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* STATE OF KANSAS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The State of Kansas submits this brief for two primary reasons. The first is to defend what should be the uncontroversial proposition that "Voters, not lawyers, choose the President. Ballots, not briefs, decide elections." *Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377, 391 (3d Cir. 2020); *accord Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24 (1981) ("[A] State, or a court, may not constitutionally substitute its own judgment for that of the Party."); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 794-95 (1995) ("The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights." (Citation omitted)). The second is that Kansas, as one of the original ratifying states of the Fourteenth Amendment, seeks to ensure that a faithful interpretation of Section 3 is applied.

SUMMARY OF ARGUMENT

Opponents of former President Donald J. Trump are attempting to defeat him before any vote is cast by preventing his name from even appearing on the ballot. Trump's opponents' chosen means for accomplishing this incredible and unprecedented feat is Section 3 of the Fourteenth Amendment, which provides:

> No 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.

For well over 100 years, Section 3 has laid largely dormant.[1] Prior to 2022, the only time Section 3 had been utilized outside of the Civil War era was in 1919, by Congress. *See generally* Clarence Cannon, *Cannon's Precedents of the House of Representatives of the United States* 52-63 (1936). In that instance, Congress used Section 3, coupled with its Article I, Section 5 power, to prevent Representative-elect Victor Berger—an avowed socialist and convicted violator of the Espionage Act—from being seated in the Sixty-Sixth Congress. *Id.* Since the Berger matter, Section 3 has not been used against anyone else in Congress. And there has never been an instance in which Section 3 has been used to keep a presidential candidate off of a state's ballot.

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[1] This is due to the passage of the Act of May 22, 1872, Ch. 193, 17 Stat. 142 (1872), and the Act of June 6, 1898, Ch. 389, 30 Stat. 432 (1898), which removed the disabilities that could possibly be imposed by Section 3.

Undeterred by the dearth of historical support for their position, Trump's opponents, spurred on by an avalanche of recently published academic articles, have filed actions in over thirty different states[2]—all

[2] Trump's opponents have filed thirty-two federal court cases in twenty-eight different states as of the filing of this brief: Case No. 1:23-cv-11 (D. Alaska 2023); Case No. 2:23-cv-1865 (D. Ariz. 2023); Case No. 2:23-cv-2172 (E.D. Cal. 2023); Case No. 2:23-cv-7489 (C.D. Cal. 2023); Case No. 1:23-cv-2543 (D. Colo. 2023); Case No. 3:23-cv-1238 (D. Conn. 2023); Case No. 1:23-cv-1068 (D. Del. 2023); Case No. 9:23-cv-80015 (S.D. Fla. 2023); Case No. 0:23-cv-61628 (S.D. Fla. 2023); Case No. 1:23-cv-393 (D. Idaho 2023); Case No. 6:23-cv-1184 (D. Kan. 2023); Case No. 1:23-cv-335 (D. Me. 2023); Case No. 1:23-cv-12121 (D. Mass. 2023); Case No. 6:23-cv-62 (D. Mont. 2023); Case No. 2:23-cv-1387 (D. Nev. 2023); Case No. 1:23-cv-531 (D.N.H. 2023); Case No. 1:23-cv-416 (D.N.H. 2023); Case No. 3:23-cv-20929 (D.N.J. 2023); Case No. 1:23-cv-766 (D.N.M. 2023); Case No. 1:23-cv-1223 (N.D.N.Y. 2023); Case No. 1:23-cv-10751 (S.D.N.Y. 2023); Case No. 1:23-cv-7833 (S.D.N.Y. 2023); Case No. 5:23-cv-496 (E.D.N.C. 2023); Case No., 5:23-cv-781 (W.D. Okla. 2023); Case No. 1:23-cv-1468 (M.D. Pa. 2023); Case No. 1:23-cv-405 (D.R.I. 2023); Case No. 3:23-cv-4501 (D.S.C. 2023); Case No. 4:23-cv-556 (N.D. Tex. 2023); Case No. 2:23-cv-617 (D. Utah 2023); Case No. 2:23-cv-453 (D. Vt. 2023); Case No. 1:23-cv-01165 (E.D. Va. 2023); Case No. 2:23-cv-598 (W. Va. 2023).

In addition to the federal lawsuits, an additional seventeen state cases or ballot objections have also been filed: Case No. 23STCP03705 (Cal. Super. Ct., L.A. Cty. 2023); Case No. 23CV041314 (Cal. Super. Ct., Alameda Cty. 2023); Case No. 2023cv32557 (Colo. Dist. Ct., 2d Jud. Dist.); Objectors' Petition, Ill. Bd. of Elections (2024); Case No. C-742188 (La. Dist. Ct., 19th Jud. Dist.); *In re: Challenge to Primary Nomination Petition of Trump*, Dep't of the Sec'y of State for the State of Me. (2023); Obj. & Compl., Mass. Ballot Law Comm'n (2024); Case No. 23-cv-128 (Mich. Ct. Cl. 2023); Case No. 23-cv-32577 (Mich. Ct. Cl. 2023); Case No. A23-1354 (Minn. 2023); Case No. MER-L-001762-23 (N.J. Sup. Ct., Mercer Cty. 2023); Five Senators Letter, N.Y. Bd.

of which seek one thing: to keep former President Trump off the ballot in a particular state. As ably argued by others, these challenges fail for the simple reason that Section 3 is not self-executing. If this Court disagrees with that proposition, though, and also finds that Trump's opponents have presented a colorable competing interpretation of Section 3, it will have to construe Section 3. This brief addresses how the Court should decide between the competing interpretations of Section 3 that have been presented. As discussed more fully below, Section 3 should be strictly construed in Trump's favor in light of Section 3's penal nature and the substantial impairment that Section 3 would exact on Trump's (as well as presumably tens of millions of others') First Amendment rights.

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of Elections (2023); Case No. 23-cv-037438-910 (N.C. Super. Ct., Wake Cty. 2023); Case No. SC070658 (Or. 2024); Case No. CL 24000022-00 (Va. Cir. Ct., Richmond Cty. 2024); Case No. 2:2023-cv-2288 (Wisc. Cir. Ct., Dane Cty. 2023); Case No. 2024-cv-53 (Wisc. Cir. Ct., Dane Cty. 2024); Case No. 2023-cv-36100 (Wyo. Dist. Ct., 2d Jud. Dist. 2023).

ARGUMENT

I. Section 3 Must Be Strictly Construed.

It has long been recognized that any question about Section 3's application should be "be resolved against the operation of the law." The Reconstruction Acts, 12 Op. Att'y Gen. 141, 160 (1867). At least two additional grounds exist that mandate an interpretation of Section 3 contrary to the one adopted by the Colorado Supreme Court. The first is the "venerable principle" that laws "imposing penalties are to be construed strictly against the government and in favor of individuals." *Bittner v. United States*, 598 U.S. 85, 101 (2023) (opinion of Gorsuch, J.) (internal quotation marks omitted); *accord Wooden v. United States*, 595 U.S. 360, 387 (2022) (Gorsuch, J., concurring in the judgment) (noting that this "rule first appeared in English Courts"). The second is that constitutional provisions should be interpreted in a way that avoids impinging upon one another, especially when the impinged provision relates to one of the most sacred and cherished rights Americans have. *Accord Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2470 (2019) (acknowledging "that § 2 [of the Twenty-First Amendment] grants States latitude with respect to the regulation of alcohol," but noting that "the Court has repeatedly declined to read § 2 [in a way violative of pre-existing constitutional provisions and norms]").

A. Strict construction is warranted because Section 3 is penal.

Laws that are penal in nature are to "be strictly construed." *See, e.g.*, *Providence Steam-Engine Co. v. Hubbard*, 101 U.S. 188, 191 (1879). Here, there is no question that Section 3 is penal and exacts a tremendous disability on Trump, as well as likely tens of millions of Americans who wish to vote for him. Accordingly, strict construction should be applied when interpreting Section 3.

i. Section 3 is penal.

The decision of whether a law is penal hinges upon "the severity of the disability imposed," as well as the law's purpose and the circumstances surrounding its passage. *Trop v. Dulles*, 356 U.S. 86, 95–96 & n.18 (1958). "The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect." *Id.* When that occurs, "[t]he controlling nature of such statutes normally depends on the evident purpose of the legislature." *Id.* at 96.

The severity of the loss potentially imposed by Section 3 cannot be overstated. Not only are Trump's rights as a candidate implicated. *See In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (No. 5,815) (stating that Section 3, "which, at once without trial, deprives a whole class of persons of office," is inconsistent with "those provisions of the constitution which deny to the legislature power to deprive any person of life, liberty or property, without due process of law, or to pass a

bill of attainer or an ex post facto"). So too are the rights of his political party "to select a standard-bearer who best represents the party's ideology and preference," *Eu v. San Francisco Cty. Democratic Cent. Committee*, 489 U.S. 214, 224 (1989) (citation omitted), and the rights of individual voters who wish to support Trump. *See Stone v. Bd. of Election Comm'rs for City of Chicago*, 750 F.3d 678, 681 (7th Cir. 2014) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983)); *see also Williams v. Rhodes*, 393 U.S. 23, 30 (1968) ("[T]he right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank among our most precious freedoms."). If a statute that authorizes the seizing of a few boxes of sugar "is a highly penal law," *United States v. Eighty-Four Boxes of Sugar*, 32 U.S. (7 Pet.) 453, 462 (1833), certainly a provision that strips a leading presidential candidate of holding the aspired-to office fits the bill as well.

As for the purpose behind Section 3, it was well understood from the Fourteenth Amendment's early days that it was a penal provision. In 1869, Chief Justice Chase had this to say this about Section 3's passage:

> It is not improbable that one of the objects of this section was to provide for the security of the nation and of individuals, by the exclusion of a class of citizens from office; but it can hardly be doubted that the main purpose was to inflict upon the leading and most

> influential characters who had been engaged in the Rebellion, exclusion from office *as a punishment for the offense*.

In re Griffin, 11 F. Cas. 7, 25-26 (C.C.D Va. 1869) (emphasis added). A year earlier, the Florida Supreme Court reached the same conclusion, stating that Section 3 was "obviously penal in its character." *Opinion of Justs.*, 12 Fla. 651, 653 (1868). Additionally, in 1867, Attorney General Henry Stanbery stated that Section 3 was "penal[] and punitive." The Reconstruction Acts, 12 Op. Att'y Gen. 141, 160 (1867). These contemporary interpretations of Congress's purpose are entitled to great weight. *See, e.g.*, *Utah v. Evans*, 536 U.S. 452, 503 (2002) (Thomas, J., concurring in part and dissenting in part) (citing *Printz v. United States*, 521 U.S. 898, 905 (1997); *Myers v. United States*, 272 U.S. 52, 175 (1926)); *United States v. Zucca*, 351 U.S. 91, 96 (1956) (citations omitted); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

Courts and federal officials spoke with such clarity when describing Congress's primary purpose because the purpose would have been clear to anyone who had lived through the Civil War and the reconstruction that followed. Understandably, following that great schism, Congressional Republicans were angry and wanted to punish treasonous actions. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1006 (Rep. Morrill presenting a petition on behalf of his constituents "asking that such conditions may be imposed upon the rebel States as shall punish treason at least with ineligibility to office and loss of

power"); *id.* at 1162 (Rep. Ames presenting a similar petition on behalf of his constituents); *id.* at 1200 (Rep. Kelley presenting a similar petition on behalf of his constituents); *id.* at 1272 (Sen. Howe presenting a similar petition on behalf of his constituents); *id.* at 1272 (Sen. Wilson presenting a similar petition on behalf of his constituents); *id.* at 1349 (Rep. Pike presenting a similar petition on behalf of his constituents); *id.* at 1436, 1752 & 2851 (Sen. Sumner presenting a similar petition on behalf of his constituents); *id.* at 1772 (Rep. Marston presenting a similar petition on behalf of his constituents); *see also* 39th Cong., 1st Sess. 1200 (Rep. Broomall presenting a petition on behalf of his constituents "praying that Congress to impose such conditions upon the rebel States as shall punish treason, reward loyalty, and abolish distinctions in their constitution and laws on account of color or race"); *id.* at 2032 (Rep. Miller presenting a similar petition on behalf of his constituents); *id.* at 2282 (Rep. Julian describing "rebel leaders" as "human monsters who plunged our peaceful country into war"); *id.* at 2544 (Sen. Stevens stating that "every rebel who shed the blood of loyal men should be prevented from exercising any power in this Government"). Thus, for anyone alive in the 1860s, there would have been no question that Congress's primary purpose was in passing Section 3 was punishment. Rather, questions have only recently been raised as opponents of Trump attempt to breathe new life into a provision that their own experts previously believed "was one of the vestigial portions of the Constitution" and had been "quickly neutered by Congress." Gerard N. Magliocca, *Amnesty and*

Section Three of the Fourteenth Amendment, 36 Const. Comment. 87, 87 (2021).

ii. Penal provisions are strictly construed in favor of individuals.

As Section 3 is penal in nature, it is to be strictly construed. Strict construction means that, when faced with two competing interpretations of a penal law, the Court is to "construe[] ambiguities in penal laws *against* the government and with lenity toward affected persons." *Buffington v. McDonough*, 143 S. Ct. 14, 19 (2022) (Gorsuch, J. dissenting from denial of certiorari); *accord Costello v. Immigr. & Naturalization Serv.*, 376 U.S. 120, 128 (1964) ("If, however, despite the impact of § 241(b)(2), it should still be thought that the language of § 241(a)(4) itself and the absence of legislative history continued to leave the matter in some doubt, we would nonetheless be constrained by accepted principles of statutory construction in this area of the law to resolve that doubt in favor of the petitioner."); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."). This rule flows from the recognition that, "as between the government and the individual, the benefit of the doubt about the meaning of an ambiguous law must be given to the individual, not to authority; for the state makes the laws." *Buffington*, 143 S. Ct. at 19 (Gorsuch, J., dissenting from denial of certiorari) (internal quotation marks and alteration omitted); *accord*

Wooden, 595 U.S. at 390 ("[W]here uncertainty exists, the law gives way to liberty.").

While this rule is most typically employed in the statutory-interpretation context, its application is not limited to just those instances. When a constitutional provision is being applied in a manner that impinges upon the powers or rights of a state or person, the provision in question must be construed strictly. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 34 (1824). And, indeed, at least one state supreme court applied this rule in interpreting Section 3 shortly after the Fourteenth Amendment's adoption. *Opinion of Justs.*, 12 Fla. 651, 653 (1868) (referring to Section 3 and stating that it "is obviously penal in its character, and judicial tribunals have ever been strict constructionists in dealing with enactments of that class, whether in the fundamental law or in ordinary statutes").

The need for strictly construing a provision like Section 3 is made even greater by the penalty it is capable of exacting without affording a political candidate any of the attendant due process protections one would expect. In 2020, over 1.3 million people voted for Trump in Colorado. Adding that number to the number of votes he received in the numerous other states in which similar challenges have been brought, it appears that tens of millions of voters could potentially be effectively stripped of their right to franchise by having their candidate of choice left off of their ballot. In places like Colorado that infringement may hinge upon a truncated court proceeding. *See* Colo. Rev. Stat. § 1-1-113. In others, such as Maine, it

may be left to an even more truncated administrative "hearing" before a single, unelected official. *See* Me. Rev. Stat. § 337. Regardless, in none of the states in which challenges have been made to the inclusion of Trump on that state's ballot does it appear that Trump, and vicariously his supporters, will receive the sort of process that great deprivations require under our Constitution. Thus, the lack of process in a case where the stakes are so incredibly high militates against anything but the narrowest interpretation of Section 3. *See generally Wooden*, 595 U.S. at 1081 (noting that strictly construing penal laws is "a means for upholding the Constitution's commitment to due process and the separation of powers").

The reporters are replete with examples of this Court's refusing to give penal laws expansive interpretations when narrower ones plausibly exist. *See generally Johnson v. United States*, 576 U.S. 591, 615 (2015) (Thomas, J., concurring) (stating, with regard to vague laws, "antebellum American courts—like their English predecessors—simply refused to apply them in individual cases under the rule that penal statutes should be construed strictly"); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."). For instance, in *United States v. Sharp*, 27 F. Cas. 1041, 1043 (C.C. Pa. 1815) (No. 16,264), when faced with competing interpretations—"one[] which may fix a crime upon the[] men" and one that would make the acts in question "no crime at all," Justice Washington opted for the latter on the ground that "[l]aws which create crimes[] ought to be so explicit in themselves,

or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid." Likewise, in *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820), Chief Justice Marshall declined to adopt a more expansive interpretation of a law because "the plain meaning of [its] words" did not mandate it, even though portions of the law suggested that Congress probably intended the more expansive interpretation. *Id.* at 105. In short, this Court, as do the other courts in this Country, has a long history of narrowly construing laws that are penal in nature in order to avoid "leaving their substantive elements to the caprices of either judge or jury." *Ex Parte Taft*, 225 S.W.457, 461 (Mo. 1920). This case presents no basis for this Court to deviate from that precedent.

B. Strict construction is necessary to avoid interfering with Trump's First Amendment rights.

The Constitution is to be interpreted "in the manner it was drafted and ratified—as a unified, coherent whole." *Ariz. State Legis. v. Ariz Indep. Redistricting Comm'n*, 576 U.S. 787, 829 (2015) (Roberts, C.J., dissenting); *accord Poindexter v. Greenhow*, 114 U.S. 270, 286 (1885) (noting that the Constitution's provisions are "to be construed and applied in harmony with all the provisions of that instrument"). Accordingly, "it is a necessary presumption that[, when] the people [exercise their power to amend the Constitution, they do so] seek[ing] to confirm and improve, rather than to weaken and impair the general spirit of the constitution." *In re*

Griffin, 11 F. Cas. 7, 26 (C.C.D Va. 1869). Thus, when interpreting a constitutional provision, the provision in question should not be construed in a way that interferes with or constrains a previously enumerated constitutional provision, *see Tenn. Wine & Spirits*, 139 S. Ct. at 2469 (stating that the Twenty-First Amendment did not override all other then-existing constitutional provisions), unless it is clear that such interference or constraint is intended, *see generally* U.S. Const. amend. XXI, § 1; *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1495-96 (2019) (recounting how the Eleventh Amendment was ratified in order to remedy judicial interpretations of Article III).

"The central commitment of the First Amendment, is that debate on public issues should be uninhibited, robust, and wide-open." *Bond v. Floyd*, 385 U.S. 116, 136 (1966) (internal quotation marks omitted). The First Amendment is "at its zenith" when applied to "core political speech," *Meyer v. Grant*, 486 U.S. 414, 420, 425 (1988), especially when such speech is made by elected officials, *see Wood v. Georgia*, 370 U.S. 375, 394-95 (1962). Thus, "it can hardly be doubted that the constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) ("There is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs, includ[ing] discussions of candidates." (Internal quotation marks and alteration omitted)).

Here, there is no question that the only basis for the application of Section 3 is Trump's speech leading up to and on January 6th—none of which called for violence or "insurrection or rebellion." Trump did not take up arms, trespass onto any property, or otherwise actively participate in what transpired on January 6th. Plain and simple, the conduct in question is pure speech, and the type of speech that this Court has indicated is subject to few restrictions. *See FEC v. Ted Cruz for Senate*, 596 U.S. 289, 305 (2022) ("This Court has recognized only one permissible ground for restricting political speech: the prevention of 'quid pro quo' corruption or its appearance."). The case for Trump's disqualification rides heavily not on overt actions Trump himself took, but rather on what others did later, supposedly in sympathy with his speech. *See* Pet. App. 91a-100a.

Therefore, in light of this, and to ensure that Trump's First Amendment rights are not infringed upon, Section 3 must be strictly construed to ensure that protected speech is not punished.

Undoubtedly, there is a point at which a person's speech goes from protected to unprotected and may be punished. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). While the line is not clearly defined, we do know that "peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high minded and patriotic, which did not agree with the one in power," is constitutionally protected. *Stromberg v. California*, 283 U.S. 359, 369 (1931). Section 3 does not provide

the appropriate backdrop for determining when a speaker's speech should be deemed to have gone too far based on the actions of another. Deciding whether one's speech is protected or not is already a difficult enough endeavor, requiring consideration of "content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147–48 (1983). It should be made based on a fully developed record and only after an individual has been afforded all of the due process that would be expected when challenges to a person's speech are made and their liberties and rights are at stake. In contrast, Section 3 does not guarantee any procedural safeguards. As recounted by Justice Samour below, the protections provided in this case looked nothing like those afforded to those that have their civil rights and liberties called into question. Pet. Appx. 152a-60a (Samour, J., dissenting). Remarkably, the protections in other states are even less, as we have seen in Maine. Thus, while it is possible that an elected official's speech can outpace his First Amendment rights, that determination should not be made in a case such as this. Rather, it should only be approached where the matter is fully presented and fairly reviewed, as is required under First Amendment analysis. *See generally Virginia v. Black*, 538 U.S. 343, 367 (2003) (stating "all of the contextual factors that are necessary to decide" whether statements fall within the First Amendment must be considered).

II. Section 3 Is Not Applicable To Trump.

As the text of Section 3 makes clear, three requirements must be satisfied before Section 3's proscription is implicated: (1) the individual in question must be attempting to fill or maintain a position covered by Section 3, (2) the individual must have previously taken an oath while serving in one of the positions enumerated in Section 3, and (3) the individual must have engaged in an insurrection or rebellion. Below, the Colorado Supreme Court recognized that there were competing interpretations of each of these requirements, and ultimately opted for the most expansive one. This was error, especially in light of the narrower interpretation compelled by the rule of lenity.

A. Section 3 does not cover the President of the United States.

Trump's opponents' interpretation of Section 3 creates a classic elephant-in-a-mousehole situation. *See Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 274 (2023) ("Congress typically does not hide elephants in a mousehole." (Internal quotation marks omitted)); *see also Biden v. Nebraska*, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring) (stating that the interpretation of legal texts must be approached with understanding of "commonsense principles of communication"). Few, if any, in the 1860s or now would contest the proposition that the President of the United States is the single most powerful position in the federal government. Stated slightly differently, the position of President is not one that would have

been overlooked. What's more, leaders in Congress at the time had openly questioned whether Section 3 covered the President, *see* Cong. Globe, 39th Cong., 1st Sess. 2899 (1866) (Senator Reverdy Johnson, former U.S. Attorney General, stating on the Senate floor that he "suppose[d] the framers of the amendment thought it necessary to provide for such an exigency," but he "d[id] not understand [Section 3 as] exclud[ing former rebels] from the privilege of holding the two highest offices in the gift of the nation"), and even had rejected a draft of Section 3 that did explicitly cover the President, *id.* at 919. The only plausible explanation for this is that Section 3's exclusion of the position of President was the product of "deliberate choice, not inadvertence," *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003).

Trump's opponents have spilled much ink attempting to explain why this absence should not be dispositive. They have failed, however, to provide a colorable reason why the 39th Congress did not just add the word "President" at the front of the list of government positions that were enumerated.[3] The 39th Congress was clearly aware of and considering the position of President when it drafted Section 3, evident most clearly by its inclusion of the "elector[s] of President and Vice President" and consideration of a draft version that included the presidency. The fact that the enacted version of Section 3 contains a list of

[3] Even if Trump's opponents could articulate a likely reason for Congress's omission, this still would not warrant their interpretation because "probability is not a guide which a court, in construing a penal statute, can safely take." *Wiltberger*, 18 U.S. (5 Wheat.) at 105.

positions throughout the federal, state, civil, and military ranks, but does not include the position of President should sound the death knell to Trump's opponents' competing interpretation. *See, e.g.*, *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 836 (2001) ("[T]he mention of some implies the exclusion of others not mentioned" so long as "there was a good reason to consider" the items not mentioned when the law "was drawn."). Accordingly, Section 3 should not be read to cover the President when the drafters of Section 3 opted not to include that position. *See Wooden v. United States*, 595 U.S. 360, 394 n.4 (2022) (Gorsuch, J., concurring in judgment) (noting that, "before [the Court] choose[s] the harsher alternative, it is necessary that Congress should have spoken in language that is clear and definite").

Even if Trump's opponents' interpretation were colorable, though, it could not prevail over Trump's. The reason: reasonable doubt as to whether Congress intended for Section 3 to apply to the position of President. *See, e.g.*, *Bifulco v. United States*, 447 U.S. 381, 400 (1980) ("Of course, to the extent that doubts remain, they must be resolved in accord with the rule of lenity."); *see also Biden v. Nebraska*, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring) (stating that the rule of lenity "break[s] a tie between equally plausible interpretations of a statute"). Section 3's language certainly does not mandate such a determination, nor do the facts surrounding Section 3's enactment or the legislative history leading up to that point. As a result, "it is the duty of a court not to inflict the penalty" set forth in Section 3 by finding that the section does not apply to the position of President. *Wooden*, 595 U.S. at

393 (Gorsuch, J., concurring) (citation and alteration omitted); *accord United States v. Granderson*, 511 U.S. 39, 54 (1994) ("In these circumstances—where text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in Granderson's favor.").

B. Trump did not engage in an insurrection or rebellion.

Trump also did not engage in an insurrection or rebellion. The longstanding interpretation of the phrase "insurrection or rebellion" in Section 3 is that it only "covers the case of domestic war."[4] The Reconstruction Acts, 12 Op. Att'y Gen., 141, 160 (1867). The Colorado Supreme Court's *ad hoc* definition and application of the term "insurrection"—namely, "a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish the peaceful transfer of power in this country," Pet. Appx. 86a, ¶ 184—is completely divorced from the understanding that phrase would have had when Section 3 was passed by Congress and ratified by the people. *See generally N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 34 (2022) (stating that constitutional provisions are to be judged based on the then-prevailing understanding of the

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[4] Trump's opponents do not claim that he violated Section 3's "aid or comfort" clause, Pet. App. 260a-261a, thus, leaving unchallenged the longstanding interpretation that that clause only "applies to foreign wars." The Reconstruction Acts, 12 Op. Att'y Gen., 141, 160 (1867).

people because such provisions "are enshrined with the scope they were understood to have *when the people adopted them*" (citation omitted)).

Unlike today, the meaning of Section 3's usage of the phrase "insurrection or rebellion" would have been well understood by people in the 1860s, as they had just lived through arguably the most horrific time of our Country's existence. To them, there would have been nothing gray about this phrase's definition, and it most assuredly would not have taken much parsing through facts to understand the difference between a one-off occurrence of an angry mob protesting/rioting and an insurrection/rebellion. This was because there was a clear divide between protest or riot and insurrection or rebellion, the latter of which occurred only when there was an "attempt[] to change a subsisting government by force." *Luther v. Borden*, 48 U.S. [7 How.] 1, 26 (1849) (Mr. Hallett, counsel for plaintiff in error); *accord Charge to Grand Jury-Treason*, 30 F. Cas. 1034, 1035 (C.C.S.D.N.Y. 1861) (No. 18,271) ("The same is true, in a qualified sense, in the case of a civil war arising out of an insurrection or rebellion against the mother government."). Contemporary decisions used the terms "insurrection" and "rebellion" to refer to the Civil War, not riots or protests. *See Latham v. Clark*, 25 Ark. 574, 591 (1869) ("This proposition we can not assent to. For, however great may have been the numbers engaged in the rebellion, however vast the proportions it may have assumed, or however long it may have been carried on without recognition as such, can not elevate the rebellious government to the dignity of a government *de facto*, change the insurrection from a rebellion to a

national war."); *Hedges v. Price*, 2 W. Va. 192, 206 (1867) ("Nor has the government of the United States, by word or act, ever acknowledged, or recognized the so-called confederacy as a government, or nation—nor in any other way than as a powerful combination of citizens in a state of insurrection and rebellion against their lawful government.").

When Congress drafted Section 3, it did not do so on a blank slate. Rather, it clearly borrowed the phrase "insurrection or rebellion" from other laws it had recently passed "in reaction to the American Civil War," Erin Creegan, *National Security Crime*, 3 Harv. Nat'l Sec. J. 373, 381 (2012). Those laws were direct responses to the Civil War itself and used the phrase to refer directly to that conflict. In adopting the same phrase for Section 3, then, Congress demonstrated that Section 3 was to have a similar reach. *See George v. McDonough*, 596 U.S. 740, 753 (2022) ("[W]hen Congress employs a term of art, that usage itself suffices to adopt the cluster of ideas that were attached to each borrowed word in the absence of indication to the contrary." (internal quotation marks and alteration omitted)).

For instance, in the Act of March 3, 1863, Ch. 75, § 30, 12 Stat. 736 (1863), Congress declared:

> That, in time of war, *insurrection or rebellion*, murder, assault and battery with an intent to kill, man-slaughter, wounding, shooting or stabbing with an intent to commit murder, robbery, arson, burglary rape, assault and battery with

> an intent to commit rape, and larceny, shall be punishable by the sentence of a General Court Martial or Military Commission, when committed by persons who are in the military service of the United States, and subject to the articles of war; and the punishment of such offenses shall never be less than those inflicted by the State, territory or district in which they may have been committed.

(Emphasis added).

In the Act of July 17, 1862, Ch. 195, § 2, 12 Stat. 590 (1862), Congress stated:

> [I]f any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give aid or comfort thereto, or shall engage in or give aid and comfort to any such existing *rebellion or insurrection*, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding $10,000, and by the liberation of all his slaves, if any he have, or by both said punishments, at the direction of the court.

(Emphasis added).

In the Act of June 17, 1862, Ch. 103, § 1, 12 Stat. 430 (1862), Congress instituted an oath to be given to every person who may be summoned to serve as a grand or petit juror, or venireman, or talesman:

> You do solemnly swear, that you have not, without duress and constraint, taken up arms, or joined any insurrection or rebellion against the United States; that you have not adhered to any *insurrection or rebellion*, giving it aid and comfort; that you have not, directly or indirectly given any assistance in money, or any other thing, to any person or persons whom you knew, or had good ground to believe, had joined, or was about to join, said insurrection and rebellion, or had resisted, or was about to resist, with force of arms, the execution of the laws of the United States;

(Emphasis added).

In the Act of June 7, 1862, Ch. 98, § 1, 12 Stat. 422 (1862), Congress ordered that:

> [I]n any State, or in any portion of any State, by reason of *insurrection or rebellion*, the civil authority of the government of the United States is obstructed, so that the provisions of the act of August 5th, 1861, for assessing, levying, and collecting the direct taxes therein mentioned cannot be peaceably

> executed, the said direct taxes, by said act apportioned among the several States and Territories respectively, shall be apportioned and charged in each State wherein the civil authority is thus obstructed, upon all the lands and lots of ground therein respectively situated, except such as are exempt by any law of the State or United States, as the said lands were enumerated and valued under the last assessment and valuation thereof, made under the authority of said State or Territory previous to the first day of January, 1861.

(Emphasis added).

Congress's consistent usage of "insurrection or rebellion" to refer to the Civil War continued on past the passage of the Fourteenth Amendment. For instance, in the Act of March 2, 1867, Ch. 185, 15 Stat. 545 (1867), Congress directed that:

> Where any appeal or writ of error has been brought to the Supreme Court from any final judgment or decree of an inferior court of the United States for any judicial district in which, subsequently to the rendition of such judgment or decree, the regular sessions of such court have been suspended or interrupted by *insurrection or rebellion*, such appeal or writ of error shall be valid and effectual, notwithstanding the time limited by law

> for bringing the same may have previously expired; and in cases where no appeal or writ of error has been brought from any such judgment or decree, such appeal or writ of error may be brought within ONE YEAR from the passage of this act.

(First emphasis added).

Likewise, President Andrew Johnson also used the phrase "insurrection or rebellion" when referring to the Civil War in his December 1868 Amnesty Proclamation:

> Now, therefore, be it known that I, Andrew Johnson, President of the United States, do, by virtue of the Constitution, and in the name of the people of the United States, hereby proclaim and declare, unconditionally and without reservation, to all and every person who, directly or indirectly, participated in the late *insurrection or rebellion*—excepting such person or persons as may be under presentment or indictment in any Court of the United States having competent jurisdiction, upon a charge of treason, or other felony--a full pardon and amnesty for the offense of treason against the United States, or of adhering to their enemies during the late civil war--with restoration of all rights of property, except as to slaves, and except also, as to

> any property of which any person may have been legally divested under the laws of the United States.

Presidential Proclamation 179—Granting Full Pardon and Amnesty for the Offense of Treason Against the United States During the Late Civil War (Dec. 25, 1868) (emphasis added).

Thus, in the mind of Section 3's drafters and ratifiers, there would have been no doubt that Section 3 was to apply only in those instances that amounted to something comparable to the Civil War, *see* The Reconstruction Acts, 12 Op. Att'y Gen., 141, 163 (1867) ("Undoubtedly, although every rebellion against the United States is comprehended, it is the late rebellion which almost, if not altogether, can be said to be the proper subject matter . . . ."). That explains why Attorney General Stanbery said the phrase "insurrection or rebellion" was to only "cover[] the case of domestic war existing in form of rebellion or insurrection," *id.* 160. While the occurrences on January 6th were certainly not our Country's finest, there is no colorable basis to conclude that they are, in any way or form, an internal uprising akin to the war that transpired from 1861 to 1865. Accordingly, Trump's opponents' interpretation of Section 3's "insurrection or rebellion" phrase should be rejected.

Nevertheless, even if this Court were to assign some weight to Trump's opponents' interpretation, it still should not carry the day because it is not the narrowest interpretation, and, under the rule of lenity

cannot be adopted over the narrower one put forward by Trump.

CONCLUSION

Operating under the mistaken guise that they are saving democracy, former President Trump's opponents have embarked on one of the most antidemocratic paths possible: attempting to strip presumably tens of millions of voters of their candidate of choice based on a handful of people's strained interpretation of a constitutional provision that does not apply to this situation. For the reasons stated above, and by other briefs submitted in support of Trump, this should not happen. Accordingly, the Colorado Supreme Court's decision should be reversed.

Respectfully submitted,

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