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 U.S. SENATOR TED CRUZ, MAJORITY LEADER STEVE SCALISE, AND 177 OTHER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER DONALD J. TRUMP

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are United States Senator Ted Cruz, House Majority Leader Steve Scalise, and 177 other members of Congress. The full list of *amici* appears on the following pages.

As members of Congress, *amici* have a strong interest in vindicating and protecting the role of Congress in the context of Section 3 of the Fourteenth Amendment. *First*, enforcing Section 3 requires implementing legislation from Congress, thereby protecting candidates from abuse by state officials; and *second*, Congress, by a two-thirds vote of both Houses, has the power to remove a Section 3 "disability" and thereby authorize an otherwise-disqualified individual to "hold" office any time it wants, including during a campaign or after an election. However, the decision by the Colorado Supreme Court short-circuited both of those congressional roles, as explained in detail below.

Further, as elected officials, *amici* have a strong interest in ensuring that the rules for eligibility for federal office are clear, objective, and neutral, rather than malleable and conveniently applied to ensnare political opponents.

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

The following is the full list of *amici*:

United States Senate

Ted Cruz

Leader Mitch McConnell
John Barrasso
Marsha Blackburn
John Boozman
Mike Braun
Katie Boyd Britt
Ted Budd
Shelley Moore Capito
John Cornyn
Tom Cotton
Kevin Cramer
Mike Crapo
Joni Ernst
Deb Fischer
Lindsey O. Graham
Charles E. Grassley
Bill Hagerty
Josh Hawley
John Hoeven
Cindy Hyde-Smith
Ron Johnson
John Kennedy
James Lankford
Michael S. Lee
Cynthia M. Lummis
Roger Marshall
Jerry Moran
Markwayne Mullin
Pete Ricketts
James Risch
Mike Rounds
Marco Rubio
Eric Schmitt
Rick Scott
Tim Scott
Dan Sullivan
John Thune
Thom Tillis
Tommy Tuberville
J.D. Vance
Roger Wicker

United States House of Representatives

Majority Leader Steve Scalise

Speaker Mike Johnson
Majority Whip Tom Emmer
Elise M. Stefanik
Gary J. Palmer
Richard Hudson
Lisa McClain
Guy Reschenthaler
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SUMMARY OF THE ARGUMENT

The Colorado Supreme Court ordered Donald Trump removed from the State's presidential primary ballot, even though he is the current frontrunner for the Republican primary and favored by many polls to win the next presidential election.

Amici, comprising numerous U.S. Senators and Representatives, focus on how the Colorado Supreme Court's opinion tramples the prerogatives of members of Congress. The court below raced past numerous textual and structural limitations on Section 3, which are primarily designed to ensure that Congress controls the enforcement and (if necessary) removal of Section 3's "disability" on holding office. *See* Parts I & II, *infra*. And then the court adopted a malleable and expansive view of "engage in insurrection," which will easily lead to widespread abuse of Section 3 against political opponents. *See* Part III, *infra*.

This Court should reverse the decision below.

ARGUMENT

I. The Colorado Supreme Court's Decision Encroaches on Congress's Express Powers.

Congress—not any state court—plays a vital role in regard to Section 3. It is Congress that must pass implementing legislation authorizing enforcement of Section 3. *See* Part I.A, *infra*. And it is Congress that has the express power to remove a Section 3 "disability," even after an election occurs. *See* Part I.B, *infra*.

The Colorado Supreme Court's decision severely intrudes on those congressional powers first by allowing enforcement of Section 3 without congressional authorization, and then by concluding that Section 3 authorizes a state to de-ballot a candidate. As explained next, both of those holdings are wrong. For similar reasons, this Court should conclude that Section 3 determinations fall within the "political question" doctrine because they are so clearly committed by constitutional text to another political branch, i.e., Congress. *See* Part I.C, *infra*.

A. Federal Implementing Legislation Is Required to Enforce Section 3.

Congress must pass authorizing legislation to enforce Section 3. The Fourteenth Amendment expressly gives Congress the "power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5; *see also* Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 TEX. REV. L. & POL. 350, 362 (forthcoming 2024) (explaining that requiring congressional legislation to *enforce* the Fourteenth Amendment is distinct from relying on the Amendment as a shield or defense).

Longstanding precedent written by Chief Justice Chase, albeit not directly binding, holds that implementing legislation is required for Section 3 specifically. *See In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (No. 5815) (Chase, C.J.). In *Griffin*, Chief Justice Chase concluded that, among the provisions of the Fourteenth Amendment, "there is no one which more clearly requires legislation in order to give effect

to it" than Section 3. *Id.* In particular, he relied on the unusually fact-specific nature of a Section 3 determination: "in the very nature of things, it must be ascertained what particular individuals are embraced by the definition" of engaging in insurrection, and to make "this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions … are indispensable; and … can only be provided for by congress." *Id.*

In other words, Section 3 enforcement mechanisms are left to Congress, not to a patchwork of state officials and courts. Congress implemented Section 3 in the Enforcement Act of 1870, which provided that when an individual was holding office in violation of Section 3, the local "district attorney of the United States" must seek a "writ of quo warranto" and "prosecute the same to the removal of such person from office." Act of May 31, 1870, ch. 114, § 14, 16 Stat. 140, 143; *see also id.* § 15. But Congress rescinded that act nearly eighty years ago, in 1948. Act of June 25, 1948, ch. 646, § 39, 62 Stat. 869, 992.

Under current law, Congress has implemented Section 3 only in the narrow context of requiring a criminal conviction for "rebellion or insurrection," and provided that those found guilty "shall be incapable of holding any office under the United States." 18 U.S.C. § 2383. Just as Chief Justice Chase anticipated in *Griffin*, § 2383 requires compliance with procedural and factfinding requirements dictated by the Fifth and Sixth Amendments. But Congress has otherwise not seen fit to implement Section 3 enforcement under

current law, even though Congress is certainly aware of its authority to do so, as demonstrated above.

The Baude and Paulsen law review article cited by the court below acknowledges the existence of § 2383 but says in a footnote, without any explanation, that it is not "preclusive of the self-executing application of Section Three." William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section 3*, 172 U. PA. L. REV. (forthcoming 2024) (manuscript at 82 n.288). The court below reached the same conclusion. Pet.App.54a. But if Section 3's disqualification were fully self-enforcing, there would have been no reason for Congress to state expressly in § 2383 that a conviction for insurrection would result in disqualification from holding certain offices. Under Baude and Paulsen's view, Section 3 would already have automatically barred such individuals from office even before conviction, and certainly would have done so after a conviction.

Enforcement legislation is not an empty formality. Disqualification under Section 3 is an extraordinarily harsh result, and the Fourteenth Amendment's own text confirms that Congress, representing the Nation's various interests and constituencies, is the best judge of when to authorize Section 3's affirmative enforcement. Moreover, if Congress did choose to authorize enforcement legislation outside of the criminal context, it could cabin the scope by defining more specifically terms like "engaging in" and "insurrection." Congress could even require a factfinding process and standards of proof that accord with the gravity of the consequence.

B. De-Balloting a Candidate Effectively Denies Congress Its Power to Remove a Section 3 Disability.

The Colorado Supreme Court held that Section 3 authorizes a state to de-ballot a candidate. Pet.App.36a–37a. That is not only wrong but directly interferes with Congress's express authority to remove a Section 3 "disability" during the election season or even after an election has occurred. U.S. CONST. amend. XIV, § 3.

Section 3 states that "[n]o person" disqualified under its provisions shall "hold any" of the specified offices. U.S. CONST. amend. XIV, § 3. That language bars presently *holding* the office, not merely *running* for it. Thus, assuming Section 3 applies to a given individual, he is barred only from actually holding one of the listed positions, not from seeking election to that position.

Even assuming that Section 3 applies to the presidency, *see* Part II, *infra*, the Twentieth Amendment confirms that a candidate may be elected President even if he is not qualified to hold the office. That amendment addresses what happens if someone is elected President but "shall have failed to qualify." U.S. CONST. amend. XX, § 3. In that circumstance, the "Vice President elect shall act as President" unless

and until Congress removes the disability on the President-elect. *Id.*[2]

The Colorado Supreme Court refused to adopt this obvious textual distinction. Pet.App.36a. The court insisted that if it were "to adopt President Trump's view, Colorado could not exclude from the ballot even candidates who plainly do not satisfy the age, residency, and citizenship requirements of the Presidential Qualifications Clause of Article II." Pet.App.36a–37a.

But far from supporting the court's decision, Article II demonstrates why it was wrong. Excluding a candidate who fails to satisfy Article II's requirements does not in any way affect Congress's authority because Congress has no power to remove an Article-II-based disqualification. By contrast, Congress can remove the Section 3 bar by a two-thirds vote of the House and Senate. *See* U.S. CONST. amend. XIV, § 3. Thus, someone covered by Section 3 could win election to one of the listed positions but still take office *if* Congress removes the disability in the interim. The two types of qualifications do not sit on equal footing.

In fact, there are historical examples of Congress removing a Section 3 disability after otherwise-unqualified individuals had won elections. Congress did so in 1868 for Franklin J. Moses, who had been elected as the Chief Justice of South Carolina. *See* 15

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[2] If both the President and Vice President fail to qualify, it is again *Congress* that is given express authority to make provisions for who shall be acting President. U.S. CONST. amend. XX, § 3.

Stat. 435 (1868). The floor debate shows the bill was passed to allow Moses to assume the office to which he had been elected. CONG. GLOBE, 40th Cong., 3d Sess. 29–30 (1868) (explaining the time by which Moses had to qualify to hold office "will expire on the 29th day of this month, so that this bill, in order to be of any avail to him and the State of South Carolina, must be passed at once").

Congress did this again later that same year for a slate of individuals, 15 Stat. 435–36 (1868), recognizing that "[i]t is necessary that the disabilities should be removed from these persons before the recess, in order to enable them to qualify for offices to which they have been elected before the 1st of January." CONG. GLOBE, 40th Cong., 3d Sess. 120 (1868); *see also id.* at 121, 154.

By de-balloting anyone it deems covered by Section 3, the Colorado Supreme Court effectively precludes Congress from exercising its Section 3 power to remove the disability during the election season or even after the election takes place, thus imposing a temporal limitation on Congress's Section 3 power. That limitation appears nowhere in the text of the provision and would force Congress to make a decision that may ultimately be unnecessary and would also require Congress to act pursuant to a state's particular timeline for primaries. Congress could reasonably conclude that it is necessary to address the removal-of-disability issue only after waiting to see whether a candidate prevailed.

This error alone justifies reversing the decision below.

C. Section 3 Determinations Fall Within the Political Question Doctrine Because They Are Reserved for Congress.

A "controversy involves a political question where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (cleaned up). The Colorado Supreme Court declined to find that this dispute fits under the "political question" doctrine because there was no textual commitment to another branch and because there were judicially manageable standards in defining and applying "insurrection" and "engage in." Pet.App.55a–61a. That latter point is certainly debatable, if the lower court's freewheeling view of those terms is any indication, as demonstrated in Part III below.

In any event, the Colorado Supreme Court was wrong that there is no textual commitment to Congress. As explained above, it is Congress that is given the power under Section 5 of the Fourteenth Amendment to issue legislation to enforce Section 3. *See* Part II.A, *supra*. And it is Congress that is given the power to remove the Section 3 disability upon a vote of two-thirds of both Houses. *See* Part II.B, *supra*.

Moreover, each House shall be the sole judge of the qualifications of its members. U.S. CONST. art I, § 5; *Jones v. Montague*, 194 U.S. 147, 153 (1904); *Cawthorn v. Amalfi*, 35 F.4th 245, 267 (4th Cir. 2022) (Richardson, J., concurring in the judgment).

Although not directly relevant to President Trump, the Colorado Supreme Court would give itself the power to judge the qualifications of those who would be elected to the House or Senate.

Finally, as President Trump's certiorari petition explains, federal courts routinely invoke the political question doctrine for disputes over other qualification requirements. *See* Pet.20–22 (collecting cases). It is hard to believe that a *state court* could nonetheless make such disqualification determinations, let alone in the particular context of Section 3, with its numerous and express commitments of power to Congress. Under that precedent, this is an easy case for finding that the Section 3 determination here is a matter textually committed to the political branches. *See Zivotofsky*, 566 U.S. at 195.

II. Section 3 Does Not Apply to Former President Trump.

The Colorado Supreme Court also erred by rejecting the argument that Section 3 is inapplicable to former President Trump, as he was never previously "an officer of the United States." U.S. CONST. amend. XIV, § 3; Pet.App.70a–73a.

Section 3 applies only to individuals who "previously" took "an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States." U.S. CONST. amend. XIV, § 3.

The only potentially relevant position here is "an officer of the United States," but for constitutional purposes, the President is never considered "an officer

of the United States." Other provisions in the Constitution uniformly distinguish between officers of the United States and the President. The Appointments Clause authorizes the President to appoint ambassadors, ministers, judges, and "all other Officers of the United States," U.S. CONST. art. II, § 2, cl. 2, and the related Commissions Clause authorizes the President to "Commission all the Officers of the United States." *Id.* § 3. Needless to say, the President does not "appoint" or "commission" himself. The Impeachment Clause also textually distinguishes the "President [and] Vice President" from "all civil Officers of the United States." *Id.* § 4.

This Court has further held that "[t]he people do not vote for the 'Officers of the United States.'" *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497–98 (2010). And Antonin Scalia, when he headed the Office of Legal Counsel, aptly explained that "when the word 'officer' is used in the Constitution, it invariably refers to someone *other than* the President or Vice President." Memorandum from Antonin Scalia, Assistant Att'y Gen., Off. of Legal Couns., to Kenneth A. Lazarus, Associate Couns. to the President, Re: Applicability of 3 C.F.R. Part 100, at 2 (Dec. 19, 1974).

This reading of "officer of the United States" is reinforced by Section 3's reference to a prior oath "to support the Constitution of the United States." U.S. CONST. amend. XIV, § 3. Article VI of the Constitution requires "[o]fficers" to take an oath to "support this Constitution," U.S. CONST. art. VI, cl. 3, but the President's oath is different and conspicuously does

not reference "supporting" the Constitution, *see* U.S. CONST. art. II, § 1.

Both of these textual indicators confirm that Section 3 simply does not apply to someone whose only former governmental position was President of the United States. This makes sense in historical context. When the Fourteenth Amendment was enacted, the only former President who had joined the confederacy, John Tyler, was dead. The framers of the Fourteenth Amendment had little reason to worry about a former President being elected, so they did not include it in Section 3.

Accordingly, for purposes of this suit, the Court need not decide whether the presidency is an "[o]ffice under the United States" for purposes of Section 3. The Court need only conclude that the President is not an "officer of the United States." This provides yet another straightforward and clean basis for reversing the decision below.

III. The Colorado Supreme Court's Decision Lacks Neutral Principles and Will Lead to Widespread De-Balloting of Political Opponents.

Although this Court need not reach the questions of what qualifies as "insurrection" or what it means to "engage in" it, it is worth explaining why the decision below presents such a serious risk to the democratic process.

The Colorado Supreme Court's opinion on these issues proceeded by first offering various competing and high-level definitions of the phrase "engage in insurrection," as used in Section 3. The court declined

to pick one specific definition, then recounted the facts surrounding January 6, 2021, and concluded by stating that those facts satisfied any definition. As demonstrated next, that approach not only expanded "insurrection" and "engaged in" past their breaking points, *see* Part III.A, *infra*, but it also provides a green light for partisan state officials to disqualify their opponents, *see* Part III.B, *infra*.

A. The Decision Below Failed to Meaningfully Confine "Engage in Insurrection."

Insurrection. The Supreme Court of Colorado refused to adopt "a single, all-encompassing definition of the word 'insurrection.'" Pet.App.86a. The strategic decision to avoid defining the core inquiry was a serious mistake. "[C]ourts 'must fully understand the historical scope'" of a constitutional provision "before they can determine whether and to what extent the challenged" action falls within that provision. *Rogers v. Grewal*, 140 S. Ct. 1865, 1868 n.2 (2020) (Thomas, J., dissenting from denial of certiorari) (cleaned up) (quoting *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1166 (9th Cir. 2014)). The court "ultimately weakened" its case by "excus[ing]" itself from the difficult work of cabining the scope of Section 3. *Wrenn v. District of Columbia*, 864 F.3d 650, 663 (D.C. Cir. 2017).

The court below concluded that "insurrection" includes—but is not necessarily limited to—any "concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to

accomplish a peaceful transfer of power in this country." Pet.App.86a. But none of the sources canvassed by the court limit insurrection to opposing the execution of election laws or the "transfer of power."

One prominently cited definition of "insurrection" includes any "open and active opposition ... to the execution of law." Pet.App.84a (quoting Noah Webster, *An American Dictionary of the English Language* (1828)); *see also* Pet.App.252a. Although Section 3 is specifically limited to an insurrection "against the [Constitution of the United States]," some officials could argue this includes any opposition to the authority of Congress or the Executive in any area. Under that view, a group hindering congressional or executive authority is equally covered as "insurrection ... against the [Constitution of the United States]." Under this theory, a group invoking principles of justice to hinder any federal laws could be deemed insurrectionists. Such action may be illegal, but that is a far cry from insurrection.

The court's view of the level of force needed to make an insurrection was also vague. According to the court, force is not required, although a "threat of force" may be, but even then, it "need not involve bloodshed, nor must the dimensions of the effort be so substantial as to ensure probable success." Pet.App.86a. Also, the effort need not "be highly organized at the insurrection's inception." Pet.App.87a. In large part, the court vaguely defined "insurrection" by what it *isn't*.

Engaged In. Critically, by focusing on insurrection in the context of the "peaceful transfer of power," the court swept under the rug the dramatic consequences of its exceedingly broad reading of the accompanying phrasal verb "engaged in."

The court defined "engaged in" to include any act "done with the intent of aiding or furthering the" insurrection. Pet.App.91a. But the court's notion of "furthering" an insurrection bears little resemblance to ordinary concepts of accessory liability. Indeed, the court's test largely amounts to a moral complicity standard.

According to the court, "engaged in" is more than "mere acquiescence." Pet.App.91a. But a person "need not [have] directly participate[d]" in any of the "overt act[s]" at issue. Pet.App.90a. The court said the phrase covers incitement to insurrection, but it may not be limited to that. *Id.* Anyone who sends a "supportive message," or an inflammatory one, may be deemed to have intended to further or cause an insurrection—even if he also urged the crowd to act "'peaceful[ly]'" and respect law enforcement. Pet.App.98a–99a.

Under the lower court's view, an individual also "engages" in insurrection when his statements made months earlier can be causally tied to later political violence, unless he immediately "condemn[s] the violence" or "ask[s] the mob to disperse." Pet.App.98a, 99a. Events at a political rally, even years earlier, can be used to identify a "'call-and-response'" pattern that shows an intent to incite an insurrection.

Pet.App.113. Anyone viewed as morally complicit could be swept within this vague definition.

An example shows the putative breadth of the term. The Colorado Supreme Court extensively cited an article arguing that "Assistant Attorney General Jeffrey Clark sought to use the power and authority of the Department of Justice to fraudulently upend state election results," and therefore arguably could have "engaged in" a "rebellion." *See* Baude & Paulsen, *supra* (manuscript at 123). Clark's supposed "engagement" in insurrection consisted of preparing a draft letter to the Georgia Secretary of State making legal arguments and questioning the integrity of the election.[3] The letter did not threaten the use of force, and it was never sent to Georgia. If preparing a letter that was never sent arguably constitutes engaging in a broader insurrection or rebellion, then "engage in" has no limiting principle.

This expansive view of "engage in" contradicts the historical understanding. "Engage in" requires more than encouraging or inflammatory messages of moral support or organizing a political rally that ultimately results in political violence. To engage in means to actually "embark in any business," to "undertake" an act. Noah Webster, *An American Dictionary of the English Language* 396 (Chauncey A. Goodrich ed., rev. 1860). Encouraging or instigating a business is not the same as embarking or undertaking one.

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[3] Draft Letter from Jeffrey Bossert Clark, Acting Assistant Att'y Gen. of Ga., et al. to Brian P. Kemp, Governor of Ga., et al. (Dec. 28, 2020), https://www.documentcloud.org/documents/21087991-jeffrey-clark-draft-letter.

Individuals do not "engage in commerce" by encouraging or even inciting it. Instead, engaging in an act requires taking part in the proscribed act; here, it means participating in the overt act of insurrection, either by directing the use of force or using force to carry out an insurrection. Incitement is not enough.

For example, northern Copperheads opposing Union war efforts were not "engaged in" insurrection against the United States, even though their political rhetoric was heated, and even though their words no doubt encouraged the Confederacy in a real sense. For example, in 1863, "[a] mass meeting of New York Democrats resolved that the war 'against the South is illegal, being unconstitutional, and should not be sustained.'" James McPherson, *Battle Cry of Freedom* 592 (1988). State legislatures enacted resolutions decrying the war. *Id.* at 595. Some legislatures even drafted "bills to take control of state troops away from the Republican governors." *Id.* In a loose sense, the rhetoric, acts, and rallies organized by Copperheads "furthered" rebellion in the South, perhaps even incited it.

In one paradigmatic case, Clement Vallandigham, a former member of the House, was accused of making "'disloyal'" speeches decrying the war, which allegedly encouraged desertion. *Id.* at 596–97. The scholars on whom the Colorado Supreme Court relied upon have said it is "conceivable" that Vallandigham's "disloyal" speeches would be covered by Section 3. Baude & Paulsen, *supra* (manuscript at 60). By that standard, many or most of the "Peace Democrats" during the Civil War conceivably engaged in insurrection against the United States, too. Yet when the Fourteenth

Amendment was enacted, no one imagined that members of groups like the Copperheads would be disqualified under Section 3 for those actions. In fact, after the Fourteenth Amendment was ratified, numerous Copperheads were reelected and seated in Congress, apparently without issue.[4]

If Section 3 does cover incitement or other lesser forms of encouragement, then it would only be because it falls under the *separate* disability covering the giving of "[a]id and [c]omfort" to the "[e]nemies" of the U.S. Constitution. U.S. CONST. art. III, § 3. But Colorado did not rely on that separate provision, and for good reason: it covers only aid to "enemies," which historically meant those who owe their allegiance to a belligerent government that is at war with or in "hostilities" with the United States. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800); *cf. Ex Parte Quirin*, 317 U.S. 1, 37–38 (1942).

The Colorado Supreme Court's broad interpretation of "engage in" thus does harm to the text and structure of Section 3 itself. By separately listing "engag[ing] in insurrection" and "giv[ing] aid and comfort to" the Nation's enemies, Section 3 makes clear that for insurrection, something more than mere "aid and comfort" is required. But the court below expressly found that "aid[ing]" an insurrection would qualify, thereby reducing the actions needed to trigger

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[4] For example, George H. Pendleton and Benjamin Wood, among others. Notably, they were not covered by the 1872 amnesty removing the Section 3 disability for a wide swath of individuals, as it expressly excluded members of the 36th and 37th Congresses. 17 Stat. 142 (1872).

the insurrection provision. Pet.App.100a; *see also* Pet.App.233a.

The Colorado Supreme Court ostensibly believed it was issuing a narrow decision about events surrounding the transfer of power. But its rationale and its failure to define the boundaries of "engaging in insurrection" will make it that much easier for enterprising state officials across the country to cherry-pick parts of the opinion below, as well as its cited sources, to come up with contrived definitions of "engage" and "insurrection" to cover what they perceive to be the most egregious actions of their political opponents, to disqualify them from the ballot—as explained next.

B. A Lengthy List of Partisan Grievances Could Be Labeled As "Engaging in Insurrection."

There are frequent, even routine, disputes among Americans about election outcomes. For example, Stacey Abrams believes she "won" her 2018 election for Governor of Georgia.[5] Hillary Clinton believes Donald Trump "stole" the 2016 election.[6] Many believe that "high-tech voting machines" fabricated decisive votes for President Bush in 2004, and efforts to challenge the Ohio slate of electors sought to

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[5] David Marchese, *Why Stacey Abrams Is Still Saying She Won,* N.Y. TIMES MAG. (Apr. 28, 2019), https://perma.cc/M33R-F9XS.

[6] Colby Itkowitz, *Hillary Clinton: Trump Is an 'Illegitimate President',* WASH. POST (Sept. 26, 2019), https://perma.cc/7RNG-9HC2.

change the outcome of that election.[7] Many politicians still believe President Bush stole the 2000 election.[8] Politicians from both parties have repeatedly voted against certifying some states' electoral votes in presidential elections since 2000.[9] At the time, some of these disputes were accompanied by rioting.[10]

In polarized times, it is easy to cast an opponent's rhetoric about the outcome of elections as encouraging others to obstruct the peaceful transfer of power. According to President Biden, a sizable portion of the Republican electorate, if not all of it, is determined to destroy democracy.[11] No doubt, state officials across

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[7] *See* Joanna Weiss, *What Happened to the Democrats Who Never Accepted Bush's Election*, POLITICO MAG. (Dec. 19, 2020), https://perma.cc/G4CH-GABZ; Mark C. Miller, *Fooled Again: How the Right Stole the 2004 Election and Why They'll the Next One Too (Unless We Stop Them)* (2005).

[8] The Editors, *Terry McAuliffe's Election Trutherism Shouldn't Be Excused,* NAT'L REV. (Oct. 14, 2021), https://perma.cc/GAF3-K3EV.

[9] *See, e.g.*, 11 CONG. REC. H31 (daily ed. Jan. 6, 2001) (objecting on the ground Florida elections "were marred by gross violations of the Voting Rights Act"); 11 CONG. REC. S41–56 (daily ed. Jan. 6, 2005) (disputing Ohio electors because of voting "irregularities"); Doina Chiacu & Susan Cornwell, *U.S. Congress Certified Trump's Electoral College Victory*, REUTERS (Jan. 6, 2017) (objecting because of "'overwhelming evidence'" of Russian interference), https://perma.cc/N6NS-GWKP.

[10] Melanie Eversley et al., *Anti-Trump Protests, Some Violent, Erupt for 3rd Night Nationwide,* USA TODAY (Nov. 11, 2016), https://perma.cc/T5FQ-9995.

[11] Tyler Olson, *Biden Says 'MAGA Republicans' Threaten Democracy As He and Dems Crank Up Anti-Trump Rhetoric Ahead of Midterms,* FOX NEWS (Sept. 1, 2022), https://perma.cc/2PPQ-LWS9.

the country have similar views, and many take opposing views. When partisan state officials believe so much is at stake, they may go to great lengths to interfere with the ordinary democratic process.

That makes it all the more critical to minimize the partisan incentive to boot opponents off the ballot using the incredible sanction of Section 3. But the decision below will only supercharge state officials to conjure bases for labeling political opponents as having engaged in insurrection.

The following examples demonstrate just how easily partisan state officials across the country could do so, using parts of the Colorado Supreme Court's decision and its cited sources. To be clear, *amici* are not contending that these examples truly do qualify as "engaging in insurrection," but rather that enterprising state officials could easily make such contentions.

Recall that the decision below and the sources it cited suggested "insurrection" may include "'open and active opposition … to the execution of law,'" Pet.App.84a, and that "engage in" could include any number of actions or inactions deemed sufficiently complicit, under a totality of the circumstances. Pet.App.90a–91a, 98a–99a.

In the context of the 2020 election, both sides could attempt to label the other as having actively opposed the peaceful transfer of power to the rightful winner, or at least being morally complicit in those actions—and thus both Trump and Biden partisans could try to disqualify each other under Section 3, in tit-for-tat

retaliation that has already been threatened after the decision below.[12]

Even if one concedes there must have been serious political *violence* aimed at the government to qualify as an insurrection, there are still plenty of examples for state officials to choose from. Consider the politicians across the country who supported protests throughout the Summer of 2020, culminating in the White House security fence being breached and President Trump being taken to the White House bunker, hindering the execution of the laws.[13] "With full knowledge of these sometimes-violent" riots throughout the summer, Pet.App.93a, some politicians still spoke out in favor of them, even telling protestors to target President Trump,[14] and some politicians gloated afterward that the President had been taken to the bunker as a result of the breach of the White House grounds.[15] Violence aimed towards the sitting President was perhaps unsurprising given the public calls by at least one Representative since

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[12] *See* Jay Ashcroft (@JayAshcroftMO), X (Jan. 5, 2024, 5:13 PM), https://perma.cc/NL5L-94CK.

[13] Jonathan Lemire & Zeke Miller, *Trump Took Shelter in White House Bunker As Protests Raged,* ASSOCIATED PRESS (May 31, 2020), https://perma.cc/DZ8A-GVAG.

[14] *See* Maxine Waters, (@RepMaxineWaters), X (May 30, 2020, 3:21 PM), https://perma.cc/37E6-PWGM.

[15] Ted Lieu (@tedlieu), X (June 8, 2020, 3:03 PM), https://perma.cc/NB47-DZ8B.

2018 for members of the public to confront and harass Trump officials.[16]

The Summer of 2020 also saw months of nightly violent attempts by large crowds to breach and destroy the Portland, Oregon, federal courthouse, using Molotov cocktails, power saws, rifles, and other weapons.[17] Under the Colorado Supreme Court's expansive definition of "engage in," any political supporters who were never present in Portland could nonetheless be deemed covered by Section 3 for publicly calling for the protective agents to be stopped, especially if they stood by those remarks even after rioters "barricaded federal officers inside [the] courthouse — and tried to set the building on fire."[18]

Such conduct by politicians was distasteful but scarcely would have been thought to qualify as *insurrection*—until the Colorado Supreme Court got involved, that is.

The Colorado Supreme Court also seemed to believe that concerted actions to interfere with or delay core functions of a legislature may qualify as insurrection. Pet.App.88a, 100a. But actions surrounding fierce legislative debate are ripe for overly aggressive assertions of "insurrection." It could

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[16] Jacob Taylor, *Rep. Waters Calls for Harassing Admin Officials in Public, Trump Calls Her 'Low IQ,'* NBC NEWS (June 25, 2018), https://perma.cc/CK85-U5QU.

[17] Dep't of Homeland Sec., *Portland Riots Read-Out* (July 21, 2020), https://perma.cc/GK9L-73C9.

[18] Lia Eustachewich, *Portland Protesters Barricade Courthouse with Federal Officers Inside, Then Try to Set It on Fire*, N.Y. POST (July 22, 2020), https://perma.cc/N3L2-ZF3H.

include legislators who encourage protests in the chamber itself.[19] And it could include any politician who tweeted encouragement or incendiary messages about the hundreds of demonstrators who were arrested during the lengthy hearings on then-Judge Kavanaugh's nomination. These protestors sometimes acted violently and were often coordinated in advance.[20] Supporters of this tactic even used the language of "insurrection," for example, claiming they "stormed" Senate offices during the hearings for now-Judge Steven Menashi.[21] Politicians supporting them could be deemed as advocating for the use of force to disrupt one of the Senate's most solemn duties. Again, such conduct by politicians is distasteful, but had never been viewed as a foray to invoking Section 3.

Nor could someone hope to escape by pointing to evidence contradicting any insurrectionary intent. Again, the Colorado Supreme Court's opinion so broadly interpreted "engage in" that it sailed right past President Trump's repeated statements to his supporters—both before the breach of the Capitol and after it was breached—telling them to act peacefully,

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[19] Kimberlee Kruesi & Jonathan Mattise, *GOP Silences 'Tennessee Three' Democrat on House Floor for Day on 'Out of Order' Rule; Crowd Erupts*, ASSOCIATED PRESS (Aug. 28, 2023), https://perma.cc/P6T7-DTTY.

[20] Jason Breslow, *The Resistance at the Kavanaugh Hearings: More Than 200 Arrests*, NAT'L PUB. RADIO (Sept. 8, 2018), https://perma.cc/G76W-3W9M.

[21] Jennifer Bendery, *Progressives Storm Senators' Offices To Confront Them On Votes for Trump's Judges*, HUFFINGTON POST (Sept. 11, 2019), https://perma.cc/A4BV-QEJN.

and that he later told them via video to "'go home now.'" Pet.App.98a–99a, 238a.

It is hard to imagine an actual insurrectionist quickly asking for peace and encouraging disbandment. But once "engage in" is defined so broadly, even significant countervailing evidence can simply be labeled as a ruse, as insufficient, or even as an implied recognition and praise of ongoing violence. Enterprising state officials, in other words, may conclude that "Peace means War." *Cf.* George Orwell, *1984* (2004).

CONCLUSION

The Court should reverse.

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January 18, 2024