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 *Amicus Curiae* of America's Future, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Inc., Heller Foundation, Tennessee Firearms Association, Tennessee Firearms Foundation, Inc., Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, Constitution Party National Committee, and Conservative Legal Defense and Education Fund in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

America's Future, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Inc., Heller Foundation, Tennessee Firearms Association, Tennessee Firearms Foundation, Inc., Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. The Constitution Party National Committee is a national political party, with an important interest in the issue of eligibility of presidential candidates.

STATEMENT OF THE CASE

Six individuals who are eligible to vote in the Republican presidential primary election filed suit in Colorado state court against the Colorado Secretary of State, seeking to prevent former President and current candidate Donald Trump from being listed on the Republican primary ballot in Colorado. These

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

individuals contend that President Trump engaged in an insurrection against the United States government on January 6, 2021, and thus he is ineligible to serve in the office of the President under section 3 of the Fourteenth Amendment.

The district court conducted an expedited and abbreviated proceeding, but one that did not conform to strict statutory scheduling requirements. On November 17, 2023, the district court issued its findings of fact and conclusions of law, including a finding that President Trump had engaged in insurrection within the meaning of Section 3, but denying relief because section 3 does not apply to the office of the President as it is not included in that section's phrase "any office, civil or military, under the United States." The ruling that President Trump had engaged in insurrection was based in part on the "Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol" and testimony of a professor of sociology. *See* Pet. at 9.

On December 19, 2023, the Colorado Supreme Court, in a 4-to-3 decision, affirmed the district court's ruling that President Trump engaged in insurrection, but reversed as to whether Section 3 applied to President Trump. The Court prohibited the Colorado Secretary of State from listing President Trump on the 2024 presidential primary ballot, staying its order to give President Trump time to challenge its ruling.

STATEMENT

Immediately after the events of January 6, the Biden Administration and the mainstream media began a relentless campaign to label President Trump and the election protestors as "insurrectionists." Among the charges brought against President Trump in his second impeachment trial was "incitement of insurrection," but that was just the first phase of the strategy. Having been acquitted of that charge by the Senate, the insurrection epithet continued to be used even though the events of January 6 in no way constituted an insurrection, and the President's call for his followers to march "peacefully and patriotically" to the Capitol hardly constituted incitement for an insurrection. It was not known at that time why President Trump's opponents continued to use the term "insurrection." The Department of Justice essentially confirmed there was no insurrection when it failed to bring charges for a violation of 18 U.S.C. § 2383 against President Trump or any protestor. To be sure, the "insurrection" label facilitated President Biden's effort to demonize half of the nation, asserting that "Donald Trump and the MAGA Republicans represent an extremism that threatens the very foundation of our republic."[2] However, it took longer for the real reason that the "insurrection" charge had to be used to become manifest.

On August 14, 2023, an advance copy of a law review article by two law professors was posted which

[2] "Remarks by President Biden on the Continued Battle for the Soul of the Nation," *The White House* (Sept. 1, 2022).

boasted that never before had "Section Three's full legal consequences ... been appreciated or enforced...." The Democrat lawfare machine swung into action to implement the strategy. The Never-Trump lawfare warriors developed a way to "sandbag" this Court. They would win either way: either Trump would be removed from the ballot based on a deeply flawed theory, or they could demean the Court for interfering in the election in a partisan manner. *Wall Street Journal* Editorial Board member Kimberly Strassel has urged this Court to respond with one voice: "The best outcome would be a ... 9-0 Supreme Court decision[] that put a decisive end to the current upheaval and discourage a repeat."[3]

SUMMARY OF ARGUMENT

The central issue here and in some 60 other ballot challenges is: Whether Section 3 of the Fourteenth Amendment applies, and if so, whether President Trump engaged in an insurrection against the United States. No aspect of Article II, Sec. 1, cl. 5 eligibility is before the Court. A narrow focus on the manner the challenge was handled by the Colorado courts would not resolve the issue that the nation needs to be resolved now.

Section 3 of the Fourteenth Amendment applies only to a person who previously served in a particular office and took an oath of the type specified. President Trump did neither. Section 3 prevents such a person

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[3] K. Strassel, "Sandbagging the Supreme Court," *Wall Street Journal* (Dec. 22, 2023), p. A15.

from holding certain positions, but not the Presidency. The Colorado Supreme Court committed the error of disregarding the text in favor of what a bare majority of that Court believed to be the Section's greater purpose. There having been no conviction of President Trump under 18 U.S.C § 2383, there can be no disqualification.

Lastly, by any historically valid definition of "insurrection," there was no insurrection on January 6. It was a serious mistake for the Colorado courts to rely for its findings on the partisan Report of the House Select Committee on January 6. If the violent and deadly Black Lives Matter riots of 2020-21 were not an insurrection, neither were the events of January 6. Due to many reasons including the release of additional video, the FBI infiltration of the crowd, the unequal treatment of Ray Epps, the Justice Department's decision not to indict anyone for insurrection, the tide has turned and the American people are no longer accepting the false insurrection narrative.

ARGUMENT

I. THE ELECTION CALENDAR REQUIRES THIS COURT TO ADDRESS THE FOURTEENTH AMENDMENT AND INSURRECTION ISSUES RATHER THAN OPINE ON THE ROLE OF CONGRESS OR MATTERS OF COLORADO LAW.

Due to the expedited nature of this proceeding, this *amicus* brief is being filed simultaneously with

Petitioner's merits brief. Therefore, these *amici* assume that the Petitioner's merits brief will urge reversal based on the same five grounds asserted in its Petition for Certiorari ("Pet.") (using the same numbering and section headings as in the Petition):

> II. Disputed questions of presidential qualifications are reserved for Congress to resolve;
> III. Section 3 is inapplicable To President Trump;
> IV. President Trump did not "engage in insurrection";
> V. The Colorado Supreme Court violated the electors clause by flouting the statutes governing presidential elections; and
> VI. Section 3 cannot be used to deny President Trump access to the ballot.

For the following reasons, these *amici* respectfully urge the Court to address and resolve only three of these five matters: whether Section 3 of the Fourteenth Amendment applies to President Trump (Pet. sections II and VI) and, if so, whether President Trump engaged in an insurrection (Pet. section IV).

A. No Aspect of Article II, Sec. 1, cl. 5 Eligibility Is Now before the Court.

The question presented by Petitioner, and on which review was granted, is: "Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?" Pet. at i. Petitioner broadly asserts that "disputed

questions of presidential qualifications are reserved for Congress to resolve." Pet. at 19. However, there is no reason to address or resolve such general propositions, as the only disputed aspect of presidential qualifications, and therefore the only issue now before the Court, is the issue of possible disqualification under Section 3 of the Fourteenth Amendment. Not before the Court are the constitutionally prescribed eligibility requirements set out in Article II. Indeed, Petitioner's main argument never addresses those eligibility requirements of age, years of residence, and natural born citizen status.

Further, Petitioner's arguments are applicable only to Section 3 — not Article II, Sec. 1, cl. 5. Judge Samour devotes an entire section of his dissent to explaining, correctly, that "Section Three of the Fourteenth Amendment Is Unlike Other Constitutional Qualification Clauses." Pet. 147a-152a. The Petition does not challenge that proposition, and Petitioner's arguments do not apply to the other eligibility provisions. For example, Petitioner correctly contends that Section 3 lacks "judicially manageable standards" (Pet. at 22) — thereby raising an argument which does not apply to the three criteria set out in Article II. Therefore, this case neither requires nor supports a sweeping proclamation that all aspects of eligibility for the Presidency are exclusively the province of Congress. Such a decision would undermine a variety of court opinions which allow states to properly police ballot access for constitutionally prescribed reasons such as insufficient age. *See, e.g., Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014); *Bates v. Jones*, 131 F.3d 843, 847 (9th Cir

1997) ("term limits on state officeholders is a neutral candidacy qualification, such as age or residence, which the State certainly has the right to impose."). These are matters that have not fully been briefed to this Court and should not be resolved here.

B. A Resolution of the Colorado Law Issues Will Not Meet the Urgent Need for a Decision on Article 3.

A decision by this Court on Petitioner's section V issue, which addresses only the due process and other nuances of Colorado election law, would not solve the problem the nation now faces. Petitioner correctly reports that: "Over the last few months, more than 60 lawsuits or administrative challenges have been filed seeking to keep President Trump from appearing on the presidential primary or general-election ballot." Pet. at 4. Time is short. Oral argument in this challenge was expedited, but not scheduled to occur until February 8, 2024 — the same date as the Nevada and Virgin Islands Republican Presidential caucuses. As of that date, the Iowa Republican Caucuses and the New Hampshire Republican Presidential primary election will have already occurred, and the South Carolina Republican primary will be only 16 days away.

State election officials need a resolution on the applicability of Section 3 — the issue common to all state challenges. To illustrate the problems created by any delay, in New Jersey, adjudication of a challenge must be resolved within nine days. Therefore, an effort is currently underway to persuade the Secretary

of State to obtain a legal opinion from the state Attorney General, even before nominating petitions are due March 25, in order to expedite consideration of a planned challenge to President Trump's appearance on the New Jersey primary ballot which has already been prepared. Those working on that New Jersey challenge are monitoring this case, but have urged that the state Attorney General's opinion be obtained because the "applicability and scope of" this Court's decision is "uncertain."[4]

This Court already has demonstrated that it understands the need to resolve the central issues quickly based on the expeditious manner in which it has handled this case. The point here is that it is now essential that this Court not be diverted by issues unique to Colorado or involving general assertions that sweep beyond the issue now before this Court. The matters that must be decided here are those which are common to all 60 challenges:

> Whether Section 3 of the Fourteenth Amendment applies, and if so, whether President Trump "engaged in insurrection" against the United States.

C. Primary and General Elections.

Lastly, to ensure that this matter not again need to come before this Court in the next few months,

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[4] C. Toutant, "'A Hurricane is Headed' This Way: Lawyers Urge State to Brace for Trump Ballot Challenge," *National Law Journal* (Jan. 11, 2024).

these *amici* urge that this Court make clear that, even though the court order under review addresses only the primary election, this Court's decision applies equally to the ballot for both the primary and general elections.

II. SECTION 3 OF THE FOURTEENTH AMENDMENT DOES NOT APPLY TO PRESIDENT TRUMP.

A. The Plain Text.

Section 3 of the Fourteenth Amendment states:

> **No person shall** be a Senator or Representative in Congress, or elector of President and Vice President, or **hold any office**, civil or military, under the United States, or under any State, **who, having previously taken 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**, shall have **engaged in insurrection or rebellion** against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability. [Emphasis added.]

These *amici* address the issue of whether or not President Trump actually engaged in an insurrection or rebellion in Section III, *infra*. In this Section II,

they address the textual preconditions to the application of Section 3.

Section 3 applies only to an individual who:

(i) previously served in a **particular office**; and
(ii) who took an **oath of the type specified**.
Such persons meeting requirements (i) and (ii) are prevented from serving only in:
(iii) **certain positions**.

President Trump did not meet either of the two preconditions, and is not seeking a position from which he could be disqualified. On this point, the district court's analysis was entirely correct. *See* Pet. 277a-283a.

As to the first issue, the oath must have been taken to serve in one of several specified federal or state government positions, but the Presidency was not among those positions specified.

As to the second issue, the oath taken must be "to support the Constitution of the United States" which is required of "officers" under Article VI, cl. 3,[5] and is distinctly different from the oath that Article II, Sec. 1, cl. 8 requires be taken by the President, "to ... preserve, protect and defend the Constitution." President Trump may have been the only President that had not previously taken such an oath, but that is

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[5] Fully consistent with Section III, *infra*, Article VI, cl. 3 requires that officers "be bound by Oath or Affirmation, to support this Constitution."

quite irrelevant, as that oath is what is required textually. Pet. 283a, n.20. A straight-forward textual reading here on the second issue is fully consistent with and supplements the first issue, in making clear that prior service in the Presidency was not envisioned by the Framers. On the other hand, the Colorado Supreme Court, in its effort to apply Section 3 to President Trump, had to reimagine not just one, but two clauses of Section 3, in a way that made more sense to them (Pet. 71-73a (officer); Pet. 74-76a (oath)).

As to the third issue, persons are disqualified only from holding certain offices in the future: "a Senator or Representative in Congress, or elector[6] of President and Vice President." Fourteenth Amdt., Sec. 3. Here again, the Presidency was omitted. Had the Framers of the Fourteenth Amendment intended to prevent a person from serving as President or Vice President, it would have been natural to place them not only on this list, but first on the list. The clear text should not be disregarded on the assumption that those who fashioned the language were inartful or careless. The fact that the language expressly includes electors for President and Vice President while omitting the office of President and Vice President evidences precision of language.

Since the Presidency was omitted from Section 3, the only way for plaintiffs to succeed would be for them to persuade this Court that the President is a mere

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[6] Insofar as Article II, Sec. 1, cl. 2 precludes any member of Congress from serving as an elector, there is no overlap between these two provisions.

"officer of the United States" — which would make Section 3 the only place in the Constitution that "officer" would have that meaning. As discussed by the district court, the President is not an "officer of the United States" under: (i) Article II, Sec. 2, cl. 2 (the Appointments Clause); (ii) Article II, Sec. 4 (the Impeachment Clause); (iii) Article II, Sec. 3 (the Commissions Clause); (iv) Article VI, cl. 3 (the Oath and Affirmation Clause); and (v) Article VI (the Oath for Officers of the United States). *See* 280a-282a. Unless the Presidency is reduced to the status of an "officer of the United States" under Section 3 of the Fourteenth Amendment — it could not prevent President Trump from taking his place on the ballot.

The arguments advanced in the forthcoming law review article by Professors Baude and Paulsen also treats the text quite casually, subordinating the text to their perception of the Section's overarching purpose.

> **We do not buy it.** [It causes] a facially **implausible** consequence: an insurrectionist *President* is not covered ... though nearly every other federal or state officeholder is.... This **makes little sense**.... [T]he argument rather implausibly **splits linguistic hairs**.... [T]he argument must rely ... on **fine parsing** of prepositional phrases. [W. Baude & M. Paulsen, "The Sweep and Force of Section Three," 172 U. PENN. L. REV., forthcoming at 108-09 (emphasis added).]

While at least one of the co-authors describes himself as an originalist, the paper demeans standard textual

analysis and the basic rules of construction. If there is a search for meaning beyond the text, lawyers should be seeking the "original public meaning" or at least the "authorial intent,"[7] not looking for a way to read words into the Constitution that are not there.

The Colorado Supreme Court wholly rejected the district court's careful analysis on this point, elevating their view of what seemeth right to them over the plain text. *See* Pet. 61a-76a. For example, as to the different oaths required from the President and officers, the Colorado Supreme Court asserted that "the President is an 'executive ... Officer[]' of the United States under Article VI, albeit one for whom a more specific oath is prescribed." Pet. 74a. The Colorado Supreme Court concluded that the two oaths may be distinct, but were generally "consistent" and therefore the distinction in the oaths was not meaningful. *See* Pet. 75a. Having presumed that the President is an officer, the Colorado Supreme Court felt free to conclude that reading the President into Section 3 was "'the most likely to be that meant by the people in its adoption'" and although nowhere to be found in the text, was "consistent with its plain language." Pet. 76a. Based on what seems "most likely" to them, the Colorado Supreme Court concluded that an oath "to support" was the same as an oath "to preserve, protect and defend," even though those at the constitutional convention believed them sufficiently different to draft a unique oath for the President. Based on what was "most likely" to them, the Colorado

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[7] *See* E.D. Hirsch, Validity in Interpretation at viii, 1, 5, 212-13 (Yale Univ. Press: 1967).

Supreme Court has approved disqualifying the candidate often showing as the leading candidate for President of the United States.[8] Lawyers cannot win cases by making unsupported assumptions about what the Framers of the Fourteenth Amendment might have thought as justification to vary the text of what the Framers actually wrote, and neither judges nor law professors should be given any greater latitude.

B. Griffin's Case.

Even if the Colorado Supreme Court were found to be correct in its view that the text allowed application of Section 3 to President Trump, this Court would need to be persuaded to disregard the first decision involving the Fourteenth Amendment made by a member of this Court. In an 1879 case, Chief Justice Salmon Chase addressed the question as to whether Section 3 was self-executing, or required implementing legislation. He read Section 3 in conjunction with Section 5, which authorized Congress to implement the provisions of the Fourteenth Amendment: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." This issue was dealt with extensively by Justice Samour in dissent. *See* Pet. 125a-150a.

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[8] *See* Latest Polls, *538* (Jan. 17, 2024). In the Iowa caucuses, President Trump not only prevailed by almost 30 percentage points over his nearest competitor, he won all but one county. *See* S. Fortinsky, "Trump poised to win 98 out of 99 Iowa counties," *The Hill* (Jan. 16, 2024).

Viewing the Fourteenth Amendment as a whole, Chief Justice Chase concluded:

> Taking the third section then, in its completeness with this final clause, *it seems to put beyond reasonable question* the conclusion that the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, and *to be made operative in other cases by the legislation of congress in its ordinary course.* [Pet. 133a-34a quoting *In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (No. 5,815) ("Griffin's Case").]

Justice Samour explained the wisdom of Chief Justice Chase's approach, in that although Section 3 bars certain persons from office, it:

> doesn't spell out the procedures that must be followed to determine whether someone has engaged in insurrection.... That is, it sheds no light on whether a jury must be empaneled or a bench trial will suffice, the proper burdens of proof and standards of review, the application of discovery and evidentiary rules, or even whether civil or criminal proceedings are contemplated.... [Pet. 126a-27a.]

Thus, each state can have its own standard, and different states can reach different results. Justice Samour suggested that there is an act of Congress that could be considered to implement Section 3:

> Significantly, there is a federal statute that specifically criminalizes insurrection and requires that anyone convicted of engaging in such conduct be fined or imprisoned *and be disqualified from holding public office*. *See* 18 U.S.C. § 2383. If any federal legislation arguably enables the enforcement of Section Three, it's section 2383. [Pet. 127a.]

Justice Samour then put the capstone on his argument, stating that "this is the only federal legislation in existence at this time to potentially enforce Section Three" and since "President Trump has not been charged under that statute ... it is not before us." Pet. 128a.[9] President Trump having never even been charged with committing the congressionally enacted crime that could bar him from "holding any office under the United States," that should dispose of the novel theory of two law professors that he engaged in an insurrection under Section 3 of the Fourteenth Amendment.

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[9] Moreover, as no other persons were charged, to say nothing of convicted, under 18 U.S.C. § 2383, it would be impossible for President Trump to have given "aid or comfort" to others engaged in insurrection or rebellion on January 6, 2021.

III. THERE WAS NO "INSURRECTION" UNDER SECTION 3 OF THE FOURTEENTH AMENDMENT ON JANUARY 6.

A. The Courts Below Incorrectly Concluded that the Events of January 6 Constituted an Insurrection by President Trump.

The disqualification language in Section 3 of the Fourteenth Amendment applies only to certain persons who "have engaged in insurrection or rebellion against [the United States] or given aid or comfort to the enemies thereof." The Colorado Supreme Court concluded that "the events of January 6 constituted an insurrection and President Trump engaged in that insurrection." Pet. at 14a. The court considered various definitions of the word "insurrection" before deciding that "for purposes of deciding this case, we need not adopt a single, all-encompassing definition...." Pet. at 86a.

However, the court considered an insurrection to include: "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 a peaceful transfer of power in this country." *Id*. The supreme court did not conduct its own independent analysis of the events of that day, but rather relied on the district court opinion. Thus, if there is to be proof of "insurrection," it must be found in the district court opinion.

As discussed, *supra*, the district court was not troubled that President Trump had not been convicted

of violating 18 U.S.C. § 2383, which applies to "Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection ... or gives aid or comfort thereto." Had President Trump been convicted of that crime, there would be no need to examine the matter further, as Congress provided that in addition to fine or imprisonment for not more than 10 years, he would have been deemed "incapable of holding any office under the United States."

The district court did not address why, in his four-count indictment, Special Counsel Jack Smith in Washington, D.C. did not bring such a charge against President Trump, rejecting the unanimous criminal referral for an insurrection charge by the January 6 House Select Committee. That Select Committee's report alleged: "the president 'was directly responsible for summoning what became a violent mob' to Washington, 'urging them to march to the Capitol, and then further provoking the already violent and lawless crowd with his 2:24 p.m. tweet about the Vice President.'"[10]

There has been considerable speculation as to why such a charge was not made,[11] since Attorney General Garland has repeatedly asserted that Trump

[10] O. Rubin, K. Faulders, and W. Steakin, "Jan. 6 committee condemns Trump as 'central cause' of insurrection in sweeping report," *ABC News* (Dec. 19, 2022).

[11] *See, e.g.*, J.D. Capelouto, "Why Jack Smith didn't charge Trump with inciting an insurrection," *Semafor* (Aug. 2, 2023).

participated in an insurrection,[12] and Garland appointed Smith as Special Counsel.[13] One lengthy critique of the Trump indictment described it as a "Prosecutorial Masterstroke" since it could result in the incarceration of the President without needing to demonstrate "Trump's direct involvement in the Jan. 6 Capitol siege [since] Trump was not at the Capitol when the violence occurred [and] issues around the First Amendment impose a potential barrier to a charge of incitement ever reaching a jury."[14]

Not only did Jack Smith decline to indict President Trump for insurrection, but also the U.S. Attorney for the District of Columbia Matthew M. Graves did not charge even one Jan. 6 protestor with that crime. This was consistent with the view of former Attorney General Bill Barr, no fan of President Trump, who

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[12] *See* L. Barr & A. Mallin, "AG Garland testifies Jan. 6 insurrection was 'most dangerous threat to our democracy,'" *ABC News* (May 12, 2021) (Garland testified he "has not seen a more dangerous threat to democracy than the 'invasion' of the Capitol on Jan. 6, which he called in written testimony a 'heinous attack' and 'intolerable assault.'").

[13] An *amicus* brief filed by former Attorney General Edwin Meese has persuasively argued that Garland had no authority to appoint Smith as a Special Counsel, and therefore, all of his actions, including bringing this indictment, have been unlawful. *See United States v. Trump*, Supreme Court Docket No. 23-624, Brief of Former Attorney General Edwin Meese III (Dec. 20, 2023).

[14] D. Aftergut, "Jack Smith's Jan. 6 Trump Indictment is a Prosecutorial Masterstroke," *Slate.com* (Aug. 1, 2023).

said: "I don't think it was an insurrection...."[15] Former Vice President Mike Pence, the supposed target of the insurrection, agreed: "I have never called what happened on January 6 an 'insurrection'..."[16]

The two main counts of President Trump's indictment were for an alleged violation of the Sarbanes-Oxley Act's financial crimes. On December 13, 2023, this Court granted certiorari to determine if the U.S. Department of Justice has misused this statute to create a crime that Congress never created. *See Fischer v. United States*, U.S. Supreme Court No. 23-5572.[17]

Even though Jack Smith declined to indict President Trump based on the referral of the January 6 Committee, the district court was willing to base its conclusion largely on the findings of that Committee's report. And there, the district court relied on the report extensively even though it was admitted over hearsay and other objections. *See* Pet. at 9. The truth is, it was a grave mistake for the court below to believe that any of that Committee's findings had any validity. Then-Speaker of the House Nancy Pelosi refused to

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[15] T. Ozimek, "Biden DOJ Went Too Far With Prosecuting Jan. 6 Suspects: Bill Barr," *Epoch Times* (Jan. 6, 2024).

[16] T. Ozimek, "Pence Says Jan. 6 Was Not an 'Insurrection,' Denounces Efforts to Block Trump from Ballot," *Epoch Times* (Jan. 9, 2024).

[17] Some of these *amici* filed the only *amicus* brief in support of Fischer's petition for certiorari. *See* No. 23-572, *Amicus* Brief of America's Future, et al. (Oct. 13, 2023).

allow the Republican leadership to appoint members to that Committee, and she selected the two most anti-Trump Republicans in the House. Thus, the January 6 Committee was not just Select, but *selective*, excluding any who would stand in the way of its pre-ordained conclusions.

Former Speaker Nancy Pelosi's strategy to release only selective excerpts of the 80,000 hours of video taken that day gave a slanted view. As more video has been released by Speakers Kevin McCarthy and Mike Johnson, the American People have come to realize that they were lied to. *See* Tucker Carlson, "This video tells a different story of Jan 6," *Fox News*.

As is true with most deceptions, the truth "will out." Now, more and more Americans have come to believe the events of January 6 were mostly a legitimate protest, not a riot, and certainly not an insurrection.[18] And even more significantly, one in four Americans believe it is "definitely or probably true" that the FBI instigated any criminal activities.[19]

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[18] A. Blake, "More Republicans now call Jan. 6 a 'legitimate protest' than a 'riot'," *Washington Post* (July 7, 2022).

[19] Had there been a plan to take down the government, the FBI certainly at least knew about it, as it is known to have infiltrated all of the groups that it claims led the "insurrection," including at least eight informants embedded in Proud Boys. *See, e.g.,* A. Feuer & A. Goldman, "F.B.I. Had Informants in Proud Boys, Court Papers Suggest," *New York Times* (Nov. 14, 2022). Moreover, having infiltrated these groups, the FBI could have had an even larger role in whatever plan may have existed, just as it did in the supposed plan to kidnap Michigan Governor Gretchen

There are many reasons that Americans do not believe the "narrative" being pushed by the Biden Administration and the mainstream media. Perhaps the most visible agitator on January 6 was Ray Epps, who became famous trying to lead protestors by screaming: "We need to go into the Capitol." The Trump supporters around him immediately began chanting "Fed, Fed, Fed." Later, Epps appeared to whisper to others immediately before they pushed down a security fence. Epps was placed on, and then quietly removed from, the FBI's wanted list. Then he was given a puff piece on mainstream media news show *60 Minutes*. When prosecutors finally felt compelled to charge him, he received kid glove treatment. *See* J. Vallejo, "Who is Ray Epps? The Capitol riot figure who disappeared from the FBI's wanted list," *Independent* (Jan. 12, 2022) (story and video).

B. The Constitutional Meaning of "Insurrection."

Those pushing a political agenda continue to peddle the term "insurrection" — without having to actually define it — which provides them two benefits.

Whitmer. What President Biden called a demonstration of "President Trump's 'tolerance of hate, vengeance, and lawlessness'" turned out to be an "FBI-fabricated case" which ensured Governor Whitmer's re-election in November 2022. *See* J. Bovard, "Inside the FBI's infiltration and entrapment of a Michigan militia crew," *New York Post* (Apr. 13, 2022). For a historical perspective on the FBI playbook on entrapment, *see* T. Aaronson, The Terror Factory: Inside the FBI's Manufactured War on Terrorism (Ig Publishing: 2013).

First, it frightens, criminalizes, and even demonizes activists in the populist MAGA movement that certainly elected President Trump in 2016, that may have reelected him in 2020, and is currently pushing his polling numbers over President Biden in many head-to-head match-ups. Second, it opens the door for efforts to destroy the leader of the populist MAGA movement — by preventing his reelection through "lawfare." This Court has an obligation to prevent the legal system from being used to knock the leading candidate for President off the field, to the advantage of those currently in charge of the Justice Department, and the Intelligence Community (which exercises remarkable control over the mainstream media[20]). It is important to search out the original meaning of "insurrection."

The legal definition of "insurrection" envisions an organized violent effort, supported by force of arms, to overthrow a legitimate government. The Constitution itself, while not defining "insurrection," gives Congress the power in Article I, Section 8 "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." This provision indicates that an insurrection must be of sufficient severity to require military force for its control.

The Framers did not draft the Constitution in a vacuum. Among those whose work was broadly known and accepted at the time of the Constitutional

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[20] *See* T. Carpenter, "How the National Security State Manipulates the News Media," *CATO Institute* (Mar. 9, 2021).

Convention, Emer de Vattel, in his seminal treatise The Law of Nations, defined relevant terms:

> A **popular commotion** is a concourse of people who assemble in a tumultuous manner, and refuse to listen to the voice of their superiors, whether the design of the assembled multitude be levelled against the superiors themselves, or only against some private individuals. **Violent commotions** of this kind take place when the people think themselves aggrieved.... If the rage of the malcontents be particularly levelled at the magistrates, or others vested with the public authority, and they proceed to a formal disobedience or acts of **open violence**, this is called a **sedition**. [E. de Vattel, III, The Law of Nations, 6th ed., at 421 (T and J.W. Johnson: 1844) (emphasis added).]

According to de Vattel, an insurrection requires more than open violence:

> When the evil spreads,—**when it infects the majority of the inhabitants of a city or province**, and **gains such strength that even the sovereign himself is no longer obeyed**,—it is usual more particularly to distinguish such a disorder by the name of **insurrection**. [*Id.* (emphasis added).]

The Capitol protest on January 6 involved a mere fraction of the population even of Washington, D.C. The civil disobedience was confined to a relative

handful of protestors (or those assuming the identity of protestors), never even beginning to "infect" the population of Washington or any other locale.

Although the FBI Director refuses to discuss the subject when questioned by the U.S. House of Representatives,[21] it is now clear that even the Capitol incursion itself was aided and abetted by hundreds of federal agents embedded in the crowd, who in multiple instances opened locked doors to protestors, and escorted and guided protestors through the Capitol. *See* Tucker Carlson Interview of Cong. Clay Higgins (Jan. 8, 2024).

Blackstone equates "insurrection" with "taking arms" and "levying war" "against the king."[22] Lord Coke likewise likened "insurrection" to war or invasion. The Supreme Court of Pennsylvania quoted Coke in declaring the Civil War to be a war as a result of insurrection: "According to Lord Coke ... when by invasion, **insurrection**, rebellion, or such like, the peaceable course of justice is disturbed and stopped, so as the courts of justice be, as it were, shut up, ... then it is said to be time of war." *Kneedler v. Lane*, 45 Pa. 238, 291 (Pa. 1863) (emphasis added).

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[21] *See* M. Ginsberg, "Wray Repeatedly Dodges On Whether Or Not FBI Had Sources In Crowd On Jan. 6," *Daily Caller* (July 12, 2023).

[22] W. Blackstone, 4 Commentaries on the Laws of England at 90 (H. Broom and E. Hadley, eds.: Wm. Maxwell and Sons: 1869).

The only weapon discharged in the Capitol or on Capitol grounds was that of the Capitol Police officer who shot and killed unarmed protestor and Air Force veteran Ashli Babbitt as she climbed through a window, posing no threat to him. That officer never attempted to effect an arrest of the unarmed Babbitt before shooting her.[23] No protestors discharged or brandished a firearm at any time.

In his Commentaries on the Constitution, Joseph Story also likens insurrection to a foreign invasion, and notes the necessity of military force to stop the insurrection. "In terms of insurrection or invasion, it would be natural and proper, that the militia of a neighbouring state should be marched into another to resist a common enemy, or guard the republic against the violences of a domestic faction or sedition."[24] "There is but one of two alternatives, which can be resorted to in cases of insurrection, invasion, or violent opposition to the laws: either to employ regular troops, or to employ the militia to suppress them," Story wrote. *Id.* at 81. Story contrasted an insurrection, requiring the military or militia to suppress it, with "ordinary cases" where resistance could be quieted "with the assistance of ... the common magistracy," or civilian law enforcement. *Id.* The Black Lives Matter

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[23] *See* G. Parry, "Killing Ashli," *American Spectator* (Jan 12, 2023); *see also* "Judicial Watch Files $30 Million Wrongful Death Lawsuit against U.S. Government on behalf of Ashli Babbitt's Husband and Estate," Judicial Watch" (Jan. 5, 2024).

[24] J. Story, III Commentaries on the Constitution at 82 (Hilliard, Gray and Co.: 1833).

protests of 2020 and 2021 involved, by orders of magnitude, more deaths, injuries, property destruction, damage to government installations, and financial loss than January 6, and yet they were never described as insurrections.

Story noted that, as of his writing, the militia had been called into action by the national government only twice. "The first was to suppress the insurrection in Pennsylvania in 1794; and the other, to repel the enemy in the recent war with Great Britain." *Id.* at 87. Story conceded the possible necessity of state military forces "to resist an expected invasion, or insurrection." *Id.* at 272-73. Again and again, he compares insurrections to invasions, in terms of the military force required to quell them.

William Rawle, another leading commentator contemporary with Story, wrote that if an insurrection is "[a] conspiracy to subvert by force the government of the United States … carried into effect, by embodying and assembling a military body and a military posture, [it] is an overt act of levying war."[25]

Early Congresses also equated insurrection with invasion. The Acts in 1792 and 1795 allowed the President to call out state militias "as he may judge

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[25] W. Rawle, A View of the Constitution of the United States of America at 142 (2d ed.) (William S. Hein and Co.: 2003).

necessary."[26] Both acts were specifically "enacted to safeguard against insurrection and invasion."[27]

Although an "insurrection" requires an organized effort, through force of arms, to overthrow a government, the FBI has conceded that there is "scant evidence that the Jan. 6 attack on the U.S. Capitol was the result of an organized plot to overturn the presidential election result."[28] "'Ninety to ninety-five percent of these are one-off cases,' said a former senior law enforcement official with knowledge of the investigation. 'Then you have five percent, maybe, of these militia groups that were more closely organized. But there was no grand scheme ... to storm the Capitol and take hostages.'" *Id.* Even for the small handful of "cells of protestors" who "aimed to break into the Capitol," the FBI "found no evidence that the groups had serious plans about what to do if they made it inside." *Id.*

However the activities of January 6 have been characterized, they were quickly resolved after only about three hours. Former chief of the U.S. Capitol Police Steven A. Sund explained it this way: "the USCP was able to get Congress back in session to

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[26] *See* Act of May 2, 1792, ch. 28, I Stat. 264; Act of Feb. 28, 1795, ch. 36, I Stat. 424.

[27] L. Fisher, "Delegating Power to the President," 19 EMORY JRNL. OF PUBL. L. 251, 268 (1970).

[28] M. Hosenball and S. Lynch, "Exclusive: FBI finds scant evidence U.S. Capitol attack was coordinated - sources," *Reuters* (Aug. 20, 2021).

certify the Electoral College results within hours of the attack and without injury to a single member of Congress." S. Sund, Courage Under Fire (Blackstone Publishing: 2023) at 326. The only real effect of the riot was that it stopped the presentation of evidence to the Congress and the American people about election irregularities.[29]

To be sure, January 6 was a political protest involving civil disobedience. By the meaning that term had in the Founding era, it failed by a wide berth to approach the historical requirements to be classified as an "insurrection."

C. Section 3 of the Fourteenth Amendment Occupies a Unique Place in American History.

Section 3 of the Fourteenth Amendment was designed to address those persons who had first served in public office prior to the Civil War, then fought against the Union in similar positions in the Confederacy, who might seek to be restored to the offices they held before the war. A few politicians, such as House Minority Leader Hakeem Jeffries, have

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[29] "The Capitol Riot: A Chronology," *National Security Archive* (Senator James Lankford (R-OK) at 11:17 am; Rep. Sean Marshall (R-KS) at 12:04 pm). Once the riot started, the presentations were stopped. Thus, the rioters caused the protest to have "had the exact reverse effect of what they wanted: an audit of the 2020 presidential election," which would have been completely orderly and lawful. J. Kelly, January 6: How Democrats Used the Capitol Protest to Launch a War on Terror Against the Political Right at 7 (Bombardier Books: 2022).

equated January 6 with acts of war,[30] but such extravagant political rhetoric cannot be taken seriously by any court. During the Civil War, 11 states declared independence[31] and commenced hostilities against the Union.[32] In response, President Lincoln declared that an insurrection existed, and called for 75,000 troops *Id.*

Section 3 was neither written to address protests like those on January 6 nor the riots surrounding President Trump's January 2017 inauguration, where in Washington alone, "[m]ultiple vehicles were set on fire," and "[p]olice said six officers were injured in scuffles."[33]

In stark contrast to the depiction of January 6 as an "armed insurrection," the bloody race riots of 2020-2021 have been almost universally described as "mostly peaceful."[34] In one week, those "largely

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[30] *See* J. Riddle, "Democrat Hakeem Jeffries Compares Jan 6 To Pearl Harbor," *Americaninsider.Org* (Oct. 28, 2023).

[31] "Secession," Britannica.com.

[32] "Civil War Timeline," Smithsonian Institution.

[33] J. Landay and S. Malone, "Violence flares in Washington during Trump inauguration," *Reuters* (Jan. 21, 2017).

[34] *See*, *e.g.*, M. Singh and N. Lakani, "George Floyd killing: peaceful protests sweep America as calls for racial justice reach new heights," *The Guardian* (June 7, 2020) ("Peaceful protests sweep America"); C. Smith-Schoenwalder, "Protests Mostly Peaceful as Arrests Top 10,000," *U.S. News and World Report* (June 4, 2020); "Protesters pack Washington, D.C., as largely

peaceful" protests in the District of Columbia alone resulted in 50 Secret Service agents being injured. Rioters set the historic St. John's Church on fire and threw bricks and Molotov cocktails at police.[35] The Secret Service moved President Trump to a secure bunker underneath the White House, intended for use in the event of terrorist attacks, for his safety.[36] Mayor Muriel Bowser was forced to activate the National Guard to stem the violence.[37] "Aerial views of the area around the [Trump] White House showed it wreathed in black smoke."[38]

Unlike January 6, rioters not only brandished weapons, but used them, against law enforcement and fellow rioters. In one night, June 1, 2020, five police officers were shot during riots.[39] More than 2000 law

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peaceful demonstrations continue across U.S.," *Thomson Reuters* (June 6, 2020).

[35] M. Mansfield and J. Lockett, "50 Secret Service agents injured in White House riots as Donald Trump is taken to 'terror attack' bunker," *The Sun* (June 1, 2020).

[36] N. Reinmann, "Trump Hid From Protests In Underground Bunker, Report Says," *Forbes* (Dec. 10, 2021).

[37] "DC Mayor Muriel Bowser issues citywide curfew, activates National Guard," *Fox5DC.com* (May 31, 2020).

[38] J. Borger, "Fires light up Washington DC on third night of George Floyd protests," *The Guardian* (June 1, 2020).

[39] M. Jankowicz, "At least 2 people were killed and 5 police officers were shot Monday night as violence continued at protests across the US," *The Insider* (June 2, 2020).

enforcement officers were injured in the first few weeks of riots.[40] A side-by-side comparison of the scale and severity of the two protests[41] shows: "some 15 times more injured police officers, 19 times as many arrests, and estimated damages in dollar terms up to 740 times more costly than those of the Capitol riot." *Id.* If the Black Lives Matter violent riots during 2020 and 2021 did not constitute "insurrection," then neither did the events of January 6.

Despite these facts, District Judge Tanya Chutkan used a January 6 case before her to call it "a false equivalence 'to compare the actions of people protesting, mostly peacefully, for civil rights' to the mob that 'was trying to overthrow the government.'"[42]

In terms of calls for violence, compare President Trump's "peacefully and patriotically" language with statements by some of his harshest critics:

- Rep. **Maxine Waters** (D-CA) incited protestors in Minneapolis to "get more confrontational" and "stay in the streets." She

[40] "More Than 2,000 Officers Injured in Summer's Protests and Riots," *PoliceMag.com* (Dec. 3, 2020).

[41] "RealClearInvestigations' Jan. 6-BLM Riots Comparison," *RealClearInvestigations.com* (Sept. 9, 2021).

[42] A. Richer, "Judge slams claims that Jan. 6 rioters are treated unfairly," *Associated Press* (Oct. 14, 2021).

promised, "I'm going to fight with all of the people who stand for justice."[43]

- Rep. **Ayanna Pressley** (D-MA) threatened, "There needs to be unrest in the streets for as long as there's unrest in our lives." *Id.*[44]

Each of these Members of Congress supported the impeachment of President Trump for inciting violence.

CONCLUSION

The decision of the Colorado Supreme Court should be reversed, and the matter remanded with instructions to restore President Trump to the Colorado Republican primary election ballot, as well as the general election ballot.

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[43] B. Stimson, "Maxine Waters urges Minnesota protesters to 'stay on the street' if Chauvin acquitted in Floyd case," *Fox News* (Apr. 18, 2021).

[44] Then-Senator Kamala Harris "urged supporters to donate to a fund that bailed violent rioters and arsonists out of jail.... She said, of the violent demonstrations: 'Everyone beware ... they're not gonna stop before Election Day in November, and they're not gonna stop after Election Day... and they should not.'" 169 *Cong. Rec*. S669 (Feb. 21, 2021). Now-Vice President Harris is the presumptive nominee for reelection with President Biden, and her encouragement of violent protestors is being ignored.

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