No. 23-719

In the Supreme Court of the United States

DONALD J. TRUMP,
Petitioner,

v.

NORMA ANDERSON, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

BRIEF OF *AMICI CURIAE* STATES OF INDIANA, WEST VIRGINIA, 25 OTHER STATES, AND THE ARIZONA LEGISLATURE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

This Court has warned judges away from intervening in "the most intensely partisan aspects of American political life." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Court involvement in pure politics can bring "delay and uncertainty … to the political process … [and] partisan enmity … upon the courts." *Vieth v. Jubelirer*, 541 U.S. 267, 301 (2004) (plurality op.). And this case involves perhaps *the* most "intensely partisan" event one can imagine—a presidential election. Even when the Court has been compelled to address questions related to elections, it has stressed that the "Constitution's design … leave[s] the selection of the President to the people, through their legislatures, and to the political sphere." *Bush v. Gore*, 531 U.S. 98, 111 (2000) (per curiam). This notion—that courts should show restraint in presidential-election cases—advances a common-sense ideal: "Voters, not lawyers, choose the President." *Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377, 391 (3d Cir. 2020).

Yet the Colorado Supreme Court showed no restraint here. Instead, amid a hotly contested election, it has barred a former President and leading candidate from its presidential ballot.

The state court's choice to declare former President Donald Trump an insurrectionist under Section 3 of the Fourteenth Amendment has vast consequences that reach far beyond Colorado. "[E]lections for presidential and vice-presidential electors" are, after all, "national elections." *Oregon v. Mitchell*, 400 U.S. 112, 117–18 (1970). As to primaries in particular, "States themselves have no constitutionally mandated

role in" selecting "Presidential and Vice-Presidential candidates" at all. *Cousins v. Wigoda*, 419 U.S. 477, 489–90 (1975). So "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest." *Anderson v. Celebrezze,* 460 US 780, 794–95; (1983) (footnote omitted). No State is an electoral "island" because "the impact of the votes cast in each State is affected by the votes cast"—or, in this case, not cast—"in other States." *Id.* at 795. The *Amici* States have a strong interest in protecting their electorates from actions that dilute their citizens' choices.

The Colorado court's decision to dilute former President Trump's votes in the upcoming election cannot stand for several reasons. It threatens to throw the 2024 presidential election into chaos. Yet courts are supposed to give "a due regard for the public interest in orderly elections." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). At the same time, the state court took on a question that the Constitution says belongs to Congress. Section 3 of the Fourteenth Amendment is not self-executing. And the court purported to decide what events might constitute an "insurrection" even though the definition rests on a series of purely political judgments—not legal ones. To make matters worse, the Colorado courts decided "complicated" constitutional questions through a truncated state process that denied former President Trump any opportunity for "basic discovery, the ability to subpoena documents and compel witnesses, workable timeframes to adequately investigate and develop defenses, and the opportunity for a fair trial." App. 126a (Samour, J., dissenting).

The Colorado Supreme Court has cast itself into a "political thicket," *Evenwel v. Abbott*, 578 U.S. 54, 58, (2016), and it is now up to this Court to pull it out. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). If the Colorado decision stands, that critical confidence will be harmed. Many Americans will become convinced that a few partisan actors have contrived to take a political decision out of ordinary voters' hands.

The Court should grant the Petition.

SUMMARY OF ARGUMENT

I. This Court's immediate intervention is required. The Colorado court's decision will create widespread chaos. Most obviously, it casts confusion into an election cycle that is just weeks away. Beyond that, it upsets the respective roles of the Congress, the States, and the courts.

II. The Fourteenth Amendment—perhaps because of the very sorts of problems described above—anticipates that Congress will decide whether a particular person is qualified to hold office under Section 3 (or at least determine the process for making that decision). The structure of the Constitution, relevant history, and authority from this Court confirm as much. The Court should grant the Petition to prevent state courts from usurping Congress's exclusive power.

III. In deciding that former President Trump engaged in insurrection, the Colorado court fashioned a definition of "insurrection" that is standardless and vague. The best available evidence suggests that

insurrection equates with rebellion—a more demanding standard than the Colorado Court settled on. But what constitutes insurrection is not a question courts should answer at all.

REASONS FOR GRANTING THE PETITION

I. The Court should grant the Petition to avoid the chaos that the Colorado decision will produce.

Our country needs an authoritative, consistent, and uniform answer to whether former President Trump is constitutionally eligible for President. Granting the Petition would at least be a step in that direction.

A. The President occupies a unique place under our Constitution. The President is only one of two "elected officials who represent all the voters in the Nation." *Anderson*, 460 US at 795. So, when States try to impose "more stringent ballot access requirements" or eligibility criteria on candidates for President, that effort "has an impact beyond [a State's] own borders." *Id.* at 795. And the practical impact makes it essential to have a single, national answer as to whether someone is eligible to run for President.

The Constitution itself recognizes the need for national answers on this issue. It imposes a single set of eligibility requirements for President, *see, e.g.*, U.S. Const., art. II, § 1 (imposing age, citizenship, and residency eligibility requirements), which States may not "modif[y]," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 811 (1995). It also gives Congress—an elected, national body capable of giving a single answer—responsibility for determining whether a President may continue in office. U.S. Const., art. I,

§ 2 (allocating "sole Power of Impeachment" to the House); U.S. Const., art. I, § 3 (allocating "sole Power to try all Impeachments" to the Senate); *id.* (limiting "[j]udgment in Cases of Impeachment "to removal from Office[] and disqualification" from further office); U.S. Const., art. II, § 4 (providing for "remov[al] from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors"). These provisions reflect the necessity of consistent, uniform rules for presidential candidates.

Previously, courts from coast to coast have warned against efforts to use state courts to determine "the eligibility of candidates to hold national offices," recognizing that making "a determination reserved for the Electoral College and Congress" may embroil courts "in national political matters for which [they are] institutionally ill-suited and may interfere with the constitutional authority of the Electoral College and Congress." *Lamb v. Obama*, No. S-15155, 2014 WL 1016308, at *2 (Alaska Mar. 12, 2014); *see also, e.g.*, *Strunk v. N.Y. State Bd. of Elections*, No. 6500/11, 2012 WL 1205117, at *12 (N.Y. Sup. Ct. Apr. 11, 2012) (same). These concerns are weighty. Indeed, James Madison thought it was "out of the question" that the *federal* judiciary would be called upon to decide the presidency, let alone 50 state systems. *See* James Madison, *Notes of Debates in the Federal Convention of 1787* 363 (Adrienne Koch ed, Ohio Univ Press, 1966) (1840).

B. Now that the Colorado court has intruded into an arena where courts previously have feared to tread, swift intervention is essential. "Court orders affecting elections, especially conflicting orders, can themselves

result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4–5. With Colorado declaring former President Trump ineligible, and other courts rejecting similar challenges, *see, e.g.*, *Davis v. Wayne Cnty. Elec. Comm'n*, No. 368615, 2023 WL 8656163, at *1 (Mich. Ct. App. Dec. 14, 2023), conflict and chaos is already setting in. Voters who may wish to cast their ballots for former President Trump cannot know whether he ultimately will be excluded from the ballot in their State or others. They may wonder whether a little non-mutual offensive collateral estoppel is all it takes for former President Trump to be excluded from ballots across the Nation. *See Vanderpool v. Loftness*, 300 P.3d 953, 957–59 (Col. Ct. App. 2012). So will voters risk casting their votes for a candidate who might be later disqualified in some or all States? If they do, what becomes of their votes?

With the earliest primaries approaching in just a few months, this Court should not let the uncertainty persist. Any damage may already have been done by the time another case raising similar issues makes its way back to this Court. And the longer litigation over a national candidate's eligibility persists, the more uncertainty and confusion will spread. Voters need an answer in time to judiciously weigh the merits of competing candidates before casting their ballots, not after voting has begun.

An authoritative answer from this Court is needed to prevent the situation from deteriorating further. With some plaintiffs having succeeded in their challenge to former President Trump's candidacy, more litigation is sure to follow. Suppose plaintiffs in

five States sue to enjoin their respective secretaries of state from placing a presidential candidate on their primary ballot just before primaries are held in 15 different States on Super Tuesday. Perhaps three succeed in obtaining an injunction. Appeals from both sides will take time. And while the litigation continues, voters will not know whether former President Trump will ultimately be disqualified in their State or others. That will undoubtedly affect how some voters cast their ballots. Perhaps some would have chosen a different candidate had they known their preferred candidate had a reduced chance, or even no chance, at the nomination.

And the way things played out below is an example of how damaging state-court-by-state-court idiosyncrasies can be. With extremely limited discovery, rapid proceedings that nevertheless blew statutory deadlines, loose evidentiary standards, no jury, and more, *see* App. 154a–60a (Samour, J., dissenting), a state court knocked former President Trump off the ballot, and applying mushy definitions, deemed him to have engaged in efforts to overthrow the government. As Justice Samour noted below, "the potential chaos wrought by an imprudent, unconstitutional, and standardless system in which each state gets to adjudicate Section Three disqualification cases on an ad hoc basis" seems "antithetical to the framers' intent." App. 160a (Samour, J., dissenting).

For elections to be fair, voters need a single, certain answer as to whether someone is ineligible for President under Section 3 of the Fourteenth Amendment. If left to the "courts of 50 states," litigation over a candidate's eligibility for President

will result in "conflicting rulings and delayed transition of power in derogation of statutory and constitutional deadlines." *Keyes v. Bowen*, 117 Cal. Rptr. 3d 207, 215 (Cal. Ct. App. 2010). Swift intervention from this Court is critical.

C. The decision below has consequences beyond just the next election. By wielding a political provision of the Fourteenth Amendment without congressional authorization, the court below "sacrifice[d] the political stability of the system" of the Nation "with profound consequences for the entire citizenry." *Storer v. Brown*, 415 U.S. 724, 736 (1974). At a minimum, it has "expose[d] the political life of the country to months, or perhaps years, of chaos." *Nixon v. United States*, 506 U.S. 224, 236 (1993).

The lower court's decision "express[es] lack of the respect due" to Congress. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Constitutionally, Congress has sole authority to remove a President from office for "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const., art. II, § 4. The power to accuse a President of an impeachable offense resides solely in the House of Representatives, *id.*, art. I, § 2, cl. 5, while the power to remove a President resides solely in the Senate, *id.*, art. I, § 3, cl 6. Congress vigorously applied these powers to former President Trump, as the House impeached him twice. But the Senate acquitted him both times, even when political opponents accused him of fomenting insurrection, much as the lower court held here. *See* 166 Cong. Rec. S938 (daily ed. Feb. 5, 2020); 167 Cong. Rec. S733 (daily ed. Feb. 13, 2021). So Colorado has effectively rendered its judgment that Congress was wrong during the impeachment proceedings. *Contra*

Nixon, 506 U.S. at 238 (holding impeachment is the exclusive domain of Congress).

The decision below throws confusion into the executive branch's activities, too.

First, the past. If the Colorado decision is correct, then some have argued that former President Trump would be immediately disqualified the moment he purportedly engaged in insurrection on January 6, 2021. *See, e.g.*, Mark Graber, *Section Three and (Not) Bills of Attainder*, Balkinization (Jan. 13, 2021), https://bit.ly/3vg4drM. Under this view, "the actions that [former President Trump] took between Jan. 7 and Jan. 20—including the pardons he issued and the bills he signed into law"—would not be constitutionally valid. Robert J. Reinstein, *Expulsion, Exclusion, Disqualification, Impeachment, Pardons: How They Fit Together*, Lawfare (Feb. 11, 2011), https://bit.ly/ 47nxYo0. Thanks to Colorado, then, some might now try to say that America was without a President for two full weeks.

Second, the future. If state courts start declaring persons insurrectionists under Section 3, then it could spawn questions about whether the Double Jeopardy Clause would prevent the government from levying a second punishment against any of those persons for the same events. Jefferson Davis, for example, argued exactly that—and the issue has never been finally resolved. *In re Davis*, 7 F. Cas. 63, 90–91 (C.C.D. Va. 1871). So decisions like Colorado's significantly complicate criminal prosecutions. That's not to suggest that any given prosecution is warranted—but the potential impairment does illustrate just how far-reaching the consequences of the decision below are. And if the lid is truly off Pandora's box, and state

courts can freely disqualify past and present Presidents under Section 3, then it's not hard to conceive of even more troubling outcomes. For instance, could a state court disqualify a sitting President from running for reelection by construing a serious misstep taken during time of war as an action that has "given aid or comfort to" enemies? U.S. Const., amend. XIV, § 3.

The Court should act now to stop all these "strange, far-reaching, and injurious results" from spinning out of control. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 142 (1912). It should grant the Petition to end the uncertainty that is sure to otherwise result.

II. The Court should grant the Petition to return power to Congress—where it belongs.

Putting aside the serious practical consequences of the lower court's decision, the decision also strikes a serious blow to "the Constitution's structural separation of powers." *Freytag v. Comm'r*, 501 U.S. 868, 873 (1991). Only Congress can disqualify a presidential candidate under Section 3.

The Fourteenth Amendment provides that "[n]o person shall … hold any office … 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." U.S. Const., amend. XIV, § 3. But it then stresses that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const., amend. XIV, § 5. And it specifies that only "Congress … by a vote of two-thirds of each House" may "remove [the] disability" imposed

by the Insurrection Clause. U.S. Const., amend. XIV, § 3. Thus, the Fourteenth Amendment charges Congress with deciding how the Insurrection Clause will be enforced. *See Kerchner v. Obama,* 669 F. Supp. 2d 477, 483 n. 5 (D.N.J. 2009) (detailing constitutional provisions that show qualifications of a President are not to be resolved by courts).

Just months after the Fourteenth Amendment's ratification, Chief Justice Salmon P. Chase (while riding circuit in Virginia) reached that very conclusion. *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869). Although the Colorado court refused to engage with *Griffin*'s specific reasoning, it rejected it as unpersuasive. *See* App. 52a–53a. But the Colorado court should have read it again. Examining the text, the Chief Justice in *Griffin* explained that the Fourteenth Amendment's "fifth section qualifies the third." 11 F. Cas. at 26. Section 5 "gives to congress absolute control of the whole operation of the amendment," and hence "legislation by congress is necessary to give effect to [Section 3's] prohibition." *Id.*

Practical considerations, Chief Justice Chase explained, "very clearly" underscored the need for legislation. *Griffin*, 11 F. Cas. at 26. To give effect to Section 3, "it must be ascertained what particular individuals" are subject to a disability. *Id.* But "only … congress" may "provide" the "proceedings, evidence, decisions, and enforcements of decisions" required to "ascertain[] what particular individuals are embraced by the definition" and "ensure effective results." *Id.*; *cf. Cawthorn v. Amalfi*, 35 F.4th 245, 275–82 (4th Cir. 2022) (Richardson, J., concurring) (explaining why only Congress may decide whether its own members

are disqualified under Section 3 of the Fourteenth Amendment). No wonder, then, that Congress at one point did pass (later-repealed) enabling legislation; Congress, like Chief Justice Chase and those who pushed the Fourteenth Amendment in the first place, recognized that this portion of "[t]he Constitution provides no means for enforcing itself." Kurt Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, Working Paper, at 46 (Oct. 31, 2023), https://bit.ly/3RfwVS8 (quoting Sen. Lyman Trumbull).

In requiring that "two-thirds of each House" agree to remove the disability, the Fourteenth Amendment also aligns with the standard for Congress to determine a President's legal qualifications under the Twenty-Fifth Amendment. Under that amendment, if the Vice President and certain officers find that the President is unable to perform the duties of his office, "Congress shall decide the issue [of ability] … by two-thirds vote of both Houses." U.S. Const., amend. XXV. "[O]therwise, the President shall resume the powers and duties of his office." *Id.* An unable President is one who lacks the ability or the legal qualifications to discharge his office. *See Grinols v. Electoral Coll.*, No 2:12-CV-02997, 2013 WL 2294885, at *6 (E.D. Cal. May 23, 2013). So the Twenty-Fifth Amendment—and by extension the Fourteenth—gives Congress the ultimate power to decide whether an official is legally unqualified to serve.

The voters first will decide whether former President Trump is legally qualified to be reelected as President. "Arguments concerning qualifications or lack thereof can be laid before the voting public before the election," as they already have been. *Robinson v.*

Bowen, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008). If the voters find former President Trump qualified, and Congress concurs, then the Constitution does not contemplate a time for the judiciary to second-guess that call. Rather, the Constitution gives Congress the sole and final authority to determine whether the President can continue to serve, as many courts have said. *See, e.g.*, *Taitz v. Democrat Party of Miss.*, No 3:12-CV-280, 2015 WL 11017373, at *16 (S.D. Miss. Mar. 31, 2015); *Grinols*, 2013 WL 2294885, at *6; *Voeltz v. Obama*, No. 2012-CA-02063, 2012 WL 4117478, at *5 (Fla. Cir. Ct. Sep. 06, 2012).

The court below concluded that Section 3 is self-executing largely by focusing on things that have been said about other aspects of the Fourteenth Amendment (or other amendments entirely). In doing so, the court ignored many cases that say the Fourteenth Amendment is not self-executing. *See, e.g.*, *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921) ("[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy."); *Ex parte Virginia*, 100 U.S. 339, 345 (1879) ("All of the [Reconstruction] amendments derive much of their force from this latter provision [in Section 5]. … Some legislation is contemplated to make the amendments fully effective."); *accord Cale v. City of Covington*, 586 F.2d 311, 316 (4th Cir. 1978) ("[W]e believe that the Congress and Supreme Court of the time were in agreement that affirmative relief under the amendment should come from Congress."). And anyway, courts need to examine each specific constitutional provision on its own merits to decide whether that provision is self-executing—not just lump provisions adopted around the same time together. *Cf. Civil Rights Cases*, 109 U.S. 3, 20 (1883)

(explaining that portions of the Fourteenth and Fifteenth Amendment that "abolished slavery[] and established universal freedom" were "self-executing," but other portions were not). A constitutional provision "is self-executing only so far as it is susceptible of execution," *Davis v. Burke*, 179 U.S. 399, 403 (1900), and that's a provision-specific question, after all.

III. The Court should grant the Petition to erase a standardless political judgment about what constitutes "insurrection."

"[C]onsiderations of policy [and] considerations of extreme magnitude" are "certainly entirely incompetent to the examination and decision of a Court of Justice." *Ware v. Hylton*, 3 U.S. 199, 260 (1796). "[C]ourts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature." *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986). But in trying to define Section 3's reach, those kinds of judgments are all the lower court could offer. Without more direction from Congress about what it means to engage in an "insurrection"—for instance, a declaration that participating in what happened on January 6 would constitute that kind of event—the Colorado court had no warrant to act here.

A. Section 3's text provides little useful guidance for judges. It applies to persons who "engaged in insurrection or rebellion against the [Constitution]," or who have "given aid or comfort to the enemies thereof." U.S. Const., amend. XIV, § 3. Evaluating whether someone has given inappropriate and actionable aid to the enemy or whether an insurrection occurred is the kind of question answered

in war and diplomacy. *Cf. Stinson v. N.Y. Life Ins.*, 167 F.2d 233, 236 (D.C. Cir. 1948) (existence of a war is a political question). But "[j]udges are not soldiers or diplomats." *Lin v. United States*, 539 F. Supp. 2d 173, 180 (D.D.C. 2008). And generally, "[t]he decision of all such questions [pertaining to war and insurrection] rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution"—Congress and, to a lesser extent, the President. *Stewart v. Kahn*, 78 U.S. 493, 506 (1870).

The decision below offered a vague understanding of insurrection: "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." App. 87a. The definition spawns more questions than answers. What constitutes a threat? Is a mere assemblage of people shouting enough to constitute a threat of force? What actions are necessary to peacefully transfer power? If two people link arms across a sidewalk to block a poll worker from entering a ballot-counting site, does that "hinder" the transfer enough to constitute an outright insurrection? Does incendiary political rhetoric at a rally become insurrection if the winning party deems that rhetoric insufficiently supportive of the new regime? Have protesters "hinder[ed] or prevent[ed] execution of the Constitution of the United States[,]" App. 85a, if their activities "prompt[] the Secret Service to temporarily lock down the" White House and cause the President to be "moved to [an] underground bunker used … during terrorist attacks"? Derrick Bryson Taylor, *George Floyd*

Protests: A Timeline, N.Y. Times (Nov. 5, 2021), https://bit.ly/3S94h5L.

B. In truth, an "insurrection" is more serious than the lower court's definition supposes. Where the Constitution uses the term "insurrection," that term appears alongside terms like "invasion" and "rebellion." For example, Article I empowers Congress to use the militia to "execute" laws and to "suppress Insurrections and repel Invasions." U.S. Const., art. I, § 8. Similarly, Section 3 of the Fourteenth Amendment speaks of "insurrection" and "rebellion" together. U.S. Const., amend. XIV, § 3. This terminology suggests that an insurrection is "an effort to overthrow the government" and therefore "more serious than" "mere[] opposition to the enforcement of the laws." Jason Mazzone, *The Commandeerer in Chief*, 83 Notre Dame L. Rev. 265, 336 n. 450 (2007); *see* Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 Wm. & Mary Bill Rts. J. 153, 167 (2021).

Other early authorities describe insurrections in similar terms. On the spectrum of civil disturbance, Blackstone places "insurrection" closer to a foreign invasion than a riot. 4 William Blackstone, *Commentaries on the Laws of England*, *82, *420; *cf. Kneedler v Lane*, 45 Pa. 238, 291 (1863) (noting Lord Coke put "invasion, insurrection," and "rebellion" in the same ballpark). Colonial-era laws often treated invasion, insurrection, and rebellion similarly. *See* James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. Pitt. L. Rev. 99, 107 (1983) (quoting *Laws of New Haven Colony* 24 (1656) (Hartford ed,

1858)); Joseph Story, *Commentaries on the Constitution of the United States* § 111 (4th ed. 1873) (noting New York put "rebellion, insurrection, mutiny, and invasion" on a similar plane). And during the Constitutional Convention debates, James Wilson noted that the major reason for the republican-form-of-government clause was to prevent "dangerous commotions, insurrections and rebellions." James Madison, *Notes of Debates in the Federal Convention of 1787* 321 (Adrienne Koch ed, Ohio Univ Press, 1966) (1840); *accord* Story, *supra*, § 490.

Early Congresses took a similar view. Section 1 of the 1792 and 1795 Militia Acts says the President can use the militia to repel a foreign "invasion" or an "insurrection in any state" if the State asks, while Section 2 says he can use the militia to stop the obstruction of the execution of laws once normal civil processes are overwhelmed. Act of February 28, 1795, ch. 36, 1 Stat. 424, 10 U.S.C. § 332; *cf.* The Insurrection Act of 1807, ch. 39, Pub. L. 9-2, 2 Stat. 443 (differentiating between "suppressing an insurrection" and "causing the laws to be duly executed"). This framing means "insurrection" and merely hindering the execution of laws are fundamentally different "type[s] of domestic danger." F.E. Guerra-Pujol, *Domestic Constitutional Violence*, 41 U. Ark. Little Rock L. Rev. 211, 222 (2019).

Judges and others during the Civil War and Reconstruction Era treated "insurrection," "rebellion," and "invasion" as on the same plane, too. *See, e.g.*, *Miller v. United States*, 78 U.S. 268, 308 (1870) (discussing federal laws using these terms seemingly equivalently); *United States v. Hammond*, 26 F. Cas 99, 101 (C.C.D. La. 1875) (discussing a state law

regarding grand jury service). The primary Reconstruction Era legal dictionary—echoing many of the sources above—defined "insurrection" as a "rebellion" "against the government"; and "rebellion" primarily meant "taking up arms traitorously against the government." John Bouvier, *Bouvier's Law Dictionary* (6th ed, 1856), *available at* https://bit.ly/3uzlbAP. In the Fourteenth Amendment floor debates, legislators freely swapped the terms. Cong. Globe, 39th Cong., 1st Sess. 2898, 2900 (1866). And a contemporaneous Attorney General opinion interpreting Section 3 of the Fourteenth Amendment saw no meaningful distinction either, constantly equating them and even defining them identically as a "domestic war." *The Reconstruction Acts*, 12 U.S. Op. Att'y Gen. 141, 160 (1867).

Indeed, throughout the early 19th century, "rebellion" and "insurrection" were often deemed "synon[y]mous." *State v. McDonald*, 4 Port. 449, 456 (Ala. 1837); *see Spruill v. N.C. Mut. Life Ins. Co.*, 46 N.C. 126, 127–28 (1853) (describing insurrection as a "seditious rising against the government …; a rebellion; a revolt"); *Ex parte Milligan*, 71 U.S. 2, 142 (1866) (Chase, C.J., concurring) (equating "insurrection" and "invasion"); *Davis*, 7 F. Cas. at 96 (treating "insurrection" and "rebellion" interchangeably). Insurrections, like rebellions and revolutions, were understood to "come under the general head of *civil wars*." *Martin v. Hortin*, 64 Ky. 629, 633 (1867) (quoting Henry Halleck, *Elements of International Law and Laws of War* 153 (1866)). They were thought to be "war between the legitimate government of a country and portions of provinces of the same who seek to throw off their allegiance to it and set up a government of their own." U.S. War

Dep't, Adjutant-Gen's Off, *General Order No. 100: The Lieber Code, Instructions for the Government of Armies of the United States in the Field* § X art. 151 (1863).

These descriptions are consistent with four of the pre-Civil War insurrections that would have been top of mind for the Fourteenth Amendment's framers: Shay's Rebellion (1786–1787), the Whiskey Rebellion (1794), Fries's Rebellion (1799–1800), and Dorr's Rebellion (1841–1842). These insurrection-rebellions lasted several months; involved extended violence that shut down courts and revenue collection in local areas; targeted particular local officials; involved militarily arrayed participants; and saw either combat or the election of a rival government. *See United States v. Mitchell*, 2 U.S. 348, 355 (C.C.D. Pa. 1795); *Case of Fries*, 9 F. Cas. 924, 933 (C.C.D. Pa. 1800); *Milligan*, 71 U.S. at 129. All were far more serious than the lower court's definition suggests.

C. Although it's clear enough that the lower court's definition is the wrong one, that's not to say that a court would be equipped to provide the right one. "Evidence from the Founding era is not entirely clear" about when a riot becomes insurrection. Mazzone, *supra*, at 336 n. 450; *see* B. Mitchell Simpson, *Treason and Terror: A Toxic Brew*, 23 Roger Williams U.L. Rev. 1, 24 (2018) (saying the "distinction between insurrection and riot" can be "narrow"). And the Colorado court oddly concluded that it could define "insurrection" just because some other modern-day courts have occasionally found a definition for the word in latter-day dictionaries in distinguishable contexts. App. 60a. That's a rough-and-ready form of constitutional construction that this Court should not endorse.

The Constitution provides the solution to the chaos that would accompany the Colorado court's approach. It specifies that a politically accountable body should publicly declare whether an ongoing disturbance of the peace constitutes a war, rebellion, or insurrection precisely because the lines between them are not always clear. Across the board, the Constitution entrusts to Congress the power "[t]o declare War," "call[] forth the Militia to suppress Insurrections and repel Invasions," and of course "enforce" Section 3 of the Fourteenth Amendment "by appropriate legislation." U.S. Const., art. I, §§ 8, 12; U.S. Const, amend. XIV, § 5.

Using legislative and political processes to decide which disturbances rise to the level of war, rebellion, or insurrection would also have been familiar to those who adopted the Fourteenth Amendment. As early as 1792, Congress required the President to issue a proclamation before exercising authority to use the Militia to "suppress Insurrections and repel Invasions." U.S. Const., art. I, § 8, cl. 15. The 1792 Militia Act authorized the President to "call forth" the militia only if he first issued a "proclamation, command[ing] [the] insurgents to disperse, and retire peaceably." Act of May 2, 1792, Ch. 28, §§ 1–3, 1 Stat. 264; *cf.* N.Y. Code of Crim. Proc., ch. 4, § 97 (Weed, Parsons & Co, 1850) (requiring published proclamation that a county is "in a state of insurrection"). The Militia Act of 1795 included the same proclamation requirement, Act of February 28, 1795 § 3—as does federal law today, *see* 10 U.S.C. § 254.

The Framers of the Fourteenth Amendment knew these processes well. The President issued many

proclamations during the Civil War declaring it to be an "insurrection against the United States." Andrew Johnson, U.S. President, Message Proclaiming End to Insurrection in the United States (Aug. 20, 1866) (collecting examples). In 1861, for example, Congress authorized a proclamation to be issued "when insurgents … failed to disperse by the time directed by the President" and the insurgents claimed to be acting under State authority. Act of July 13, 1861, ch 3, § 5, 12 Stat 255. No one therefore had to guess whether the Civil War was an insurrection; an authoritative, public process for proclaiming it an insurrection gave the definite answer. But Congress did not exercise any of those powers when it came to the events of January 6, and—beyond the Civil War—Congress has not endeavored to define what might constitute an "insurrection" more generally.

If Congress or the President were to authoritatively give persons notice that continuing to take part in a serious, widespread disturbance constitutes an insurrection (as they did during and after the Civil War), then courts perhaps would have a manageable standard to apply. *See* Lynch, *supra*, at 214–15 (stating that disqualification requires certain acts "after the President issues a Proclamation pursuant to the Insurrection Act"). But without a proclamation, courts—the Colorado Supreme Court included—are ill-equipped to second-guess the judgments of politicians, soldiers, and diplomats about how to label politically charged conflicts. But when it comes to the events of January 6, at least, the Colorado court simply had no *legal* standard to apply.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

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