No. 23-719

In the Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

NORMA ANDERSON, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF 102 COLORADO REGISTERED ELECTORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

J. GREGORY TROUTMAN*
TROUTMAN LAW OFFICE, PLLC
4205 Springhurst Blvd,
Suite 201
Louisville, KY 40241
(502) 412-9179
jgtatty@yahoo.com
Attorney for Amici Curiae

* *Counsel of Record*

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INTERESTS OF AMICI CURIAE[1]

Amici are 102 Colorado citizens and duly registered electors (what voters are called in Colorado),[2] including a 2024 candidate for the House of Representatives. *Amici* each intend to vote for former President Donald J. Trump in the March 5, 2024 Colorado Republican presidential primary and, if nominated, again in the 2024 presidential election.

The electoral franchise—the right to vote for a desired candidate—is one of the most cherished and protected rights upon which this nation was founded. *Amici*, given their intended electoral choice in the 2024 Republican presidential primary, have a substantial interest in the outcome of this litigation as the franchise of voting for the candidate of their choice, in this instance former President Trump, is a fundamental constitutional right. The Colorado Supreme Court's December 19, 2023 opinion, however, stripped away that right by way of a deeply flawed and extra-constitutional legal analysis. *Amici* are thus understandably concerned with the dangerous precedent set by the Colorado court and its potential to both virally spread to other states as well as motivate some states to attempt an exactment of a

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[1] This brief was not authored in whole or in part by counsel for any of the parties; no party or party's counsel contributed money for preparing or submitting this brief; and no one other than *amici* and their counsel have contributed money for preparing or submitting this brief.

[2] *Amici* are listed in the attached appendix.

political tit-for-tat against President Biden. The result of such efforts would only further split an already deeply divided nation and ultimately upend the legitimacy of the 2024 presidential election before the first votes are even cast. Accordingly, *amici* offer the Court a view of the salient issues through the lens of their perspective since the adjudication of such issues will ultimately impact their electoral choice.

SUMMARY OF ARGUMENT

Section 3 of the Fourteenth Amendment was adopted in the wake of the Civil War to exclude many former Confederates from holding federal and state offices. Section 3 specifically barred those persons who, as either a member of Congress, a member of a state legislature, a state executive or judicial office, or as an officer of the United States, had taken an oath to support the United States Constitution. Such latter class of officers—"officers of the United States"—is the focus of this case.

Amici first argue the Colorado courts lacked jurisdiction under the Colorado Election Code to adjudicate a claim arising under federal law relating to former President Trump's eligibility under Section 3 of the Fourteenth Amendment. *Amici* concede that Colorado has a legitimate interest in ensuring the sanctity of its electoral process. The Colorado Legislature established an election code which included a summary process for adjudicating claims that election officials had breached their duties or committed misconduct. The

Colorado Legislature, however, did not include the conduct proscribed by Section 3 among the types of breaches of duty or official misconduct which triggered the jurisdiction of its state courts. *Amici* nevertheless assert that a determination on the merits is needed lest the issues herein evade review.

Amici next argue that former President Trump is not among the class of persons for which an electoral disability attached under Section 3 of the Fourteenth Amendment. The only class in which former President Trump could conceivably fall is that of an "officer of the United States". *Amici* explore how the Framers crafted a clear distinction between the constitutional Office of the President and the inferior and subordinate offices which Congress creates under statutory law. The Framers provided that "officers of the United States" fall into the latter category of inferior and subordinate officers. *Amici* further explore how the Framers provided a presidential oath which was distinctive from the oath taken by "officers of the United States." *Amici* conclude by arguing the Fourteenth Amendment's drafters carried forward the Framer's distinction by not articulating a different definition of "officers of the United States" and relying upon the Article VI oath taken by such officers when crafting Section 3. Further, *amici* address how this Court's historic jurisprudence has consistently applied the Framer's understanding.

Finally, *amici* argue a point not addressed by the Colorado Supreme Court—that Congress invoked the authority provided in Section 3 of the Fourteenth Amendment to remove any disability

otherwise arising thereunder in its 1872 and 1898 Amnesty Acts. *Amici* explore the historical underpinnings of these Amnesty Acts as evidencing a sign of the nation's post-Civil War healing and the intention of Congress to exercise its authority to deactivate Section 3 going forward.

ARGUMENT

I. THE COLORADO ELECTION CODE DOES NOT VEST COLORADO COURTS WITH JURISDICTION TO ADJUDICATE QUESTIONS RELATING TO SECTION 3 OF THE FOURTEENTH AMENDMENT.

At the outset, the *amici* acknowledge that Colorado, like every other state, has an obligation under U.S. CONST. ART. I, SEC. 4 to regulate the time, place, and manner of elections. *Amici* do not challenge the proposition that Colorado has an "important and well-established interest in regulating ballot access and preventing fraudulent or ineligible candidates from being placed on the ballot." *See Bullock v. Carter*, 405 U.S. 134, 145 (2005) which noted that "a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies").

Amici do not question that Colorado has a legitimate interest in adopting and following a specific statutory process to adjudicate election disputes arising under state law. However, what Colorado does not have is a legitimate interest in allowing its election officials to either impose qualifications for the presidency beyond those prescribed in U.S. CONST. ART. II, SEC. 1, CL. 5. The

Colorado Legislature attempted to fulfill these principles by crafting COLO. REV. STAT. § 1-1-113 to provide for summary adjudications which constrains a court's jurisdiction to simply adjudge claims for any "breach or neglect of a duty or other wrongful act" of Colorado election officials which arises under the Colorado Election Code.

In *Frazier v. Williams*, 401 P.3d 541 (Colo. 2017), the Colorado Supreme Court confirmed that Section 1-1-113 sets forth a process for summarily adjudicating disputes relating to a limited scope of wrongful actions and conduct by election officials. The court has further held that Section 1-113 does not impose affirmative duties upon election officials such that it cannot serve as a jurisdictional predicate with respect thereto. *Carson v. Reiner*, 370 P.3d 1137 (Colo. 2016). With respect to federal claims relating to the conduct of elections or the acts of election officials, the court specifically held in *Frazier* that Section 1-1-113 does not provide a jurisdictional basis for their adjudication. The applicability of Section 3 of the Fourteenth Amendment is a quintessentially federal claim.

The Colorado Election Code also does not incorporate the conduct proscribed by Section 3 of the Fourteenth Amendment among the "neglect of duty" or "other wrong act" of an election official which triggers Section 1-1-113. The Colorado Supreme Court's haste to abandon the judiciary's apolitical role by determining that former President Trump was ineligible to appear on the state's 2024 Republican primary ballot led it to ignore

fundamental jurisdictional elements of Colorado law.[3]

The Colorado court's determination, like the foolish man's house in *Matthew* 7:24-27, was built upon the sand. Its determination, like that foolish man's house, must be doomed to the same fate. The Colorado court built a house upon the sand by anchoring its determination to a faulty jurisdictional predicate: COLO. REV. STAT. § 1-1-113, slip op. at 18 ("we conclude that the district court had jurisdiction to adjudicate the Elector's claim under section 1-1-113"). The court reasoned that Colorado's legislature gave its state courts "the authority to assess presidential qualifications." *Id*. at 19.

The Colorado Legislature gave such authority, but *Frazier* holds that it did not so through a Section 1-1-113 challenge as to any issues arising under federal law. In this respect, the Colorado court's jurisdictional anchor was directly at odds with its existing interpretation of Section 1-1-113's plain text as limiting its applicability to claims for "breach or neglect of a duty or other wrongful act" which arises under the Colorado Election Code.[4]

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[3] Such haste also led the court to both grossly misinterpret and misapply Section 3 of the Fourteenth Amendment and ignore Congress' later deactivation of Section 3. More about that in Sections II and III *infra*.

[4] COLO. REV. CODE. § 1-4-1204 addresses the placement on candidate names the presidential primary ballot. For major parties, Section 1-4-1204(1) grants ballot access to those who are "bona fide" candidates under their party's rules. The Colorado Election Code, however, does not define the term "bona fide" candidate. In turn,

Frazier discussed the types of claims to which Section 1-1-113 applies—all requiring some form of misconduct by a Colorado election official.

Amici are at a loss to comprehend what official misconduct by the Respondent Secretary of State could have served as a jurisdictional predicate in this case, other than her failure to unilaterally adjudicate that former President Trump was ineligible under Section 3. That, of course, is not something within the Respondent Secretary of State's legal powers and duties under either COLO. REV. STAT. §§ 1-1-107 or 1-4-1204. It thus defies logic how the Respondent challengers could have invoked these two sections of the Colorado Election Code to seek redress for a non-existent breach of duty. As such, Section 1-1-113 could not serve as a basis for invoking the jurisdiction of the Colorado courts to adjudicate former President Trump's electoral eligibility under federal law.

This Court could grant review and simply vacate the Colorado Supreme Court's ruling on the above jurisdictional grounds. Doing so, however, would solve nothing and actually make matters worse because such ruling has unleashed harms which will creep beyond that state's borders.

And creep it has.

Section 1204(4) points a would-be challenger to Section 1-1-113 but that section limits a challenge to breaches of duties or misconduct arising under the Colorado Election Code, of which the acts proscribed by Section 3 of the Fourteenth Amendment are not included.

On December 28, 2023, the Maine Secretary of State issued a ruling which determined that former President Trump was disqualified from having his name placed on Maine's 2024 presidential primary ballot for the same reasons found by the Colorado Supreme Court.[5] Cases which challenge former President Trump's Section 3 qualifications are presently pending before courts in Alaska, New Mexico, Oregon, South Carolina, Texas, Vermont, Virginia, West Virginia and Wisconsin.[6] Two post-Colorado efforts to remove former President Trump from the primary ballot have also

[5] *See* State of Maine, *Ruling of the Secretary of State* (Dec. 28, 2023). https://www.maine.gov/sos/news/2023/Decision%20in%20Challenge%20to%20Trump%20Presidential%20Primary%20Petitions.pdf

[6] *Castro v. Dahlstrom*, U.S.D.C. D. AK, No. 1-2023cv00011 (Alaska); *Castro v. Toulouse Oliver*, U.S.D.C. D. NM, No. 1:2023cv00766 (New Mexico); *Dewald v. Trump*, U.S.D.C. S.D. NY., No. 1:2023cv07833 (New York); *Nelson v. Griffin-Valade*, Ore. Sup. Ct., No. S070658 (Oregon); *Castro v. SC Elections Comm.*, U.S.D.C. D. SC, No. 3:2023cv04501 (South Carolina); *Castro v. Trump*, U.S.D.C. N.D. TX, No. 4:23-cv-00556 (Texas); *Castro v. Copeland-Hanzas,* U.S.D.C. D. VT, No. 2:2023cv00453 (Vermont); *Perry-Bey, v. Trump*, U.S.D.C. E.D. Va, No. 1:2023cv01165 (Virginia); *Castro v. Warner*, U.S.D.C. S.D. WVa, No.2:2023cv00598 (West Virginia); and *Castro v. Wisconsin Elections Comm.*, Wisc. Cir. Ct., No. 2023CV002288 (Wisconsin).

been initiated at the executive level in Illinois[7] and Massachusetts.[8]

The Colorado court's ruling is now the template for both the courts in these remaining cases and election officials across the country who may wish to practice mischief. The Colorado court's ruling, like *kudzu*, is an invasive species which must be aggressively neutralized lest it rapidly spreads further. Failing to do so in this case will only lead to a further political balkanization of the nation. The Court should therefore not allow the issues before it to become "capable of repetition yet evading review." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

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

Few issues have divided this nation more than the January 6, 2021 statements and actions of former President Trump. Politicians, pundits and the public have dissected whether those statements and actions constitute an "insurrection" for purposes of Section 3 of the Fourteenth Amendment in a manner that would amaze and impress even the most fervent biology teacher. Neither the Constitution nor the Fourteenth Amendment define the term "insurrection" and this Court need not

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[7] *Anderson v. Donald J. Trump*, *Objectors' Petition*, Illinois Bd. of Elections (Jan. 4, 2024).

[8] *Chafee v. Donald John Trump*, *Objection and Complaint*, Mass. St. Ballot Law Comm. (Jan. 4, 2024).

wade into those brackish waters because former President Trump's statements and actions have relevance in the context of Section 3 only if he is among the class of persons for which it provides an electoral disability.

The Colorado Supreme Court's inclusion of former President Trump in that class of persons subject to Section 3 is at odds with the scope of its limiting language which specifically states:

> "[n]o person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."

U.S. CONST., AMEND. XIV, SEC. 3.

By its plain terms, Section 3 only applies to those persons who have taken an oath to support the United States Constitution as either a member of Congress, a member of a state legislature, a state executive or judicial office, or an officer of the United States. The specific oath referenced in

Section 3—to support the Constitution—is the oath prescribed in U.S. CONST., ART. VI, CL. 3 for those appointed to inferior or subordinate federal offices. It is undisputed that former President Trump has never taken the Article VI oath as either a member of Congress, a member of a state legislature, or as a state executive or judicial officeholder. He likewise has never taken the Article VI oath as an "officer of the United States."

When assuming the presidency, the only oath which former President Trump took was that prescribed by U.S. CONST., ART. II, SEC. 1, CL. 8. The presidential oath, as evidenced by its plain text, does not track the text of the oath described in either Section 3 or Article VI. Specifically, the presidential oath does not use the same "to support the Constitution" words found in both Section 3 and Article VI which are applicable to "officers of the United States." These distinctive constitutional oaths are not interchangeable. This is the first hint that both the Framers and the 14th Amendment's drafters intended to treat the Office of the President differently than all other inferior and subordinate federal offices.

A. Neither the Framers nor this Court have viewed the President as being an Officer of the United States.

The Colorado Supreme Court committed plain legal error in determining that former President Trump was an "officer of the United States" for purposes of Section 3's electoral disqualification.

The Colorado's court's determination is thus inconsistent and incompatible with the Framer's clear understanding and expression of such phrase. To the point, Hamilton confirmed this concept in Federalist No. 67 by observing the offices occupied by "officers of the United States" under the Appointments Clause are offices created not by the Constitution by instead solely by statute. Federalist No. 67, at 407 (C. Rossiter ed. 1961) (Hamilton).

That fact is apparent not only from the distinctive oath taken by the President but also from the plain text of the Appointments Clause, U.S. CONST., ART. II, SEC. 2, cl. 2, which authorizes the President to appoint "Officers of the United States." This Court's opinion in *U.S. v. Arthrex, Inc.*, 594 U.S. ___, 141 S.Ct. 1970, 1978-9 (2021) succinctly articulates the mechanics of the Appointments Clause.

This Court's pre-Civil War understanding of the status of "officers of the United States" as being inferior and subordinate to the President was consistent with that of the Framers as expressed in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155 (1803) (summarizing the President's role in both appointing officers of the United States and granting their commissions). This Court carried forward such understanding to the post-Civil War era when holding that "Officers of the United States" meant those persons who served the government:

> "by virtue of an appointment by the President, or of one of the courts of

> justice or heads of Departments authorized by law to make such an appointment."

U.S. v. Mouat, 124 U.S. 303, 307 (1888). The President obviously did not then, and does not now, occupy office by virtue of a presidential appointment. No amount of mental or linguistic gymnastics by the Colorado Supreme Court can get around the logical and factual reality that the President does not appoint himself. That's not how it works.

This Court has retained such understanding in modern times in finding that "officers of the United States" are those persons appointed to an office created by Congress. *See Buckley v. Valeo*, 424 U.S. 1 (1976). Even more recently, this Court acknowledged the Framers' understanding that the phrase "encompassed all federal civil officials 'with responsibility for an ongoing statutory duty.'" *NLRB v. SW General, Inc.*, 580 U.S. 288, 314 (2017) (Thomas, J., concurring). The President would not thus be an "officer of the United States" under either the *Mouat*, *Buckley* or *SW General* definitions, and logically could never be because the presidential duties arise under U.S. CONST. ART. II.

For purposes of Section 3, an "officer of the United States" must solely encompass those presidential appointees who occupy inferior and subordinate positions *vis-a-vis* the President. Such result is consistent with this Court's holdings in that "officers of the United States" are those appointed to an office created by Congress. *Buckley, supra.*;

Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. ___, 140 S.Ct. 2183 (2020). The Office of the President is obviously not an office which Congress created by statute. There is also nothing in this Court's jurisprudence to suggest that Congress has ever attached a different meaning to the phrase "officers of the United States" from that which the Framers articulated in the Appointments Clause.

B. The Colorado Supreme Court's definition of an "Officer of the United States" contradicts the Framer's and this Court's understanding of such phrase.

The Colorado Supreme Court turned the Framers' intentions and over 200 years of this Court's jurisprudence on their ear in finding that former President Trump was an "officer of the United States" while serving as President. It founded such determination upon four flawed premises: (1) the normal and ordinary usage of the term "officer of the United States; (2) the understanding of the drafters of the Fourteenth Amendment; (3) the structure of Section 3; and (4) the purpose of Section 3. These premises are each deeply flawed and cannot survive this Court's scrutiny.

First, the Colorado court erred in its finding that a president's position as the nation's chief executive officer reflects a common usage and understanding which made him an "officer of the United States". Slip op. at 80. This determination is a conflation of a clear distinction between constitutional

and statutory offices which wholly ignores everything ever written on the subject by Madison or Hamilton. It is clear, however, from both of their writings that a person can be an officer within the federal government without being an "officer of the United States." Madison's and Hamilton's understanding is also evidenced by this Court's longstanding understanding that such phrase is confined to the class of political appointees who are subordinate to the President. *See supra.*, at 11 - 12. The key distinction missed (or ignored) by the Colorado court is that the Office of the President arises solely under the Constitution whereas the offices occupied by inferior and subordinate "officers of the United States" arise by virtue of a congressional enactment.

Second, the Colorado court erred in its finding that the Fourteenth Amendment's drafters understood the President was an "officer of the United States". Slip. op. at 70. The tenuousness of the court's position is evidenced by its reliance upon citations to two sources that in no way even remotely relate to Section 3: the congressional debate found at Cong. Globe, 39th Cong., 1st Sess. 915 (1866) and this Court's opinion in *The Floyd Acceptances*, 74 U.S. 666 (1868), both of which refer to the President as an officer. The former addressed the legality of Congress disarming the Confederate state militias and the latter addressed the legal authority of an officer to pay government debts. Neither addressed, let alone found, that the President is an "officer of the United States" either generally or under the Fourteenth

Amendment specifically. The Colorado court, in all respects, wove its decision from thin and worn thread.

Furthermore, the Framers would strongly disagree with the position staked out by the Colorado court. The Framers well understood the stark difference between a constitutional office—like the Office of the President—and the inferior and subordinate offices created by Congress. This is evident from the fact the Framers provided the presidency was to be the lone office created under the Constitution while separately vesting Congress with the sole authority to create all other inferior federal offices. To this end, the Framers vested Congress with the power under the Necessary and Proper Clause:

> "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

U.S. CONST. ART. I, SEC. 8, CL. 18.

The Framers went a step further by confirming a clear understanding through their precise textual wording of the Appointments Clause. The Framer's precisely crafted the presidential power to appoint "officers of the United States" to the offices "which shall be *established by Law*." U.S. CONST. ART. II, SEC. 2, CL. 2 (emphasis added). They absolutely calculated the emphasized phrase

to encompass those inferior and subordinate officers subject to presidential appointment and Senate confirmation. 2 *The Records of the Federal Convention of 1787*, at 628 ("[a]fter "Officers of the U.S. whose appointments are not otherwise provided for," were added the words "and which shall be established by law"."). Madison absolutely understood the phrase "established by law" meant offices which Congress established by statute. 1 Annals of Cong. 7 582 (1789) (Madison).

This understanding perfectly dovetails with Madison's theory of constitutional physics: the delicate balance of friction combating faction which underlies the separation of powers. Federalist No. 51, at 319 (C. Rossiter ed. 1961) (Madison). The Colorado court's determination is wholly incongruent with nearly 235 years of accepted constitutional understanding and has upset the equilibrium of the system which Madison so carefully crafted.

Third, the Colorado court adopted a skewed view that the structure of Section 3 was persuasive of the proposition that the President is an "officer of the United States." Slip op. at 82. The court came to this rationalization by dissecting and comparing the persons and offices respectively listed in the two halves of Section 3. The court observed that the first half "describes the offices protected and the second half addresses the parties barred from holding those protected offices." *Id*. The court then found a "parallel structure" between the two halves such that the protected offices and the barred parties matched, save electors for

President and Vice President, in a way which included the President as being subject to a disability. *Id*.

The Colorado court in part hung its hat on a particular portion of the Fourteenth Amendment debates which alluded to the inclusion of the President within the scope of Section 3. The court, at slip op. 77-8, cited a colloquy between two senators found at CONG. GLOBE, 39th Cong., 1st Sess. 2899 (1866) as supporting its structural analysis. In this colloquy, a senator inquired why the Office of the President was not included in Section 3 to which a fellow senator responded the proposed phrase "or hold any office, civil or military, under the United States" would encompass such Office. If anything, the court's reliance upon this colloquy demonstrates its lack of understanding (and perhaps also the senators' lack of understanding) of the dichotomy between the two parts of Section 3. The above colloquy conflated these two parts as the inquiring senator was concerned that the President was not included in the second part of Section 3 (which identified the disqualified party part) while the responding senator's comments concerned the first part (which identified the prohibited offices). A president would not be subject to the first part unless identified in the second part, something the drafters failed to include.

The Colorado court's attempt at linguistic and logical gymnastics ignores this Court's requirement that the Constitution must be read and interpreted based upon its plain text, *Widmar v. Vincent*, 454 U.S. 263 (1981); *Trump v. Mazars USA,*

LLP, 140 S.Ct. 2019 (2023), and within the confines of its historical perspective, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen,* 142 S.Ct. 2111 (2022). The plain text of Section 3 does not support the Colorado court's Procrustean attempt to contort and shoehorn its flawed interpretation thereof. Simply put, the Colorado court tried to shove a square peg into a round hole and then whittled off the square edges to make it fit. The court, however, left the most important content on the shop room floor.

Fourth, the Colorado court erred in analyzing and articulating what it termed "the clear purpose" of Section 3—ensuring that disloyal officers would be forever barred from playing a role in the government. Slip op. at 83 - 84. Such conclusion, however, wholly ignores both the Framer's historical understanding of the Constitution's meaning and the reasons why the Fourteenth Amendment's drafters included Section 3 but also enabled Congress to negate its effect. This two-pronged historical understanding is critical in any current analysis. *Bruen, supra*.

As argued above, the Framers understood the distinction between the Office of the President and the inferior and subordinate "officers of the United States." The Colorado court's position cannot be reconciled with the fact the Fourteenth Amendment's drafters used both the same "officers of the United States" phrase as the Framers did when crafting key parts of the Constitution and referred to the same distinctive Article VI constitutional

oath taken by such inferior and subordinate officers without articulating a distinguishing meaning.

The Framers certainly knew what they were doing when drafting the Constitution and ensuring a "Republican Form of Government in U.S. CONST. ART. IV, SEC. 4. As such, those who serially screech that former President Trump's candidacy (and everything else with which they disagree) is a "threat to democracy" should perhaps pick up a history book and discover the true genius of the Framers in designing our constitutional REPUBLIC. Indeed, they might discovery, much to their chagrin:

> "the distinguishing feature of [the republican form of government] is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies."

In re Duncan, 139 U.S. 449, 461 (1891). Therein, this Court set out the key elements of the Framer's understanding of how our republican form of government must operate: a recognition that "the people are thus the source of political power" and the constitution sets bounds on government power "as against the sudden impulses of mere majorities." *Id*.

The Framers vested the *amici* and all Colorado voters with the right to choose their own elected officials and the Court is obligated to uphold their right to vote for former President Trump in this

instance against the Colorado court's assault on our republican form of government.

III. CONGRESS REMOVED ANY ELECTORAL DISABILITY VIA THE 1872 AND 1898 AMNESTY ACTS.

Finally, the Colorado Supreme Court's determination cannot stand even if Section 3 of the Fourteenth Amendment otherwise imposed a political disability against former President Trump. The plain text of the 1872 Amnesty Act removed any such disability by providing that:

> "all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are Bennehereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States."

See Act of May 22, 1872, CH. 193, 17 STAT. 142 (1872). This plain text encompassed all persons who would have otherwise been disabled as an "officer of the United States" within the scope of its grant of amnesty.

The historic context of the relationship between Section 3 and the 1872 Amnesty Act is critical. The Fourteenth Amendment was passed and ratified within three years following the conclusion of the Civil War. The need for Section 3

became evident in December 1865 when the members of the 39th Congress convened and the newly-elected senators and representatives from the former Confederate states who had participated in the rebellion, sought to be sworn and take their seats. *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 91 (2021). Section 3 was thereafter used to exclude both federal and state officials from assuming or continuing in office, *id*. at 110-11 (describing the Senate's refusal to seat North Carolina's wartime governor); *id*. at 88 (describing an effort to oust half of Tennessee's Supreme Court).

Yet, one of America's remarkable traits—grace of forgiveness—soon took hold as many recognized that amnesty for the former Confederates was a key part of the nation's healing and rebuilding. *Id*. at 111-12. Prior to 1872, Congress employed its authority to remove Section 3 disabilities through thousands of private amnesty bills. *Id*. at 112. Professor Magliocca's treatise suggests that Congress granted private amnesty on an "you-ask-you-get" basis. *Id*. A new plan was needed as the "sheer number of personal amnesty requests soon overwhelmed Congress and led to calls for general Section Three amnesty legislation." *Id*. at 112-13. President Grant's endorsement of such effort precipitated congressional efforts to pass what became the 1872 Amnesty Act. *Id*. at 116.

The debates underlying the 1872 Act evidenced the desire of Congress to "take another step forward" by removing Section 3's disabilities.

CONG. GLOBE, 41st Cong., 3d Sess. 203 (1870) (statement of Rep. Bingham).[9] These debates demonstrate Congress's strong commitment to keep moving forward the nation's healing. A key signal of this commitment is the recognition that Section 3's disabilities were proving counterproductive to advancing that healing. *See* CONG. GLOBE, 42d Cong., 1st Sess. 63 (1871) (statement of Rep. Farnsworth); *id.* at 103 (statement of Rep. Buckley); *id.* (statement of Rep. Blair).[10]

The representatives and senators debating the 1872 Amnesty Act were also surely cognizant of this Court's notation in *Worthy v. Commissioners*,

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[9] Statement of Rep. Bingham: "As nearly as I can ascertain, there are about twenty thousand men scattered throughout this country who are under the disability of the fourteenth amendment, the majority of whom, I undertake to say, all things considered, are as guiltless of their country's blood as we ourselves are."

[10] Statement of Rep. Farnsworth: "We have had these disqualifications existing for a great length of time. Disorders have not ceased in consequence. Will, then, the continuance of these disqualifications help to restore order? I think not."

Statement of Rep. Buckley: "Mr. Speaker, we never can put down violence and outrage in the South by the mere continuance of political disabilities."

Statement of Rep. Blair: "I would appeal to the Republicans of this House; I would appeal to the colored Representatives here to say why the withholding of this measure today, refusing to remove these disabilities, will remedy the evil of which they speak in the southern States?"

76 U.S. (9 Wall.) 611, 613 (1869) of a potential fatal flaw in the Fourteenth Amendment: a conflict between Sections 1 and 3 such that the disabilities imposed by the latter negated an immunity and privilege granted by the former. The former Confederates to which Section 3 applied were, after all, still citizens entitled to the privileges and immunities of Section 1. Such same fatal flaw would arguably still exist, and be ripe for adjudication, to the extent the 1872 Amnesty Act and the 1898 Amnesty Act, discussed *infra*., did not fully neutralize Section 3. One could plausibly argue that Congress wished to foreclose this eventuality by mooting the issue entirely and relegating Section 3 to the dustbin of history.

Furthermore, *amici* cannot ignore the historical irony of a key statement which President Grant made in his 1871 State of the Union speech when endorsing amnesty. President Grant's recognition that:

> "[w]hen the purity of the ballot is secure, majorities are sure to elect officers reflecting the views of the majority"[11]

was quite prescient of the issues in this case. Former President Trump won the 2016 election and received nearly 75 million votes in 2020. Furthermore, the Attorneys General from 27 states (more than a majority of states) have weighed in as *amici* in support of former President Trump. It could thus be argued that he reflects the views of a

[11] Ulysses S. Grant, Third Annual Message (Dec. 4, 1871).

majority (or near majority) of voters such that removing his name from any ballot would compromise the purity of that ballot. Courts and election officials should therefore tread lightly when wading into those waters.

The above historical context explains why Congress so precisely drafted the 1872 Amnesty Act as it did. A clear textual reading of the Act evidences that Congress removed "[a]ll political disabilities imposed" by Section 3, subject to a number of exceptions for high federal officials who participated in the rebellion.[12] The plain text also shows that Congress did not use limiting language which narrowed the Act's remedial scope to only include "persons currently subject to a Section 3 disability" or "persons against whom the disabilities were lodged" at the time of its adoption. This type of limiting language, had Congress used it, would have ensured that amnesty applied solely to the removal of Section 3 disabilities against former Confederates and not on a prospective basis.

Congress, however, did not use such limiting, backward-looking language when crafting the 1872 Amnesty Act. After all, Congress looked to continue moving forward and recognized that amnesty served that goal. *See supra.*, at 22. Thus, Congress did not either specifically refer to the

[12] These exceptions included the following high federal offices: Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States.

disabilities imposed upon the individuals who participated in the Civil War's rebellion or preserve those disqualifications for future potential cases. *See* Hans A. von Spakovsky, *Efforts by Courts of State Officials to Bar Members of Congress from Running for Re-Election or Being Seated Are Unconstitutional*, The Heritage Foundation, Legal Memorandum No. 301 at 5 (Apr. 6, 2022).

Instead, the plain text of the 1872 Act shows that Congress used more expansive and general language to remove all Section 3 disabilities from all persons not explicitly excepted in a way which connoted the intention of a prospective application. *Id*. This Court's jurisprudence traditionally presumes that "statutes affecting substantive rights and liabilities are presumed to have only prospective effect." *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985). It cannot therefore be credibly argued that either a Section 3 disability or the removal thereof is anything other than substantive in nature. This Court should take Congress at its word and not interpret the 1872 Amnesty Act beyond the confines of its plain text.

Given *Bruen, supra*., any consideration of the scope of the 1872 Amnesty Act *vis-à-vis* Section 3 must also be viewed in its historical context. The United States was in the midst of its "Reconstruction" era in 1872: having the ultimate goal, as its name suggests, of both healing the many political and societal wounds laid open by the Civil War and reunifying the Union. This explains why both President Grant and Congress required the former Confederate states to adopt the Fourteenth

Amendment as a condition of re-admission to the Union.

The nation was on the road to regaining its bearings and found itself in a far different (and better) place by 1872. By then, all former Confederate states had been readmitted to the Union and a structural framework had been constructed to ensure the Union thereafter remained intact all while ensuring both fundamental rights for the newly-freed slaves and a statutory means to enforce these rights.

Ultimately, the 1872 Amnesty Act represented a sign a good will, an olive branch if you will, and reflected one of America's best traits—its willingness to forgive past transgressions. It was, in many respects, the legislative embodiment of the hope for the future expressed in Lincoln's second inaugural address:

> "[w]ith malice toward none with charity for all" as the nation strove "to finish the work we are in to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan - to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations."

Abraham Lincoln, Second Inaugural Address (1865). *Amici* thus find it ironic that the Colorado court failed to address the 1872 Amnesty Act in its analysis of former President Trump's eligibility. Perhaps its knife was too dull from whittling away the edges of the square peg it tried to shove into a

round hole when finding a Section 3 disability to whittle any more square edges.

The 1872 Amnesty Act, however, was not the end of the game. In 1898, Congress passed a second amnesty act which removed the remaining disabilities from those persons excepted in the 1872. The plain text of the 1898 Act provides that:

> "the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed."

Amnesty Act of 1898, CH. 389, 30 STAT. 432 (emphasis added).

The plain text of both 1872 and 1898 Amnesty Acts had the cumulative effect of first, removing the disability from "all persons whomsoever" except those specifically itemized and, second, removing the disability from those itemized persons. Such cumulative effect demonstrates that any Section 3 disability no longer be applied going forward, and certainly cannot be applied today against former President Trump to the extent he was an "officer of the United States."

The Fourteenth Amendment shares a commonality with other amendments: specific grants of authority for Congress to enact enabling legislation "to enforce this article by appropriate legislation." *Compare* U.S. CONST. AMEND. XIV, SEC. 5 to U.S. CONST., AMEND. XIII, SEC. 2; AMEND. XXIII, SEC. 2; AMEND. XVI, SEC. 5; AMEND XV, SEC. 2; AMEND. XIX, CL. 2; AMEND. XXIII, SEC. 2; AMEND. XXIV, SEC. 2; AND AMEND. XXVI, SEC. 2. The

Fourteenth Amendment's drafters, however, included a unique element not found in any other part of the Constitution—a provision which specifically authorized a super-majority of Congress to override its restrictions.

The Fourteenth Amendment's drafters would not have comprehended most of today's modern technologies. However, they were in some ways far ahead of their time in comprehending a key component of modern mechanical engineering—the kill switch. Just as a kill switch allows the overriding of an operating mechanical system, the Fourteenth Amendment's drafters foresaw the possibility that one day Congress may have a just basis to override the disabilities imposed by Section 3.

The post-Civil War congresses exercised their respective authority under the Thirteenth, Fourteenth and Fifteenth Amendment to adopt meaningful legislation which enforced their respective protections. *See e.g.* Enforcement Act of 1870, 16 STAT. 140 (May 31, 1870); Enforcement Act of 1871, 17 STAT. 13 (Apr. 20, 1871); and the Civil Rights Act of 1875, 18 STAT. 335 (Mar. 1, 1875). Modern congresses have continued utilizing such authority to ensure the fulfillment of the rights guaranteed by these three amendments. *See e.g.*, the Civil Rights Act of 1957, 71 STAT. 634 (Sept. 9, 1957); Civil Rights Act of 1964, 78 STAT. 241 (Jul. 2, 1964); the Voting Rights Act of 1965, 79 STAT. 437 (Aug. 6, 1965); and the Fair Housing Act of 1968, 82 STAT. 73 (Apr. 11, 1968).

The same post-Civil War congresses, on the other hand, also understood the significance of their discretion to neutralize Section 3's efficacy. Ultimately, their desire to ensure the nation's healing and ensuring the acceptance of the new civil rights recognized by the Thirteenth, Fourteenth and Fifteenth Amendments overrode any continued desire for retribution against the former Confederates. Maybe, just maybe the enactment by the post-Civil War congresses of a statutory framework to enforce the rights guaranteed by the Thirteenth, Fourteenth and Fifteenth Amendments ameliorated any potential harm of allowing former Confederates to have a place in government.

Congress saw an obvious benefit in hitting the Fourteenth Amendment's kill switch, first through private amnesty bills and later through the 1872 and 1898 Amnesty Acts. The scope of both Amnesty Acts are critically important here because the Colorado Supreme Court neither mentioned nor discussed them in its opinion. Instead, the Colorado court sought to change the course of the 2024 presidential election by making a choice which affects the franchise of all Colorado voters and potentially leads other states down the same road. This is something which the Court cannot allow to stand; it should declare that road closed because Section 3 is a vestigial relic of a bygone era.

CONCLUSION

Based upon the foregoing, *amici* ask that this Court reverse the December 19, 2023 opinion of

the Colorado Supreme Court and remand this matter with instructions to dismiss the verified petition of the Respondent Electors.

January 16, 2024

J. GREGORY TROUTMAN*
TROUTMAN LAW OFFICE, PLLC
4205 Springhurst Blvd,
Suite 201
Louisville, KY 40241
(502) 412-9179
jgtatty@yahoo.com
Attorney for Amici Curiae

* *Counsel of Record*

APPENDIX
NAMES OF *AMICI*

STEPHANIE CAMPANA,
DENVER, COLORADO

PAULA MAGIN,
STEAMBOAT SPRINGS, COLORADO

TRENT LEISY,
CANDIDATE FOR U.S. HOUSE OF REPRESENTATIVES,
COLORADO 4TH DISTRICT
WINDSOR, COLORADO

MICHAEL RHORER AND CATHY RHORER,
ARVADA, COLORADO

NICOLE SAMUELSON,
AURORA, COLORADO

DR. PHILIP HAAS,
PARKER, COLORADO

EDWARD HAWKINS,
EAGLE, COLORADO

MARY ECKHOUT,
AURORA, COLORADO

FRANK BROWN,
CASTLE ROCK, COLORADO

ANTHONY MULEI,
HIGHLANDS RANCH, COLORADO

KENNY CALLAHAN,
LAKEWOOD, COLORADO

ASHLIE CROWDER,
EAGLE, COLORADO

WAYNE STERLER,
WELLINGTON, COLORADO

PAM TANNER,
EVERGREEN, COLORADO

JAIME BAUER,
GOLDEN, COLORADO

RICK LUNA,
WESTMINSTER, COLORADO

JOE SARAGOSA,
DENVER, COLORADO

TYLER HOSTETTER,
GRAND JUNCTION, COLORADO

MICKEY SANCHEZ,
CENTENNIAL, COLORADO

MIKE MILLER,
KREMMLING, COLORADO

KEN ANDERSON,
AURORA, COLORADO

BARRY HARDING,
GREELEY, COLORADO

DELBERT JAVORNIK,
PUEBLO, COLORADO

BRANDON JOHNSON,
PARKER, COLORADO

JONATHAN PRUITT,
WESTMINSTER, COLORADO

BYRON HARRINGTON,
KREMMLING, COLORADO

BETH CALLAHAN,
LAKEWOOD, COLORADO

MARK ECKHOUT,
AURORA, COLORADO

MICHAEL VALLES,
AURORA, COLORADO

JOHN HEGGE,
ARVADA, COLORADO

LISA MARIE CONNER
GOLDEN, COLORADO

RICHARD SEALEY,
DENVER, COLORADO

JIMMI PEREGO,
ENGLEWOOD, COLORADO

ANN MOBERLY,
DENVER, COLORADO

SAMUEL G DEFLICE, JR.,
CENTENNIAL, COLORADO

LEROY RAEL,
DENVER, COLORADO

JENNIFER LAMBERSON,
DENVER, COLORADO

RAELYNNE HOSSLER,
DENVER, COLORADO

ERNEST CHAVEZ,
DACONO, COLORADO

MICHAEL LAURIENTI,
AURORA, COLORADO

GEOFF DUKE,
CENTENNIAL, COLORADO

SEAN DIXON,
AURORA, COLORADO

CHRISTINE NEWLAND,
COLORADO SPRINGS, COLORADO

NICOLE ESPINOZA,
COLORADO SPRINGS, COLORADO

TIMOTHY CASE,
GRAND JUNCTION, COLORADO

LAURA HUTCHINS,
PALISADE, COLORADO

JAMES R LAWLESS,
COLORADO SPRINGS, COLORADO

CHRIS BROCHU,
GRAND JUNCTION, COLORADO

GERALD PASTULA,
AURORA, COLORADO

APRIL BRADY,
HENDERSON, COLORADO

KARL MORRISON,
COLUMBINE, COLORADO

MARIA MAYNARD,
DENVER, COLORADO

KYLE BROTT,
PARKER, COLORADO

ANNETTE BROTT,
PARKER, COLORADO

TOSHA BROTT,
PARKER, COLORADO

CALVIN BROTT,
PARKER, COLORADO

RICHARD ARMSTRONG,
DENVER, COLORADO

BRIEANA CARRILLO,
PALISADE, COLORADO

JULIA JONES,
PARKER, COLORADO

ADAM BALCH,
THORNTON, COLORADO

LISA BROCHU,
GRAND JUNCTION, COLORADO

PAULA GILMORE,
AURORA, COLORADO

TANYA WRIGHT,
PARKER, COLORADO

CATHY MORRISON,
COLUMBINE, COLORADO

TOMMY CRANE,
DENVER, COLORADO

PETER ELMORE,
LITTLETON, COLORADO

JOSEPH GEORGSEN,
COLORADO SPRINGS, COLORADO

JUSTIN HOLMES AND HEATHER HOLMES,
HIGHLANDS RANCH, COLORADO

ALLEN CAMPBELL,
WESTMINSTER, COLORADO

MANDE BAUM,
PARKER, COLORADO

LOU CATALE AND MARGARET CATALE,
AURORA, COLORADO

STEVEN JONES,
PARKER, COLORADO

JUSTIN JONES,
PARKER, COLORADO

CHRISTOPHER JONES,
PARKER, COLORADO

JEREMY HARRIGAN,
MONUMENT, COLORADO

GINA WATSON,
PUEBLO, COLORADO

JEFF JOHNSON AND HEIDI REID JOHNSON,
HIGHLANDS RANCH, COLORADO

DANIEL CASTRO AND NATALIA CASTRO,
HIGHLANDS RANCH, COLORADO

JOE MATRONI,
HIGHLANDS RANCH, COLORADO

BEN HITCH AND AMY HITCH,
PARKER, COLORADO

CHRIS BEAUMIER AND BECKY BEUAMIER,
HIGHLANDS RANCH, COLORADO

SETH HOUY,
HIGHLANDS RANCH, COLORADO

KEN SHINGLE,
LITTLETON, COLORADO

CLAY SHINGLE,
LITTLETON, COLORADO

RYAN HALL,
DENVER, COLORADO

DAVE HALL,
DENVER, COLORADO

JESUS DOMINQUEZ,
DENVER, COLORADO

JESUS DOMINQUEZ, JR.,
DENVER, COLORADO

JOHN VAN ANNE,
LITTLETON, COLORADO

TOM EGLE,
LITTLETON, COLORADO

KEVIN O'SULLIVAN,
HIGHLANDS RANCH, COLORADO

MARK HAMLIN AND TRACY HAMLIN,
LITTLETON, COLORADO

GRANT HALL,
DENVER, COLORADO

JAMES MARLATT,
LITTLETON, COLORADO

JASON BAUM,
CASTLE ROCK, COLORADO