

No. 23-719

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In The  
**Supreme Court of the United States**

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DONALD J. TRUMP,

*Petitioner,*

v.

NORMA ANDERSON et al.,

*Respondents.*

—◆—  
**On Writ Of Certiorari To The  
Supreme Court Of Colorado**

—◆—  
**BRIEF FOR DAVID P. CULLENBERG,  
BRYANT “CORKY” MESSNER,  
AND WILLIAM C. SATURLEY,  
AS AMICI CURIAE SUPPORTING RESPONDENTS**

—◆—  
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**INTEREST OF THE *AMICI CURIAE*<sup>1</sup>**

The *amici curiae* to this brief are residents of, and voters in, the State of New Hampshire. The *amici curiae* have a constitutional interest in a ballot which contains only qualified candidates for president who have not forfeited the right to serve in that office. This right deserves protection. The *amici curiae* are concerned that this right will not be addressed by the parties or other *amici curiae*.

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**SUMMARY OF ARGUMENT**

The events leading up to the attack on the U.S. Capitol on January 6, 2021 in which Donald J. Trump participated, culminating in the attack itself, sought to disrupt the peaceful transfer of power from one administration to the next. It caused the loss of innocent American lives, injuries to others, and the destruction of property. The attack was an insurrection which Trump called for and in which he participated. Trump has promised even more horrendous acts if he is elected president.

Trump's actions and choices disable him from acting as president and commander-in-chief of the country's military forces, by operation of Section 3 of the Fourteenth Amendment to the Constitution. The *amici*

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<sup>1</sup> No counsel for any party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.



*curiae*, and all Americans, have a constitutional right to the enforcement of Section 3, and a ballot free of such an insurrectionist. It is the duty of this Court to protect this right by, at a minimum, finding no error in the ruling of the Colorado Supreme Court. More broadly, the Court should issue a writ of prohibition prohibiting Trump from being elected or appointed to any office under the United States.



## **FACTUAL BACKGROUND**

### **Trump is an insurrectionist.**

#### **1. Trump willed the mob to act on January 6.**

As laid out in detail in the Colorado Supreme Court ruling in *Anderson v. Griswold*, 2023 CO 63 (December 19, 2023, see *Appendix to Petition for Certiorari*, p. 1a), Trump took numerous, deliberate actions to overturn the 2020 presidential election result. He variously termed the result “stolen” and “rigged”; he conspired with others to change the official results in a variety of states, by fraud, persuasion, or intimidation of state and local officials; he endorsed a plan to substitute fake electors for the lawful slates of electors; he reached out to many Congressmen and Senators to convince them to refuse to count the real electors’ votes; and he put extraordinary pressure on the Vice President, both privately and publicly, to abandon his constitutional role and overturn the legitimate result of the election.

Prior to January 6, he solicited his followers to attend a protest in Washington on that date: “Big protest in D.C. on January 6th. Be there, will be wild!” When the crowd was assembled, he announced he had summoned them to oppose the “steal” of the election, calling it “the most corrupt election in the history, maybe of the world.” He knew this was a lie.

Knowing many of the attendees were armed, he nevertheless directed his followers to march on the Capitol. “Our country has had enough. We will not take it anymore and that’s what this is all about. . . . We will stop the steal.” He urged them to “fight like hell, and if you don’t fight like hell you’re not going to have a country anymore.”

The riot/rebellion was televised. Trump watched the broadcast. He watched, apparently with satisfaction, as the battle flag of the Confederacy, which came no closer than six miles of the Capitol during the Civil War, was paraded through the Capitol Rotunda. His advisors pleaded with him to call off the mob, but for three hours while his followers disrupted the constitutional process he remained silent, speaking only to condemn Vice President Pence for lacking “the courage to do what should have been done to protect our Country and our Constitution.”

Trump’s inaction during this period, ignoring his duty to intervene despite having the tools to do so, confirms that the rioters were acting in a way he intended and that there was no mistake on the crowd’s part in understanding that intention.

## **2. The Colorado court found Trump to be an insurrectionist.**

The record on appeal from the Colorado Supreme Court establishes: (i) that even before the election, Trump was laying the groundwork for a claim that the election was rigged (*Appendix to Petition for Certiorari* (hereinafter “*App.*”) *at 92a*); (ii) that Trump undertook efforts to prevent the certification of the election results (*id.*); (iii) that many state officials who had been targeted by Trump were subsequently subjected to a barrage of harassment and violent threats by his supporters (*App. at 92a-93a*); (iv) that his plan was that Vice President Pence would reject the true electors and certify fake electors who supported Trump (*App. at 94a*); and (v) that Trump urged his supporters to come to Washington on January 6 to fight (*id.*). The court easily concluded that “the events of January 6 constituted a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish the peaceful transfer of power in this country,” i.e., that it was an insurrection (*App. at 87a*) and that Trump engaged in the insurrection (*App. at 100a*). Turning to the issue before it, the court ruled that Trump took an oath to support the constitution; that the presidency is an office under the United States; that Section 3 of the Fourteenth Amendment applies to the presidency and is self-executing; and that Trump, as an insurrectionist, is barred from serving as president of the U.S.

### **3. The Minority Leader of the Senate concluded Trump was an insurrectionist.**

After the insurrection was quelled, Republican Senate Minority Leader, Mitch McConnell, standing on the floor of the United States Senate, announced to the world it was a failed insurrection:

We will not bow to lawlessness or intimidation. . . . They failed. They failed. They failed to attempt to obstruct the Congress. This failed insurrection only underscores how crucial the task before us is for our republic.

*See* Table of Authorities, Other Sources (hereinafter “*Other Sources*”), a.

Five weeks later, McConnell again stood in the well of the Senate and informed the world Trump was responsible:

There is no question that President Trump is practically and morally responsible for provoking the events of that day. The people who stormed this building believed they were acting on the wishes and instructions of their president. . . . The leader of the free world cannot spend weeks thundering that shadowy forces are stealing our country and then feign surprise when people believe him and do reckless things.

*Other Sources*, b.

**4. Congress concluded the events of January 6 were an insurrection.**

The act awarding congressional gold medals to the Capitol Police and those who protected the U.S. Capitol on January 6 contains an official finding that “a mob of *insurrectionists* forced its way into the U.S. Capitol building and congressional office buildings and engaged in acts of vandalism, looting, and violently attacked Capitol Police officers.” Pub. Law No. 117-32 (August 5, 2021), 135 Stat. 322 (emphasis supplied).

The impeachment proceedings against President Trump reached the same conclusion. A majority of the members of Congress (232 to 197) approved an article of impeachment charging Trump with “incitement of insurrection.” Likewise, a substantial majority of the Senate (57 to 43) endorsed the charge and the conclusion. Accordingly, majorities in both branches of Congress concluded that Trump incited an insurrection.

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**ARGUMENT**

**Trump forfeited his right to serve as an officer of the United States. The *amici curiae* are entitled to have that forfeiture enforced by the judiciary.**

**I. Section 3 of the Fourteenth Amendment is an unambiguous forfeiture clause.**

No person shall . . . hold any office, civil or military, under the United States . . . who, having previously taken an oath . . . as an officer of the United States to support the Constitution

of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.

Section 3 of the Fourteenth Amendment is as plain, clear, concise, and unambiguous as Section 1, about which Justice Swayne wrote in his dissenting opinion in *The Slaughter House Cases*, 83 U.S. 36, 126 (1872), four years after the passage of the Amendment:

No searching analysis is necessary to eliminate its meaning. Its language is intelligible and direct. Nothing can be more transparent. Every word employed has an established signification. There is no room for construction. There is nothing to construe. Elaboration may obscure, but cannot make clearer, the intent and purpose sought to be carried out.

Section 3 is a forfeiture provision, not a criminal statute. It does not assign civil liability or criminal penalty, purposes for which the common law and criminal statutes exist. Its purpose is to protect the rights and privileges of all Americans by disabling insurrectionists from holding any office giving them the power and influence of the government to further their designs against the United States, seek retribution, or both.

## **II. Section 3 does not require enabling legislation.**

Like Section 1 of the Fourteenth Amendment, Section 3 “is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances.” *The Civil Rights*

*Cases*, 109 U.S. 3, 20 (1883). And “[a]s enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing.” *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803, *on other grounds as recognized in Ramirez v. Collier*, 595 U.S. 411, 424 (2022). That state of circumstances exists here and now.

### **III. Trump disabled himself from holding any office.**

After taking an oath to support the Constitution, Trump organized, promoted, and participated in an insurrection against the United States. In so doing, Trump chose to forfeit his right to hold any office under the United States. It is his forfeiture that created his Section 3 disability, irrespective of his Article II qualifications. Only Congress can remove his disability. Until then he shall not hold any office, not for a single day, not even while he might be seeking removal of his disability.

The corollary to Section 3 is: until Trump’s disability is removed, he cannot be elected president, because the sole purpose of the presidential election is to elect a qualified person who is not under a Section 3 disability.

### **IV. Trump has taken no steps to remove his Section 3 disability.**

Trump knew well before January 6 that he had lost the election. He lost lawsuit after lawsuit alleging

election fraud. His attempts to coerce election officials to alter election results had failed. His scheme to overturn the election with slates of alternate electors would fail without the willing participation of the Vice President, which he had yet to receive. His last hope was that a sufficiently disruptive and powerful show of force would compel that participation and subvert the constitutional transfer of power. He called his supporters to Washington for a “big protest” on January 6, enticing them with the promise “Be there, will be wild!”

Trump knew that the attack he watched on television was an insurrection. Trump knew through the proceedings of his second impeachment (acquitted on other grounds) that the attack was an insurrection. Trump knew by the press and through other media and, no doubt, by his competent lawyers and competent advisors (and Senator McConnell) that the attack was an insurrection.

Trump had options to remove the self-imposed disability. He had the opportunity to testify and present witnesses to vindicate himself at the impeachment hearings, but declined and instructed witnesses not to testify, claiming executive privilege. He had the opportunity to testify and vindicate himself before the January 6 Select Committee, but again declined and again instructed witnesses not to testify. He had the right at any time during the past three years to petition a court for redress through declaratory relief, asking the court to rule he had not participated in an insurrection and had no Section 3 disability. He had the right to petition Congress to remove the disability. He did none of these things.



This case presented Trump with yet another opportunity to present evidence of his innocence. He was afforded the opportunity to testify on his own behalf. Once again, he chose to present no evidence on the issue.

Trump's failure to pursue his rights during the three years since the insurrection is of his own making. He cannot claim foul after sitting on his rights, nor can he turn that decision into a due process claim designed to prevent the Colorado court from applying a Constitutional provision to the State's ballot. Neither should his claims prevent this Court from enforcing the rights of the *amici curiae* and all Americans to be free from an insurrectionist as president.

**V. Trump, individually and through his associates and followers, presents a clear and present danger to all Americans.**

During the three years since his failed insurrection, Trump has relentlessly claimed that the election was stolen, that the criminal charges against him are the work of the deep state, and that he is the subject of a witch hunt. Trump threatens prosecutors "if you come after me, I am coming after you." *Other Sources*, c. He demeans judges, calling them fake and corrupt. He issues warnings, some obscure and some more transparent. Trump's repeated lies and demeaning comments dehumanize all those who oppose him, whether by political party, by race, by gender, or by beliefs. He targets the press, prosecutors, judges, and

political foes, likening them all to vermin, *Other Sources*, d., as did other dictators before him.

Trump’s rhetoric is not just demeaning. It provokes violence. He frames the coming election and his anticipated future administration as a battle in which he and his allies and followers will crush the opposition:

We are going to finish what we started: . . . to see this battle through to ultimate victory. . . . We will root out[,] . . . expel[,] . . . cast out . . . [our enemies]. . . . 2024 is the final battle.

*Other Sources*, e.

Trump’s vitriolic rhetoric is stochastic terrorism – the use of mass media by a political figure to provoke random, ideologically motivated acts of violence that are statistically predictable but individually unpredictable – directed at his perceived enemies and those he seeks to intimidate into making decisions in his favor. The effect of Trump’s stochastic rhetoric is evident everywhere, including the disclosure of personal, private information, the posting of threats, the picketing of officials’ homes, and the brandishing of weapons at state capitals, office buildings, municipal offices, and public hearings.<sup>2</sup>

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<sup>2</sup> Specific examples of random threats and acts of violence resulting from Trump’s stochastic rhetoric include death threats made against federal Judge Tanya Chutkan, New York Attorney General Letitia James, Georgia District Attorney Fani Willis, Manhattan District Attorney Alvin Bragg, U.S. District Attorney and special counsel Jack Smith, Colorado Secretary of State Jena Griswold, and Maine Secretary of State Shenna Bellows and the

With Trump on the ballot, the intensity of the rhetoric is likely to increase. As in 2020, election workers will be demeaned, intimidated, and threatened. The pool of people willing to serve that function has already been diminished by these actions. If he loses, bedlam and civil disorder throughout the country is a real possibility with followers rising up in anger, now with guns and bullets. There will be little to dissuade Trump from weaponizing the Department of Justice, using persons loyal only to him, as he attempted

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swatting of the homes of Chutkan, Griswold and Bellows, *Other Sources*, f., g., and h.; the shooting into houses of Democrats in New Mexico by a self-described MAGA king, *Other Sources*, i.; the attack on the FBI office in Cincinnati by a man incensed by the search of Trump's home for classified documents, *Other Sources*, j.; the plot by a terrorist group to kidnap Michigan Governor Whitmer, *Other Sources*, k.; the assault on Speaker Pelosi's husband, intended for the Speaker, *Other Sources*, l.; Arizona Representative Paul Gosar's repetition of Trump's statement that General Mark Milley should be executed for treason, when during the insurrection Milley assured his Chinese counterpart that the U.S. government was stable, *Other Sources*, m.; and the many prominent Republicans whose words seem to welcome the prospect of civil war, such as former Governor Sarah Palin, speaking during a Newsmax interview: "Do you want us to be in a civil war? Because that's what's going to happen. . . . I like that you suggested that we need to get angry. We do need to rise up and take our country back." *Other Sources*, n. Or Kari Lake, former Republican candidate for Governor of Arizona: "If you want to get to President Trump, you're going to have to go through me and . . . 75 million Americans just like me. . . . [M]ost of us are card-carrying members of the NRA. That's not a threat – that's a public service announcement. We will not let you lay a finger on President Trump. Frankly, now is the time to cling to our guns and our religion." *Other Sources*, o. Or Mike Huckabee, former Governor of Arkansas: If the legal cases keep Trump from winning, "it is going to be the last American election that will be decided by ballots rather than bullets." *Other Sources*, p.

immediately after the 2020 election. In that instance, he convinced then-Acting Attorney General Rosen to publish a letter saying the Justice Department had opened an investigation into serious incidents of election fraud, and left the rest up to him. This attempt was stymied only by the threat of mass resignations. Actions like these not only weaken democracy but also directly deprive individual Americans of the privileges and immunities guaranteed by the constitution.

The prohibition in Section 3 is a guard against such deterioration. It applies to both civil and military offices, and the president not only occupies the highest civil office of the country but he is also the commander-in-chief of the armed forces, a distinctly different leadership role with its own powers. Two of the *amici curiae* to this brief are former military officers. They adamantly oppose handing the reins of power as commander-in-chief to a former insurrectionist, particularly one who has already attempted an overthrow of a presidential election and has called to throw out the Constitution. In a recent article, a professor emeritus of national security affairs at the U.S. Naval War College described how the military was a bulwark against Trump's anti-democratic designs; how Trump nurses deep grudges against those officers; and if reelected, how Trump will attempt to turn the "armed forces into praetorians loyal not to the Constitution, but only to him."<sup>3</sup>

In a speech on January 27, 1838 before the Young Men's Lyceum in Springfield, Illinois, Abraham

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<sup>3</sup> Tom Nichols, "A *Military Loyal to Trump*," *The Atlantic*, issue of January/February 2024.

Lincoln addressed the then-current fractiousness in the nation, warning that it was growing worse, and of the danger in a social environment that was seeing diminishing respect for the law and political institutions:

[T]here is, even now, something of ill-omen, amongst us. I mean the increasing disregard for law which pervades the country; the growing disposition to substitute the wild and furious passions, in lieu of the sober judgment of Courts; and the worse than savage mobs, for the executive ministers of justice. This disposition is awfully fearful in any community; and that it now exists in ours, though grating to our feelings to admit, it would be a violation of truth, and an insult to our intelligence, to deny. Accounts of outrages committed by mobs, form the every-day news of the times. They have pervaded the country, from New England to Louisiana; – they are neither peculiar to the eternal snows of the former, nor the burning suns of the latter[.] . . . Whatever, then, their cause may be, it is common to the whole country. . . .

By such examples, by instances of the perpetrators of such acts going unpunished, the lawless in spirit, are encouraged to become lawless in practice; and having been used to no restraint, but dread of punishment, they thus become, absolutely unrestrained. – Having ever regarded Government as their deadliest bane, they make a jubilee of the

suspension of its operations; and pray for nothing so much, as its total annihilation.<sup>4</sup>

The “Lyceum Address,” as it has come to be known, is as applicable today as it was then.

## **VI. The failure to stop Trump now will weaken democracy.**

The failure to disqualify Trump using Section 3 will inform future politicians that attempts to steal an election will not be disqualifying in the future. Criminal exposure is insufficient, since the lesson from Trump’s freedom to pursue the presidency after inciting an insurrection will be that stealing an election is not a disabling act. Future attempts to steal elections – not only at the presidential level, but at state and local levels as well – will in some instances succeed. Politicians will focus on stealing elections instead of winning voters, thereby diluting the importance of voting and disenfranchising voters.

Trump was part of an insurrection in the time leading up to and including January 6, 2021. He remains just as dangerous today, if not more so. He has openly promised to subvert the government and the Constitution. He and his followers are already using the weapons of 21st Century terrorists: intimidation and terror through social media. Guns and bullets may follow. If these words and rebellious actions do not

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<sup>4</sup> Abraham Lincoln Online, “Lyceum Address,” [https://www.abrahamlincolnonline.org/lincoln/speeches/lyceum.htm?utm\\_source=substack&utm\\_medium=email](https://www.abrahamlincolnonline.org/lincoln/speeches/lyceum.htm?utm_source=substack&utm_medium=email).

disqualify a candidate from the presidency, then what will? If this behavior is permitted – if this insurrectionist is allowed to run for president and win – then there will be no limit on the future behavior of this man and those who follow.

**VII. Section 3 of the Fourteenth Amendment to the Constitution guarantees the American people will be protected from an insurrectionist as president.**

Because this case arises out of Colorado's election law, it does not directly address the rights of the *amici curiae* and the American people. The *amici curiae* ask that in answering the question before them, the justices of this Court consider a broader frame of reference than just the Colorado election laws. The *amici curiae* ask the Court to consider the American peoples' constitutional right to a ballot free of insurrectionists.

Section 1 of the Fourteenth Amendment prohibits any State from making or enforcing any law abridging the privileges or immunities of American citizens; from depriving any person of life, liberty, or property, without due process of law; and from denying to any person within its jurisdiction the equal protection of the laws. While styled as a series of prohibitions against the States, the language simultaneously supplies affirmative rights to the people. The judicial branch has the duty and power to enforce those affirmative rights.

Section 3 is similar. Its language takes the form of a prohibition. But its effect is to create an affirmative right, this time in all Americans, to be free of an insurrectionist sitting in the office of the president and wielding that power.

Donald J. Trump has mounted more than 60 lawsuits seeking to overturn one or another aspect of the last election. Despite his overwhelming lack of success, he continues his advance to the presidency. He misstates facts and openly threatens his enemies, but without political consequence. Exposed to potential criminal liability, he promises to pardon himself once elected. In short, nothing deters him. The protection of Section 3 is needed, now. It must be used to protect those Americans and those institutions at risk if he takes power, as he seeks to do. The framers of the Constitution and of the Fourteenth Amendment recognized that majority rule by vote has its flaws; hence the absolute constitutional protection afforded those who might be in the bad graces of a man who gave aid and comfort to the enemies of this country but who nevertheless has a credible chance of achieving a powerful office.

Article III, Sections 1 and 2 of the Constitution vest the judicial power of the United States in this Supreme Court to hear all cases in law and in equity arising under the Constitution. The instant matter poses questions arising under the Constitution presenting a unique set of circumstances never heard by this Court. Whatever this Court's decision, it will be both profound



and momentous, affecting the course of events for America for generations to come.



## CONCLUSION

It is this Court's duty to protect the Constitutional rights of all Americans who petition the Court for its protection. Chief Justice John Marshal opined for this Court in 1821:

The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would-be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty.

*Cohen v. Virginia*, 19 U.S. 264, 404 (1821). As difficult as it may be for this Court, given the highly politicized and polarized environment, it nevertheless must exercise its best judgment. "The power to interpret the Constitution in a case or controversy remains in the Judiciary." *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997). The Court cannot avoid its duty. It must declare that Trump is disabled by Section 3 of the Fourteenth

Amendment from holding any office under the United States.

WHEREFORE, the *amici curiae* humbly request this Court:

- (i) To declare that Donald J. Trump has forfeited his right to hold any office under the United States; and
- (ii) To issue a writ of prohibition prohibiting Donald J. Trump from being placed on the ballots of all states and jurisdictions voting in the 2024 presidential election and all future elections, and prohibiting the counting of write in votes for Donald J. Trump in all elections.

Respectfully submitted,

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