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* DAVID BOYLE IN SUPPORT OF NEITHER PARTY

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] wants the 2024 election to be fair and violence-free, so that he and other Americans may have democracy and long life. Thus, he submits this brief, discussing ways the Court can hold Petitioner, ex-President Donald J. Trump ("Trump"), responsible as needed for the deadly U.S. Capitol terrorist/insurrectionist attack of January 6, 2021 ("January 6"), but also consider, fairly, arguments against removing him from the Colorado presidential ballot due to the Constitution's 14th Amendment, Section 3 ("Section 3").

Despite Trump's questionable behavior, though, there are many reasons to submit a brief for neither party. First, Amicus isn't an expert on these issues (is anybody?).

Second, interested parties can't predict outcomes; e.g., will keeping Trump on the ballot: 1. help Republicans (get Trump elected), or 2. hurt them, by putting a troubled candidate, Trump, up against President Joseph R. Biden, Jr.? (Keeping Trump on the ballot may also hurt the chances of other, non-insurrectionist Republican candidates,)

Third, a neutral, not-for-either-party brief helps emphasize that however the Court rules, it can be a neutral provider of civic education, e.g., that a ruling for, or against, Trump, may not vindicate, or damn, respectively, everything Trump did on January 6, or anytime else. This will help voters make more rational decisions.

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[1] No party or its counsel wrote or helped write this brief, or gave money for the brief, *see* S. Ct. R. 37.

SUMMARY OF ARGUMENT

The Presidency is an Office under, and the President is an Officer of, the United States. The Constitution's Article II helps confirm these things, and does not impede them as Petitioner claims. Section 3's drafters might not have wanted Jefferson Davis in higher office.

Petitioner conceded that the President is an officer of the United States back in June 2023, *see infra* § II of this brief. He should have mentioned this in his certiorari petition, and should discuss it from now on.

He also conceded various other points, e.g., that being elected does not preclude one from being an officer of the U.S.

The Article VI, Clause 3 officer-oath, *see id.*—like Section 3, *see id.*—does not require saying the exact word "support". The Article II Presidential oath, *see id.*, not only fulfills Article VI conditions, it is even stronger than the usual officer-oath.

Section 3, which is self-executing, may preclude Petitioner from ballots even if he did not personally invade the Capitol building on January 6, and regardless of the order of offices mentioned in the Section.

The instant case is ripe, considering, e.g., that Petitioner can ask Congress for a Section 3 pardon at this moment—which often entails pleading guilty. Even if he doesn't ask for a pardon, it would be asinine to put him on the ballot and wait until after the election to resolve the case or see if he is

pardoned; a future pardon is far more speculative than, say, turning 35 by Inauguration Day.

Too, an election-winner could physically threaten Congress into pardoning him. A hypothetical is offered to illustrate problems.

Democracy includes protecting people from insurrectionists, not just letting anyone onto the ballot. Joseph Goebbels believed in exploiting democracy to destroy democracy, showing insurrectionists' diabolical mindset. Past abusers need not be enabled to commit further abuse.

Petitioner's speech on January 6 shows he may have truly been an insurrectionist. He exhibited sadistic hate, racial abuse, a rule-breaking mentality, and other vices, helping show one need not openly declare treason or rebellion, to be an insurrectionist.

Similarly, Petitioner's actions and language pre- and post-January 6, including his sexual abuse of E. Jean Carroll, and calling January 6 rioters "hostages", make it credible that he is a lawless insurrectionist.

If a "national solution" precluding further State litigation about Section 3 is desired, the Court could simply rule Petitioner should be removed from every State's ballot. This may be no worse than the opposite "national solution" of preventing all States from removing him from ballots.

Manageable standards may well exist for judging States' Section 3 challenges. Courts can dismiss such challenges if there are *de minimi*s nods at

insurrection, such as nose-thumbing towards the Government; but more serious insurrection can result in removal from a ballot, or office.

New Mexico's treatment of insurrectionist Couy Griffin is an example of competent judicial handling of Section 3 issues.

As mentioned before, there are reasons for Amicus, and others, to support neither party, even if strong evidence favors Anderson Respondents ("Respondents") and Colorado's removal of Petitioner from the ballot.

The Court may be a neutral educator about its ruling not endorsing, or condemning, either major political party or its supporters or candidates.

ARGUMENT

I. REASON AND AMPLE EVIDENCE SHOW THE PRESIDENT TO BE AN "OFFICER OF THE UNITED STATES"

Rod Serling: *"Imagine, if you will, Jefferson Davis, a battered ex-President of the Confederacy, now elected President of the United States—and also Speaker of the U.S. House of Representatives at the same time.*

You have entered… the Trumplitigation Zone."

Indeed, some of Petitioner's or his amicae/i's arguments, or the arguments' consequences, are bizarre enough, that even Rod Serling's head might be spinning.

First off:

A. The Presidency Is Obviously a Federal

Office Not Just of, But Also Under, the United States. And, Related Ineligibility-Clause Issues

Much quibbling has occurred over whether the President of the United States, holding that *Office* (a big hint…), is an "Officer of the United States", especially for Section 3 purposes. Well, he/she's federal, and holds an office, which is of the U.S., not Mars, or Pago-Pago, so… Officer of the United States, unless somehow disproven, e.g., explicitly excluded by another provision.

And if his Office isn't *under* the United States: is it *above* them? Sounds like Hitler, not democracy. Or exactly *equal* to the U.S.? One person serving 4-8 years, hired by the People, being equal to the whole U.S.? So, all that's left is *under* the United States.

On those notes, a query, re "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office", Art. I, § 6, cl. 2 (Ineligibility Clause): so, do the President and Vice President, if they're not really "Officers"—which is what "Office"-holders tend to be called—, do they get to be Members of Congress at the same time, too, since the Ineligibility Clause wouldn't prevent them?

Thus, the nightmare scenario *supra* at 4, where Jefferson Davis could be President *and* House Speaker simultaneously. God forbid.

B. The Appointments, Commissions, and Impeachment Clauses of Article II

As for the Appointments Clause (Art. II, § 2, cl. 2) and "all other Officers of the United States, whose

Appointments are not herein otherwise provided for [etc.]", *id.*: needless to say, the President doesn't have to appoint himself, since the People already "appointed" him by electing him. Maybe inferior officers need to be appointed, but not he.

Thus, he can still be an Officer of the U.S.

Similarly, as for the Commissions Clause (Art. II, § 3, cl. 6), and the President having to "Commission all the Officers of the United States", *id.*: the President doesn't *have* to commission himself, already being voted into his *Office*. So, he is an obvious, common-sense exception to the rule.

Cf. Romans 3:23, "[A]ll people have sinned and fallen short of the glory of God", *id.*; clearly, St. Paul didn't mean to say that Jesus himself (a man) sinned. That would be absurd, and blasphemous. Jesus is an obvious exception to the rule.

Similarly, it may be absurd to see the chief federal officer of the U.S., Chief Executive/ Magistrate, Head of State, as not being an "Officer of the United States", just because he hypertechnically isn't "appointed" or "commissioned" *per se*.

And though the Impeachment Clause (Art. II, § 4) includes, "The President, Vice President and all civil Officers of the United States [etc.]", *id.*: while it'd have been clearer to have an "other" after "all", *supra*, it isn't necessary. If, say, one addresses a softball-team gathering, "Jane, LaWanda, and all the talented softballers", that doesn't mean that Jane and LaWanda aren't softballers (or aren't talented). Perhaps there's some special reason for mentioning Jane and LaWanda by name: e.g., they were MVP's and deserve special recognition?

Similarly, then, it makes sense to mention President and Vice President by name in the Impeachment Clause, just to make sure we know we can impeach even those very powerful people. Too, since the President is Commander-in-Chief (and could declare martial law), and the Vice President is Acting President if the President is disabled, some might have thought those two military-directing Offices aren't merely *civil* Offices at times.

Thus, it is prudent to mention explicitly those two Officers of the U.S., President/Vice President, as being impeachable, in addition to inferior "civil Officers", *id.*

C. Article II Mentioned Explicitly That One Could Be an Officer And Also Act as President

Moreover, at the time the 14th Amendment was born (1868), Article II said the following, though some change has occurred with the 25th Amendment:

> [T]he Congress may by Law provide for the Case of Removal, Death [etc.] both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

Art. II, § 1, cl. 6 ("Vacancy Clause"). The above makes it clear, *see id.*, that someone can be both an Officer and President at the same time, disproving the notion that being President is constitutional "kryptonite" preventing one from also being an

Officer.

Some may quibble that the quote *supra* doesn't say "Officer of the United States". Well, what country is the quote talking about? Too, even if the Officer somehow weren't called President, but "Acting President", or even "Guy/Gal Doing President-Work": the sayings "if it quacks like a duck…" and "a rose by any other name…" come to mind. President = Officer.

Although the 25th Amendment language is different, and basically discusses having the Vice President replace the President, with Cabinet officers also involved in the decision, and doesn't mention putting an "Officer" in place of President or Vice President, *see id.*: it doesn't disavow the Vacancy Clause's common-sense idea that one could indeed be Officer and President both, thus supporting the validity of that idea.

And this Section I of the brief is assisted by Trump's having already *admitted in writing* to being an officer of the United States…

II. PETITIONER PREVIOUSLY CONCEDED IN FEDERAL COURT THAT HE WAS AN OFFICER OF THE UNITED STATES

Petitioner's petition for certiorari claims, "[T]he President is not 'an officer of the United States[.]'" *Id.* at 2. Very notably, though, the petition doesn't mention that he already conceded in federal court to being an *officer of the United States*. (Or demanded to be treated as such, for his own benefit.) *See New York v. Trump*, 1:23-cv-03773-AKH, Pres. Donald J. Trump's Mem. of L. in Opp'n

to Mot. for Remand ("Memorandum"), ECF No. 34 (S.D.N.Y. June 15, 2023), *available at* https://www.courtlistener.com/docket/67326478/34/people-of-the-state-of-new-york-v-trump.

First off: the Memorandum, *supra*, says, in bold lettering,

> **POINT I: THE PRESIDENT IS AN OFFICER OF THE UNITED STATES WHO CAN REMOVE CASES TO FEDERAL COURT**.

Id. at 2. Not very subtle.

The Memorandum qualifies shortly after, by saying, "The President of the United States is an 'officer . . . of the United States' under 28 U.S.C. § 1442(a)(1)", Mem. at 2, which could still imply he's *ipso facto* an officer of the U.S. under Section 3, 14th Amendment. But the Memorandum at least concedes Trump *is* an officer of the United States, meaning that the certiorari petition should have mentioned that prominently, even if it later tried to distinguish it or explain it away.

To take the Court's time presently to claim Trump isn't an officer of the U.S., when Trump previously *demanded* to be considered one, is highly questionable. Words like estoppel, reliance, etc., come to mind.

Petitioner's conduct is all the more questionable, in that he openly accused other litigants of deceit. "DANY [Manhattan District Attorney's Office] offered no response to [certain] case law, in fact, they deceivingly did not cite it." Mem. at 4. But has he shown candor himself re the Memorandum? (He may

not have acted/omitted with malice; but, still…)

Petitioner did briefly discuss the matter in the Colorado Supreme Court, when pressed by Respondents, but Amicus believes the matter has received far too little attention. If Petitioner also fails to discuss it in his brief due January 18, that will double the problem. (Due to Amicus' filing his own brief by the 18th, he may not have time to read Petitioner's brief and then comment on it.)

Respondents noted in their November 20, 2023 opening brief, that "Trump[,] in a New York case[,] argued both that the President *is* an 'officer of the United States' and that the Appointments Clause and related decisions have no bearing on that question." Br. at 45.

Too, in a November 3, 2023 cross-examination of Robert Delahunty by Respondents' lawyer Jason Murray, Murray mentioned the issue, basically mentioning parts of the Memorandum to Delahunty, who didn't seem overly aware of the Memorandum. *See* Tr. 252:8-255:16 (Nov. 3, 2023).

Petitioner responded, in his November 27, 2023 Opening-Answer Brief,

> Finally, Cross-Applicants accuse President Trump of taking a contrary position regarding his status as "Officer of the United States" in other litigation, referring to his arguments opposing a motion to remand before the District Court for the Southern District of New

> York. These statements do not constitute judicial estoppel or an admission. Those unsuccessful arguments solely concerned his status as an officer of the United States for purposes of 28 U.S.C. § 1442(a)(1), and he specifically observed that the meaning of "officer" under the Constitution and under § 1442(a)(1) could differ. As such, his previous arguments do not contradict his current position, estop him, or alter the Constitutional meaning in this case.

Br. at 13 (footnotes omitted). However, Amicus isn't sure that Petitioner is correct.

A. An Officer of the United States for Purposes of 28 U.S.C. § 1442(a)(1) Can Also Be an Officer of the U.S. under Section 3

Indeed, Amicus thinks an officer of the U.S. under § 1442 may also be one under Section 3, unless proven otherwise.

§ 1442(a)(4), for example, mentions "Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House", *id.*, as someone who can also remove a case to federal court. So, an officer of the U.S., as in § 1442(a)(1), is differentiated from § 1442(a)(4)'s Congressional officers; thus, "officer of the United States" isn't just a generic term covering anyone who can remove cases.

Even if some courts have held that Congressmembers in general, not just those in §

1442(a)(4), can be considered officers of the U.S. for removal purposes, *see* Mem. at 3, 6: Petitioner is no Congressmember. His presidency is the *predicate* for being an officer of the U.S. So, the question is open, as to whether Petitioner's being a § 1442(a)(1) officer of the U.S. means he is also one under Section 3.

B. Petitioner, a Confessed Federal Officer, Has Conceded That Just Because the President Is Voted into Office, That Doesn't Prevent Him from Being an Officer of the United States. And, the Mandamus Act Has Been Used to Call a President "Officer of the U.S."

Other claims from the Memorandum:

"DANY [Manhattan District Attorney's Office] argues that the removal statute does not apply to the President of the United States because he is an elected official and thus not an 'officer of the United States,' never once citing or otherwise acknowledging the numerous cases—including those involving President Trump—rejecting that proposition." Mem. at 1 (supporting that elected officials can be officers of the U.S.).

"In *K&D LLC v. Trump Old Post Off. LLC*, 951 F.3d 503, 505 (2020), the D.C. Circuit affirmed President Trump's removal of a civil action to federal court under § 1442." Mem. at 3 (supporting Trump's being an officer of the U.S.).

"Moreover, under DANY's flawed logic that 'officials . . . elected to their positions rather than appointed' are not 'officers of the United States,' (RMOL [Remand Memorandum of Law] at

30), members of Congress also could not remove cases to federal court under § 1442." Mem. at 3.

This, *see id*., hurts Petitioner's case, if he or any of his amici maintain that being elected prevents the President from being an officer of the U.S. If DANY has "flawed logic", *id*., then *non-flawed*, accurate logic must be that elected officials can be officers of the United States, as Petitioner admits *supra*. Estoppel/reliance, etc.

(Indeed, his amici have already claimed that being elected, the President cannot be an officer of the U.S. under the Appointments Clause; *see, e.g.*, Br. for Republican Nat'l Comm. and Nat'l Republican Cong. Comm. as *Amici Curiae* in Supp. of Pet'r. (Jan. 5, 2024), at 21-22, despite Petitioner's admission *supra*.)

Petitioner also notes about removal issues, or the absence of such issues, *vis-à-vis* the President, "DANY cites two cases, but neither even purports to address the reach of § 1442." Mem. at 4.

Thus, the New York D.A. means that *in general*, not just re § 1442, election bars the President from being an officer of the U.S. Conversely, Petitioner arguing against New York, may endorse *in general*, not just re § 1442, that election doesn't bar the President from being an officer of the U.S.

More details on the "two cases", Mem. at 4:

> DANY . . . quotes *Free Enterprise Fund*[,] "[t]he people do not vote for the 'Officers of the United States.'" RMOL at 30. This language purportedly shows that "the Supreme Court has long

> interpreted 'officer' to exclude the President and Vice President because those officials are elected to their positions rather than appointed." Upon review of the language and context, however, it is clear that the Supreme Court was not deciding that meaning of "officer of the United States" as used in every clause in the Constitution, let alone in every statute in the United States Code. Rather, the Court was simply describing the meaning of "other officers of the United States" as used in U.S. Const. art. II, § 2, cl. 2. There, the Constitution addresses the President's "power" to "appoint … other officers of the United States[.]"

Mem. at 4. This admission, *supra*, forecloses Petitioner's side from using *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), to argue the President, being elected, automatically can't be an officer of the U.S.

> Similarly unavailing is DANY's reliance on *United States v. Mouat*, 124 U.S. 303 (1888). *Mouat* addressed not whether the President (or members of Congress) are ever "officers of the United States," but when a government official is, in the modern parlance, a mere employee and not someone "holding employment or appointment under the United States." *Id.* at 305.

Mem. at 5. This admission, *supra*, forecloses Petitioner's side from using *Mouat* to argue the President can't be an officer of the U.S.

> The fact that a President is an officer of the United States under § 1442 is also consistent with how the phrase has been interpreted in … the Mandamus Act[,] provid[ing] that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel *an officer or employee of the United States* . . . to perform a duty owed to the plaintiff." 28 U.S.C. §1361 (emphasis added). In *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974), a federal employees' union sued President Nixon in his official capacity to compel him to implement a pay raise[.] The D.C. Circuit found it had jurisdiction under the Mandamus Act "to mandamus the President to perform the ministerial duty" of effectuating legally required pay raises. *Id.* at 616.

Mem. at 6-7. So, *see id.*, Petitioner openly admits 28 U.S.C. § 1361 (which *doesn't mention* Congress, *id.*) establishes the President as an officer of the U.S., *independently of* § 1442.

Too, Trump also admits to being a federal officer, period (mentioned if useful here),

"President Trump has also raised an immunity defense [re] the discharge of his official duties as President. A federal officer who is reasonably discharging his federal duties remains immune from state prosecution." Mem. at 17.

"President Trump has more than adequately demonstrated a federal defense entitling him to Supremacy Clause immunity[,] which protects federal officers from state prosecution under certain circumstances[.]" Mem. at 23.

Amicus could cite more, but the excerpts already cited are useful enough. Again, Petitioner may be estopped in current claims, by what he has already said. —Now to another issue re "officers of the U.S.":

III. ARTICLE VI DOESN'T STIPULATE EXACT LANGUAGE FOR OATHS TO SUPPORT THE CONSTITUTION; AND THE PRESIDENT'S OATH IS LIKE THAT OF OTHER OFFICERS OF THE U.S., BUT EVEN STRONGER

Some say the President's oath or affirmation of office, not having the word "support" found in Article VI re the oath/affirmation of other officers of the U.S. to "support this Constitution", *id.* cl. 3, disqualifies him from being such an officer. But this is false, in various ways.

First, Article VI, *id.*—like Section 3 itself, *id.*—doesn't require the actual word "support" to be used. While the oath is to support the Constitution, it doesn't stipulate the actual *words* to be used, unlike

the President's oath.

Currently, 5 U.S.C. § 3331 does say people besides the President "elected or appointed to an office of honor or profit in the civil service or uniformed services" will use the words, "support and defend the Constitution", *id.* But that doesn't preclude the President from using the wording of his Article II oath to "support the Constitution" and fulfill Article VI, Clause 3.

On that note: "preserve, protect and defend the Constitution of the United States", what the President's oath says, Art. II, § 1, cl. 8, by common sense includes the idea of supporting the Constitution. And in even a stronger version than in § 3331, *supra*: with *three* words, preserve-protect-defend, not just two, support-defend. So, the President's oath is like § 3331, but "on steroids", as the colloquialism goes.

When the President's oath is even stronger than the § 3331 oath, it looks odd to claim this *precludes* him from being an officer of the United States; rather, it helps cement the idea that he really is one—and the strongest one.

Now to Section 3, 14th Amendment, to discuss whether Officer-of-the-United-States Trump lived up to his office.

IV. SECTION 3 MAY HOLD PETITIONER LIABLE, IN A SELF-EXECUTING WAY, EVEN IF HE DIDN'T PERSONALLY BEAR ARMS, AND REGARDLESS OF WORD-ORDER IN THE SECTION

Section 3 may not require that Petitioner himself stormed the Capitol, bore weapons, or personally hanged Mike Pence. The fomenter of insurrection may be held liable, not only the actual combatant; just as the "religious leader" who incites a terrorist or suicide bomber may be held liable, even if the "leader" himself commits no physical violence. There is also violence of the spirit.

…Some say the word-order of Section 3 somehow benefits Petitioner, i.e., that if the President were to be included, he'd have been mentioned first, and that the order of importance of people mentioned goes from greater to lesser. But this isn't true: "Senator or Representative" are mentioned first, then "elector of President and Vice-President", then, "any office, civil or military, under the United States [etc.]", *id.* However, it's hard to argue that being U.S. Secretary of State is somehow less important than being a presidential elector.

So, the order of words doesn't truly run greater-to-lesser: maybe there's no special reason for the order, or maybe the drafters wanted to start with Article I personnel (Congresspeople), then were more random later. (The Constitution, while a fine document, could've been better-written…) Thus, the word-order doesn't benefit Petitioner.

Finally, Section 3 is *prima facie* self-executing, There is nothing in its text, *see id.*, that demands Congress to do anything to enforce it—even if such enforcement is allowed, and Congress is allowed to pardon insurrectionists.

…But has Petitioner asked for a pardon?

V. THIS CASE IS RIPE, ESPECIALLY SINCE TRUMP CAN ASK CONGRESS FOR A PARDON RIGHT NOW INSTEAD OF AFTER THE ELECTION

Petitioner may argue that if Section 3 forbids *holding office* if an insurrectionist, he shouldn't be barred from the ballot, but rather, wait until he (possibly) wins, and then have the case judged, or ask Congress for a pardon. This is a bad idea.

Inter alia, what about the immense confusion in the public this might cause, that tens of millions will have voted and donated to Petitioner, and then, after an apparent victory, may find out at the last minute that he's ineligible? What? Also, much public time and money may be wasted putting him on a ballot, when he wasn't eligible for office.

And what about Trump's own role in the delay? He himself is causing the delay, hurting the public, if he could speed things up right now by trying to resolve the pardon issue, and doesn't.

A. Trump Can Ask Congress for a Pardon Right Now, And Can Admit He Is an Insurrectionist

Trump can ask Congress for a Section 3 pardon, admitting he fomented an insurrection, if he likes. (Isn't admitting guilt for a crime/misdeed often considered necessary for a pardon?)

The sooner he does this, the more honest he may be, and the quicker the issue may be resolved. Or maybe request a pardon from Joe Biden, if Biden, like Congress, is able to pardon insurrectionists.

B. If Trump Doesn't Ask Congress for a Pardon

Right Now, Would It Be Fair for Him to Do So After the Election?

Is Petitioner suddenly going to have a convenient change of heart after winning the election, admit to being an insurrectionist (but why not be honest enough to tell voters before the election?), and ask Congress for a pardon then?

When Petitioner himself is causing the delay, by not asking for a pardon right now (if he already has, Amicus is unaware of it), this can be called "unclean hands", prohibiting any relief he seeks, especially his being put on the ballot in supposed hopes that he'll somehow be pardoned, or things will otherwise work out, after the election.

(Note: even if he does ask for pardon, and is refused: the asking, alone, doesn't give reason to put him on the ballot. The process of various States' considering removing him from the ballot, can still continue. It is just especially absurd for Petitioner to complain the case is unripe, if he hasn't even asked for a pardon yet.)

C. Letting Trump Wait Until After the Election to Ask for Pardon, Would Put Him in a Position to Physically Threaten Congresspersons if They Don't Pardon Him—And He Has a History

Another objection to letting any candidate wait until after an election to ask for a pardon, is that the candidate could likely summon angry mobs to threaten Congresspeople who don't give him a pardon. "Those Congress jerks are stealing my win! Stop the steal!", the candidate might exhort his

followers.

And with Trump in particular: he *already has a history* of threatening Congress. "January 6"; that's all that Amicus needs to say.

D. "The Case of Chuckie Peanut": a Hypothetical, Showing the Absurdity of Waiting Until Post-Election to Resolve Issues

Imagine, if you will, Chuckie Peanut, a precocious 8-year-old YouTube/TikTok/etc. star running for the Presidency—27 years too early.

He insists (with the help of unscrupulous advisers) that, by will of the gods, he's received a communication from space aliens hosting the ghost of Stephen Hawking, saying a spaceship will come down *after the election* and take the Earth into a parallel universe, where a time warp will make him be born 27 years before he actually was, so that he'll be 35 on Inauguration Day.

Critics say this is claptrap: he responds that it can't be disproven, and that myriads of his followers have had similar visions. Indeed, the young Svengali gets many of his fanatical fans to swear out affidavits, that they did indeed have religious visions "proving" the Big Hawking Spaceship is really coming—*after the election*. Master Peanut's lawyers even bring up First Amendment ("religious freedom") issues, to defend his nonsensical claims.

Lastly, he insists that proof of his fantasies won't be available until… after the election, and he demands to be put on the ballot because the issue isn't "ripe" yet.

Good idea?

Fortunately, conscientious citizens and public authorities see through the trickery, and investigate/litigate the matter *before* the election. Peanut isn't put on the ballot, and eventually fades into middle-aged obscurity, living under a bridge and eating stray garbage such as orange peels.

Once again, it's an incredible waste of public time and money to put someone on the ballot, see if he wins, and then dare to disappoint masses of his voters, by telling them *post*-election, that he isn't really eligible. Wouldn't it make more sense to determine eligibility now, to prevent fraud and unfairness?

E. One Can Reasonably Predict Things Like Turning 35 by Inauguration Day, Versus the Uncertainty of Getting a Section 3 Pardon

Finally, while one can rationally plan/expect things such as the age of a person, or the duration of her residency in the U.S., by Inauguration Day, the "hope-you-win-the-lottery" uncertainty of getting a Congressional pardon for insurrection, militates against letting candidates on the ballot in the hopes of a post-election pardon. The "Chuckie Peanut" scenario *supra* shows the stupidity in such a thing.

"Those who believe absurdities, will commit atrocities." (attributed to Voltaire)

After all, democracies are about more than just the whims of candidates or their fanatical voters…

VI. DEMOCRACY DOES NOT REQUIRE PUTTING ENEMIES OF DEMOCRACY ON THE BALLOT; IT MIGHT REQUIRE KEEPING THEM OFF

> On 30 April 1928, [Joseph] Goebbels wrote in his paper "Der Angriff";
>
> > We enter parliament in order to supply ourselves, in the arsenal of democracy, with its own weapons. … [I]f democracy is so stupid as to give us free tickets and per diem for … this "blockade" (Barendienst), that is its own affair.

The Avalon Project, *Nazi Conspiracy and Aggression*, Vol. 1, ch. VII, Yale L. Sch., https://avalon.law.yale.edu/imt/chap_07.asp (2008) (citation omitted).

The Goebbels quote *supra* helps explain why democracies have a right to protect themselves from enemies who would use the tools of democracy itself, to destroy democracy. (Those enemies' previous insurrection may "estop" them from running for office.)

If one doesn't believe in that right, it would resemble believing that rapists should be freely allowed into women's shelters ("fox in the henhouse", "wolf in the sheepfold"), or that Jeffrey Epstein should've been asked to run recovery programs for molested children, or Hamas allowed to run Israel's national-security programs. Or that sexual-abuse victim E. Jean Carroll be required to let Petitioner

sleep in her bedroom.

Yes, keeping Trump off-ballot would, technically, lessen the choices of some voters. But so does, e.g., the being-35-years-old requirement for being President—Art. II, § 1, cl. 5—(which "hindered the choices" of Chuckie Peanut's wannabe voters). And it may be exponentially more important to keep an insurrectionist off the ballot, than to keep someone off who's 34 years, 11 months, and 29 days old on Inauguration Day.

Too, it also restricts democracy to… lower the number of *voters*, not just candidates. Those responsible, shouldn't complain about others' allegedly trying to "stop democracy" by keeping insurrectionists off-ballot. *See, e.g.*, Emmanuel Felton & Dan Rosenzweig-Ziff, *Black voting rights under threat in GOP supermajority states, lawmakers say*, Wash. Post, Apr. 28, 2023, 6:00 a.m., https://www.washingtonpost.com/nation/2023/04/28/southern-republicans-black-democrats-tennessee/.

Democracy includes things like law and order, and representing the whole society and its good, not just maximizing the choices of one group of voters at one time, regardless of whether one of those choices, one candidate, fomented insurrection.

If some felon who stupidly "took a joyride" years ago, didn't hurt anybody besides taking his car for a while—and has been a fine citizen since then—, can be disenfranchised from voting for many years for doing that, and we call that "democracy": what problem is there in taking off the ballot someone who did far worse than joyriding, got people killed in an attempt at overthrowing an election, and may do

worse when he's President again?

Otherwise put, it's bad enough to have insurrectionists; why make it worse by easing the path for the insurrectionist to enter the government he tried to overturn? Why pay someone for trying to destroy you? *See* Goebbels Quote, *supra* at 23.

VII. TRUMP'S JANUARY 6 SPEECH HELPS PROVE HE HAD THE MALICE TO BE AN INSURRECTIONIST, EVEN IF HE DIDN'T SAY, "HEY, I'M REVOLTING! INSURRECTION!!"

Speaking of insurrectionists: a look at Petitioner's speech to the crowd on January 6—so different from Martin Luther King's noble "I Have a Dream" speech—-makes it more credible that he intended insurrection.

A. Some Damning Speech-Excerpts

"But this year, using the pretext of the China virus and the scam of mail-in ballots, Democrats attempted the most brazen and outrageous election theft." Petitioner's Certiorari-Brief Appendix ("Pet'r's App.") at 290a. This excerpt, *see id.*, shows racist or racist-leaning animus. *See, e.g.*, Dr. Mishal Reja, *Trump's 'Chinese Virus' tweet helped lead to rise in racist anti-Asian Twitter content: Study*, ABC News, Mar. 18, 2021, 2:58 p.m., https://abcnews.go.com/Health/trumps-chinese-virus-tweet-helped-lead-rise-racist/story?id=76530148.

"We're leading Pennsylvania, Michigan, Georgia by hundreds of thousands of votes, and then late in the evening or early in the morning, boom, these

explosions of bullsh[]t …" Pet'r's App. at 290a. (brackets added) Note Petitioner's foul language, *id.* (vowel deleted here); hardly presidential or rational.

"We want to be so respectful of everybody, including bad people …" Pet'r's App. at 291a. This is hypocritical, and/or self-contradicting, *see id.*, given the racially-abusive and foul language previously cited.

> You know, look, I'm not happy with the Supreme Court. They love to rule against me. I picked three people. I fought like hell for them, one in particular I fought. … And you know what? They couldn't give a damn. They couldn't give a damn. Let them rule the right way, but it almost seems that they're all going out of their way to hurt all of us, and to hurt our country. To hurt our country. …

Pet'r's App. 298a-299a. Petitioner may be not only repetitious, but also seriously slandering the Court here, *see id.* This shows disrespect for the rule of law, as one might expect from an insurrectionist.

"Brian Kemp, vote him the hell out of office, please." Pet'r's App. 308a. Rude, uncivil, foul-mouthed, *see id.*

"When you catch somebody in a fraud, you're allowed to go by very different rules." Pet'r's App. 313a. This shows Petitioner's willingness to disregard rules, *see id.* Just because one is the victim

of (alleged) fraud, that doesn't automatically allow the victim himself to ignore the rules. And rule-breaking, lawlessness, may lead to insurrection.

B. Trump's Not Saying *Per Se* That He Was Trying to Overthrow the Government, Is Not a Defense

Petitioner may have been cleverer than Hitler—whose "Beer Hall Putsch" was another failed insurrection—, since Petitioner didn't openly *declare* an insurrection. But should society give a free pass to people who start riots and try to disrupt vote counts and threaten or kill people, but are sly enough not to scream, "I'm revolting! Overthrowin' the government!"

Probably not. This would tend to encourage more insurrection.

VIII. PETITIONER'S PERSONAL CONDUCT AND WORDS BEFORE AND AFTER JANUARY 6 SUPPORT HIS BEING AN INSURRECTIONIST

Did Petitioner engage in insurrection, or was he just "there when it happened"? Some notes about him may help support the former.

First, Trump was found liable, in a May 2023 verdict, for sexually abusing and defaming E. Jean Carroll in 1996, and was ordered to pay her $5 million in damages. *See, e.g.*, Wikipedia, *E. Jean Carroll v. Donald J. Trump*, https://en.wikipedia.org/wiki/E._Jean_Carroll_v._Donald_J._Trump (as of Jan. 18, 2024, 11:19 GMT).

He'd be our first sitting President, if re-elected, to

be a known legally-punished sexual abuser (not mentioning his lying/defaming), to Amicus' knowledge. His sexual-abuser status makes it more credible that he would be a lawless insurrectionist, and his legal status as a liar/defamer lowers the credibility of his claims not to be an insurrectionist.

Next, Trump claimed in court that he could kill fellow politicians and not be prosecuted until post-impeachment. *See* Mathias Hammer, *US president could have a rival assassinated and not be criminally prosecuted*, *Trump's lawyer argues*, Semafor, Jan. 9, 2024, updated 10:26 a.m., https://www.semafor.com/article/01/09/2024/trump-immunity-hearing-president-assassinate-rival-not-prosecuted,

> During a hearing at a federal appeals court[, o]ne of the judges asked [Trump's lead lawyer John] Sauer: "Could a president who ordered SEAL Team 6 to assassinate a political rival, and is not impeached, would he be subject to criminal prosecution?"
>
> Sauer responded: "If he were impeached and convicted first... there is a political process that would have to occur."

Id. Stranger than fiction. Thus, putting Trump on the ballot (or in office) may resemble putting John Wilkes Booth, Lee Harvey Oswald, Sirhan Sirhan, or John Hinckley there. Those four men, politician-assassins or attempted assassins, could be called insurrectionists, or close.

The title of Dave McKinney's article, *Trump did not sign Illinois' loyalty oath that says he won't advocate for overthrowing the government*, WBEZChicago, Jan. 6, 2024, 6:00 a.m., updated 2:58 p.m., https://www.wbez.org/stories/trump-did-not-sign-illinois-candidate-loyalty-oath/1d1fbaf4-261f-4c15-b466-8fb749d404e1, is self-evidently relevant here,

> President Joe Biden's campaign Saturday condemned Republican former President Donald Trump for sidestepping a decades-old, Illinois ballot-access tradition this past week in which candidates pledge against advocating for an overthrow of the government.
>
> …
>
> "Why wouldn't he sign it?" asked former Republican U.S. Rep. Adam Kinzinger, who served on the House Jan. 6th select committee[.]
>
> "Has he been advised maybe not to sign it because maybe there's some legal exposures…given that oath, if he signed it, would be a violation of everything he actually did on Jan. 6th, 2021, and leading up to it?" Kinzinger said.

Id. No comment needed.

Finally, Petitioner called the January 6 terrorists/insurrectionists—not their innocent victims—

"hostages", *see* Michelle L. Price, Jill Colvin & Thomas Beaumont, *Trump Says 'J6 Hostages' Have 'Suffered Enough' On Anniversary Of Deadly Capitol Attack*, HuffPost, AP, Jan. 6, 2024, 11:44 p.m., https://www.huffpost.com/entry/trump-jan-6-hostages-capitol-attack-anniversary_n_659a24d9e4b0f9f6621cf1c2,

> Former President Donald Trump, campaigning in Iowa Saturday, marked the third anniversary of the Jan. 6, 2021 assault on the U.S. Capitol by casting the migrant surge on the southern border as the "real" insurrection.
>
> …
>
> Trump also continued to bemoan the treatment of those who have been jailed for participating in the [January 6] riot, again labeling them "hostages." More than 1,230 people have been charged with federal crimes connected to the violence, including assaulting police officers and seditious conspiracy.
>
> "They ought to release the J6 hostages. They've suffered enough," he said in Clinton, in the state's far east. "Release the J6 hostages, Joe [Biden]. Release 'em, Joe. You can do it real easy, Joe," he said.
>
> …
>
> Trump … also attacked … the late Sen. John McCain of Arizona, whose "no" vote derailed GOP efforts to repeal

> former President Barack Obama's signature healthcare law.
>
> "John McCain, for some reason, couldn't get his arm up that day," said Trump of McCain, who was shot down over Vietnam in 1967 and spent 5½ years as a prisoner of war. The injuries he suffered left him unable to lift his arms over his head for the rest of his life. …

Id. Not even mentioning Trump's sadistic, unpatriotic abuse of McCain, a war hero with disabled arms, *see id.*: on Trump's illogical, hateful "logic", John Hinckley could be called a "hostage" for being jailed for his shooting President Ronald Reagan—though Reagan didn't die, while innocent people did die because of January 6.

Trump's falsely calling the insurrectionists "hostages" supports his being an insurrectionist.

Amicus could offer more examples, but the ones *supra* may make the point.

IX. *ARGUENDO*, SHOULD THE COURT FIND PETITIONER INELIGIBLE TO BE ON ANY, AND ALL, STATES' BALLOTS?

Given all the evidence and reasoning *supra*, the Court could (or, for the sake of argument, should?) simply find Petitioner ineligible to be on *any* State's ballot, period, due to his role in January 6.

This would be a "national solution" indeed, precluding further litigation, and any attending work for the Court. No more battles in 50 States over

putting Trump on the ballot: the issue would be resolved, neatly.

Amicus is not actually recommending the Court do this; but it may be no less reasonable than the rigid "national solution" Petitioner wants, which is to prevent any State from having the right to take him off the ballot.

Can States do a good job in making such a decision?

X. MANAGEABLE JUDICIAL AND STATE STANDARDS LIKELY EXIST FOR JUDGING IF SOMEONE SHOULD BE REMOVED FROM THE BALLOT

Amicus read the Colorado Supreme Court's opinion and it seemed to make sense. Other States, e.g., Maine, may also perform competently here. If the Court must judge ballot challenges in multiple States, that is part of the Court's work.

A. *De Minimis* Issues re Section 3: Not Every Incident May Be "Insurrection"

The Court, naturally, can warn that *de minimis* violations of propriety or law may not be treated as true insurrection.

Imagine Joe Blow (no relative of Joe Biden), a would-be town councilman who's had a few too many "hard ciders" that day, and, in a bad mood, passes the town post office and moans, "Darned government!" A local troublemaking youth with green hair, Joe Ker, empathizes with Blow, picks up a stone, and throws it through the post-office

window, screaming, "Overthrow for Joe! Blow up the State!"

Some overly-ambitious opponents of Joe in the town-councilman race try to get him thrown off the ballot under Section 3, screaming, "Insurrection! Terrorist!!" Is this proper?

While Amicus doesn't like broken windows or excessive rage, he doubts it is truly necessary to throw Blow off the ballot in the case *supra*. On that note, the Court, and other courts, can ensure that *de minimis* rumbles against government aren't blown out of proportion, while ensuring that major disasters like January 6 can be fairly considered as cause for Section 3 ballot removal.

B. New Mexico's Couy Griffin Section 3 Case Shows Precedent for January 6-Related Removal from Office

Under Section 3, Judge Francis Mathew barred Otero County, New Mexico commissioner Couy Griffin from holding public office for life, after Griffin led "Cowboys for Trump" at the Capitol on January 6. *Marco White, et al., v. Couy Griffin*, Case No. D-101-CV-2022-00473 (Dist. N.M.), Findings and Conclusions ("Opinion") (Sept. 6, 2022), *available at* https://www.citizensforethics.org/wp-content/uploads/2022/09/ D101CV202200473-griffin.pdf.

Although Griffin was convicted of trespassing on Capitol grounds, Op. at 18, a criminal conviction wasn't needed for Section 3 disqualification, Op. at 43, and, notably,

> The Court also rejects Mr. Griffin's argument that his removal and

> disqualification …would 'subvert the will of the people.' … Griffin disregards that the Constitution *itself* reflects the will of the people[,] and he overlooks that his own insurrectionary conduct on January 6 sought to subvert the results of a free and fair election, which would have disenfranchised millions of voters.

Op. at 44-45 (citations omitted). This judicial decision, *supra*, shows that State courts can manage Section 3 issues competently, so that courts in general needn't "punt" such issues away as a "political question". (Note: Griffin is seeking certiorari in this Court, No. 23-279.)

XI. REASONS FOR NOT SUPPORTING EITHER PARTY HERE—EVEN IF AMICUS' REASONING HURTS PETITIONER'S CASE

Amicus may have put forth many damning indictments against Petitioner and his character and conduct, and compelling reasons for removing him from the ballot. However, from an abundance of caution, to mention one reason, Amicus isn't supporting any party in this case.

First, as previously noted, he doesn't claim to be an expert on the issues—if there is any.

Second, many people have reasons to be neutral, e.g., people can't predict the results of the case.

Let's say someone is a Trump supporter, but thinks ballot removal may *benefit* Trump, in that many States removing Trump from the ballot will be "Blue States", who wouldn't have voted for Trump anyway—and if Trump can cry that he's being

"persecuted" by ballot removal, it may rile up followers and increase turnout for him on Election Day. So should the Trump supporter want him to win this case, or lose?

Too, a Republican Party member may feel her vote is robbed of its value when an insurrectionist is on the primary ballot, unfairly taking away votes from the voter's favored candidate, who never fomented rebellion on January 6.

And third, neutrality lets Amicus emphasize that the Court can be a neutral public educator about the issues herein, as per the next section.

XII. THE COURT SHOULD NEUTRALLY EDUCATE THE PUBLIC ABOUT THE MEANING OF ITS OPINION: VICTORY FOR ONE SIDE IS NOT A POLITICAL ENDORSEMENT

Whatever the Court decides, its Opinion should stress that the Court isn't endorsing the political success of the side that wins. Not everyone may realize this if the Court doesn't take pains to emphasize it.

For example, if the Court overturns Colorado, the Court should emphasize that this isn't an endorsement of the Trump campaign, or an absolvement for anything Trump did on, or concerning, January 6. (Trump might claim it is an absolvement, but the Court shouldn't help him.)

Conversely, if the Court upholds Colorado, the Court should emphasize that this isn't an endorsement of the Biden campaign, or a suggestion that every, or any, other State should remove Trump

from the ballot. (People might claim those things, but the Court shouldn't help them.)

(An exception to the above is if the Court holds that Trump should be removed from every ballot in the Nation, which might also entail condemnation of Trump's role in January 6. But even if the Court so rules, it can emphasize it does so neutrally, not out of hatred of Petitioner.)

The Court will help uphold democracy by being a neutral public educator, whichever way it rules here.

* * *

One should avoid personal hatred towards anyone, whether Trump, Biden, whomever. On that note, Amicus is sorry that Trump's mother-in-law Amalija Knavs recently passed away (RIP). Amicus prays she is in a better place. But Trump has not always shown similar compassion to others; and this is important to note.

While Petitioner Trump's character and credibility do not solely dictate the outcome of this case, they should certainly be considered. A man who has spread the falsehood and evil that he has, with his baseless claims of winning the 2020 election, the terrorism and needless abortion of human life on January 6, and abusing E. Jean Carroll and others, sexually or politically, may increasingly remind people, of satanic child Anthony Fremont from the *Twilight Zone* episode, "It's a Good Life" (CBS television broadcast Nov. 3, 1961), someone who, *see id.*, "wishes into the cornfield", mercilessly destroys, anyone he dislikes. (A cousin of Chuckie Peanut, so to speak.)

But abusers, people who act without bounds, can be bounded, punished, in a lawful democracy. The rapist can be kept out of the women's shelter. The terrorist, insurrectionist, any abuser, can be dealt with as needed, under the law. The Colorado Supreme Court, and Anderson Respondents, seem to be asking for a right to protect Colorado's people, and the American people. If the Court deems this fair and lawful, so be it. If not, not.

CONCLUSION

The Court should do justice in this case, *vis-à-vis* Section 3, January 6, and related matters, in a fair, neutral spirit, and educate the public about what the Court's ruling means. Amicus humbly thanks the Court for its time and consideration.

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Respectfully submitted,

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