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 *AMICUS CURIAE* OF BRIAN J. MARTIN IN SUPPORT OF THE ANDERSON RESPONDENTS

WALLACE K. LIGHTSEY
Counsel of Record
WYCHE P.A.
200 East Broad Street
Suite 400
Greenville, SC 29601
(864) 242-8200
wlightsey@wyche.com

Counsel for Amicus Curiae Brian J. Martin

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INTERESTS OF *AMICUS CURIAE*[1]

Mr. Martin is a retired attorney living in Stokes County, North Carolina. He is a registered unaffiliated voter in North Carolina who intends to vote in the Republican primary in that state. Pursuant to North Carolina statutory law, he has filed with the North Carolina State Board of Elections a challenge to the candidacy of Petitioner Donald J. Trump in the North Carolina Republican primary. *See generally* N.C.G.S. § 163-127.2. The action is presently pending before the North Carolina General Court of Justice, Superior Division. *Martin v. North Carolina State Board of Elections*, No. 23CV037438-910 (N.C. Super. Ct., Wake Cty).

Mr. Martin brought his challenge to Petitioner Trump's candidacy in North Carolina for three reasons: (1) North Carolina has a robust procedure by which a voter may challenge a person's candidacy for office before a state board with the power to determine constitutional eligibility (and a history of North Carolina courts doing precisely this); (2) he wants to be a voice for the Constitution; and (3) he wants to ensure the integrity of elections run by the Board of Elections in North Carolina so as to allow voters to make an informed choice from among candidates who can actually hold the office of President.

Mr. Martin served as law clerk to Chief Justice Warren E. Burger in the 1984 Term, and as Assistant to Solicitors General Fried and Starr under Presidents

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* and his counsel made a monetary contribution to its preparation or submission.

Ronald Reagan and George H.W. Bush. His experience in serving this Court and appearing before it was thus for a conservative Chief Justice and two conservative Republican presidents. But the issue presented to the Court is one that transcends politics and ideology.

As law clerk to Chief Justice Burger, Mr. Martin took an oath to support and defend the Constitution of the United States. That oath was administered to Mr. Martin by the Chief Justice of the United States, and Mr. Martin continues to take his oath seriously. He urges this Court to follow the plain meaning of the Constitution so that Presidents and candidates for the office of President do the same.

SUMMARY OF ARGUMENT

How does the United States Constitution protect *itself*? That is the fundamental issue presented by this case. There are several lines of defense built into the document: the structural device of separation of powers, with the authority to "say what the law is" residing in the judicial branch; the requirement that the President and other federal and state office-holders take an oath to preserve, protect, support, and defend the Constitution; and the provision of Section 3 of the Fourteenth Amendment that any such officer, having taken such an oath and then broken it by engaging in insurrection against the Constitution, shall be disqualified from office unless relieved of that disqualification by a supermajority of the Congress.

All three of these lines of defense require the Court, exercising its responsibility of judicial review, to rule that Section 3 means what it says and that it disqualifies Petitioner from seeking office after breaking his sacred vow to preserve, protect, and defend the Constitution of the United States, by engaging in an

insurrection aimed at stopping the constitutional process for the counting of electoral votes in the 2020 presidential election.

Contrary to arguments put forward by Petitioner and others, this straightforward application of Section 3 is not too difficult for the courts to handle, will not unleash a flood of unmanageable and pernicious claims, and is mandated by the right to vote for a presidential candidate who can actually hold office. The judgment of the Colorado Supreme Court should be affirmed.

ARGUMENT

I. All Parties Have Properly Asked This Court To Declare What Section 3 of the Fourteenth Amendment Means.

This case is about the United States Constitution and how it protects itself so that the rights and freedoms written in the document remain strong enough to preserve our Republic and protect its citizens. The first important line of defense is embedded throughout the language and structure of the original Constitution ratified on June 21, 1788. We commonly know this as Separation of Powers or the dispersion of governmental powers.

The drafters and ratifiers of the original Constitution (the "Framers") understood from their experience with the British monarchy that concentrating governmental powers in a single person or entity could subject the nation's people to arbitrary and oppressive government action. To preserve liberty, the Framers sought to ensure that a separate and independent branch of the federal government would exercise each of government's three basic functions: legislative, executive, and judicial. As anyone schooled in United States civics knows, the Constitution, which has guided us for

over two hundred years, divides governmental power among three branches by vesting the Legislative Power of the federal government in Congress (Article I), the Executive Power in the Office of President (Article II), and the Judicial Power in the Supreme Court and any lower courts created by Congress (Article III). Each branch has defined and limited powers. And within that framework, the Constitution further disperses power by dividing legislative powers between two houses, with a possible executive veto, and permits amendments to the Constitution only through a rigorous process requiring supermajorities in Congress and the states. Furthermore, within the executive branch there are limits on what the President can do in his administration. *See generally United States v. Nixon*, 418 U.S. 683 (1974).

The late Justice Antonin Scalia took time away from the Court occasionally to speak to law students, community leaders, and to the Senate Judiciary Committee. At a meeting of legal and political leaders in Memphis, Tennessee, on December 17, 2013, Justice Scalia promoted the importance of an independent judiciary in our American system of decentralized government. He said:

> If you were to ask the average man on the street what has been the greatest source of our freedoms – you probably would get a response [like] freedom of speech. Freedom of press. That is so mistaken. Do you not realize that every tyrant in the world has a bill of rights? Every banana republic? … Unless the real constitution of a country prevents the centralization of power, all the rest is words on paper.

Andy Meek, *Scalia Shares Legal Insights in Memphis*, Memphis Daily News (Dec. 17, 2013).

The Los Angeles Times reported on Justice Scalia's comments to the Senate Judiciary Committee in 2011. The newspaper reported:

> Scalia discounted the importance of the Bill of Rights and its protection for freedom of speech and the press. "Every banana republic has a Bill of Rights," he said. "Those are just words on paper. It depends on the 'structure of government,' including independent courts, to enforce the rights [in the Constitution]."

David Savage, *Justice Scalia: Americans 'should learn to love gridlock,'* Los Angeles Times (Oct. 5, 2011).

In *Marbury v. Madison*, 5 U.S. 137 (1803), this Court solidified its role under the Constitution by establishing the rule that this Court, not the legislative or executive branches, has the final word on what the Constitution means. Although that case was decided over 200 years ago, its significance is felt today in the Supreme Court building itself, which displays a magnificent statue of Chief Justice Marshall and paintings of both Marbury and Madison. As Chief Justice Marshall wrote for the Court: "It is emphatically the province and duty of the Judicial Department to say what the law is." 5 U.S. at 177.

This Fourteenth Amendment case is before this Court because of *Marbury v. Madison*. After the Colorado Supreme Court's ruling, the parties did not take to the streets. Nor did the parties go to the Houses of Congress for their view of Section 3 of the Fourteenth Amendment. They came here.

This Court will soon "say what the law is." *Marbury v. Madison*, 5 U.S. at 177. In making that announcement, the Court will follow the basic tenets of Constitutional analysis. As this Court wrote in

Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, __, 142 S. Ct. 2228, 2244-45 (2022): "Constitutional analysis must begin with 'the language of the instrument,' *Gibbons v. Ogden*, 9 Wheat. 1, 186-189 (1824), which offers a 'fixed standard' for ascertaining what our founding document means, 1 J. Story, Commentaries on the Constitution of the United States § 399, p. 383 (1833)." This Court will rule whether Section 3 of the Fourteenth Amendment means what one would naturally think it means upon first reading.

II. Section 3 of the Fourteenth Amendment Is the Constitution's Enhanced Self-Protection Device.

The second important line of self-defense within the Constitution is the required oath to support the Constitution. The oath is something like the Constitution's immune system – designed to fend off harmful infections from outside. The Framers and the states understood that the Constitution can continue to be the law that binds us together *only if people in government are loyal to the Constitution itself*. If you are reading this Brief in the Supreme Court as a Justice or a law clerk, you have taken an oath to support the Constitution.

There are two sections of the original Constitution that set forth the oath requirement. Article II, Section 1, Clause 8 sets forth the presidential oath:

> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:– "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my

> Ability, preserve, protect and defend the Constitution of the United States."

Article VI, Clause 3 sets forth the oath requirement for other persons serving in the United States and state governments:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .

Congress has determined the contents of this oath required under Article VI. All federal employees except the President take the oath set out in Title 5 of the United States Code, Section 3331:

> I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

Article III federal judges also take a judicial oath set forth in Title 28, Section 453 of the U.S. Code.

The oath to support the Constitution is a sacred vow. The statutory oath contains the phrase "So help me God," and most modern Presidents – including, notably, Petitioner Trump – have added that phrase to their oath of office. The oath is a felt obligation, not just boiler-plate words to recite.

George Washington understood the paramount significance of the oath. Washington met with Jefferson, Hamilton, and Henry Knox in 1793 to discuss his second inauguration. They decided that the inauguration should be a public event, so it was held in the Senate Chamber in front of members of Congress, dignitaries, foreign ministers, and other invited guests. *See George Washington's Mount Vernon*, "George Washington's Second Inaugural Address" (Mar. 4, 1793) (www.mountvernon.org/george-washington/the-first-president/second-term-1793-1797/second-inaugural-address/). George Washington devoted the entirety of his inaugural speech to the oath. He believed that it was important to take the oath in front of others. In words that are most relevant to the case at hand, President Washington said:

> Fellow-Citizens:
>
> I am again called upon by the voice of my country to execute the functions of its Chief Magistrate. When the occasion proper for it shall arrive, I shall endeavour to express the high sense I entertain of this distinguished honor, and of the confidence which has been reposed in me by the people of united America.
>
> Previous to the execution of any official act of the President, the Constitution requires an oath of office. This oath I am now about to take, and in your presence: That if it shall be found during my administration of the Government I have in any instance violated willingly or knowingly the injunction thereof, I may (besides incurring Constitutional punishment) be subject to the upbraidings of all who are now witnesses of the present solemn ceremony.

Id. (quoted in full).

The commentary to the address notes, with emphasis, that "in the address's focus upon the oath of office, Washington underscored an element of the presidency that can be overlooked: that the occupant of the office, while vested with substantial power, is also bound to adhere to the specific terms of an oath found in the Constitution itself." *Id.* (https://www.mountvernon.org/george-washington/the-first-president/second-term-1793-1797/second-inaugural-address/).

The Civil War showed that the threat to the lawful operation of the Constitution was not always abated by the oath requirement. The lessons of the Civil War caused Congress and the ratifying states to adopt a sweeping Fourteenth Amendment and, specifically, to impose a specific repercussion for violating the oath to support the Constitution. This is the third line of self-defense in the Constitution. Section 3 of the Fourteenth Amendment came from the understanding that officials who swore an oath to the Constitution, and then violated that oath by joining the insurrection of the Confederacy, could not be trusted to return to "*any office*" under the United States or the states. *See* National Archives, *14th Amendment to the U.S. Constitution: Civil Rights (1868)* (www.archives.gov/milestone-documents/14th-amendment) (last visited Jan. 24, 2024); *see also* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 91-92 (2021).

Congress and the state ratifiers of Section 3 did not ask Congress to think about the importance of oaths and possibly come up with an idea about how that requirement could have teeth and real-world meaning. Section 3 made positive law. By its express terms, it is self-executing: "No person shall be" sets forth a rule,

not a suggestion; it does not give Congress the option to decide not to put the rule into effect.

Mr. Martin brought a case in the North Carolina Superior Court in his effort to enforce Section 3. *See Martin v. North Carolina State Board of Elections*, No. 23-CV037438-910 (N.C. Super. Ct., Wake Cty). There is an issue in that case whether the Board of Elections can have an evidentiary hearing on a challenge to a presidential candidate at the primary stage in North Carolina. The Board was split on that question. There is no dispute, however, that North Carolina can enforce Section 3 of the Fourteenth Amendment without further congressional action.

In *Worthy v. The Commissioners*, 63 N.C. 199 (N.C. 1869), the County Commissioners for Moore County refused to administer the oath and place in office a person who won the election for sheriff. The elected sheriff brought suit challenging that decision. The court noted that Section 3 applies to state officers who violated their oath to support the Constitution, and that Section 3 of the Fourteenth Amendment governs state courts as well as federal courts. The court examined the evidence and found that the sheriff was an officer who took an oath to support the Constitution, and that he violated that oath by engaging in the rebellion on the side of the Confederacy.

In reaching its conclusion, the court also relied on an opinion of the Attorney General of the United States. The court upheld the commissioners' decision because the person elected sheriff "is disqualified from holding the office of the sheriff now, by reasons of Section 3" of the Fourteenth Amendment. *Worthy*, 63 N.C. at 201. This Court denied the disqualified sheriff's appeal. *Worthy v. The Commissioners*,76 U.S. 611 (1869).

Some have argued that Section 5 of the Fourteenth Amendment means that Section 3 is not law unless Congress passes some sort of statute that makes it law. That argument is wrong.

It is well settled that Congress has the power to legislate only in areas authorized by the Constitution. This Court explained this fundamental principle in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012):

> The Federal Government "is acknowledged by all to be one of enumerated powers." [*McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819).] That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. Congress may, for example, "coin Money," "establish Post Offices," and "raise and support Armies." Art. I, § 8, cls. 5, 7, 12. The enumeration of powers is also a limitation of powers, because "[t]he enumeration presupposes something not enumerated." *Gibbons v. Ogden*, 9 Wheat. 1, 195 (1824). The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government "can exercise only the powers granted to it." *McCulloch*, *supra*, at 405.

Sebelius, 567 U.S. at 434-35.

Section 5 of the Fourteenth Amendment is a grant of authority to Congress to pass laws to enforce the Amendment. It states: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." That grant of authority is in

addition to Congress's listed powers under Article I, Section 8 of the Constitution. This Court has upheld federal statutes as properly within the scope of Congress's enumerated power under Section 5. For example, in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), this Court upheld Section 4(e) of the Voting Rights Act of 1965 as a valid exercise of Congress's power under Section 5 to enforce the Fourteenth Amendment's Equal Protection Clause. *See also Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding law banning literacy tests).

The limits of the enumerated power given to Congress in Section 5 are not at issue here. What is clear is that Section 5 is not a grant of authority to Congress to repeal or amend Section 3's clear constitutional dictate. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court made it plain that Section 5's enforcement power is not the power to repeal or amend or change the substance of the Fourteenth Amendment. The Court described the enforcement power in Section 5:

> In assessing the breadth of § 5's enforcement power, we begin with its text. Congress has been given the power "to enforce" the "provisions of this article." We agree with respondent, of course, that Congress can enact legislation under § 5 enforcing the constitutional right to the free exercise of religion. . . . Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial," *South Carolina v. Katzenbach,* [383 U.S. 301], at 326 [(1966)]. The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's

> restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

City of Boerne, 521 U.S. at 519.

There would be no integrated public schools if the provisions of the Fourteenth Amendment were not law until Congress passed an enforcing statute. *See Brown v. Board of Education*, 347 U.S. 483 (1954). In countless other cases, it is self-evident that the Constitution's language, not congressional action, offers the "fixed standard" of what the fundamental law is. *Dobbs*, 597 U.S. at ___, 142 S. Ct. at 2244-45.

Of course, under Section 5, Congress has the power to enact laws that might set forth a well-defined legal process for litigating Section 3 cases. Recently, North Carolina Senator Thom Tillis introduced a bill in the Senate entitled, "The Constitutional Election Integrity Act." *See* S. 3588, Constitutional Election Integrity Act, 118th Cong. (Jan. 11, 2024). Under his bill, "The Supreme Court of the United States shall have the sole jurisdiction to decide claims arising out of section 3 of the 14th Amendment." *Id.*; *see also* Press Release, *Tillis to Introduce Bill to Require SCOTUS Review of Presidential Candidate Qualifications* (Dec. 19, 2023) (www.tillis.senate.gov/2023/12/tillis-to-introduce-bill-to-require-scotus-review-of-presidential-candidate-qualifications). His bill is proper under Section 5 because it

"does not enforce a constitutional right by changing what the right is." *City of Boerne*, 521 U.S. at 519. Nor does it purport to give Congress the "power to determine what constitutes a constitutional violation." *Id.*

In short, Section 5 of the Fourteenth Amendment cannot be construed to require congressional action in order to effectuate the dictate of Section 3. Holding to the contrary would effectively make the Fourteenth Amendment advisory at best and this Court would not have had the power to make constitutional rulings as it did in *Brown v. Board of Education* and countless other cases applying the Fourteenth Amendment.

III. Both Federal and State Courts Are Capable of Issuing Findings of Fact and Conclusions of Law in Section 3 Cases That Comply with Due Process.

Petitioner Trump and others have argued that Section 3 cases are just too hard for the Courts, particularly state courts, to hear and decide. That argument is meritless.

State courts play a major role in the administration of justice in the United States. Justice Scalia, in addressing a group of judges and community leaders in Memphis, Tennessee, addressed the importance of state courts. The Memphis daily newspaper reported:

> Scalia said, among other things, that state supreme courts – not the U.S. Supreme Court – hold more sway over the lives of everyday Americans. As proof, he said, some 90 percent of laws affecting peoples' day-to-day lives are state laws.

Andy Meek, *Scalia Shares Legal Insights in Memphis*, Memphis Daily News (Dec. 17, 2013).

Indeed, state courts and impartial state triers-of-fact may be an especially appropriate forum for hearing and deciding Section 3 cases. State courts are bound by the United States Constitution. Article VI, clause 2 provides that the "Constitution . . . shall be the supreme law of the land; and judges in every state shall be bound thereby . . . ." Operating under the umbrella of the Constitution, state legislatures have authority to direct the "manner" of appointing presidential electors. U.S. CONST. art. II, § 1, cl. 2. All states have decided to appoint electors by state-run elections. *See Bush v. Gore*, 531 U.S. 98, 104 (2000). In fact, states or their political subdivisions run all state and federal elections, including elections for President and Congress. That is why all the relevant litigation in *Bush v. Gore* took place in state courts before the matter reached this Court.

Every state has some form of "candidate challenge," and every state has excluded candidates who lack a qualification to hold office – including presidential candidates who do not meet a constitutional qualification. *See* Project on Government Oversight, *Routine Disqualification: Every State Has Kept Ineligible Candidates off the Ballot, and Trump Could Be Next* (Sept. 5, 2023) (www.pogo.org/reports/routine-disqualification-every-state-has-kept-ineligible-candidates-off-the-ballot-and-trump-could-be-next). All initial decisions on a candidate challenge are subject to judicial review. The initial arbiter sets forth findings of fact and conclusions of law. Contrary to the suggestion of some, there is nothing inherently unfair about the initial arbiter being a person elected or appointed in a partisan manner. All the judges in North Carolina are elected by running in party primaries and then appearing as a member of a party on the general election ballot. That is true in many jurisdictions.

Likewise, even Article III judges are appointed by a Republican or a Democratic President. To be sure, all initial arbiters must be impartial and follow their oaths of office. If there is a question of impartiality amounting to a Due Process violation, the judgment of the arbiter can be appealed, and every state has a highest court. This Court then has the discretion to review a final judgment of the state's highest court if it presents a federal issue under Section 3 or the Due Process Clause.

Because state tribunals are bound by the United States Constitution, a trial or evidentiary hearing concerning Section 3 must be fundamentally fair. That means the parties, and especially the challenged candidate, are entitled to an impartial arbiter, adequate notice of the trial or hearing, and an opportunity to appear and present a fair defense against the allegation of disqualification. These Due Process requirements apply whether the initial arbiter is a state court, a state multi-member Board of Elections, a state administrative officer, or a federal district court.

Experience shows that there is nothing unusual or improper for state courts to hear matters involving Section 3 of the Fourteenth Amendment. As noted above, the North Carolina Supreme Court in *Worthy v. The Commissioners* methodically went through the elements of Section 3 ("officer," "oath," "engagement in insurrection or rebellion") and concluded that the commissioners correctly barred the candidate from entering office again.

In September 2022, a New Mexico County Commissioner became the first public official to lose his job for participating in the January 6, 2021, riot at the United States Capitol when a state judge ruled that Otero County Commissioner Couy Griffin violated the Consti-

tution by engaging in an insurrection after having previously taken an oath to support the Constitution. After a trial, the New Mexico District Court Judge ruled that Griffin, founder of a group called "Cowboys for Trump," violated Section 3 of the Fourteenth Amendment when he took part in the riot that left four people dead and 100 police officers injured. The court entered a judgment disqualifying Griffin from holding local, state, or federal office. In its 49-page ruling, the court made extensive findings showing that the attack on the Capitol of January 6, 2021, was an insurrection against the Constitution, and that Mr. Griffin engaged in that insurrection. *See New Mexico v. Griffin*, D-101-CV-2022-00473 (N.M. 1st Judicial Dist., Santa Fe Cty). Griffin's attempt to seek reversal of the decision by the New Mexico Supreme Court failed.

In the case at hand, the Colorado trial court followed the common practice of pre-trial motions, followed by a trial. The court then entered extensive findings of facts and conclusions of law. The Colorado Supreme Court reviewed the entire record, received briefs, and heard oral arguments. The Colorado Supreme Court then issued its decision reversing the trial court on one important legal point and concluding that Petitioner Trump is disqualified from holding the Office of President. This Court is reviewing that decision. Hence, the process to date in this case is exactly the type of work that lawyers, litigants, and the courts routinely conduct.

One can readily identify much harder cases for courts to handle and decide. In this case, assuming the legal meaning of "officer" and "any office … under the

United States" is settled,[2] the only question is whether the candidate "engaged in insurrection or rebellion" against the Constitution. That issue is far narrower and much easier to define than cases interpreting and applying constitutional phrases such as "cruel and unusual punishments" (Eighth Amendment), "equal protection of laws" (Fourteenth Amendment, Section 1), "due process of law" (Fourteenth Amendment, Section 1), and "the right of people to keep and bear arms" (Second Amendment).

Even in the realm of candidate challenges, Section 3 cases may be easier than many other challenges. Mr. Martin has observed candidate challenges made in North Carolina this year and almost all of them involve the issue of the candidate's "permanent residence" or "domicile." In cases involving domicile or permanent residency, the trier of fact may have to consider as many as sixteen factors – e.g., time spent in location, ownership of property, location of mail delivery, bank account addresses, tax filings, etc. *See, e.g., Martin v. Martin*, 253 N.C. 704, 710, 118 S.E.2d 29, 34 (1961) ("All of the surrounding circumstances and the conduct of the person must be taken into consideration."). Ultimately, the trier of fact must determine the person's state of mind. *Id.* By contrast, as the courts in New Mexico, North Carolina, and Colorado demonstrate, the trier of fact in a Section 3 case may find that the candidate engaged in insurrection against the Constitution by making findings based on observable facts without having to reach a conclusion on state of mind.

As is common when a case reaches this Court, the Court is tasked with the interpretation of words in the

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[2] Because the Anderson Respondents are addressing this issue, Mr. Martin will not duplicate their efforts here.

Constitution – here, the one word "insurrection." The ordinary meaning of the word in the text controls, not the subjective opinion of one person. Thus, this Court will consider this issue, as it did when interpreting the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008), by looking at the common dictionary definition at the time Section 3 was adopted. *See, e.g.*, N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828); J. BOAG, A POPULAR AND COMPLETE ENGLISH DICTIONARY (J. Boag ed., 1848).

Under any common definition at the time, the January 6 attack on, and occupation of, the United States Capitol was an insurrection. A violent group used force to stop the constitutional process of counting electoral votes in a presidential election. The United States Attorney of the District of Columbia's report of January 5, 2024, describes the events constituting the insurrection and the status of the prosecutions of those involved:

> Saturday, January 6, 2024, marks three years – or 36 months – since the attack on the U.S. Capitol that disrupted a joint session of the U.S. Congress in the process of affirming the presidential election results.
>
> . . . .
>
> Under the continued leadership of the U.S. Attorney's Office for the District of Columbia and the FBI's Washington Field Office, the investigation and prosecution of those responsible for the attack continues to move forward at an unprecedented speed and scale.
>
> Based on the public court documents, below is a snapshot of the investigation as of the close of business January 4, 2024. ...

Arrests made: More than **1,265** defendants have been charged in nearly all **50** states and the District of Columbia.

Criminal charges:

- Approximately **452** defendants have been charged with assaulting, resisting, or impeding officers or employees, including approximately **123** individuals who have been charged with using a deadly or dangerous weapon or causing serious bodily injury to an officer.
- Approximately **140** police officers were assaulted on Jan. 6 at the Capitol, including about **80** from the U.S. Capitol Police and about **60** from the Metropolitan Police Department.
- Approximately **11** individuals have been arrested on a series of charges that relate to assaulting a member of the media, or destroying their equipment, on Jan. 6.
- Approximately **1,186** defendants have been charged with entering or remaining in a restricted federal building or grounds. Of those, **116** defendants have been charged with entering a restricted area with a dangerous or deadly weapon.
- Approximately **71** defendants have been charged with destruction of government property, and approximately **56** defendants have been charged with theft of government property.
- More than **332** defendants have been charged with corruptly obstructing, influ-

encing, or impeding an official proceeding, or attempting to do so.

- Approximately **57** defendants have been charged with conspiracy, either: (a) conspiracy to obstruct a congressional proceeding, (b) conspiracy to obstruct law enforcement during a civil disorder, (c) conspiracy to injure an officer, or (d) some combination of the three.

Pleas:

- Approximately **718** individuals have pleaded guilty to a variety of federal charges . . . .

Trials:

- **139** individuals have been found guilty at contested trials, including **3** who were found guilty in the Superior Court of the District of Columbia. Another **32** individuals have been convicted following an agreed-upon set of facts. **76** of these **171** defendants were found guilty of assaulting, resisting, or impeding officers and/or obstructing officers during a civil disorder, which are felony offenses, including one who has been sentenced to more than 14 years in prison.

Sentencings:

- Approximately **749** federal defendants have had their cases adjudicated and received sentences for their criminal activity on Jan. 6. Approximately **467** have been sentenced to periods of incarceration. Approximately **154** defendants have been sentenced to a period of home deten-

> tion, including approximately **28** who also were sentenced to a period of incarceration.

U.S. Attorney's Office, D.C., *Three Years Since the Jan. 6 Attack on the Capitol* (Jan. 5, 2024) (https://www.justice.gov/usao-dc/36-months-jan-6-attack-capitol-0) (boldface in original).

Considering these facts, the Colorado courts were wholly justified in ruling that the January 6 attack was an "insurrection."

The words "engaged in" in Section 3 of the Fourteenth Amendment do not need clarification. Those words are understood to mean "to take part in." The Colorado trial court looked at the evidence and made many findings that show that Petitioner engaged in the insurrection on January 6. Indeed, such a finding is justified if one looks only at the facts following Petitioner's return to the White House after delivering his incendiary speech on January 6 at the Ellipse, urging his followers to "fight like hell" in order to "stop the steal" – an exhortation that was understood by those present to mean, storm the Capitol and stop the counting of the electoral votes.

By 1:21 p.m., Petitioner Trump was informed that the Capitol was under attack. For the balance of the afternoon, over a period of three hours, he watched the insurrection unfold on television in the President's dining room and did nothing to stop it, despite having both the power to do so and the constitutional duty to see that the laws are faithfully executed. Pat Cipollone, the White House Counsel, saw the attack on the Capitol and ran down the hallway to talk with Chief of Staff Mark Meadows, who had been with the President in the dining room. Cipollone said: "The

rioters have gotten into the Capitol, Mark. We need to go see the President now."

Trump did not heed the advice to call off the rioters and command them to leave the Capitol. Instead, after watching television coverage of the rioters chanting "hang Mike Pence," Trump personally wrote in a tweet: "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!" That tweet attacking the Vice President was read over a bullhorn to the rioters at the Capitol. Trump's tweet *in and of itself* constitutes taking part in, and involving himself in, the insurrection. Trump's words energized the rioters to ramp up the ferocity of the attack. They understood that Trump was on their side in this battle.

Sarah Matthews, White House Deputy Press Secretary, said that the tweet gave Trump's supporters permission to continue their assault. She stated: "It was essentially giving the green light to these people." *What Time Is the Jan. 6 Committee Hearing Today?*, Wall Street Journal (July 21, 2022). Matthews told the Bipartisan House January 6 Committee:

> You know, I worked on the campaign, traveled all around the country going to countless rallies with him. And I've seen the impact his words have on his supporters. They truly latch on to every word and every tweet that he says. And so I think that in that moment for him to tweet out the message about Mike Pence, it was him pouring gasoline on the fire and making it much worse.

In a sit-down interview with ABC News' David Muir, Vice President Pence gave his understanding of Trump's 2:24 p.m. tweet. When asked about the tweet, Vice President Pence stated: "It angered me. But I turned to my daughter, who was standing nearby, and I said, 'It doesn't take courage to break the law. It takes courage to uphold the law.' I mean, the president's words were reckless. *It was clear he decided to be part of the problem*." Pence says Trump's words were 'reckless' on Jan. 6, ABC News (Nov. 13, 2022) (https://abcnews.go.com/Politics/video/pence-trumps-words-reckless-jan-9322856 4) (emphasis added)

In short, state tribunals in general are well suited to handle Section 3 cases and, in this case, the courts of Colorado had more than sufficient evidence to find that Petitioner engaged in an insurrection against the Constitution.

Nevertheless, some argue that, if this Court affirms the judgment, the "floodgates" will open and the states will be inundated with many frivolous and pernicious Section 3 cases that will be impossible to adjudicate. That contention does not withstand scrutiny.

In the first place, Section 3 does not impose disqualification for just any violation of the oath. A party cannot state a claim by contending that a President violated the oath by failing to act to the "best of [his] ability." Section 3's disqualification applies *only* to a violation of the oath *by engaging in insurrection* against the Constitution. If such a claim is made against a President, the adjudication of the issue must comport with Due Process, and there will be appellate review. Frivolous claims can easily be resolved at the initial stage or upon appeal.

Nor need this Court be concerned about some scary scenario of the floodgates opening. If this Court affirms the judgment in the case at hand, one hopes that no future President will violate his or her oath of office by engaging in insurrection against the Constitution. If there are future challenges under Section 3 against a former President, they will be more like a drip or trickle than a flood. If not, courts are well equipped to handle multitudes of cases. For example, there were 284,220 civil cases filed in the U.S. district courts in 2023. *See Federal Judicial Caseload Statistics 2023* (www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023) (last visited Jan. 24, 2024). A hypothetical case against a future former President running for office again need not scare anyone. Nor need the Court be concerned if challenges are brought against members of Congress. Each case will be decided on the merits, based on the evidence presented. If a member of Congress engages in insurrection against the Constitution, and a tribunal so holds after a fair hearing subject to appellate review, then that member will be disqualified. That is simply the application of Section 3 as enacted.

IV. The Right To Vote and the Guarantee of Equal Protection Do Not Allow a Disqualified Candidate To Be Elected President but Not Hold Office.

Americans would not understand a ruling by this Court that would allow Petitioner to be elected President but not permitted to hold the Office of President. Their skepticism would be well justified.

The Constitution's sacred "right to vote" includes the right to have your vote count. As the United States Supreme Court ruled in *Reynolds v. Sims*, 377 U.S. 533 (1964):

> Undeniably, the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, *Ex parte Yarbrough*, 110 U.S. 651, and to have their votes counted, *United States v. Mosley,* 238 U.S. 383. In *Mosley,* the Court stated that it is "as equally unquestionable that the right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box." 238 U.S. at 386.

Reynolds v. Sims, 377 U. S. at 554.

The Constitution also mandates that, when a vote is counted, that vote must have equal weight to other votes in the contest. That was the basis of *Bush v. Gore*, 531 U.S. 98 (2000). The Court wrote there:

> [I]n each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. . . .
>
> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by

> later arbitrary and disparate treatment, value one person's vote over that of another.

Id. at 104-05. A vote for Petitioner, who cannot hold office, would count less than a vote for one of his opponents who can hold office. The Equal Protection Clause does not permit that disparity.

CONCLUSION

Petitioner violated his oath to support the Constitution by engaging in insurrection against the Constitution. The judgment of the Colorado Supreme Court should be affirmed so that Petitioner "incur[s] Constitutional punishment"[3] under Section 3 of the Fourteenth Amendment.

Respectfully submitted,

WALLACE K. LIGHTSEY
Counsel of Record
WYCHE P.A.
200 East Broad Street
Suite 400
Greenville, SC 29601
(864) 242-8200
wlightsey@wyche.com

Counsel for Amicus Curiae Brian J. Martin

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[3] "George Washington's Second Inaugural Address," *supra*.