**IN THE OREGON SUPREME COURT OF THE STATE OF OREGON**

STATE EX REL MARY LEE NELSON, MICHAEL NELSON, JUDY HUFF, SAMUEL JOHNSON, and CHAD SULLIVAN, electors of Oregon,

Plaintiffs-Relators,

v.

LAVONNE GRIFFIN-VALADE, Secretary of State of Oregon,
Defendant.

S070658

# MANDAMUS PROCEEDING: REPLY BRIEF BY PLAINTIFFS-RELATORS (CORRECTED)


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The Petition for Mandamus seeks to require the Secretary of State to determine that Trump is not qualified to appear on Oregon's primary election or *general* election ballot. Relators continue to ask the Court to address the general election as well as the primary election. None of the Secretary's rationales for refusing to apply the 14th Amendment, § 3, to the Oregon Republican presidential primary election ballot apply to the Oregon general election ballot.

If the Court defers until Trump potentially receives the Republican nomination on July 18, 2024, only about 7 weeks would remain to adjudicate the matter before the printing deadline for Oregon's general election ballots. Further, Oregon Republican presidential primary voters should be informed before that election whether Trump is qualified to serve as President, so that their votes are not wasted on an ineligible candidate.

**INTRODUCTION**

Intervenor Trump seeks to block this Court's mandamus authority based on arguments that lack basis in state or federal law and that, if accepted, would render Section 3 of the Fourteenth Amendment a nullity. As demonstrated below, contrary to Trump's arguments: mandamus is appropriate here; the political question doctrine does not bar Oregon from adjudicating this matter; Section 3 is self-executing and may be enforced by states at the ballot stage; the president is an "officer of the United States" who takes an oath to support the Constitution, and the presidency is an office of the United States. Finally,

Trump has already been adjudicated to have engaged in insurrection, a determination confirmed by the undisputed factual record, rendering him disqualified from the presidency under Section 3 of the 14th Amendment.

## I. MANDAMUS IS PROCEDURALLY APPROPRIATE HERE.

The Intervenors-Respondents' Memorandum in Opposition to Mandamus [hereinafter "Trump" with a page reference], pp. 12-13, states that

> mandamus lies to require [government officers] to act, but it will not compel them to decide disputed questions of fact in a particular way." *State ex rel Kristof v. Fagan*, 369 Or 261, 279, 504 P3d 1163, 1173 (2022) (quoting *State ex rel Ware v. Hieber*, 267 Or 124, 128, 515 P2d 721 (1973)); *accord, e.g.*, *Oregon State Hosp. v. Butts*, 358 Or 49, 58--59, 359 P3d 1187, 1192 (2015).

But Trump left out the important parts of that quotation, which reads:

> Although mandamus relief is appropriate in "a situation where a right is inferable as a matter of law from uncontroverted facts," *State ex rel Maizels v. Juba*, 254 Or 323, 330, 460 P2d 850 (1969), we have not held that mandamus can be used to challenge an official's findings of fact. In the context of writs of mandamus directed to lower courts, we have explained that, "'[a]s a general rule, mandamus lies to require inferior courts to act, but it will not compel them to decide disputed questions of fact in a particular way.'" *State ex rel Ware v. Hieber*, 267 Or 124, 128, 515 P2d 721 (1973) (quoting *State ex rel. v. Crawford*, 159 Or 377, 386, 80 P2d 873 (1938)).

*State ex rel Kristof v. Fagan*, 369 Or 261, 279, 504 P3d 1163 (2022).

First, the Secretary made no findings of fact about Trump's engagement in insurrection or any other fact, apart from perhaps that Trump's candidacy has received coverage in the national news media (which no one disputes). Thus, this case does not involve a "challenge [to] an official's findings of fact."

Moreover, as explained *infra*, all the relevant facts have been decided in sister-state litigation in which Trump was a full party. If Trump were truly concerned that mandamus be used only "to require [government officers] to act, but [not] to decide disputed questions of fact in a particular way," Trump (pp. 12-13), he would stipulate to a mandamus ordering the Secretary to act--that is, to determine, on the merits, whether he is constitutionally eligible for the office of President, just as her predecessor determined, on the merits, whether Kristof was constitutionally eligible for the office of Governor.

Second, as explained *infra*, to the extent that Trump disputes his engagement in insurrection, all questions of material fact were resolved, following full evidentiary proceedings in a trial court and affirmance by the Colorado Supreme Court, in *Anderson v. Griswold*, 2023 CO 63, ___ P3d ___, 2023 WL 8006216 (Colo Dec. 19, 2023), *cert granted sub nom Trump v. Anderson, No. 23-719*, 2024 WL 61814 (2024), provided with our Memorandum of Additional Authorities filed December 20, 2023. Trump was a full party.

Our Response to Motion for Leave to File Brief Amicus Curiae by Landmark Legal Foundation (December 26, 2023), pp. 2-6, established that issue preclusion prnciples and the full litigation in Colorado courts of the issue of Trump's engagement in insurrection precludes reconsideration of that issue here.

> Oregon recognizes a common-law doctrine of issue preclusion, which "'arises in a subsequent proceeding when an issue of ultimate fact has been determined by a valid and final determination in a prior proceeding.'" *Barackman v. Anderson*, 338 Or 365, 368, 109 P3d 370

> (2005) (quoting *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103, 862 P2d 1293 (1993)).

*Hancock v. Pioneer Asphalt, Inc.*, 276 Or App 875, 880, 369 P3d 1188 (2016). Oregon courts recognize the issue preclusive effect of court decisions rendered by non-Oregon jurisdictions. *Serenity Servs., Inc. v. Castrey*, 109 Or App 360, 819 P2d 750 (1991); *E. Side Plating, Inc. v. City of Portland*, 316 Or App 111, 502 P3d 1192 (2021), *review denied*, 369 Or 675 (2022); *First Resolution Inv. Corp. v. Avery*, 238 Or App 565, 246 P3d 1136 (2010). The pendency of an appeal from the decision in the prior proceeding does not affect the application of issue preclusion in the second proceeding. *Berg on behalf of Estate of Higbee v. Benton*, 297 Or App 323, 328, 443 P3d 714 (2019).

Trump (p. 13) claims that "the secretary has not had the opportunity to develop a record." But the record has been fully established in a fully-litigated judicial proceeding in Colorado. Further, the Secretary had every opportunity to develop her own record but refused. On June 29, 2021, undersigned co-counsel from Free Speech for People ("FSFP") wrote the current Secretary's predecessor, setting forth the basis for Trump's disqualification and concluding that "[r]ather than wait until the urgency of an impending election, we urge you to address this critical issue now." Ltr. from FSFP to Secretary Shemia Fagan (June 29, 2021).[1] On July 12, 2023, FSFP wrote to the current Secretary and (1)

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1. https://freespeechforpeople.org/wp-content/uploads/2021/06/oregon-letter.pdf

requested that she make a declaratory ruling that Trump is disqualified from Oregon ballots and (2) provided a proposed "Secretary of State Declaration" with a detailed factual and legal analysis.[2] See Petition for Mandamus, Exhibit 1. FSFP on November 21, 2023, requested that the Secretary adopt a temporary rule and declaratory ruling to exclude Trump from Oregon ballots and provided a proposed temporary rule and proposed declaratory ruling. See Petition for Mandamus, Exhibit 2. A declaratory ruling requires a contested case hearing under ORS 183.410. But the Secretary refused to conduct the necessary proceedings or engage in any sort of fact finding.

Trump (p. 14) claims that ORS 254.165 "does not say that the Secretary must or shall determine whether any candidate has died or become disqualified." But keeping a known dead or disqualified candidate on the ballot would violate the Secretary's duty as "the chief elections officer of this state," with responsibility to obtain and maintain uniformity in the application, operation and interpretation of the election laws." ORS 246.110. And not even the Secretary agrees with Trump, as she has treated as "required" her exclusion from the ballot of persons disqualified from holding the offices sought.

On August 8, 2023, the Secretary adopted a temporary rule to implement Measure 113 (2022), which amended the Oregon Constitution to disqualify

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2. Trump (pp. 17-18) incorrectly attributes the July 12, 2023, letter to Relators.

certain members of the Oregon Legislature from serving in that body for a subsequent term. The Secretary concluded that she was required to exclude those members from appearing on the ballot, even though Measure 113 contained no provision about ballot access, because they would not be qualified to serve in the offices sought. The Secretary in her Respondent's Answering Brief in *Knopp, et al. v. Lavonne Griffin-Valade*, S070456 (October 27, 2023), p. 1, treated Measure 113 as requiring their exclusion from the ballot.[3]

> Information available to voters explained that Measure 113 would disqualify legislators from serving their immediate next term of office. Consistent with that understanding, the Secretary of State promulgated a temporary administrative rule providing that, under Measure 113, disqualified legislators are ineligible for legislative office for "the term immediately following their current term."

She referred (p. 14) to "the disqualification required by Measure 113" and repeatedly labeled it as both "automatic disqualification" (p. 15) and "the disqualification required by the measure" (p. 23). She treated the exclusion of those candidates from the 2024 primary ballot as mandatory, not discretionary. Completely changing course now, without explanation, is reversible error. ORS 183.482(8)(b)(B).

Trump (p. 15) states that the "Secretary of State clearly has no historical practice or duty to remove" inactive candidates from the Oregon presidential primary ballot. That is a function of logistics, not law. Oregon must start

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3. https://appellate-public.courts.oregon.gov/public/caseView.do?csIID=190445

printing primary ballots in mid-March. Presidential candidates often drop out after mid-March but before the mid-May Oregon primary election. It is not practicable to remove them from the primary ballots. But the Secretary can exclude from ballots a candidate who is not qualified to serve in the office, if his disqualification is brought to the attention of government authorities before the mid-March ballot printing deadline.

In *State ex rel Ofsink v. Fagan*, 369 Or 340, 505 P3d 973 (2022), this Court denied a mandamus petition, because the relators (chief petitioners on a prospective initiative petition) could avoid the adverse action by the Secretary merely by starting over with very slightly different measure text. Here, if Trump is on the Oregon ballots, Relators could not "start over" to obtain his removal from those ballots.

Further, Trump's argument is contradicted by *Kristof*, *supra*, where this Court entertained a direct mandamus action brought by the attempted candidate, who filed his candidacy papers on December 20, 2021. The Secretary rejected those papers on January 6, 2022. Kristof filed his mandamus petition on January 7, 2022. Trump's view is that the Court should have rejected his mandamus petition, because he could have filed his candidacy papers as early as September 10, 2021, and could have adjudicated his case by appealing the Secretary's decision to Marion County Circuit Court under ORS 246.910 and receiving a final decision prior to the mid-March primary ballot printing

deadline. And Kristof could have announced his candidacy even earlier, asked the Secretary for a declaratory ruling on his eligibility, and appealed the declaratory ruling to the Court of Appeals under ORS 183.482. But this Court nevertheless granted his mandamus petition and decided the matter, due to the impending deadline for printing the 2022 primary election ballots.

That other remedies, specifically including ORS 246.910, are not expeditious or adequate is addressed in detail at Petition for Mandamus, pp. 5-8.

## II. THIS COURT SHOULD REJECT THE SECRETARY'S REQUEST TO LIMIT REVIEW TO STATE LAW QUESTIONS.

The Memorandum of the Secretary of State in Response to Petition for Writ of Mandamus (December 20, 2023) [hereinafter Secretary's Memorandum], p. 7, states:

> If this court exercises its discretion to consider this case, it should limit its review to the state-law question of the Secretary's authority or other threshold legal issues that can be resolved without factual development. The court should not opine on the merits of the Section 3 question, because the merits ultimately turn on factual findings that it would not be appropriate for this court to make in the first instance in a mandamus proceeding.

Relators agree that this Court need not engage in fact-finding to resolve the 14th Amendment, § 3, issues (engagement in insurrection), because the applicable underlying and ultimate findings of fact were already made in *Anderson v. Griswold*, *supra*, establishing issue preclusion under Oregon law (see p. 2, *ante*).

The Secretary's Memorandum (p. 11) contends that placing Trump's name on the primary ballot is more convenient than requiring this supporters to write in his name. But the disqualification of Trump from office by Amendment XIV, § 3, applies, whether votes for him are conveyed by filling in an oval or writing a name. The Secretary should not count write-in votes for Trump.

## III. THE POLITICAL QUESTION DOCTRINE DOES NOT BAR ADJUDICATING PRESIDENTIAL CANDIDATES' QUALIFICATIONS.

As demonstrated in Plaintiffs-Relators Memorandum in Support of Mandamus [hereinafter "Relators' Supporting Memorandum" followed by a page reference], the political question doctrine does not apply here, because neither Section 3 of the 14th Amendment nor any other provision commits the determination of insurrection disqualification (or other presidential qualifications) exclusively to Congress; rather, states have plenary authority under Article II's Electors Clause to make those determinations. Relators' Supporting Memorandum, pp. 62-67. The Colorado Supreme Court recently rejected Trump's identical political question argument, explaining:

> [N]o constitutional provision * * * reflects a textually demonstrable commitment to Congress of the authority to assess presidential candidate qualifications. Conversely, the Constitution commits certain authority concerning presidential elections to the states and in no way precludes the states from exercising authority to assess the qualifications of presidential candidates.

*Anderson v. Griswold*, *supra*, at *62. Each of Trump's arguments to the contrary is unavailing.

### A. TRUMP RELIES ON UNPERSUASIVE AND DISCREDITED DECISIONS.

In seeking to invoke the political question doctrine, Trump relies mainly on unpublished trial court decisions dismissing challenges by pro se plaintiffs who failed to cite relevant authority. *See, e.g., Castro v NH Secretary of State*, ___ FSupp3d ___, 2023 WL 7110390 (D NH Oct. 27 2023) (Docket No. 23-cv-416-JL) ("Castro does not present case law that contradicts the authority discussed above—nor has the court found any."), *aff'd on other grounds, Castro v Scanlan*, 86 F4th 947 (1st Cir 2023) (confining analysis to standing and noting "the limited nature of the arguments that [Castro] makes about the more generally consequential political question issue"). Most were filed in *federal* court, where plaintiffs lacked Article III standing (not applicable in this case). Several cases invoked by Trump were decided on other grounds without discussing the political question doctrine. *See Robinson v. Bowen*, 567 FSupp2d 1144, 1147 (N.D. Cal. 2008) (discussing timing and citing a Supreme Court case on *ripeness*); *Keyes v. Bowen*, 189 Cal App 4th 647, 659–661, 117 Cal Rptr 3d 207 (2010) (dismissing on state law grounds).

In those that did mention the political question doctrine, appellate courts declined to adopt the political question doctrine ruling and affirmed solely on

other grounds. *See Castro*, 86 F4th at 953 (expressly declining to decide political question issue); *Grinols v. Electoral College*, 622 F App'x 624, 625 n1 (9th Cir 2015) (similar); *Kerchner v. Obama*, 612 F3d 204, 209 n3 (3d Cir 2010) (similar); *Berg v. Obama*, 586 F3d 234, 242 (3d Cir 2009) (similar); *Davis v. Wayne County Election Comm'n*, No. 368615 and 368628, Mich Ct Appeals (Dec. 14, 2023) (affirming denial solely on state law grounds). And the pre-2014 California federal district court decisions Trump cites were superseded by *Lindsay v. Bowen*, in which the Ninth Circuit held that resolution of presidential candidates' qualifications is *not* exclusively committed to Congress. *Lindsay v. Bowen*, 750 F3d 1061, 1065 (9th Cir 2014).

### B. TRUMP'S ATTEMPT TO LIMIT THIS COURT'S AUTHORITY TO CASES INVOLVING "UNDISPUTED FACTS" IS MERITLESS AND UNAVAILING.

Trump (pp. 24-25) suggests that states may only decide presidential qualifications in cases involving undisputed facts. But the political question doctrine never turns on the existence (or non-existence) of factual disputes. If, as Trump claims, all eligibility questions were textually committed to Congress, then states could not exclude *any* candidates as ineligible. Nothing in the Constitution supports Trump's concocted division of labor—states can decide "easier" questions, but Congress must decide "harder" questions.

Further, any such distinction would not support Trump's position. While Trump claims to "dispute" the relevant facts, as a matter of law, the fact that

Trump engaged in insurrection has been established by the overwhelming public record, including the Report of the January 6 Committee and by the recent binding determination of the Colorado Supreme Court. Trump is barred from relitigating those determinations here by issue preclusion, discussed at p. 2, *ante*.

## IV. THE ISSUES WERE NOT RESOLVED BY THE SENATE IMPEACHMENT TRIAL.

Trump next argues that the Senate's failure to convict Trump conclusively resolves the matter in his favor. But if the Senate impeachment vote has any relevance, it *supports* the conclusion that Trump engaged in insurrection. A bipartisan majority of 57 Senators concluded, as did a majority of the House, that Trump incited insurrection and should be convicted. And 22 Senators expressly based their vote to acquit on their belief (notwithstanding an earlier 56–44 procedural vote on jurisdiction, where those 22 were in the minority) that the Senate lacked jurisdiction over a former official. Those 22 Senators either criticized him or stated no view on the merits. *See* Goodman & Asabor, *In Their Own Words: The 43 Republicans' Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JUSTSECURITY (February 15, 2021).[4] A clear Senate majority, and likely two-thirds, agreed that Trump incited the

4. https://bit.ly/3uUZA1A

insurrection.[5] And as discussed *supra*, the Colorado Supreme Court determined that Trump *did* engage in insurrection. *Anderson*, 2023 CO 63, ¶¶ 196-225.

## V. THE POSSIBILITY OF CONFLICTING DECISIONS DESERVES NO WEIGHT.

Trump asserts this Court should not decide this case, because other states may decide differently. But Article II grants *each state* the power to appoint electors in the manner directed by *its* legislature.[6] States have historically and ably adjudicated ballot-access cases through their own proceedings, in the very "51-jurisdiction marathon" that Trump now bemoans. *See* Derek T. Muller, *"Natural Born" Disputes in the 2016 Presidential Election,* 85 FORDHAM LAW REVIEW 1097 (2016). If the political question doctrine prevented resolution wherever sister courts might disagree, no case could ever be decided. That is why appellate courts exist. If any state decides Trump is

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5. The United States agrees. *See United States v. Trump*, No. 23-3228 (D.C. Cir), ECF No. #2033810 (Answering Br.), at 57-59 (noting that "at least 31 of the 43 Senators who voted to acquit [Trump] explained that their decision to do so rested in whole or in part on their agreement with [his] argument that the Senate lacked jurisdiction to try him because he was no longer in office," even as they held him responsible for the insurrection), *available at* https://bit.ly/3NVO29n.

6. The sky does not fall when presidential candidates appear on only some states' ballots. In 2020, Kanye West appeared on twelve states' ballots. Lee, *Kanye West Reportedly Concedes Defeat, Ending 2020 Race*, ATLANTA JOURNAL-CONSTITUTION (Nov. 4, 2020). In 2012, four major Republican presidential candidates were excluded from Virginia's primary ballot. Mears, *Four GOP Candidates Fail To Make Virginia Primary Ballot, Judge Rules*, CNN (January 13, 2012).

disqualified, the U.S. Supreme Court can resolve the issue—and indeed, has granted certiorari in the Colorado case. *See Trump v. Anderson*, *supra*.

This process—currently being carried out efficiently, properly, and before the 2024 general election—will not be, as Trump (p. 28) suggests, a "recipe for chaos, confusion, and constitutional crisis." To the contrary, Trump's demand—that states be forced to place unqualified candidates on the ballot and await resolution by Congress at the counting of electoral votes on January 6, 2025—is far more likely to result in the "chaos, confusion, and constitutional crisis." Trump has already created chaos on one January 6th; this Court should decline his invitation to propose a repeat.

## VI. SECTION 3 DOES NOT REQUIRE FEDERAL LEGISLATION.

Relators' Supporting Memorandum (pp. 1-21) demonstrated, based on Section 3's plain language, history, and clear weight of precedent, that Section 3, like the other Sections of the 14th Amendment and like the 13th and 15th Amendments, may be applied by states without special permission from Congress. Trump (pp. 32-35) largely ignores that and relies almost exclusively on *Griffin's Case*, 11 F. Cas. 7 (C.C.D.Va. 1869), insisting that Section 3 has no force absent Congressional authorization. *Griffin's Case* is neither persuasive nor credible and is inconsistent with the text, history, and purpose of the 14th Amendment. Relators' Supporting Memorandum, pp. 12-19.

Further, Trump's argument that Section 3 is unenforceable except by Congress has recently been thoroughly analyzed and thoroughly rejected by the Colorado Supreme Court. *Anderson*, *supra*, at 49-60.

> In summary, based on Section 3's plain language; Supreme Court decisions declaring its neighboring, parallel Reconstruction Amendments self-executing; and the absurd results that would flow from Intervenors' reading, we conclude that Section Three is self-executing in the sense that its disqualification provision attaches without congressional action.

*Id.* at *60 This Court should adopt the compelling reasoning of the Colorado Supreme Court and reject Trump's "absurd" argument here.

## VII. TRUMP'S CLAIM THAT SECTION 3 DISQUALIFIES INSURRECTIONISTS FROM "HOLDING OFFICE," NOT "RUNNING FOR OFFICE," IS UNAVAILING.

Trump (p. 45) insists that this Court must allow him to appear on the ballot because, he argues, Section 3 bars insurrectionists from "holding office" but not from "appearing on a ballot or being elected." This is the same argument that then-judge, now-Justice Gorsuch rejected in *Hassan v. Colorado,* 485 Fed Appx 947, 2012 WL 3798182 (10th Cir 2012). Like Trump here, Hassan argued that "even if Article II properly holds him ineligible to *assume the office* of president," it was unlawful "for the state to deny him a *place on the ballot.*" *Id.* (emphasis in original). The court rejected this distinction, concluding that "a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to *exclude from the ballot* candidates who are

*constitutionally prohibited from assuming office." Id.* (emphasis added). *See also Anderson,* at 38-39 ("Nor are we persuaded by President Trump's assertion that Section Three does not bar him from *running for or being elected to* office because Section Three bars individuals only from *holding office. Hassan* specifically rejected any such distinction.") (emphasis in original).

Trump (pp. 45-46) argues that Section 3's provision "that the disability may be removed by Congress" renders it unenforceable at the ballot stage. But *Trump himself* cannot cure the disqualification. Only Congress, by a two thirds majority of each house, may remove the Section 3 disability. Trump has not even requested that Congress do so (Relators' Statement of Facts ¶ 274), and there is no evidence that it would, if requested. Trump's contention that election officials and the courts are powerless to enforce Section 3 unless and until a disloyal insurrectionist has successfully run for an office for which he is not currently qualified, then belated and unsuccessfully asks Congress to remove the disability, is as much a recipe for chaos as his contention Section 3's enforcement must await the Congressional vote. The fanciful and speculative possibility that two-thirds of each chamber would vote to remove Trump's Section 3 disqualification provides no basis for including Trump on the ballot. As of now, he is disqualified from holding the office and therefore may not appear on the ballot.

## VIII. SECTION 3 APPLIES TO FORMER PRESIDENTS AND TO THE PRESIDENCY.

### A. "OFFICER OF THE UNITED STATES" INCLUDES THE PRESIDENT.

Trump (pp. 53-54) argues that "officer of the United States" as used in Section 3 is a technical "term of art" that excludes the president. And he dismisses extensive nineteenth-century official references to the president as an "officer of the United States"—by Congress, presidents, the Supreme Court, and the public—as not using the term in "the strict Constitution sense." *Id.* But the "Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia v Heller*, 554 US 570, 576 (2008); *see also Whitman v Oxford Nat'l Bank*, 176 US 559, 563 (1900) (similar). Trump's self-serving construction cannot be reconciled with the plain language: the Constitution refers to the presidency as an "office" over 25 times, and the plain meaning of "officer" is one who holds an office. *See* Relators' Supporting Memorandum, p. 30.

As the Colorado Supreme Court explained, "If members of the Thirty-Ninth Congress and their contemporaries all used the term 'officer' according to its ordinary meaning to refer to the President, we presume this is the same meaning the drafters intended it to have in Section Three. * * * [I]n the absence of a clear intent to employ a technical definition for a common word, we will not do

so." *Anderson*, 2023 CO 63, ¶ 148. "A construction of Section Three that would nevertheless *allow* a former President who broke his oath, not only to participate in the government again but to run for and hold the highest office in the land, is flatly unfaithful to the Section's purpose." *Id.* at 83-84, ¶ 151.

### B. THE PRESIDENTIAL OATH IS AN OATH TO SUPPORT THE CONSTITUTION.

Trump's argument (pp. 54-55) that the Article II oath sworn by the President to "preserve, protect, and defend the Constitution" is not an oath to "support" the Constitution strays equally far from common meaning. By definition, an oath to "preserve, protect and defend" the Constitution *is* an oath to "support" the Constitution. *Anderson,* at 86 ("Modern dictionaries define 'support' to include 'defend' and vice versa. So did dictionaries from the time of Section Three's drafting.") (citations omitted).

Further, the fact that Article VI provides that "all executive and judicial Officers * * * of the United States * * * shall be bound by Oath or affirmation, to support this Constitution," does nothing to advance Trump's argument, because "the President is an 'executive * * * Officer[]' of the United States under Article VI, albeit one for whom a more specific oath is prescribed." *Anderson,* at 85. Article II's presidential oath to support the Constitution is more specific, as is the oath prescribed by statute for all other executive officers. Relators' Supporting Memorandum, p. 41; *Anderson*, at 86 ("The specific

language of the presidential oath does not make it anything other than an oath to support the Constitution.").[7]

### C. THE PRESIDENCY IS AN OFFICE UNDER THE UNITED STATES.

Trump also argues that the presidency is not an office under the United States from which oath-breaking insurrectionists are disqualified by Section 3. This argument, which would disqualify disloyal insurrectionists from every public office, from meat inspector, to Governor, to Supreme Court Justice, *except the presidency*, flies in the face of the history and purpose of Section 3. And in the context of a Constitution that refers to the presidency as an "office," no less than 25 times, it defies "normal and ordinary meaning." *See Heller*, 554 US at 576.

The fact that an early draft of Section 3 included the phrase "office of the President or Vice President," CONG. GLOBE, 39th Cong., 1st Sess. 919 (1866), does not, as Trump claims, suggest that the drafters intentionally *omitted* the office of the President or Vice President from Section 3. Instead, the drafters

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7. Trump's argument contradicts his federal court brief filed six months ago. There, Trump argued that he *is* a former "officer of the United States"; distinguished the Appointments Clause cases upon which he now relies; and noted that *amicus* Professor Tollman's views—which he now espouses—are "idiosyncratic . . . and of limited use." *See* Trump Memo in Opp. to Met to Remand, pp 2–9, available at https://bit.4ly/5TrumpRemandOpp. The court agreed with Trump that the president *is* an "officer of the United States." *New York v. Trump*, ___ FSupp3d ___ (SD NY 2023) (remanding on other grounds). This Court should reject Trump's opportunistic turnabout.

chose to include a "much broader catchall," one that still included but was not limited to the office of the Presidency and Vice Presidency. *Anderson*, 2023 CO 63, ¶ 140-141; Maine Secretary of State, *In re: Challenges of Kimberley Rosen, Thomas Saviello, and Ethan Strimling; Paul Gordon; and Mary Ann Royal to Primary Nomination Petition of Donald J. Trump, Republican Candidate for President of the United States*, at 22 ["*In re Rosen*"].[8] During amendment debates, Senator Reverdy Johnson specifically expressed concern that rebels might be elected President or Vice President; his colleague Senator Lot Morrill specifically drew his attention to the catchall phrase: "Let me call the Senator's attention to the words 'or hold any office, civil or military, under the United States.'" Senator Johnson was satisfied with this answer. CONG. GLOBE, 39th Cong., 1st Sess. 2899 (1866).

Nor does the fact that Section 3 lists senators, representatives, and electors, but not the presidency, provide any evidence that the office of the presidency was not included among the "offices under the United States," to which Section 3 applies. Instead, "the Presidency is not specifically included because it is so evidently an 'office,'" while senators, representatives, and electors are not considered "offices" under the Constitution. *Anderson*, at 71.

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8. https://www.maine.gov/sos/news/2023/Decision%20in%20Challenge%20to%20Trump%20Presidential%20Primary%20Petitions.pdf

## IX. TRUMP'S ARGUMENT THAT HE DID NOT ENGAGE IN INSURRECTION IS PRECLUDED BY THE JUDGMENT OF THE COLORADO SUPREME COURT AND INCONSISTENT WITH THE UNDISPUTED RECORD OF EVIDENCE SUPPORTING THAT DECISION.

### A. TRUMP IS PRECLUDED FROM RELITIGATING WHETHER HE ENGAGED IN INSURRECTION.

After extensive briefing and consideration of a voluminous evidentiary record produced in a five-day trial in which Trump fully participated as a party-intervenor, the Colorado Supreme Court in *Anderson v. Griswold* affirmed the state trial court's conclusions:

> [T]hat the events at the US Capitol on January 6, 2021, constituted an "insurrection"[; and]

> [T]hat President Trump "engaged in" that insurrection through his personal actions.

*Id.* at *3. This Court must give these determinations *at least* as much preclusive effect as would the courts of Colorado. *Durfee v. Duke*, 375 US 106, 109, 684 SCt 242 (1963) ("Full faith and credit * * * requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it."); *see also Aguirre v. Albertson's, Inc.*, 201 Or App 31, 46, 117 P3d 1012 (2005) ("The general rule is that the preclusive effect to be given to a judgment is determined by the law of the jurisdiction in which the judgment was rendered.").

Under Colorado law, as elsewhere, the party seeking to bar relitigation of an issue must show:

> (1) the issue is identical to an issue actually litigated and necessarily adjudicated in the prior proceeding; (2) the party against whom [preclusion] was sought was a party to or was in privity with a party to the prior proceeding; (3) there was a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issues in the prior proceeding.

*Stanton v. Schultz*, 222 P3d 303, 307 (Colo 2010). Issue preclusion does not require mutuality and "can be invoked defensively or offensively." *Foster v. Plock*, 394 P3d 1119, 1124-26 & n5 (Colo 2017). *See also* the discussion of issue preclusion at page 2, *ante*.

This case raises the same issue that was fully litigated and decided by the Colorado courts in *Anderson*: whether Trump engaged in insurrection or rebellion. Trump had an opportunity, as party intervenor, to fully and fairly litigate the issue, which was briefed, tried, and vigorously litigated in both the Colorado trial court and the Colorado Supreme Court. The Colorado trial "took place over five days and included opening and closing statements, the direct- and cross examination of fifteen witness, and the presentation of ninety-six exhibits," all of which resulted in a final judgment on the merits contained in the trial court's "comprehensive, 102-page order." *Anderson*, 2023 WL 8770111, at *18. The parties further litigated the issues before the Colorado Supreme Court, which issued a final judgment on the merits in a thorough 134-page opinion addressing and resolving whether Trump engaged in insurrection. Finally, the

determination of the issue was "necessary to judgment." *Huffman v. Westmoreland Coal Co.*, 205 P3d 501, 507 (Colo Ct App 2009).

The Colorado Supreme Court's opinion in *Anderson* represented its "final decision" with respect to the issues considered therein. *Rantz v. Kaufman*, 109 P3d 132, 138 (Colo. 2005). The fact that the opinion provides that it would be stayed by filing a petition for Supreme Court certiorari, *see Anderson*, 2023 WL 8770111, at *3, or that the Colorado Supreme Court has adopted a rule that a "pending appeal" prevents a prior judgment from being "final" for preclusion purposes, *Rantz*, 109 P3d at 141, does not defeat issue preclusion here. While the Full Faith and Credit Clause obligates this Court to give the *Anderson* judgment "at least" the preclusive effect it would receive in Colorado, *Durfee*, 375 US at 109, that obligation is a floor, not a ceiling. *See Dancor Const., Inc. v. FXR Const., Inc.*, 64 NE 3d 796, 810 (Ill Ct App 2016) (stating that forum state can apply its own law to preclude relitigation of issues even where the rendering state's law would not). In fact, Oregon, most other states, and federal courts follow the opposite rule: that a decision is final for preclusion purposes notwithstanding the pendency of an appeal. *See Berg on behalf of Estate of Higbee v. Benton*, *supra*, 297 Or App at 328; *see also So. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.*, 740 F2d 1011, 1018-19 (DC Cir 1984); RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. f (1982). Applying Oregon law to

determine that the *Anderson* judgment is final and binding here best advances the purpose of issue preclusion and the public policy of this state.

In applying offensive nonmutual issue preclusion, courts consider four factors beyond the basic issue preclusion elements: (1) whether the party seeking preclusion could have joined the first action but opted to "wait and see"; (2) the extent to which the party sought to be precluded had an incentive to litigate vigorously in the prior case; (3) whether the prior court decision is inconsistent with another decision involving the party to be precluded; and (4) whether the second case affords the party sought to be precluded procedural protections that were unavailable in the first case. *Vanderpool v. Loftness*, 300 P3d 953, 958 (Colo Ct App 2012).

Here: (1) Relators could not have joined the Colorado proceeding because they do not live in Colorado, are not Colorado voters, and do not have any interest in Colorado ballots that would have allowed them to intervene in an action under Colo Rev Stat § 1-1-113(1); (2) Trump had every incentive to litigate in Colorado vigorously and did so; (3) the Colorado proceeding afforded him significant procedural protections and a fair opportunity to be heard; and (4) those procedural protections were akin to what he would receive in Oregon. This case does not present the concern that Relators have tried to manipulate the judicial process by adopting a "wait and see" approach.

Finally, no inconsistent judicial decisions involving Trump would make it unfair to bind him to the Colorado Supreme Court's determinations. To date, two other state court actions seeking Trump's removal from a primary ballot have been dismissed but solely based on *state* law. Those courts did not issue judgments on any of the federal issues that grounded the *Anderson* decision.[9] *See LaBrant v. Benson*, No. 166470 (Mich Dec. 27, 2023) (mem), *leave to appeal denied*, No. 368628 (Mich Ct App Dec. 15, 2023) (finding pre-primary challenge unavailable under state law, but expressly declining to address federal constitutional issues); *Growe v. Simon*, Minn No. A23-1354, 997 NW 2d 81 (mem) (Minn Nov. 8, 2023). No court anywhere in the United States has determined that Trump did *not* engage in insurrection.[10]

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9. Several cases involving similar allegations were dismissed for lack of standing in federal court. *E.g., Caplan v. Trump*, No. 23-CV-61628, 2023 WL 6627515 (SD Fla Aug. 31, 2023). They are not inconsistent with *Anderson* because—by definition—they did not reach the merits. *See Peabody Sage Creek Mining, LLC v. Colo. Dep't of Pub. Health & Env., Water Quality Control Div.*, 484 P3d 730 (Colo Ct App Aug. 2020) (dismissal for lack of subject matter jurisdiction "is not an adjudication on the merits, but rather is the result of a court lacking the power to hear the claims asserted").

10. These unpublished Michigan decisions are available at https://freespeechforpeople.org/michigan-voters-challenge-trumps-ballot-eligibility-under-14-3-insurrectionist-disqualification-clause.

## B. THIS COURT SHOULD ADOPT THE FINDINGS OF THE COLORADO COURTS AND DETERMINE THAT TRUMP IS DISQUALIFIED FROM THE PRESIDENCY AND MAY NOT APPEAR ON THE PRIMARY OR GENERAL BALLOT.

Even if the Court determines that the Colorado judgment is not "final" or is otherwise not legally binding, it should nonetheless adopt the Colorado courts' determination that Trump engaged in insurrection and is disqualified from the presidency under Section 3. The petitioners have submitted to this Court the full record of the Colorado proceedings, including the undisputed documentary evidence and transcripts of the testimony. As the detailed findings of the Colorado district court establish, and as the Colorado Supreme Court's thorough decision affirms, that evidence collectively establishes beyond serious question that Trump engaged in insurrection and is therefore disqualified from the presidency and may not appear on the primary or general presidential ballots. *See Anderson,* at 96-116.

> We conclude that the foregoing evidence, the great bulk of which was undisputed at trial, established that President Trump engaged in insurrection. [His] direct and express efforts, over several months, exhorting his supporters to march to the Capitol to prevent what he falsely characterized as an alleged fraud on the people of this country were indisputably overt and voluntary. [T]he evidence amply showed that President Trump undertook all these actions to aid and further a common unlawful purpose that he himself conceived and set in motion: prevent Congress from certifying the 2020 presidential election and stop the peaceful transfer of power.

*Id.* at 115.

The Colorado courts are not outliers in these determinations. After Trump participated and vigorously litigated a full evidentiary proceeding, the Maine Secretary of State also found in a through and detailed opinion that Trump engaged in insurrection and was disqualified under Section 3. *In re Rosen*, *supra*, at 26-33. And at least nine federal judges have explicitly assigned responsibility for the January 6 insurrection to Trump. *See* Relators' Supporting Memorandum, p. 48 (summarizing these findings). No court addressing the issue on the merits has found otherwise; there is no basis for this Court to do so.

## X. TRUMP'S FIRST AMENDMENT ARGUMENTS ARE UNAVAILING.

Finally, the First Amendment provides no escape hatch from his disqualification under Section 3. As explained in Relators' Supporting Memorandum, the First and Fourteenth Amendment are coequal provisions. For this reason, the First Amendment does not protect words that meet Section 3's definition of "engag[ing" in insurrection." *See* Relators' Supporting Memorandum, p. 54. And Section 3 is a qualification for office, not a penalty. *See In re Rosen* at 32 (finding no precedent "that permits the First Amendment to override a qualification for public office"). Even if this Court were to analyze Trump's speech under the standard applicable to criminal statutes, Trump's speech and actions clearly satisfy it. *See Brandenburg v. Ohio*, 395 US 444, 447 (1969). Trump explicitly or implicitly encouraged the use of violence or lawless action; he intended, knew or should have known that his speech

would result in the use of violence or lawless action; and the imminent use of violence or lawless action was the likely result of that speech. *See Anderson*, 2023 CO 63, ¶ 227, 238-56 (Trump's speech satisfies all three prongs of the *Brandenburg* test); *In re Rosen* at 32 (similar); *Thompson v. Trump*, 590 FSupp3d 46, 115 (D DC 2022) (similar), *aff'd on other grounds sub nom. Blassingame v. Trump*, 87 F4th 1 (DC Cir 2023).

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Respectfully Submitted,

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## CERTIFICATE OF FILING AND SERVICE

I certify that on this day I filed by Efile to the Appellate Court Administrator the foregoing:

**MANDAMUS PROCEEDING: REPLY BRIEF BY PLAINTIFFS-RELATORS (CORRECTED)**

I certify that on this day I served that document on the party representatives listed below by Efile and by conventional email:

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