time for the judiciary to second-guess that call. Rather, the Constitution gives Congress the sole and final authority to determine whether the President can continue to serve, as many courts have said. *See, e.g.*, *Castro v. N.H. Sec'y of State*, No. 23-CV-416-JL, 2023 WL 7110390, at *9 (D.N.H. Oct. 27, 2023), *aff'd sub nom. Castro v. Scanlan*, 86 F.4th 947 (1st Cir. 2023); *Taitz v. Democrat Party of Miss.*, No 3:12-CV-280, 2015 WL 11017373, at *16 (S.D. Miss. Mar. 31, 2015); *Grinols*, 2013 WL 2294885, at *6; *Voeltz v. Obama*, No. 2012-CA-02063, 2012 WL 4117478, at *5 (Fla. Cir. Ct. Sep. 6, 2012).

The court below concluded that Section 3 is self-executing largely by focusing on things that have been said about other aspects of the Fourteenth Amendment (or other amendments entirely). In doing so, the court ignored many cases that say the Fourteenth Amendment is not self-executing. *See, e.g.*, *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921) ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy."); *Ex parte Virginia*, 100 U.S. 339, 345 (1879) ("All of the [Reconstruction] amendments derive much of their force from this latter provision [in Section 5]. … Some legislation is contemplated to make the amendments fully effective."); *accord Cale v. City of Covington*, 586 F.2d 311, 316 (4th Cir. 1978) ("[W]e believe that the Congress and Supreme Court of the time were in agreement that affirmative relief under the amendment should come from Congress."). And anyway, courts need to examine each specific constitutional provision on its own merits to decide whether that provision is self-executing—not just lump provisions adopted around the same time together. *Cf. Civil Rights Cases*, 109 U.S. 3, 20 (1883) (explaining that portions of the Fourteenth and Fifteenth Amendment that "abolished slavery[] and established universal freedom" were "self-executing," but other portions were not). A constitutional provision "is self-executing only so far as it is susceptible of execution," *Davis v. Burke*, 179 U.S. 399, 403 (1900), and that's a provision-specific question.

The Court should thus hold that Section 3 of the Fourteenth Amendment is not self-executing. The Colorado Supreme Court had no room to apply it before Congress acted.

II. Without more direction from Congress, courts cannot say what constitutes "insurrection" under Section 3.

As it turns out, Section 3 does not supply a "sufficient rule" for a court—federal or state—to apply. *Davis*, 179 U.S. at 403. That's a problem for any court that purports to apply the "insurrection" provision sans enacting legislation that provides that rule, as "an unintelligible text is inoperative." *United States v. Matchett*, 837 F.3d 1118, 1128 (11th Cir. 2016) (Pryor, J., respecting denial of rehearing en banc) (quoting Antonin Scalia & Bryan Garner, *Reading Law* 32-33 (2012)); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1243 n.2 (2018) (Thomas, J., dissenting). At best, courts would be left to make base policy judgments about what it means to engage in "insurrection." But "considerations of policy [and] considerations of extreme magnitude" are "certainly entirely incompetent to the examination and decision of a Court of Justice." *Ware v. Hylton*, 3 U.S. 199, 260 (1796); *accord Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Altogether, then, the Colorado court should have stayed its hand.

A. Section 3's text provides little useful guidance for judges. It applies to persons who "engaged in insurrection or rebellion against the [Constitution]," or who have "given aid or comfort to the enemies thereof." U.S. Const. amend. XIV, § 3. Evaluating whether someone has given inappropriate and actionable aid to the enemy or whether an insurrection occurred is the kind of question answered in war and diplomacy. *Cf. Stinson v. N.Y. Life Ins.*, 167 F.2d 233, 236 (D.C. Cir. 1948) (existence of a war is a political question). But "[j]udges are not soldiers or diplomats."

Lin v. United States, 539 F. Supp. 2d 173, 180 (D.D.C. 2008). And generally, "[t]he decision of all such questions [pertaining to war and insurrection] rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution"—Congress and, to a lesser extent, the President. *Stewart v. Kahn*, 78 U.S. 493, 506 (1870); *accord Martin v. Mott*, 25 U.S. 19, 30 (1827) (stating "that the authority to decide whether the exigency [i.e., invasion] has arisen, belongs exclusively to the President"). Judicial meddling in such matters "is a guarantee of anarchy, and not of order." *Luther v. Borden*, 48 U.S. 1, 43 (1849).

The decision below offered a vague understanding of insurrection: "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 the peaceful transfer of power in this country." App. 87a. The definition spawns more questions than answers. What constitutes a threat? Is a mere assemblage of people shouting enough to constitute a threat of force, given that the required force "need not involve bloodshed"? App. 86a. What actions are necessary to peacefully transfer power? If two people link arms across a sidewalk to block a poll worker from entering a ballot-counting site, does that "hinder" the transfer enough to constitute an outright insurrection? Does incendiary political rhetoric at a rally become insurrection if the winning party deems that rhetoric insufficiently supportive of the new regime? Have protesters "hinder[ed] or prevent[ed] execution of the Constitution of the United States[,]" App. 85a, if their activities "prompt[] the Secret Service to temporarily lock down the" White House and cause the President to be

"moved to [an] underground bunker used … during terrorist attacks"? Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. Times (Nov. 5, 2021), https://bit.ly/3S94h5L. And what about the "knots of activists" who protested former President Trump's inauguration by throwing "rocks and bottles" at police officers, smashing windows with "chunks of pavement and baseball bats[,]" and setting fire to vehicles and trash cans? Jonathan Landay and Scott Malone, *Violence flares in Washington during Trump inauguration*, Reuters (Jan. 21, 2017, 5:37 am), https://bit.ly/3O08beF. Were those protesters—hundreds of whom were arrested—insurrectionists, too?

B. In truth, an "insurrection" is more serious than the lower court's definition supposes. Where the Constitution uses the term "insurrection," that term appears alongside terms like "invasion" and "rebellion." For example, Article I empowers Congress to use the militia to "execute" laws and to "suppress Insurrections and repel Invasions." U.S. Const. art. I, § 8. Similarly, Section 3 of the Fourteenth Amendment speaks of "insurrection" and "rebellion" together. U.S. Const. amend. XIV, § 3. "Under the familiar interpretive canon *noscitur a sociis*, a word is known by the company it keeps." *Dubin v. United States*, 599 U.S. 110, 124–25 (2023) (cleaned up) (quoting *McDonnell v. United States*, 579 U.S. 550, 568–69 (2016)). Wise use of this canon prevents courts from assigning "breadth" to a word that it was never intended have. *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). Here, adjacent references to "Invasion[]" and "rebellion" suggest that an insurrection is "an effort to overthrow the government" and therefore "more serious than" "mere[] opposition to the enforcement of the laws." Jason Mazzone, *The Commandeerer in Chief*,

83 Notre Dame L. Rev. 265, 336 n.450 (2007); *see* Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 Wm. & Mary Bill Rts. J. 153, 167 (2021).

Other early authorities describe insurrections in similar terms. On the spectrum of civil disturbance, Blackstone places "insurrection" closer to a foreign invasion than a riot. 4 William Blackstone, *Commentaries on the Laws of England*, *82, *420; *cf. Kneedler v. Lane*, 45 Pa. 238, 291 (1863) (noting Lord Coke put "invasion, insurrection," and "rebellion" in the same ballpark). Colonial-era laws often treated invasion, insurrection, and rebellion similarly. *See* James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. Pitt. L. Rev. 99, 107 (1983) (quoting *Laws of New Haven Colony* 24 (1656) (Hartford ed., 1858)); Joseph Story, *Commentaries on the Constitution of the United States* § 111 (4th ed. 1873) (noting New York put "rebellion, insurrection, mutiny, and invasion" on a similar plane). And during the Constitutional Convention debates, James Wilson noted that the major reason for the republican-form-of-government clause was to prevent "dangerous commotions, insurrections and rebellions." James Madison, *Notes of Debates in the Federal Convention of 1787* 321 (Adrienne Koch ed., Ohio Univ. Press, 1966) (1840); *accord* Story, *supra*, § 490.

Early Congresses took a similar view. Section 1 of the 1792 and 1795 Militia Acts says the President can use the militia to repel a foreign "invasion" or an "insurrection in any state" if the State asks, while Section 2 says he can use the militia to stop the obstruction of the execution of laws once normal civil

processes are overwhelmed. Act of February 28, 1795, ch. 36, 1 Stat. 424, 10 U.S.C. § 332; *cf.* The Insurrection Act of 1807, ch. 39, Pub. L. No. 9-2, 2 Stat. 443 (differentiating between "suppressing an insurrection" and "causing the laws to be duly executed"). This framing means "insurrection" and hindering the execution of laws are different "type[s] of domestic danger." F.E. Guerra-Pujol, *Domestic Constitutional Violence*, 41 U. Ark. Little Rock L. Rev. 211, 222 (2019).

Judges and others during the Civil War and Reconstruction Era treated "insurrection," "rebellion," and "invasion" as on the same plane, too. *See, e.g.*, *Miller v. United States*, 78 U.S. 268, 308 (1870) (discussing federal laws using these terms seemingly equivalently); *United States v. Hammond*, 26 F. Cas 99, 101 (C.C.D. La. 1875) (discussing a state law regarding grand jury service). The primary Reconstruction-era legal dictionary—echoing many of the sources above—defined "insurrection" as a "rebellion" "against the government"; and "rebellion" primarily meant "taking up arms traitorously against the government." John Bouvier, *Bouvier's Law Dictionary* (6th ed. 1856), *available at* https://bit.ly/3uzlbAP. In the Fourteenth Amendment floor debates, legislators freely swapped the terms. Cong. Globe, 39th Cong., 1st Sess. 2898, 2900 (1866). And a contemporaneous Attorney General opinion interpreting Section 3 of the Fourteenth Amendment saw no meaningful distinction either, constantly equating them and even defining them identically as a "domestic war." *The Reconstruction Acts*, 12 U.S. Op. Att'y Gen. 141, 160 (1867).

Indeed, throughout the 19th century, "rebellion" and "insurrection" were often deemed "synon[y]mous."

State v. McDonald, 4 Port. 449, 456 (Ala. 1837); *see Spruill v. N.C. Mut. Life Ins. Co.*, 46 N.C. 126, 127–28 (1853) (describing insurrection as a "seditious rising against the government …; a rebellion; a revolt"); *Ex parte Milligan*, 71 U.S. 2, 142 (1866) (Chase, C.J., concurring) (equating "insurrection" and "invasion"); *Davis*, 7 F. Cas. at 96 (treating "insurrection" and "rebellion" interchangeably). Insurrections, like rebellions and revolutions, were understood to "come under the general head of *civil wars*." *Martin v. Hortin*, 64 Ky. 629, 633 (1867) (quoting Henry Halleck, *Elements of International Law and Laws of War* 153 (1866)). Insurrections were thought to require "a considerable military force" to be put down. *In re Charge to Grand Jury*, 62 F. 828, 830 (N.D. Ill. 1894) (cited at App. 86a). They were considered "war between the legitimate government of a country and portions of provinces of the same who seek to throw off their allegiance to it and set up a government of their own." U.S. War Dep't, Adjutant-Gen.'s Off., *General Order No. 100: The Lieber Code, Instructions for the Government of Armies of the United States in the Field* § X art. 151 (1863). So like a rebellion, insurrection entails an attempt to outright overthrow the government. Even many of the more modern (and unhelpful) court decisions preferred by the Colorado Supreme Court recognize that much. *See, e.g.*, *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1017 (2d Cir. 1974) (insurrection contemplates a "violent uprising by a group or movement … for the specific purpose of overthrowing the constituted government and seizing its powers"); *accord Younis Bros. & Co. v. CIGNA Worldwide Ins. Co.*, 91 F.3d 13, 14 (3d Cir. 1996); *Home Ins. Co. of N.Y. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954).

These descriptions are consistent with four of the pre-Civil War insurrections that would have been top of mind for the Fourteenth Amendment's framers: Shay's Rebellion (1786–1787), the Whiskey Rebellion (1794), Fries's Rebellion (1799–1800), and Dorr's Rebellion (1841–1842). These insurrection-rebellions lasted several months; involved extended violence that shut down courts and revenue collection in local areas; targeted particular local officials; involved militarily arrayed participants; and saw either combat or the election of a rival government. *See United States v. Mitchell*, 2 U.S. 348, 355 (C.C.D. Pa. 1795); *Case of Fries*, 9 F. Cas. 924, 933 (C.C.D. Pa. 1800); *Milligan*, 71 U.S. at 129. All were far more serious than the lower court's definition suggests.

C. Although it's clear enough that the Colorado court's definition is the wrong one, that's not to say that a court would be equipped to provide the right one. "Evidence from the Founding era is not entirely clear" about when a riot becomes insurrection. Mazzone, *supra*, at 336 n.450; *see* B. Mitchell Simpson, *Treason and Terror: A Toxic Brew*, 23 Roger Williams U.L. Rev. 1, 24 (2018) (saying the "distinction between insurrection and riot" can be "narrow"). Since then, things have not become any clearer. *Cf. Herndon v. Lowry*, 301 U.S. 242, 261 (1937) (finding that a state statute purporting to punish an attempt to incite an insurrection did "not furnish a sufficiently ascertainable standard of guilt"). And the Colorado court concluded that it could define "insurrection" just because some other modern-day courts have occasionally found a definition for the word in latter-day dictionaries in distinguishable contexts. App. 60a. A hundred years ago, even the Colorado Supreme Court gave a different answer. *See In re Moyer*, 85 P. 190,

192 (Colo. 1904) (holding that the court could not review the governor's determination that an insurrection had occurred). But the Colorado Supreme Court of today preferred a rough-and-ready form of constitutional construction that this Court should not endorse.

The Constitution provides the solution to the chaos that would accompany the Colorado court's approach. It specifies that a politically accountable body should publicly declare whether an ongoing disturbance of the peace constitutes a war, rebellion, or insurrection, precisely because the lines between them are not always clear. Across the board, the Constitution entrusts to Congress the power "[t]o declare War," "call[] forth the Militia to suppress Insurrections and repel Invasions," and of course "enforce" Section 3 of the Fourteenth Amendment "by appropriate legislation." U.S. Const. art. I, §§ 8, 12; U.S. Const, amend. XIV, § 5.

Using legislative and political processes to decide which disturbances rise to the level of war, rebellion, or insurrection would also have been familiar to those who adopted the Fourteenth Amendment. As early as 1792, Congress required the President to issue a proclamation before exercising authority to use the Militia to "suppress Insurrections and repel Invasions." U.S. Const. art. I, § 8, cl. 15. The 1792 Militia Act authorized the President to "call forth" the militia only if he first issued a "proclamation, command[ing] [the] insurgents to disperse, and retire peaceably." Act of May 2, 1792, ch. 28, §§ 1–3, 1 Stat. 264; *cf.* N.Y. Code of Crim. Proc., ch. 4, § 97 (Weed, Parsons & Co. 1850) (requiring published proclamation that a county is "in a state of insurrection"). The Militia Act of 1795

included the same proclamation requirement, Act of February 28, 1795, § 3—as does federal law today, *see* 10 U.S.C. § 254; *see also Mott*, 25 U.S. at 31 (holding that court could not question a president's proclamation of insurrection under the 1795 Act).

The framers of the Fourteenth Amendment knew these processes well. The President issued many proclamations during the Civil War declaring it to be an "insurrection against the United States." Andrew Johnson, U.S. President, *Message Proclaiming End to Insurrection in the United States* (Aug. 20, 1866) (collecting examples). In 1861, for example, Congress authorized a proclamation to be issued "when insurgents … failed to disperse by the time directed by the President" and the insurgents claimed to be acting under State authority. Act of July 13, 1861, ch. 3, § 5, 12 Stat. 255; *see also* Act of July 29, 1861, ch. 25, 12 Stat. 282 (amending the Militia Act of 1795 and reimposing a proclamation requirement). No one therefore had to guess whether the Civil War was an insurrection; an authoritative, public process for proclaiming it an insurrection gave the definite answer. *Cf. United States v. Greathouse*, 26 F. Cas. 18, 23 (C.C.N.D. Cal. 1863) (finding that "public notoriety, the proclamations of the president, and the acts of congress" were "sufficient" to prove "the existence of a rebellion against the United States"). But Congress did not exercise any of those powers when it came to the events of January 6, and—beyond the Civil War—Congress has not endeavored to define what might constitute an "insurrection" more generally. "[W]hen called on to construe one of the Constitution's underdeterminate phrases, an originalist judge"—or any judge, really—"should ask …, 'what is my role?'" Amul R. Thapar & Joe Masterman, *Fidelity and*

Construction, 129 Yale L.J. 774, 807 (2020). Here, the answer must be to wait.

If Congress or the President were to authoritatively give persons notice that continuing to take part in a serious, widespread disturbance constitutes an insurrection (as they did during and after the Civil War), then courts perhaps would have a manageable standard to apply. *See* Lynch, *supra*, at 214–15 ("after the President issues a Proclamation pursuant to the Insurrection Act"). But without a proclamation, courts—the Colorado Supreme Court included—are ill-equipped to second-guess the judgments of politicians, soldiers, and diplomats about how to label politically charged conflicts. And when it comes to the events of January 6, certainly, the Colorado court had no *legal* standard to apply.

III. Allowing state courts to apply Section 3 to Presidents without congressional action would damage our system of government.

In the end, the practical results of affirming the Colorado court confirm that its construction of Section 3 cannot be right. From the very beginning, this Court has preferred constructions that do *not* render the government's operations "difficult, hazardous and expensive." *M'Culloch v. Maryland*, 17 U.S. 316, 408 (1819). Rather, where the text allows, the Court works to avoid "rendering the government incompetent to its great objects." *Id.* at 418; *see also, e.g.*, *Martin v. Hunter's Lessee*, 14 U.S. 304, 326 (1816) ("[T]his instrument, like every other grant, is to have a reasonable construction, according to the import of its terms."). And here, allowing state courts to do what the Colorado court did would undermine most every

part of our constitutional system. "[T]he framers of the constitution[al] [amendment] could never have intended to insert in [the constitution], a provision so unnecessary, so mischievous, and so repugnant to its general spirit." *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 628 (1819).

A. Take Congress. By now, it should be clear that the Colorado decision undermines Congress's specific power to disqualify by leaping ahead without enabling legislation. *See* pp. 3–8, *supra*. Relatedly, the decision undermines Congress's ability to *lift* a disqualification under Section 3, as Congress never had the chance to make that call before Colorado struck former President Trump from the ballot. Now, Congress must decide whether the actions of one State will compel it to take that step. *Cf. Colegrove v. Green*, 328 U.S. 549, 565 (1946) (Rutledge, J., concurring) (worrying that a court decision would "pitch[] this Court into delicate relation to the functions of state officials and Congress, compelling them to take action which heretofore they have declined to take voluntarily or to accept the [court-imposed] alternative"). None of that fits well with the primary role for Congress that the Constitution contemplates.

But more generally, the Colorado decision intrudes into a realm that Congress has traditionally controlled. To be sure, States can regulate the "manner" of conducting presidential elections. U.S. Const. art. I, § 4. But "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833–34 (1995). Most often, then, the choice of how to regulate a presidential election

beyond the nuts and bolts "presents a question primarily addressed to the judgment of Congress." *Burroughs v. United States*, 290 U.S. 534, 547 (1934). After all, the Framers conferred upon "the Federal Government" "the final control of the elections of its own officers," *Oregon v. Mitchell*, 400 U.S. 112, 134 (1970), and Congress (perhaps along with the Electoral College) is the body through which that federal power manifests. Even state courts had recognized before that making these kinds of calls can therefore "interfere with the constitutional authority of the Electoral College and Congress." *Lamb v. Obama*, No. S-15155, 2014 WL 1016308, at *2 (Alaska Mar. 12, 2014); *see also, e.g., Strunk v. N.Y. State Bd. of Elections*, No. 6500/11, 2012 WL 1205117, at *12 (N.Y. Sup. Ct. Apr. 11, 2012) (same).

And don't forget impeachment. The power to accuse a President of an impeachable offense resides solely in the House of Representatives, U.S. Const. art. I, § 2, cl. 5, while the power to remove a President resides solely in the Senate, *id.*, art. I, § 3, cl. 6. Congress applied these powers to former President Trump, as the House impeached him twice. But the Senate acquitted him both times, even when political opponents accused him of fomenting insurrection, much as the lower court held here. *See* 166 Cong. Rec. S938 (daily ed. Feb. 5, 2020); 167 Cong. Rec. S733 (daily ed. Feb. 13, 2021). So Colorado has effectively declared that Congress was wrong—particularly in the latter impeachment proceeding. Congress thus loses its role as the exclusive arbiter of that question. *Contra Nixon v. United States*, 506 U.S. 224, 238 (1993) (holding impeachment is the exclusive domain of Congress).

B. Now consider how decisions like this one would affect the Presidency. The President is one of only two "elected officials who represent all the voters in the Nation." *Anderson v. Celebrezze,* 460 U.S. 780, 795 (1983). But if this decision stands, then every President will now have to constantly look over his shoulder, wondering how any politically charged decision or even campaign-related rhetoric might play out in each of the 50 States. Imagine, for instance, that a decision to withdraw from war abroad is widely opposed by the population of a given State. Could litigants now sue the President in that State, saying that his war-time decisions are so egregious that they constitute "aid or comfort" to our enemies, U.S. Const. amend. XIV, § 3, and have the President disqualified? Or could litigants attack a President for opposing some act of Congress too vehemently, refusing to implement it, or voicing support for those who end up using violence in response to political action, even though his "[a]mbition" is supposed to "counteract" Congress's? The Federalist No. 51 (James Madison). Once these kinds of stories might have seemed laughably implausible. Yet with a fluid definition of insurrection now on the table (remember that the Colorado court refused to give an "all-encompassing" definition of the word, App. 86a), and some state actors evidently anxious to make use of it, the unimaginable is becoming disappointingly more real. Our supposedly national representative could thus become subject to constant second (and fiftieth) guesses.

Think, too, about how this decision will affect Presidents of days gone by. If the Colorado decision is correct, then some have argued that former President Trump would be immediately disqualified the moment he purportedly engaged in insurrection on January 6,

2021. *See, e.g.*, Mark Graber, *Section Three and (Not) Bills of Attainder*, Balkinization (Jan. 13, 2021), https://bit.ly/3vg4drM. Under this view, "the actions that [former President Trump] took between Jan. 7 and Jan. 20—including the pardons he issued and the bills he signed into law"—would not be constitutionally valid. Robert J. Reinstein, *Expulsion, Exclusion, Disqualification, Impeachment, Pardons: How They Fit Together*, Lawfare (Feb. 11, 2011), https://bit.ly/47nxYo0; *see also* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. (forthcoming 2024) (manuscript at 29), https://ssrn.com/abstract=4532751 ("Those who cannot constitutionally hold office cannot constitutionally exercise government power, so the subjects of that power can challenge their acts as *ultra vires*."). Thanks to Colorado, then, some might now try to say that America was without a President for two full weeks. And nothing is to say that this problem of "ultra vires" acts would be confined to January 6.

C. Courts are not spared the ill effects of this decision, either. State and federal courts alike have traditionally been justifiably cautious about intervening in "the most intensely partisan aspects of American political life." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). For good reason. Court involvement in pure politics can bring "delay and uncertainty … to the political process … [and] partisan enmity … upon the courts." *Vieth v. Jubelirer*, 541 U.S. 267, 301 (2004) (plurality op.). Yet this case involves perhaps the most "intensely partisan" event one can imagine—a presidential election. And so a real danger exists that the "intelligent man on the street" would say it's "a bunch of baloney" to think that a dispassionate

application of the law resulted in a politically charged candidate being disqualified. Tr. of Oral Arg. at 37–38, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161). Rather, the smart observer will suppose that "[i]t must be because the [relevant] [c]ourt preferred the Democrats over the Republicans," or vice versa. *Id.*

This direct blow to the legitimacy and perception of courts has real effects. Judicial "authority"—and every court's authority—"ultimately rests on sustained public confidence in its moral sanction." *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting). As far back as de Tocqueville, it was understood that courts hold only "a power of opinion" that drops if away if the public "scorn[s]" its pronouncements. Alexis de Tocqueville, *Democracy in America* 142 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835). If the public begins to get the sense that courts have moved beyond a "properly judicial role," then that scorn will no doubt begin to build. *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 438 (2017).

And indeed, if courts take on Section 3 cases like these—acting without direction from Congress, and lashing out against the President himself—then it seems almost inevitable that they will come to be viewed as political operators unworthy of the special respect that gives force to courts' decisions. Even more so if they employ routes that don't look like ordinary due process, as seemed to be the case here. *See* App. 154a–60a (Samour, J., dissenting) (noting how the Colorado trial court allowed extremely limited discovery, used rapid proceedings that nevertheless blew statutory deadlines, adopted loose evidentiary standards, and did not involve a jury). These problems

no doubt help explain why James Madison thought it was "out of the question" that the federal judiciary would be called upon to decide the Presidency, let alone 50 state systems. *See* James Madison, *Notes of Debates in the Federal Convention of 1787* 363 (Adrienne Koch ed., Ohio Univ Press, 1966) (1840).

D. And lastly, greenlighting standardless Section 3 suits like this one will harm the States. Yes, the States here most often come before this Court as champions of federalism. And one might generously call the Colorado court's free-for-all approach a spin on federalism. But even aside from the text of the Fourteenth Amendment (which must ultimately prevail no matter how fond one might be of federalism), the States here see real harms to their own interests by heading down this path.

Most obviously, the States have an interest in seeing our electoral system work effectively. "[E]lections for presidential and vice-presidential electors" are, after all, "national elections." *Oregon v. Mitchell*, 400 U.S. 112, 117–18 (1970). As to primaries in particular, "States themselves have no constitutionally mandated role in" selecting "Presidential and Vice-Presidential candidates" at all. *Cousins v. Wigoda*, 419 U.S. 477, 489–90 (1975). So "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest." *Anderson*, 460 U.S. at 794–95 (footnote omitted). Those interests extend beyond a State's "own borders." *Id.* at 795. And no State is an electoral island because "the impact of the votes cast in each State is affected by the votes cast"—or, in this case, not cast—"in other States." *Id.* So state-led disqualification decisions create cross-border harms.

What's more, the Colorado court's decision to dilute former President Trump's votes in the upcoming election will throw the 2024 presidential election into chaos. Yet courts are supposed to give "a due regard for the public interest in orderly elections." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). "[S]ome sort of order, rather than chaos, is to accompany the democratic process." *Cook v. Gralike*, 531 U.S. 510, 524 (2001). Nothing about throwing open the doors to *ad hoc*, state-by-state Section 3 disqualifications bespeaks order. Quite the opposite: "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4–5; *see Keyes v. Bowen*, 117 Cal. Rptr. 3d 207, 215 (Cal. Ct. App. 2010) (warning that undue state interference in similar qualifications cases can result in "conflicting rulings and delayed transition of power in derogation of statutory and constitutional deadlines").

If the Court endorses what happened in Colorado, then the chaos can only be expected to worsen. No doubt a political tit-for-tat will ensue, in which competing parties will find new avenues to disqualify their opponents. And elections could then come down to small variations among state elections laws and the political composition of state administrations. In short, indulging challenges of this sort and in this posture will "sacrifice the political stability of the system" of the Nation "with profound consequences for the entire citizenry." *Storer v. Brown*, 415 U.S. 724, 736 (1974). At a minimum, it will "expose the political life of the country to months, or perhaps years, of chaos." *Nixon*, 506 U.S. at 236. But "[w]hat in this

gamesmanship and chaos c[ould] we be proud of?" *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring).

It also seems odd to say that Colorado rightly seized this constitutional power when so many States have said otherwise. Even beyond Section 3, state "election administrators … [have] frequently expressed reluctance that they should be the ones who handled such disputes." Derek T. Muller, *"Natural Born" Disputes in the 2016 Presidential Election*, 85 Fordham L. Rev. 1097, 1110 (2016). And even when it comes to Section 3 and January 6, only two States have seen fit to try to disqualify former President Trump. That general reluctance and restraint should serve as a strong signal that the answers should really come from somewhere else.

* * * *

All these "strange, far-reaching, and injurious results" from the Colorado court's approach confirm what the text of Section 3 already says: the court never should have held as it did. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 142 (1912). Affirming the Colorado court will only invite more judicial meddling and more loss of confidence in the judiciary. To restore public confidence, the only way forward is to reverse.

CONCLUSION

The Court should reverse.

Respectfully submitted.

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