No. 23-719

In The
Supreme Court of the United States

Donald J. Trump, *Petitioner*

v.

Norma Anderson, *et al.*, *Respondents*

On Writ of Certiorari to the
Colorado Supreme Court

Brief of *Amicus Curiae* James Madison Center for Free Speech In Support of Petitioner

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Interests of Amicus Curiae[1]

The purpose of the James Madison Center for Free Speech ("**Madison Center**") is to support litigation and public education activities defending the rights of political expression and association.[2] The Madison Center is an internal educational fund of James Madison Center, Inc., a District of Columbia nonprofit corporation. Madison Center is tax exempt under 26 U.S.C. 501(c)(3). Counsel for Amicus have authored articles, testimony, and comments and litigated numerous cases involving campaign finance and free speech issues. James Bopp, Jr. is Madison Center's general counsel. Cases in which he was counsel in this Court include *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002), *FEC v. Beaumont,* 539 U.S. 146 (2003), *McConnell v. FEC,* 540 U.S.93 (2003), *Wisconsin Right to Life v. FEC,* 546 U.S. 410 (2006), *Randall v. Sorrell,* 548 U.S. 230 (2006), *FEC v. Wisconsin Right to Life,* 551 U.S. 449 (2007), *Citizens United v. FEC,* 558 U.S. 310 (2010), *American Tradition Partnership v. Bullock,* 567 U.S. 516 (2012), and *McCutcheon v. FEC,* 134 S.Ct. 1434 (2014).

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[1] Rule 37.6 Statement: No party's counsel authored this brief in whole or in part; no party's counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person or entity other than amicus or its counsel funded it.

[2] *See Mission Statement*, James Madison Center for Free Speech (Jan. 16, 2024, 10:23 AM), https://www.jamesmadisoncenter.org.

Summary of the Argument

Section Three's prohibition against having "engaged in insurrection or rebellion" requires a direct, overt act of insurrection, not incitement through speech. The phrase, "engage in insurrection or rebellion," should not be construed to include indirect or inchoate acts aiding an insurrection, such as encouragement or incitement. A careful consideration of historical practice and terminology—including terminology used in other laws addressing "engaging in insurrection or rebellion"—compels this conclusion, as do logic, common sense, and good policy. Accordingly, "inciting" is not conduct covered by "engaging in insurrection or rebellion" by Section Three of the Fourteenth Amendment to the U.S. Constitution.

If incitement fell under "engage," however, in order to remove constitutional protection from speech under this Court's incitement jurisprucence, the Court must find that (1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech.

The Colorado Supreme Court, however, erred in its *Brandenburg* analysis, as it did throughout its opinion, by cherry-picking out-of-context statements of President Trump and by importing inapplicable legal points of law to jerry-rig its analysis.

It did so in its *Brandenburg* analysis in three ways. First, it applied speech to the first prong of its *Brandenburg* analysis that was far removed in time

from the Ellipse Speech[3] in order to assign "meaning" to the words of the Ellipse Speech. Second, it took the actual words in the Ellipse Speech completely out of context. Third, it refused to import any meaning from President Trump's calls for peacefully protesting within an hour of the Ellipse Speech itself. Each error is fatal to its conclusion that the Ellipse Speech was constitutionally unprotected.

This kind of out-of-context cherry-picking does not align with this Court's precedent on incitement or with the U.S. Constitution.

For these reasons, the Colorado Supreme Court's decision should be reversed.

Argument

I.
Section Three's prohibition against having "engaged in insurrection or rebellion" requires a direct, overt act of insurrection, not incitement through speech.

Early in the Civil War, Congress established penalties against any person who would "[t]hereafter *incite*, set on foot, assist, or *engage* in any rebellion or insurrection against the authority of the United States . . . ." Second Confiscation Act, ch. 195, § 2, 12 Stat. 589, 590 (1862) (emphases added). Soon after, between 1866 and 1868, the Fourteenth Amendment

[3] "Ellipse Speech" means the speech President Trump made on January 6, 2021, at the Washington, D.C. ellipse. A transcript of this speech was included in Petitioner's Appendix to his Petition for Writ of Certiorari, 285a - 317a. Throughout this brief, any citations to the Ellipse Speech cite to that Appendix as "Cert. Pet. [x]a".

would be proposed and ratified, with Section Three containing similar language, but with a reference to incitement nowhere to be found. U.S. Const. amend. XIV, § 3 ("**Section Three**") (prohibiting from office those "who, having previously taken an oath" of office, "shall have engaged in insurrection or rebellion against the same ["**insurrection or rebellion**" clause] or given aid or comfort to the enemies thereof ["**aid or comfort clause**"].").

Yet the inclusion of "incite" (and "set on foot" and "assist"), alongside "engage" in the Second Confiscation Act, was not mere surplusage; it conclusively demonstrates that they mean different things. And this was a simple consequence of the meaning of the words. "Engage," as understood at the time, required more than indirect contribution, such as encouragement or incitement. It required a direct, overt act, by taking part in the insurrection or rebellion *itself*. This did not change in the six short years that passed before Section Three was ratified. Indeed, in construing Section Three, United States Attorney General Stanbery provided clear guidance about the meaning of "engage." He stated "The force of the term to *engage* carries the idea of active rather than passive conduct," focusing on the term's requirement of a "direct overt act for the purpose of promoting the rebellion." 12 Op. Att'y Gen. 141, 161-62 (Off. of the Att'y Gen. May 24, 1867) ("**Stanbery I**"). Referring again to the idea of "direct overt act[s]"—the requirement for *engaging*—Attorney General Stanbery's opinion says that "[m]erely disloyal . . . expressions are not sufficient." *Id.* at 164.[4]

[4] A later opinion offered by Attorney General Stanbery on the

As *amicus* will show, any attempt to remove Section Three from its linguistic-historical context, or to shoehorn Civil War applications thereof into contexts that have absolutely nothing to do with a war, are bound to fail. This kind of linguistical nonsense results in an erroneous reading of Section Three.

The most cogent historical evidence of the construction of the word "engage" shows that former judge and Professor Michael McConnell is correct in his assessment that Section Three's use of "the verb 'engage in,' [] connotes active involvement and not mere support or assistance."[5] Historical applications of Section Three's standards to incitement involved incitement—not to insurrection or rebellion—but to war, thus triggering the "aid or comfort" clause. Decontextualization of Section Three from this linguistic and historical context can result in nothing other than obvious misinterpretation.

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same topic, but limited to its application to Civil War confederates, does not change this. *Infra* Part I.C.

[5] Eugene Volokh, *Prof. Michael McConnell, Responding About the Fourteenth Amendment, "Insurrection," and Trump*, REASON: VOLOKH CONSPIRACY (Aug. 12, 2023, 6:58 PM), https://reason.com/volokh/2023/08/12/prof-michael-mcconnell-responding-about-the-fourteenth-amendment-insurrection-and-trump/; *see also* Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 Tex. Rev. L. & Pol. 350, 511 n.464, (forthcoming 2024), https://ssrn.com/abstract=4568771 (all page number references for Blackman & Tillman refer to this manuscript's pagination). ("**Blackman & Tillman**")

A. To "engage" requires more than mere words.

Even without understanding the particular meaning of the word "engage," two aspects of Section Three's plain text show that incitement alone does not constitute engaging in insurrection.

1. The text's omission of incitement is weighty evidence that "engage in insurrection or rebellion" does not cover incitement.

First, the drafters of Section Three knew how to draft language that would encompass incitement to insurrection, as the Second Confiscation Act shows. Indeed, that Act's language is strikingly similar to Section Three's, and it almost certainly *did* serve as a model for Section Three.[6]

But Section Three's drafters did not reproduce that language wholesale: as noted, in contrast to the Second Confiscation Act, Section Three includes no reference to "incitement." So if "engage" in the Second Confiscation Act does not include "incitement," then "engage" in Section Three does not either.

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[6] Even Professors William Baude and Michael Stokes Paulsen, who argue for a more expansive understanding of the word "engage," nonetheless find it "hard to avoid the conclusion that" Civil War usage, including the Second Confiscation Act's usage of "engage," "carried over into the meaning of Section Three." *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 1, 86 (forthcoming 2024), https://ssrn.com/abstract=4532751 (all page number references for Baude & Paulsen refer to this manuscript's pagination). ("**Baude & Paulsen**").

It is difficult to imagine that this omission of "incitement" in one of our Nation's most important documents was an accident. Instead, the Section Three drafters' "substantial[] depart[ure]" from the Second Confiscation Act's sweeping language, and explicit, detailed application to indirect acts aiding insurrection, shows by contrast the limited, restricted nature of Section Three, which "a reasonable person circa 1866–1868, when the Fourteenth Amendment was proposed and ratified, would have understood . . . ." Blackman & Tillman, *supra* n.5, at 511.

Well-established canons of statutory construction bid the reader to closely consider this comparison. When a law's literal text is ambiguous, this Court looks beyond the bare words of the statute to discern meaning from historical context. *See District of Columbia v. Heller*, 554 U.S. 570, 592–95 (2008) (consulting "historical background" of Second Amendment to determine if the phrase "keep and bear arms" extends to personal self-defense).

This is especially true here: the *in pari materia* canon requires consideration of Section Three's "engaged in insurrection" language in conjunction with language of companion statutes enacted by the Reconstruction Congresses to shed critical light on intended meaning. This Court has consistently applied the *in pari materia* canon, considering statutory language in tandem with previous language, when "'obviously transplanted from another legal source,'" as it "'brings the old soil with it.'" *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (quoted source omitted).

Only a few years before ratifying Section Three, the Reconstruction Congress had passed the Second

Confiscation Act, targeting both those *inciting* and *engaging in* rebellion. This *in pari materia* statute, enacted by the same Reconstruction Congress, provides compelling evidence that "engage" does not contemplate "incitement."

Another uncontroversial principle of statutory construction, the surplusage canon, compels this same conclusion, disfavoring interpretations negating other statutory terms' *independent* effect. Principles against superfluity are offended by interpretations that effectively read the Second Confiscation Acts' "incite" and "set on foot" language as wholly superfluous, incorporated in, and redundant to, its "engage" language. If incitement alone qualifies one as *engaged* in insurrection, those the explicit reference to incitement becomes meaningless. This Court should decline to ignore deliberate word choices or render enacted text mere surplusage.

Because it is plain that Section Three's authors deliberately deployed terminology from a preceding act, a nearly irrefutable implication arises that the predecessor language—including *omission* thereof in *in pari materia* statutes—applies in equal force to successor constitutional enactments. Old soil necessarily infuses new plants. With Reconstruction Congresses repeatedly employing the specific phraseology "engaged in insurrection or rebellion" across interlocking enactments combating the Civil War insurrectionists, we must interpret Section Three cognizant of companion efforts enacted by the same body against the same perceived threats. By anchoring office-holding sanctions to engaging in insurrection, paralleling prior acts but omitting any reference to incitement, Section Three's drafters sought to

disqualify persons who committed direct, overt acts of insurrection, not those who spoke words.

Accordingly, comparing Section Three's plain text to that of the Second Confiscation Act shows that the former, far from implicitly including incitement, intentionally *excludes* it.

2. Plainly disjunctive language puts a wall between the meaning of "engaging" and the wholly separate inchoate acts of aiding or comforting.

Second, the "engage in" clause is separate and distinct from the "aid or comfort" clause. The disjunctive nature of Section Three's clauses can rouse no genuine controversy. A plain reading shows that the "insurrection or rebellion" clause is distinct (separated with "or" and a comma) from the "aid or comfort" clause. Therefore, because an "enemy" requires a war, *infra* Part I.B, merely providing aid or comfort to non-enemy insurrectionists does not fall under Section Three.

Uncontroversial principles of statutory construction once more demonstrate the flaw in expansively interpreting Section Three's "engaged in insurrection" language. The *noscitur a sociis* canon counsels that statutory terms be considered in light of surrounding text. A word is known by the company it keeps, which "avoid[s] ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Yates v. United States*, 574 U.S. 528, 543 (2015). Thus, the fact that the "insurrection or rebellion" clause requires one to actually "engage"—with no indication

in the clause that indirect or inchoate acts meet that criteria—while the "aid or comfort" clause applies plainly to inchoate acts, strongly indicates that Section Three's drafters did *not* intent "engage" to reference indirect or inchoate conduct such as incitement. Thus, a plain reading alone shows that *engaging* in "insurrection or rebellion" does not include inciting it or otherwise having merely "given aid or comfort" to those who so engage.

Professors Josh Blackman and Seth Barrett Tillman give further support to these conclusions in their exhaustive, 238-page article on the subject.[7] Blackman & Tillman, *supra* n.5. Diving deep into the historical understanding of what it means to engage in insurrection and what it means to aid an enemy, they show clearly why "engage in insurrection" cannot be broadly construed to include "inchoate and indirect crimes," "such as attempted insurrection or rebellion, conspiracy to commit insurrection or rebellion, or accessory liability (before- or after-the-fact) in relation to insurrection or rebellion," and indeed was not, historically, understood so capaciously. *Id.* at 509–10. Thus, it includes neither "encouragement [to insurrection] . . . in the form of either words or deeds," nor "incitement[]." *Contra* Baude & Paulsen, *supra* n.6, at 67, 53.

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[7] Josh Blackman is Centennial Chair of Constitutional Law, South Texas College of Law Houston. Seth Barrett Tillman is an Associate Professor of Maynooth University School of Law and Criminology in Ireland. Their article refutes Baude & Paulsen, *supra* n. 6.

B. "Insurrectionists" or "rebels" are not, without more, "enemies."

Because the word "enemy" is not coextensive with those who engage in insurrection or rebellion, indirect acts of aiding *insurrection* also cannot be shoehorned into Section Three's "aid or comfort" clause, which requires such aid to an *enemy*.[8] Four considerations show that "enemy" does not encompass those who, without more, engage in insurrection or rebellion.

1. An "enemy" is an enemy *nation*.

First, under Section Three, an "enemy" is confined to an enemy nation. Thus, as used in the Treason Clause, "[t]he term 'enemies' . . . , according to its settled meaning, at the time the constitution was adopted, applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. An enemy [national] is always the subject of a foreign power who owes no allegiance to our government or country. We may, therefore, omit all consideration of

[8] Although Baude and Paulsen assume the opposite throughout their article, their argument on this point suffers a fatal defect: they offer almost no explanation for why they consider the terms coextensive, arguing simply that the "rebels and insurrectionists" of the Civil War would have been considered "enemies." Baude & Paulsen, *supra* n.6, at 68; Blackman & Tillman, *supra* n.5, at 517–18. While this is correct in the context of the Civil War, *infra* Part I.B.1, it establishes only that such insurrectionists would have been liable under either Section Three clause, not that the terminology of each is synonymous. Blackman & Tillman, *supra* n. 5, at 518.

this second clause in the constitutional definition of treason." *United States v. Greathouse*, 26 F. Cas. 18, 22 (C.C.N.D. Calif. 1863).

This point is opaque today. *E.g.*, Carlton F.W. Larson, *On Treason: A Citizen's Guide to the Law* 135–36 (2020) ("Failure to understand this point contributes to the most significant misapprehensions of American treason law."); *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 674 (1863) (highlighting potential confusion on this point as early as 150 years ago; rejecting common-law sources of definition of "enemy" and instead "looking to equity, natural law, and public international law as the proper sources to understand the Constitution's use of "enemies," Blackman & Tillman, *supra* n.5, at 523). But the particular meaning of "enemy" as used in the Constitution is clear in various venerable cases. *See The Prize Cases*, 67 U.S. at 673–74 (using "enemy" to refer to those territories "claiming to be . . . sovereign" and "held in possession by an organized, hostile and belligerent power," and denizens of same); *Greathouse*, 26 F. Cas. at 22. This means, of course, that "[a]n enemy can only exist during a war," even if undeclared. Blackman & Tillman, *supra* n.5, at 523 (citing *Bas v. Tingy*, 4 U.S. 37, 39, 41, 44 (1800) (respective opinions of Moore, Washington, & Chase, JJ.); *The Prize Cases*, 67 U.S. at 665–67).

However, although the same is true of the crime of treason, the "aid or comfort" clause of Section Three is "not coextensive with" treason. Blackman & Tillman, *supra* n.5, at 525. Although the crime of treason was established when Section Three was drafted, Section Three does not use the word "treason," and there

significant differences in the language of the Treason Clause and Section Three (the Treason Clause required "adhering to enemies" in addition to giving the "aid *and* comfort," U.S. Const. art. III, § 3, cl. 1. (emphasis added), not "aid *or* comfort" as in Section Three (emphasis added)).

Accordingly, Section Three's "aid or comfort" clause is broader than treason, "a traditional criminal offense." Blackman & Tillman, *supra* n.5, at 526. "[N]o known crime is associated with" that Section Three clause, so "a defendant did not enjoy an established right to all the standard criminal law defenses and all the customary constitutional safeguards, protections, and procedures . . . connected to alleged violations of federal criminal law." *Id.* Conversely, the conduct covered by Section Three's "insurrection or rebellion" clause *was* considered criminal wrongdoing that would entitle a person to all the protections of an ordinary trial. *Id.* The procedural differences flowing from the differing nature of these two clauses further show their distinct nature.

The foregoing considerations show that an "enemy" is not simply one who engages in insurrection, but requires a war. Therefore, although the Civil War provided this criteria, such that the insurrectionists thereof were also enemies, Section Three cannot be read to apply to those who "aid or comfort" *non-enemy* insurrectionists.

2. Civil War prosecution amplifies the conclusion that "aid or comfort" to non-enemy insurrectionists is not covered by Section Three.

Second, this distinction comports with the manner in which Civil War wrongdoing was prosecuted. *Id.* at 528–30. This occurred on dual tracks. Those who actually "engaged in insurrection or rebellion" could be prosecuted for criminal offenses in traditional trials in civilian courts (though this was an infrequent resolution). *Id.* at 528.

On the other hand, those who gave aid or comfort to the enemy—the Confederacy, an enemy during "a de facto war against a de facto government"—could be tried in military tribunals, or detained. *Id.* at 528–29. This shows, in practice, the context and manner in which the drafters of Section Three understood what constituted an enemy, and the legal consequences for giving aid or comfort to enemies, which differed categorically from those for engaging in insurrection.

3. Potential overlap of "enemies" and "insurrectionists" does not mean *per se* overlap.

Third, logically, the fact that (as exemplified by the Civil War) an insurrectionist can be the aider of an enemy, and vice-versa, is no reason to understand the two as being coextensive or overlapping. *Id.* at 530–31. Insurrection can occur *absent* a war, and one can aid an enemy (if there is a war) without actually *engaging* in insurrection. *Id.* The fact that one person might commit both violations is no reason to believe one could

be liable for *engaging* in insurrection on the basis of indirect acts.

4. Casual construction of "enemies" leads to dangerous outcomes.

Simple common sense dictates the fourth and final reason to decline to treat lightly the proper meaning of the word "enemy." Baude and Paulsen claim that "[c]onduct participating in, advancing, supporting, or assisting either secession or armed resistance to U.S. authority constituted 'engaging in' or giving 'aid or comfort to' the Union's enemies." Baude & Paulsen, *supra* n.6, at 74. But this reads as quite an over-broad indictment of secession. Surely Section Three should not be read to apply to those who aid or comfort "pacific and lawful secession movements," such as Puerto Rico's independence movement. Blackman & Tillman, *supra* n. 5, at 532.

This point demonstrates the danger of broadly construing what it means to aid an "enemy" and "reflects a broader criticism of Baude and Paulsen's article," which "attempt[s] to pigeonhole the language of Section Three to fit neatly into" the Civil War and January 6, 2021, "[b]ut their theory only fits well into one": "[t]he language designed in consequence of the Civil War experience is not a tight fit for all subsequent events." *Id.* at 533–34.

C. The second opinion from Attorney General Stanbery fits well within this construction.

The Colorado Supreme Court erred in its analysis of the second opinion issued by Attorney General

Stanbery during the Reconstruction era. The court found that Attorney General Stanbery stated "when a person has, by speech or by writing, incited others to engage in rebellion, [h]e must come under the disqualification." *Id.* at 90a (quoting Reconstruction Acts opinion, 12 Op. Att'y Gen. 182, 205 (Off. of the Att'y Gen. June 12, 1867) ("**Stanbery II**"), But a careful reading of this opinion from Attorney General Stanbery simply reiterates the points made above and shows the Colorado Supreme Court's analytical error.

We must first note two obvious points. First, the opinion was expressly addressed to the purpose of answering "questions upon which the military commanders"—the commanders assigned to the military districts formed in the former rebel states—"require instructions." *Id.* at 183. It was addressed to the purpose of addressing their questions about their duties in regard to the former confederate states, and nothing else.

Second, in discussing what is prohibited by "the oath prescribed in the supplemental act," *id.* at 201, the Attorney General was referring to the original Reconstruction Act's first supplement ("An Act supplementary to an Act entitled 'An Act to provide for the more efficient Government of the Rebel States,' . . . "). Specifically, Attorney General Stanbery was discussing the oath required by Section 1 thereof, which (like Section Three) required denial of having "engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof."

This Act was passed in direct response to the rebellion of the Civil War, and the opinion is written for the express purpose of answering questions arising

from that war and nothing else. This is shown not only by the purpose expressed, but also the language used: it refers with great frequency not simply to the *idea* of "rebellion," but to "*the* rebellion." *E.g.*, Stanbery II at 203 (three times), 204 (four times), 205 (five times) (emphasis added). Everything this opinion says concerning who was disqualified by the oath was written in this context. In this context, the Confederacy was an enemy in a war, so that the aiding and abetting phrase applied.

To ignore this context in construing such guidance would be akin to ignoring the historical context of *Romeo and Juliet* and asking why they did not simply text one-another when their parents were not looking. This is true of Stanbery's statement,

> [O]fficers who, during the rebellion, discharged official duties not incident to war . . . are not to be considered as thereby engaging in rebellion or disqualified. Disloyal sentiments, opinions, or sympathies would not disqualify; but when a person has, by speech or by writing, incited others to engage in rebellion, he must come under *the disqualification*.

Id. at 205 (emphasis added). Accordingly, we must note, first, that this statement, like so many of the others in this opinion, is about "the rebellion"—indeed, it is part of subsection 16, which could hardly be more specific in addressing "*the* common unlawful purpose . . . of *the* rebellion, . . . *the* rebel *confederacy*, . . . *the* rebel cause . . . ." *Id.* (emphases added). "[T]he" rebel cause was the *enemy* in the Civil

War.

We must therefore note, second, that in discussing "the disqualification," Stanbery contemplates *both* its "insurrection or rebellion" clause and its "aid or comfort" clause in regards to rebels who were, in fact, enemies. This is clear in the immediate context of the language in question: Stanbery has just addressed conduct clearly falling under the "aid or comfort" clause, stating, "Mere acts of charity . . . not done in aid of the cause in which he may have been engaged, do not disqualify. But organized contributions of food and clothing, for the general relief of persons engaged in the rebellion, and not of a merely sanitary character, but contributed to enable them to perform their unlawful object, may be classed with acts which do disqualify." *Id.* Giving a Confederate soldier a pair of trousers so that he could continue marching per his orders could hardly be thought of as actually *engaging* personally in rebellion—it is clear that the opinion is referring here (as its use of the word "aid" indicates) to the "aid or comfort" clause.

With these two things in mind, the notion that "when a person has . . . incited others to engage in rebellion, he must come under the disqualification," *id.*, fits perfectly within the ordinary historical terminological understanding discussed above. The Colorado Supreme Court's quotation of this language is therefore taken out of context. Cert. Pet. 90a. Attorney General Stanbery never says that such incitement was tantamount to engaging in rebellion, but only that it falls "under the disqualification." Stanbery II at 205. This is not a controversial statement: it is plain that inciting others to engage in rebellion—when the rebellion clearly referenced is one

conducted by *enemies* in a war—is an act of "giv[ing] aid or comfort to . . . enemies[.]" Supplementary Reconstruction Act, ch. 6, § 2, 15 Stat. 2, 2. Because such incitement to aid an enemy in a war falls directly within the disqualification's language, it is plain that a person who conducted such incitement would be disqualified. That mere fact in no way contradicts the fact that actually *engaging* in insurrection or rebellion requires *more* than mere incitement.

The Colorado Supreme Court employs sleight of hand to avoid this conclusion in a paragraph opening with, "Attorney General Stanbery's opinions on the meaning of 'engage[]' . . . are in accord with these historical and modern definitions." Cert. Pet. 89a (quoting Stanbery I at 161). The Colorado Supreme Court notes Attorney General Stanbery's view that engaging in insurrection requires an "overt act,"[9] *id.* at 90a (quoting Stanbery I at 161–62). But then, the court claims, "*Accordingly*, '[d]isloyal sentiments, opinions, or sympathies would not disqualify; but when a person has, by speech or by writing, incited others to engage in rebellion, [h]e must come under the disqualification.'" *Id.* (emphasis added) (quoting Stanbery II at 205). But this conclusion does *not* "accord[.]" As explained above (and as is apparent in the language just quoted), Attorney General Stanbery did *not* state that incitement was a form of engaging in insurrection—he merely stated that incitement to rebellion *with wartime enemies* would disqualify. As explained above, such incitement would fall squarely within the "aid or comfort" clause.

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[9] Attorney General Stanbery later stated that the law required a "direct overt act." Stanbery I at 164.

In sum, the phrase, "engage in insurrection or rebellion," should not be construed to include indirect or inchoate acts aiding an insurrection, such as encouragement or incitement. A careful consideration of historical practice and terminology—including terminology used in other laws addressing "engaging in insurrection or rebellion"—compels this conclusion, as do logic, common sense, and good policy. Accordingly, "inciting" is not conduct covered by "engaging in insurrection or rebellion" by Section Three of the Fourteenth Amendment to the U.S. Constitution.

II.
Even if Section Three's use of "engaged" included incitement, *Brandenburg* applies and the Ellipse Speech is constitutionally protected.

The Colorado Supreme Court also erred in its use of context in three ways. First, it applied speech to the first prong of its *Brandenburg* analysis that was far removed in time from the Ellipse Speech in order to assign "meaning" to the words of the Ellipse Speech. Second, it took the actual words in the Ellipse Speech completely out of context as part of its *Brandenburg* analysis. Third, it refused to import any meaning from President Trump's calls for peacefully protesting within an hour of the Ellipse Speech itself. Each error is fatal to its conclusion that the Ellipse Speech was constitutionally unprotected.

A. Under the *Brandenburg* test, only the Ellipse Speech's words may be analyzed to determine whether they were directed to incite or produce imminent lawless action.

The government cannot "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added). Following *Brandenburg*, this Court refused to find speech punishable just because it had a "tendency to lead to violence" when "there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder." *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (emphasis added).

From this line of cases, circuit courts will not find speech meets the *Brandenburg* test for incitement unless "(1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech." *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 246 (6th Cir. 2015).

Under this three-pronged approach, the intent prong is a limiting factor, not an expanding factor. This conclusion is supported by this Court's observation that if a person is found to have incited violence in one speech, evidence of that person's previous non-inciting speech could be used as corroborating evidence [of intent]. *See NAACP v. Claiborne Hardware Co.*, 458

U.S. 886, 929 (1982) ("**Claiborne**").

Both *Brandenburg* and *Hess* stand for the principle that inciting speech has to be directed at producing *imminent* disorder—that is, almost immediate disorder. A speaker's alleged ill intent or history of prior speech cannot be used to remove constitutional protection from otherwise non-inciting speech. An evaluation *of the speech at issue* has to come first—previous non-inciting speech by the same speaker cannot be used to interpret the *meaning* of the speech at issue when a court evaluates *Brandenburg*'s first prong—that is, whether the speech explicitly or implicitly encouraged the use of violence or lawless action.

This principle is consistent with the fact that *Brandenburg* "thoroughly discredited" the idea that "any group that advocates violent overthrow as an abstract doctrine must be regarded as necessarily advocating unlawful action." *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 450 (1974) (citing *Whitney v. California*, 274 U.S. 357 (1927). This Court has understood, throughout its incitement jurisprudence, that to evaluate the meaning of allegedly inciting speech through the lens of what a particular speaker has said in the past runs a real risk of removing constitutional protection from much non-inciting speech.

Brandenburg and its progeny's insistence that speech be tied to *imminent* lawless action necessarily means that only the speech closely related in time to the lawless action may be considered under the first prong in a court's analysis. The Colorado Supreme Court disagreed with this plain temporal connection

between the speech at issue and the lawless action. It shrugged off these concerns by acknowledging there were "limits" to the speech that may be considered, but it "need not define those outer limits now." Trump Cert. Pet. 106a. The court then held that it was appropriate to consider President Trump's "history of courting extremists and endorsing political violence" to provide "context" to the Ellipse Speech. *Id.*

The problem with the Colorado Supreme Court's approach is that it did exactly what *Brandenburg* swept into the ash heap of constitutional history—it held constitutionally protected speech was incitement, based largely upon the speaker's alleged history.[10]

The court started its *Brandenburg* evaluation of whether the Ellipse Speech encouraged the use of violence or lawless action not with the Ellipse Speech itself, but with an example of President Trump's speech from February 2016, nearly five years prior to the Ellipse Speech. *Id.* It then looked at speech from March 2016. *Id.* It then turned its attention to "the 2020 election cycle." *Id.* at 106a-07a.

Next, the court evaluated the district court's evaluation of the testimony of Professor Peter Simi, a professor of sociology at Chapman University. *Id.* Professor Simi focused not on what President Trump said, but on what others "understood" about his speech. *Id.* Professor Simi testified that when "most politicians" called people to "fight," they meant it "only

[10] Another way in which the Colorado Supreme Court applied the wrong context to its analysis is its use of "true threat" jurisprudence. *Id.* at 104-05. While the court acknowledged true threats are "doctrinally distinct" from incitement, *Id.* at 104a, it still used true threat jurisprudence to apply (out of) context to the constitutional issues present in this case.

symbolically." But when *President Trump* said "fight," "violent far-right extremists" understood it as a literal call to violence. Professor Simi testified this was so because President Trump "develop[ed] and deploy[ed] a shared coded language with his violent supporters." *Id.* The court then turned back to various statements President Trump made during the 2020 election cycle which the district court found "encouraged and supported violence." *Id.* Finally, the court discussed various parts of the Ellipse Speech, upholding that the district court's conclusion that the Ellipse Speech "was understood by a portion of the crowd as, a call to arms." *Id.* at 108a.

The Colorado Supreme Court used the "context" of President Trump's previous speech to impart *meaning* into the Ellipse Speech. Under *Brandenburg,* it was not permitted to do so. On this basis alone, the Colorado Supreme Court's decision should be reversed.

B. President Trump's speech was not directed to inciting or producing imminent lawless action.

Context does matter. But unlike the Colorado Supreme Court's focus on the "context" provided five years prior to the Ellipse Speech, the *context of the Ellipse Speech itself matters* under *Brandenburg*. The court below agreed with the district court's identification of "specific incendiary language" in the Ellipse Speech, so it's important for the Court to understand the context of the words used in the Ellipse Speech.

But as an initial matter, comparing the language at issue in other incitement jurisprudence provides

helpful "context" to the types of "incendiary" speech that this Court has held *retains* its constitutional protection. Charles Evers, the NAACP Field Secretary in Mississippi, gave a speech to several hundred people in the context of a boycott of all white-owned business. *Claiborne*, 458 U.S. at 902. In this speech he stated: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.* This Court held Mr. Evers' speech was advocacy, not incitement. During the context of a war protest in which protestors blocked a public street, Gregory Hess yelled to the crowd, "We'll take the fucking street later." *Hess*, 414 U.S. at 107. Again, this Court held Mr. Hess' speech was not incitement.

Within the context of this Court's jurisprudence, including *Claiborne* and *Hess*, it is important to consider the portions of the Ellipse Speech the Colorado Supreme Court found to be inciting.

The Colorado Supreme Court found it incendiary when President Trump announced, "we're going to walk down, and I'll be with you, we're going to walk down . . . to the Capitol . . . ." Cert. Pet. at 108a. The end ellipses in the court's opinion eliminates the actual "context" critical to understanding this portion of the Ellipse Speech. President Trump stated, in full context, "We're going to walk down to the Capitol, and we're going to cheer on our brave senators, and congressmen and women. And we're probably not going to be cheering so much for some of them because you'll never take back our country with weakness. You have to show strength, and you have to be strong." *Id.* at 291a. So, President Trump asked supporters to walk—not march, not storm, not overwhelm—to the Capitol in order to cheer on members of Congress who in his view,

were doing the right thing by questioning the certification of the Electoral Ballots.[11] Nothing in the plain language of this portion of the Ellipse Speech could be viewed as directing or inciting imminent lawless action, when seen in context.

The court pointed out that President Trump used the word "fight" or variations of that word twenty times in the Ellipse Speech. That's true, but none of President Trump's uses of the word "fight" can be interpreted as a call to arms within the context of the Ellipse Speech.

First, it must be acknowledged that the word "fight" is used in numerous, non-violent contexts every day. If you fight for something, you try in a determined way to get it or achieve it (He fought hard for his place on the expedition.).[12] A candidate fights an election by trying to win it (He helped raise almost $40 million to fight the election campaign.). People fight in court (Watkins sued the Army and fought his case in various courts for 10 years.). People fight emotions or desires (He fought the urge to smoke.). None of those usages of "fight" mean a physical altercation—although physically fighting is certainly one other way the word is used, depending on the context (The boxer fought his opponent.).

In the Ellipse Speech, how did President Trump use the word "fight," or its variation? What follows is the

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[11] Counsel for *amicus* is not arguing President Trump's legal conclusion about certifying the Electoral Ballots was correct—it simply argues his speech urging supporters to cheer on Congress is constitutionally protected.

[12] *Definition of "fight,"* Collins English Dictionary, Jan. 16, 2024, 10:26 AM,
https://www.collinsdictionary.com/us/dictionary/english/fight

complete quote from each usage in the Ellipse Speech with a parenthetical explaining the context in which it was used:

- "He fights. He fights, and I'll tell you. Thank you very much, John [Eastman]. Fantastic job. I watched." (thanking the military, the Secret Service, the police, law enforcement, Rudy Guliani, and John Eastman). Cert Pet. at 287a.
- "They're out there fighting. These House guys are fighting, but it's incredible." (commending certain members of Congress for politically fighting against election fraud). *Id.* at 289a.
- "Unbelievable, what we have to go through, what we have to go through, and you have to get your people to fight. And if they don't fight, we have to primary the hell out of the ones that don't fight." (criticizing "weak Republican" lawmakers who didn't stand up politically against Democrats). *Id.* at 290a.
- "Republicans are constantly fighting like a boxer with his hands tied behind his back. . . . And we're going to have to fight much harder, and Mike Pence is going to have to come through for us." (criticizing Republican politicians who aren't politically aggressive enough, in President Trump's view and urging Vice President Pence to refuse to certify the Electoral Ballots, under his legal theory). *Id.* at 291a.
- "And now we're out here fighting." (describing his political "fight" after the outcome of the 2020 election). *Id.* at 293a.
- "They fought a good race." (referencing Kelly Loeffler and David Perdue, who were candidates for U.S. Senate from Georgia). *Id.* at 295a.

- "But it used to be that they'd argue with me, I'd fight. So I'd fight, they'd fight. I'd fight, they'd fight. . . . You don't fight with them anymore, unless it's a bad story." (describing President Trump's back and forth arguments with the media over the course of his career). *Id.* at 296a.
- "I picked three people. I fought like hell for them, one in particular I fought." (referencing contentious confirmation hearings for President Trump's nominees to this Court). *Id.* at 298a.
- "But our fight against the big donors, big media, big tech, and others is just getting started." (referencing political movement against these entities). *Id.* at 314a.
- "Our brightest days are before us. Our greatest achievements still wait. I think one of our greatest achievements will be election security because nobody until I came along, had any idea how corrupt our elections were. And again, most people stand there at 9:00 in the evening and say, 'I want to thank you very much,' and they go off to some other life, but I said, 'Something's wrong here. Something's really wrong. Can't have happened." And we fight. We fight like hell and if you don't fight like hell, you're not going to have a country anymore." (describing President Trump's fight, politically and legally, against what he viewed as a fraudulent election result and the need for robust election integrity). *Id.* at 316-17a.

None of the references to "fight"reasonably refer to an actual physical altercation.

Finally, President Trump also said in the same speech that "everyone here will soon be marching to

the Capitol building to peacefully and patriotically make your voices heard." *Id.* at 292a. The Colorado Supreme Court rejected out of hand this statement's meaning in the context of the Ellipse Speech, concluding this "isolated reference" to peacefully making your voices heard could not "innoculate" the "fight like hell" words made later in the speech. *Id.* at 110a. So, the court found no problem with using speech five years prior to the Ellipse Speech to import incitement into the meaning of the words used in the Ellipse Speech, but refused to import any meaning into President Trump's calls for "peacefully and patriotically mak[ing] your voices heard" in the same speech and within an hour of the allegedly inciting words.[13]

This kind of out-of-context cherry-picking does not align with this Court's jurisprudence on incitement or with the U.S. Constitution. Thus, President Trump did not incite the attack on the Capitol.

Conclusion

For the foregoing reasons, this Court should reverse the decision of the Colorado Supreme Court.

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[13] For the same contextual reasons explained in this section, the Ellipse Speech could not have been likely to incite lawless action, which is the third prong under *Brandenburg*. Obviously, lawless action did occur on January 6, 2021. But that is not the question before this Court—the question here is, did the Ellipse Speech incite that lawless action?

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