No. 23-719

In the Supreme Court of the United States

DONALD J. TRUMP, PETITIONER

v.

NORMA ANDERSON, ET AL.

ON WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

BRIEF FOR CHUCK GRAY, SECRETARY OF STATE OF WYOMING, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The question presented is:

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

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INTEREST OF AMICI CURIAE

Chuck Gray, Secretary of State of Wyoming, is responsible for administering, supervising, and conducting elections in Wyoming. The eligibility of a candidate for the Nation's highest office is an exceptionally important question, for only a clear resolution ensures the "[c]onfidence in the integrity of our electoral processes" that is "essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Secretary Gray, like other state election officials across the Nation, has a strong interest in ensuring confidence in the integrity of elections in Wyoming. By misconstruing several complex questions of federal constitutional law, the Colorado Supreme Court effectively disenfranchised millions of voters from supporting the candidate of their choice. Such disenfranchisement threatens public confidence in elections not only in Colorado, but nationwide. Secretary Gray, therefore, respectfully submits this brief in the hopes of assisting the Court in resolving the question presented in a manner that maximizes confidence in our Nation's electoral processes going forward.[1]

SUMMARY OF ARGUMENT

I. The text, history, and structure of the Constitution compel the conclusion that the terms "officer" and "Officer of the United States" neither are interchangeable nor include the President. Whatever his status in other contexts or the meaning of these terms in colloquial parlance, the Constitution's employment of the

[1] No counsel for any party authored this brief, in whole or in part, nor did counsel for any party or either party make a monetary contribution intended to fund this brief in whole or part. No person or entity other than amicus and counsel for amicus contributed monetarily to this brief's preparation or submission.

phrase "Officer of the United States" reflects a term of art that does not include the President.

Although the Constitution of 1788 refers to "Officers of the United States" in several places—the Appointments Clause, the Impeachment Clause, and the Commissions Clause—each usage clearly illustrates that the term does not include the President. Nor did the Constitution of 1788 use the term "officer" to refer to the President. Thus, multiple commentators, including Justice Story, have treated the phrase "Officer of the United States" as a constitutional term of art. And when this Court encountered the phrase in several statutes following Reconstruction, it interpreted the phrase as coterminous with its meaning in the Appointments Clause—which, again, unquestionably excludes the President.

II. Even if the President were an "Officer of the United States," Former President Trump did not commit either of the two acts described in section 3—"engag[ing] in insurrection or rebellion" against the United States or "giv[ing] aid or comfort to the enemies" of the United States. Each of these disqualifying offenses is distinct and each contains its own elements.

The first offense, where a covered individual has "engaged in" an "insurrection or rebellion," disqualifies individuals who have directly and personally participated in a severe, organized political uprising against the United States. The term "engaged in" does not, standing alone, include conduct designed to induce action in others. Contemporaneous statutes, which punished individuals inciting or aiding serious political violence as well as those engaging in them, highlight the difference between a direct role—that is, engaging in—violent opposition to the government and an indirect role

in it. And the terms "insurrection" and "rebellion" connote severe degrees of violent political opposition to a government: these terms exist on a spectrum, with "insurrections" and "rebellions" as the most severe terms for political unrest short of outright war. Former President Trump, who made various statements prior to and during the political unrest of January 6, did not "engage in" any political violence himself, nor did the events of January 6, whatever their scope, reach the degree of seriousness to constitute an "insurrection" or "rebellion" within section 3's scope. The Colorado Supreme Court erred in concluding otherwise.

The second offense, where a covered individual has "given aid or comfort to the enemies" of the United States, requires an individual to provide material tangible or logistical support or relief to those making war on the United States. While "giving aid or comfort" to an individual does not require the personal participation in political unrest that "engaging in" requires, the phrase's consistent use suggests that the term includes providing a hostile belligerent with supplies, ammunition, and similar resources necessary to prosecute a war. Likewise, the "enemies" of the United States are not merely those who have undertaken political unrest or even committed crimes against the United States: the term includes only those who owe allegiance to a hostile power or those who have themselves made war, formally or otherwise, on the United States. The Colorado Supreme Court's judgment cannot be upheld based on section 3's second offense because Former President Trump's statements did not provide hostile belligerents with support or relief in any sense within the phrase "aid or comfort"; likewise, the participants in the unrest of January 6 did not make war

on the United States. The Colorado Supreme Court's judgment should be reversed.

ARGUMENT

I. The President Is Not an "Officer of the United States."

The notion that the President is not an "Officer of the United States" is strange to the modern colloquial ear. But the phrase has a specific meaning that plainly excludes the President, reinforced by decades of precedent. The Colorado Supreme Court erred in concluding contrary to this long-settled understanding.

The Colorado Supreme Court concluded that the President must be an "Officer of the United States" because an officer of the United States was anyone who held an office in the United States government, "'without any qualification.'" Pet. App. 71a (citation omitted). But constitutional drafting is not so "informal[]." *Id.* As constitutional text, history, and structure reveal, the terms "officer" and "Officer of the United States" are not interchangeable, and the President—whatever his status in other contexts—is not an "Officer of the United States" as the Constitution employs that phrase.

At the outset, the Constitution of 1788 used *neither* the phrase "Officer of the United States" *nor* the standalone term "officer" to refer to the President. The Constitution of 1788 referred to "Officers of the United States" in several places—none of which could plausibly include the President. *First*, Article II, section 2's Appointments Clause empowers the President to nominate, and with the advice and consent of the Senate, to "appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States," which unquestionably cannot include

the President himself. *Second*, Article II, section 3 obligates the President to "Commission all the Officers of the United States," which no President has ever understood to include commissioning himself. Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution Part III: The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62 S. Tex. L. Rev. 349, 416-18 (2023). *Third*, Article II, section 4's Impeachment Clause provides that the "President, Vice President, and all civil Officers of the United States" may be impeached and removed from office for certain offenses. Again, there is no coherent textual reading of the Impeachment Clause other than that the President and Vice President are not civil "Officers of the United States."

Writing in his *Commentaries*, Justice Story recognized this distinction in the Impeachment Clause's text. Per Story, the Impeachment Clause did "not even affect to consider [the President and Vice President] officers of the United States." 3 Joseph Story, Commentaries on the Constitution of the United States § 793 (4th ed. Boston: Little, Brown and Company, 1873). As Story understood it, the "'civil Officers of the United States' meant such as derived their appointment from and under the national government," while other office-holders, such as the President and Vice President, "derived their appointment from the States, or the people of the States." *Id.*

The few times this Court interpreted whether an individual was an officer of the United States during and following Reconstruction, it has done so by referencing this constitutional term of art. For example, in *United States v. Germaine*, 99 U.S. 508 (1878), this Court interpreted a criminal statute that applied to "[e]very officer

of the United States." *Id.* at 509. The defendant was neither nominated by the President and confirmed by the Senate, nor appointed as an inferior officer, so he argued that he was not, therefore, an officer of the United States. *Id.* This Court agreed, turning to the Appointments Clause to understand the term: "It [was], therefore, not to be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to" include anyone not appointed consistent with the Clause. *Id.* at 510, 512. The Court reiterated its holding in *Germaine* a mere decade later in *United States v. Mouat*, 124 U.S. 303 (1888), resolving whether an individual was an "officer of the United States" for purposes of a reimbursement statute by resort to the Appointments Clause. *Id.* at 307. This Court determined that the meaning of the phrase "officer of the United States, in any of the various branches of its service, [had] been very fully considered . . . in *United States v. Germaine*," and that the phrase "officer of the United States," as used in the statutes implicated in *Germaine* and *Mouat*, matched the "well established definition" that came from the Appointments Clause. *Id.* This Court's modern observations in other contexts are consistent with *Germaine* and *Mouat*.[2]

[2] Though far removed from the usage of the phrase at either the Founding or during the framing of the Fourteenth Amendment, this Court's modern observations in other contexts suggest an understanding of the phrase "officers of the United States" consistent with *Germaine* and *Mouat*. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976) (noting in passing that "the term 'Officers of the United States' as used in Art. II . . . is a term intended to have substantive meaning"); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 497-98 (2010) ("The people do not vote for the 'Officers of the United States.'").

Founding-era documents likewise recognized the term "officer of the United States" as a term of art that did not include the President. The phrase "officer of the United States" derived from the English analogue of "officers . . . of the Crown," who were individuals appointed solely by, and loyal solely to, the Crown. Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 Cornell L. Rev. 1045, 1053, 1055-56 (1994). As Alexander Hamilton used the term in describing the President's appointment power, "[t]he President is to nominate . . . in general all officers of the United States established by law, and whose appointments are not otherwise provided for by the Constitution," with the Senate's advice and consent. The Federalist No. 69, 1788 WL 483, at *3 (A. Hamilton). Hamilton routinely took the distinction between the President and "officers" as given. See The Federalist No. 67, 1788 WL 481 (A. Hamilton) (discussing the appointment power); The Federalist No. 76, 1788 WL 490 (A. Hamilton) (same); The Federalist No. 77, 1788 WL 491, at *3 (A. Hamilton) (noting the President's authority "in commissioning all the officers of the United States"). Simply put, no one in the Revolutionary era would have confused the King for an "officer of the Crown"—nor the President for an analogous "officer of the United States."

Nor did the Constitution of 1788 use the term "officer" alone to refer to the President. As then-Assistant Attorney General Antonin Scalia observed as then-head of the Department of Justice's Office of Legal Counsel, "when the word 'officer' is used in the Constitution, it invariably refers to someone other than the President or

Vice President."[3] "This use of the word 'officer' in the Constitution," per Scalia, "led the Department of Justice consistently to interpret the word in other documents as not including the President or Vice President unless otherwise specifically stated." *Id.* Likewise, then-head of OLC William Rehnquist noted in passing that "[g]enerally, statutes which refer to 'officers' or 'officials' of the United States are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive."[4]

These intra-textual clues, consistent usage throughout the Constitution, and contemporaneous judicial understandings strongly suggest that the Framers of the Fourteenth Amendment intended the phrase "officers of the United States," as used in section 3, to mirror its usage in the Constitution of 1788. *See* U.S. Const. art. II, § 4 (Impeachment Clause); *id.* art. II, § 2, cl. 2 (Appointments Clause); *id.* art. II, § 3 (Commissions Clause).

But section 3's structure suggests as much as well. Section 3 disqualifies officers of the United States who commit one of two predicate acts along with three categories of office-holders *not* appointed by the President: Members of Congress, Members of state legislatures, and executive or judicial officers of the States. *Id.* amend. XIV, § 3. If the Colorado Supreme Court's understanding of "officer"—that is, one who held any office, Pet. App. 71a-72a—were correct, section 3 would not need to

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[3] Antonin Scalia, Memorandum to Kenneth A. Lazarus, at 2 (Dec. 16, 1974), available at https://irp.fas.org/agency/doj/olc/121674.pdf (last visited Jan. 17, 2024).

[4] William H. Rehnquist, Memorandum for the Honorable Egil Krogh, at 3 (Apr. 1, 1969), available at https://www.justice.gov/olc/page/file/935966/dl?inline (last visited Jan. 17, 2024).

spell out these other individuals; at a minimum, Members of Congress would have been "officers of the United States."

The Colorado Supreme Court's definition of "officers of the United States" requires this Court to assume that the framers of the Fourteenth Amendment deliberately included superfluous language in the groups section 3 covered. Moreover, it requires this Court to believe those framers intended that a term that clearly excluded the President in other constitutional contexts included him for section 3 alone. There is no reason to assume such shoddy draftsmanship from the framers of the Fourteenth Amendment: the President is not an "officer of the United States."

II. Former President Trump Did Not Commit Either Act Described In Section 3.

Section 3 disqualifies only covered individuals who "shall have engaged in insurrection or rebellion against [the United States], or given aid or comfort to the enemies thereof." These two clauses form two distinct predicate offenses. Former President Trump committed neither, so section 3 does not disqualify him from holding office.

A. This Court should give effect to section 3's two distinct disqualification predicates.

Section 3 contains two separate predicates. It begins by identifying a disability to be imposed on a class of covered persons, then limits the membership of that class to those who took a relevant oath while holding a relevant office, then lists two offenses that trigger the disqualification: having "engaged in insurrection or rebellion" against the United States, "or given aid or comfort to the enemies thereof." In short, their separate character

requires an individual to complete all of the elements of *either* offense to be subject to section 3's disqualification, either by himself engaging in insurrection or by providing aid and comfort to the enemies of the United States. But something halfway—for example, providing aid and comfort to someone else engaged in insurrection—will not suffice: section 3 is not a wardrobe where one is free to mix and match.

Section 3's structure suggests that the offenses are distinct. Each offense is contained in its own dependent clause. Each offense consists of a distinct prepositional verb ("engage in," "give aid or comfort to"), a distinct direct object ("insurrection," "enemies thereof,") and one contains an indirect object ("against the same"), while the other does not. The two clauses lack a common antecedent modifier or any textual indication that the elements in one should be applied to the other. As a matter of structure, the two disqualification predicates cover two different classes of actions, each with its own limits.

The predicates' separate character is confirmed by the fact that neither their verbs nor their respective objects are coterminous. As discussed below, *see infra* Part II.B., to "engage in" an action is to undertake an active, direct role in that act; to "give" "aid" or "comfort" is far broader, potentially including a variety of less-involved supporting roles. A prominent contemporaneous act confirms this distinction. The Second Confiscation Act of 1862, the subject of significant public debate, James Garfield Randall, The Confiscation of Property during the Civil War 9-12 (1913), specifically punished anyone who "shall engage in, or give aid and comfort to, any . . . rebellion or insurrection." 12 Stat. 589, 590 (1862). That Act also provided that "any person [who] shall hereafter incite, set on foot, assist, or engage in any rebellion or

insurrection" against the United States would also commit an offense. *Id.* That Act's modern analogue, 18 U.S.C. § 2383, preserves this phrasing, independently criminalizing inciting, engaging in, or providing aid or comfort to a rebellion or insurrection. If providing "aid and comfort" to an insurrection—or an individual engaged in insurrection—were sufficient to engage in that insurrection, then these statutory distinctions were entirely superfluous. That is unlikely. *See, e.g.*, *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("[O]ne of the most basic interpretive canons is that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.").

Likewise, an individual participating in an "insurrection" or "rebellion" is not necessarily an "enemy of the United States." As the Colorado Supreme Court noted after reviewing precedent and several Civil War-era dictionaries, acts of domestic opposition to a lawful government can be described as "fall[ing] along a spectrum" from a "riot" to a "rebellion." Pet. App. 85a-86a (citations omitted). The end point of this spectrum—after an insurrection has fomented into a rebellion, and then further—comes when the parties are mutually recognized belligerents, and the rebels make war on the United States. *The Prize Cases*, 67 U.S. (2 Black) 635, 666-67 (1863). That is the point at which one becomes an "enemy" of the United States in the sense contemplated by section 3; not before.[5] *See infra* Part II.B.

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[5] Indeed, one could be an insurrectionist without becoming a rebel—let alone an enemy of the United States. As this Court recognized in *The Prize Cases*, an "[i]nsurrection may or may not

The reverse can also be true: one can become an enemy of the United States without ever having engaged in insurrection or rebellion. For example, a foreign belligerent may be killed where he is found consistent with the Constitution and the laws of war because that belligerent would be an enemy of the United States, not because he would have engaged in insurrection or rebellion. *See* H. W. Halleck, Elements of International Law and Laws of War 185 (1866) ("The status of all the citizens and subjects of the hostile state, is that of legal hostility, and their character of public enemies continues so long as the war lasts, whatever may be their occupation, and in whatever country they may be found."). In other words, those who are engaged in insurrection or rebellion and those who are enemies of the United States are only partially overlapping groups: one does not commit section 3's "aid or comfort" disqualification offense by providing aid or comfort to an insurrectionist who is *not* an enemy of the United States. The distinction makes the constitutional difference.

The Colorado Supreme Court fundamentally conflated these two distinct predicates. For instance, that court first faulted President Trump for "laying the groundwork for a claim that the election was rigged" months before any unrest on January 6. Pet. App. 92a. Next, it blamed him for "continu[ing] to fan the flames of his supporters' ire" at rallies. *Id.* at 93a. And it criticized him for tweeting and repeating "his invitation to come to Washington, D.C. on January 6." *Id.* at 94a. Even assuming that supporters believed "President Trump's

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culminate in an organized rebellion." 67 U.S. at 666. By extension, not all insurrectionists ultimately become rebels, let alone enemies of the United States.

messages were a call to his supporters to fight and that his supporters responded to that call," *id.* at 94a, those supporters were not *enemies* in the constitutional sense.

The Colorado Supreme Court construed President Trump's tweets and speeches as "putting a significant target on Vice President Pence's back during the electoral-vote count" and "exhort[ing] his supporters to fight at the Capitol." *Id.* at 96a. Such evidence conflates engaging in an insurrection with providing aid and comfort to supporters by encouraging them to "march to the Capitol" to stop "an alleged fraud on the people of this country." *Id.* at 99a. Had the Fourteenth Amendment been intended to treat these distinct offenses interchangeably, it would have said so. It does not.

B. President Trump did not commit either of Section 3's disqualification offenses.

1. President Trump did not engage in insurrection or rebellion against the United States.

a. At the outset, President Trump did not "engage in" insurrection. To *engage in* something is to take an active, personal role in it. Comparisons in modern language abound. When news emerges that nations have "engaged in military exercises," one expects to read that "ships and planes" have been deployed, not tweets or press releases.[6] Similarly, if someone has been described as "engaging in violence," one expects that the person being spoken about has himself used force on another—not that he has issued some taunt about force undertaken by

[6] Steven Erlanger, *Rising Tensions Between Turkey and Greece Divide E.U. Leaders*, N.Y. Times (Aug. 27, 2020), https://www.nytimes.com/2020/08/27/world/europe/greece-turkey-eu.html.

a third party. Engaging in a matter and remarking publicly about it are not the same, even with matters as weighty as wars or insurrections.[7]

This is how the term would have been understood in 1868. Dictionary definitions at the time recognized that engaging in an action required an individual to take a direct, personal, and often aggressive role. It was to "encounter; to begin to fight; to attack in conflict," or "[t]o embark in any business; to take a concern in; to undertake." Webster's American Dictionary 396 (1862 ed.); *see also* Robert Sullivan, A Dictionary of the English Language 176 (1869) ("to embark in an affair; to win by pleasing means; to bind by a contract; to attack, to fight"); Alexander Reid, A Dictionary of the English Language 143 (1863) ("to bind; to enlist; to embark; to gain; to attack; to employ; to encounter"); Noah Webster, A Compendious Dictionary of the English Language 103 (1806) (defining "engage" as "to oppose, fight, enter upon, embark, win over, attach, employ, bind, make liable").

The notion that engaging in something was actively participating in it was nowhere clearer than in the military context. For instance, a military "engagement" was understood as synonymous with a battle or combat, denoting "a close encounter between contending parties." *Webster's American Dictionary*, *supra*, at clxxvi. Indeed, an *engagement* signified a clash at a large scale, "suppos[ing] large numbers on each side, *engaged* or

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[7] Indeed, the President is constitutionally empowered either to "engage in military exercises" or to merely "declare that the United States is contemplating military options in response to a crisis," Matthew C. Waxman, *The Power to Threaten War*, 123 Yale L.J. 1626, 1638 (2014). These options carry different diplomatic consequences precisely because engaging in a matter and discussing it differ fundamentally.

intermingled in the conflict." *Id.* Senator John Sherman spoke in similar terms when describing section 3's scope, stating that "all of us understand the meaning of the third section," to include "those men who have once taken an oath of office to support the Constitution of the United States and have violated that oath in spirit by taking up arms against the Government of the United States are to be deprived for a time at least of holding office." Cong. Globe, 39th Cong., 1st Sess. 2899 (1866).

To *engage in* was not, by contrast, to encourage or incite action in a third party. Both of these concepts or words revolved around inducing action in another. Congress specifically distinguished these uses in Civil War-era legislation that formed the backdrop of section 3. For instance, the Second Confiscation Act made it a crime to "incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof," or to "give aid or comfort thereto, or [to] engage in, or give aid and comfort to, any such existing rebellion or insurrection." Second Confiscation Act, ch. 195, 12 Stat. 589, 590 (1862). The Insurrection Act of 1862 likewise made it a crime to "incite, set on foot, assist, or engage in any rebellion or insurrection," or to "give aid and comfort thereto, or [to] engage in, or give and comfort, to any such existing rebellion or insurrection." Act of July 17, 1862, ch. 195 § 2, 37 Stat. 590. Congress could have likewise included similar, non-participatory conduct when it framed the "engaged in" prong of section 3. It did not.

Contemporary examples in other contexts illustrate that when governments intended to punish those who encouraged conduct without engaging in it, they said so clearly. For instance, the U.S. delegate to the Netherlands during the Civil War reported that Dutch

authorities had issued a proclamation in 1864 concerning privateering, which promised to treat anyone who would "engage in or lend their aid in privateering" would be punished as a pirate. Letter from James S. Pike to William H. Seward (June 16, 1861), *reprinted in* Papers Relating to Foreign Affairs, Accompanying the Annual Message of the President to the First Session Thirty-Seventh Congress 353-54 (2d Sess. 1861). The proclamation was specifically intended to "warn the Dutch people against privateering" under "letters of marque recently issued by the Montgomery revolutionists." *Id.* at 853. Accordingly, the Dutch government spoke clearly that punishment would not be reserved merely for those who would "engage in" privateering themselves. *Id.* at 854.

In another example, an 1864 treatise explained that Vermont law made it unlawful not only to "engage in a duel," but also to "challenge another person to fight such duel, or to send or deliver any written or verbal message purporting or intending to be such challenge, although no duel ensue." M. L. Bennett. Vermont Justice, Being a Treatise on the Civil and Criminal Jurisdiction of Justices of the Peace, Prepared Primarily for the Use of Justices of the Peace, and the Junior Members of the Bar in Vermont 571 (1864). Thus, "if a person accepts such challenge, or shall knowingly carry or deliver such challenge, or shall be present at the fighting of a duel, with deadly weapons, as an aid, or second, or surgeon; or shall advise, encourage, or promote such duel, he is subject to punishment in the state prison, or by fine." And a "conviction of any of the preceding offences" also carried "a disability to hold any place of honor, profit or trust, under the constitution and laws of this state." *Id.*

This treatise noted how "careful [the Vermont] legislature have been, not only to punish duelling with death,

whenever death has been the consequence of it, but to visit upon all who are in any way *abetting or encouraging* this atrocious crime, exemplary punishment." *Id.* (emphasis added). But such care would have been superfluous if "engaging in a duel" captured the litany of other dueling offenses. Those legislators—like those who drafted the Fourteenth Amendment—understood that *engaging in* conduct reflected participatory action, rather than mere encouragement or promotion of the conduct.

The Colorado Supreme Court's conclusion that Former President Trump engaged in an insurrection misunderstood the import of "engaging in" conduct at every turn. It began by articulating a standard for "engaging in" conduct where an individual "need not directly participate in the overt act of . . . insurrection" to engage in insurrection. Pet. App. 90a. Indeed, that court diluted the participation requirement to "engage in" conduct to a requirement of only "an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose." *Id.* at 91a. But imposing a co-conspirator theory of vicarious liability finds no basis in the constitutional text or accompanying contemporaneous sources.

Having defined engagement in an insurrection broadly, the Colorado Supreme Court found that actions months attenuated from January 6, 2021, proved that Former President Trump engaged in an insurrection. That court faulted the former President for a statement at an August 2020 campaign rally, *id.* at 92a; for refusing to answer a politically charged question in September 2020, *id.*; for blaming third-party political violence at a November 2020 rally on a politically opposed group with a history of violence, *id.*; and for encouraging his

supporters to travel to Washington on January 6. *Id.* at 93a-94a.

To be sure, the Colorado Supreme Court also identified numerous reasons to believe that some of those who planned to travel to Washington did so with a plan to engage in political unrest. *Id.* at 95a. There, per that court, Former President Trump "gave a speech in which he literally exhorted his supporters to fight at the Capitol." *Id.* at 96a. The court then recounted a number of martial metaphors that Former President Trump employed—"fighting like a boxer with his hands tied behind his back," the "egregious assault on our democracy," the perennial political need to "fight like hell," *id.* at 96a-97a—and determined that these and subsequent communications demonstrated "that President Trump engaged in insurrection." *Id.* at 99a.

But while the court claimed that Former President Trump had done more than "merely incite the insurrection," *id.* at 100a, it never identified how the former President personally participated in the unrest of January 6th—because he did not.

Taken in the worst light, any statements Former President Trump made all reflected an assumption that others were participating in political unrest on January 6—not that Former President Trump intended to participate in, let alone actually engage in, political unrest himself—and certainly not to the level of an insurrection.

That is not to say that to incite someone to insurrection is good—and again, Former President Trump did no such thing—or even to say it is not punishable as a crime. It certainly would have been punishable when Congress enacted the Insurrection Act of 1862—*see* Act of July 17, 1862, ch. 195 § 2, 37 Stat. 590—and remains punishable today under comparable prohibitions, *see* 18 U.S.C.

§ 2383. But the constitutional question here is whether inducing others to political violence is itself "engaging in" that violence. It is not, and the Colorado Supreme Court erred in concluding otherwise.

b. Even had the former President "engaged in" political unrest—which he did not—the unrest on January 6 would have to have risen to an "insurrection" or "rebellion" to complete section 3's first disqualifying offense. It did not.

In 1868, an insurrection would have been described as a "rising against civil or political authority," which differed from a rebellion, "for the latter expresses a revolt, or an attempt to overthrow the government, to establish a different one, or to place the country under another jurisdiction." Webster's American Dictionary, supra, at 613 (defining "insurrection"); *see also id.* at 916 (defining "rebellion" as an "open an avowed renunciation of the authority of the government to which one owes allegiance" or "the taking of arms traitorously to resist the authority of lawful government; revolt"). Both were understood as severe, forcible defiance of a domestic political authority. The key distinction between an insurrection and a rebellion was that the latter denoted a breach of the bonds of national allegiance. Attorney General Henry Stanbery distinguished the two when he noted the unique "rebellion against the United States" that was the Civil War from "cases of temporary or local insurrection." Henry Stanbery, Reconstruction Acts, The, 12 Op. Att'y Gen. 141, 163 (1870); *see also The Prize Cases*, 67 U.S. (2 Black) at 673 (explaining that "in organizing this rebellion," the Confederacy had "acted as States claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal

Government. . . . It is no loose, unorganized insurrection, having no defined boundary or possession.").

The term "insurrection" and the more severe "rebellion" existed on a continuum of terms for political unrest. For example, sedition, as opposed to insurrection, was "a less extensive rising of citizens." Webster's American Dictionary, *supra*, at 916. As one contemporaneous English source put it, the various terms increased in severity and typically developed from one another: "There may be first an unlawful assembly, next an ordinary riot, then a felonious riot, next an insurrection, and, lastly, a rebellion." Law Times (Mar. 16, 1867). Insurrection and rebellion lay at the most severe end of that spectrum short of outright war. "An insurrection is the rising of a portion of the people against their government, or against its officers, or against the execution of its laws," whereas the term "rebellion is applied to an insurrection of large extent or long duration, and is usually a war between the legitimate government of a state, and portions or parts of the same, who seek to overthrow the government, or to dissolve their allegiance to it, and to set up one of their own." Halleck, *supra*, at 151; *see also* Franklin Chamberlin. American Commercial Law, relating to Every Kind of Business 348-49 (1869) (The difference between a "mob or riot," and a "civil commotion" or "rebellion," as a *crime*, is such, that the one is a mere breach of the peace, with greater or less aggravation, and perhaps involving, *incidentally*, other crimes and misdemeanors; while the other is treason, and includes all other crimes committed in effecting its guilty purpose."). Given the continuum on which the terms "insurrection" and "rebellion" lay, section 3's first disqualifying offense therefore only includes personal participation in—that is, being

"engaged in"—organized, violent political opposition of a sufficiently large and sustained magnitude.

The Constitution's text reflects this understanding of the severity inherent in the terms. "Insurrection" is used elsewhere in the Constitution to address the power of Congress to call forth the militia. U.S. Const. Art. I, § 8, cl. 15 (enabling Congress "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"). This accordingly implies that an insurrection in the constitutional sense must be a level of sustained domestic forcible opposition such that mustering an organized fighting force to suppress it might be an appropriate tool. The term "rebellion" appears in the Suspension Clause, which provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9. Given the unique status the Great Writ held in the Founding Era—the "most celebrated writ in the English law," per Blackstone, 3 William Blackstone, Commentaries *129—one can infer that a rebellion in the constitutional sense was an uprising of such severity and duration that it threatened the whole domestic order. After all, "[i]n the Jeffersonian model certain types of rebellions are viewed as an intrinsic part of the constitutional system in that they, combined with the reactions against them and the debates they foster, force the polity to come to grips with the implications of the American political creed." Harris G. Mirkin, *Rebellion, Revolution, and the Constitution: Thomas Jefferson's Theory of Civil Disobedience*, American Studies XIII, at 61, 71 (Fall 1972). Treating *all* forms of "rebellion" with equal constitutional gravity would conflict with that historical background.

While there was some level of political unrest, January 6 failed to rise to the severity of an insurrection, let alone a rebellion. Again, the Colorado Supreme Court erred in applying a too-lax definition of section 3's key terms. That court defined "an insurrection as used in section 3 is (1) a public use of force or threat of force (2) by a group of people (3) to hinder or prevent execution of the Constitution of the United States." Pet. App. 85a (citation omitted). In the Colorado Supreme Court's telling, that definition required neither "highly organized" activity nor any "probable success" of the political unrest at hand, *id.* at 86a-87a. Nor did that court attempt to distinguish an insurrection from other forms of unrest by reference to a minimum scale: though the court described the group that entered the Capitol on January 6 as "large," it defined an insurrection as requiring only a "group of people." *Id.* at 87a. Tellingly, that court referenced these individuals as "armed," yet in the next breath, credited findings that "many in the mob" improvised weapons from objects at the Capitols. *Id.*

Presumably, the Colorado Supreme Court saw no need to parse the difference because at "its inception an insurrection may be a pretty loosely organized affair. . . . It may start as a sudden surprise attack upon the civil authorities of a community with incidental destruction of property by fire or pillage, even before the military forces of the constituted government have been alerted and mobilized into action to suppress the insurrection." *Id.* (quoting *Home Ins. Co. of N.Y. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954)). But if comparable room for expansion existed on January 6, the Colorado Supreme Court failed to identify it. In failing to explain why those events were an *insurrection*, as opposed to a "less

extensive rising of citizens" like sedition, Webster's American Dictionary, *supra*, at 916, that court erred.

2. Former President Trump did not give aid or comfort to the enemies of the United States.

While the Colorado Supreme Court did not examine section 3's second disqualifying predicate, its judgment cannot be upheld on that basis, either: Former President Trump did not give "aid or comfort" to "enemies of the United States."

a. The historical phrase of giving "aid or comfort" does not track the President's actions on January 6. At common law, giving "aid or comfort" to an enemy of the King involved some meaningful, logistical assistance—such as "by giving them intelligence, sending them provisions, selling them arms, treacherously surrendering them a fortress, or the like." Samuel Warren, BLACKSTONE'S COMMENTARIES SYSTEMATICALLY ABRIDGED AND ADAPTED TO THE EXISTING STATE OF THE LAW AND CONSTITUTION WITH GREAT ADDITIONS 598 (1855) (citation omitted). This assistance could come through assistance in undertaking an unlawful act or protection afterwards; as one English military-justice treaty explained, "[i]t has been reckoned always the same species of crime, to afford any collateral or incidental aid or comfort to the enemy, either in the prosecution of his design, or in sheltering him from any of the evils consequent on the issue of it." E. Samuel. Historical Account of the British Army 582-83 (1816). But it meant assistance of a practical and not merely notional sort—it encompassed "whoever shall relieve the enemy with *money*, *victuals*, or *ammunition*, or shall *knowingly harbour* or *protect an enemy*." *Id.* at 583. Indeed, such offenses were "so clearly defined, and

of so marked a hue, as to need not the slightest illustration." *Id.* After the Founding, States similarly enacted treason laws enumerating "aid and comfort" along with other tangible goods suitable to hostile action, such as "furnishing arms, ammunition, provision, or any other articles for their aid or comfort." Zephaniah Swift. System of the Laws of the State of Connecticut 298 (1796).

The phrase occurs in one other place in the Constitution: the Treason Clause. That Clause provides that "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." U.S. Const. art. III, § 3, cl. 1. Like section 3, the Treason Clause contains a similar aid-and-comfort element, indicating that they should be understood similarly. This meaning of "aid and comfort" was well understood to be restrictive; indeed, an overly expansive view of "treason" at common law is exactly why the Treason Clause defined the crime specifically and narrowly. *See* Suzanne Kelly Babb, *Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh*, 54 Hastings L.J. 1721, 1728 (2003) ("There was well-founded concern that reigning powers might expansively define treason to increase their power and authority.") (citing *United States v. Hoxie*, 26 F. Cas. 397, 398 (C.C.D. Vt. 1808)). Concluding that Former President Trump's statements on January 6 would expand the understanding of "aid and comfort" well beyond this narrow scope.

b. Nor were those who took part in political unrest on January 6 "enemies of the United States" for purposes of section 3's second disqualifying offense or otherwise.

Other than Confederates during the Civil War, Americans are hardly ever "enemies of the United

States" in the constitutional sense. The word "enemies" appears in the Constitution of 1788 once—in the Treason Clause. It states: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." U.S. Const., Art. III,§ 3, cl. 1. In that context, the term "enemies" was understood—consistent with international law—to be either enemy nationals or enemy states. Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 Tex. Rev. L. & Pol. 350, 520 (forthcoming 2024). An early decision of this Court concluded that an American could only commit treason—that is, could only give aid and comfort to an enemy of the United States—if some group had actually levied war on the United States first. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 126 (1807) (Marshall, C.J.) ("To constitute [treason], war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason."); *see also Jecker, Torre & Co. v. Montgomery*, 59 U.S. (18 How.) 110, 112 (1855) ("[I]n a state of war between two nations, . . . the two nations and all their citizens or subjects are enemies to each other.") (internal quotation marks omitted). But an individual could become an enemy for constitutional purposes in a state of war: for example, an individual living in enemy territory during a war against the United States was, by definition, an enemy of the United States. *See Ford v. Surget*, 97 U.S. (7 Otto) 594, 604 (1878).

It suffices to say that the federal government enjoys radically greater authority regarding how to dispense with enemies of the United States in part because that status accrues only as a consequence of war. *See, e.g.*,

Halleck, *supra*, at 185 ("[T]he treatment which they are entitled to receive at our hands varies according to circumstances."). This authority includes the power to kill enemy combatants, to incidentally kill enemy civilians consistent with the laws of war, to authorize the wholesale confiscation or destruction of enemy property, and more. *See generally* Nathan S. Chapman, *Due Process of War*, 94 Notre Dame L. Rev. 639 (2019). "[U]nder the law of nations, war flipped a switch. A belligerent nation's rights and duties changed with respect to other nations, whether enemies or neutrals," and "[t]he subjects of an enemy nation became enemy aliens." *Id.* at 663. To conclude that Former President Trump gave aid and comfort to enemies of the United States on January 6th is to conclude that those who broke the law that day not only formed a "rebellion," *supra* Part II.B.1.b., but that they engaged in such sustained violence as to make war on the United States and thereby authorize the federal government to deploy these vast powers against them. This Court should not countenance such a conclusion.

CONCLUSION

The decision of the Colorado Supreme Court should be reversed.

Respectfully submitted.

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