THE SUPREME COURT OF THE STATE OF COLORADO 2 East 14th Avenue, Denver, CO 80203	
Appeal Pursuant to § 1-1-113(3), C.R.S. District Court, City and County of Denver, Case No. 2023CV032577, Hon. Sarah B. Wallace	
Petitioners-Appellants: NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN, individuals, v. **Respondent-Appellee:** JENA GRISWOLD, in her official capacity as Colorado Secretary of State, And **Intervenors-Appellees:** COLORADO REPUBLICAN STATE CENTRAL COMMITTEE, an unincorporated association, and DONALD J. TRUMP, an individual.	▲ COURT USE ONLY ▲
Attorneys for Amici: Steven A. Hirsch California Bar No. 171285 Keker Van Nest & Peters LLP [redacted] Edward C. Hopkins Jr. Colo. Reg. No. 43298 Rathod Mohamedbhai LLC [redacted]	Supreme Court Case No: 2023SA300

BRIEF OF AMICI FLOYD ABRAMS, BRUCE ACKERMAN, MARYAM AHRANJANI, LEE C. BOLLINGER, ERWIN CHEMERINSKY, ALAN CHEN, KENT GREENFIELD, MARTHA MINOW, AND GEOFFREY R. STONE IN SUPPORT OF PETITIONERS-APPELLANTS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, 29, and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d), as it contains 4,749 words (under the 4,750-word limit).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Edward C. Hopkins Jr.
Edward C. Hopkins Jr.,
Colo. Reg. No. 43298

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I. IDENTITY OF THE AMICI CURIAE AND THEIR INTERESTS IN THE CASE[1]

Amici are Constitutional and First Amendment scholars and practitioners who have an interest in protecting democracy against the exercise of state power by individuals who, by engaging in violent insurrection against the authority of the United States Constitution, have violated their oath to uphold that Constitution. Amici likewise oppose the misuse of the First Amendment as a cover for insurrectionist violence.

Floyd Abrams is Senior Counsel at Cahill Gordon & Reindel LLP and a Visiting Lecturer in Law at Columbia Law School. For 15 years he taught as well at the Columbia Graduate School of Journalism as the William J. Brennan Jr. Visiting Lecturer in First Amendment law. For the last half-century he has been counsel or co-counsel in numerous First Amendment cases of note, including, among others, *New York Times Co. v. United States (Pentagon Papers Case)*, 403 U.S. 713 (1971); *Landmark Communications Inc. v. Virginia*, 435 U.S. 829 (1978); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Herbert v. Lando*, 441 U.S. 153 (1979); *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003); and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). He has written three books and numerous articles about the

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[1] No party's counsel authored this brief in whole or in part; and no person, party, or party's counsel contributed money that was intended to fund preparing or submitting this brief, which was prepared on a *pro bono* basis.

First Amendment, and has received numerous awards for his work in the area.

Bruce Ackerman is Sterling Professor of Law and Political Science at Yale, and the author of 19 books on constitutional law, political philosophy, and public policy. He is a member of the American Law Institute and has been awarded the Henry Phillips Prize for lifetime achievement by the American Philosophical Society for his three-volume work, *We the People*. His scholarship has had a global impact, leading French President Jacques Chirac to name him a Commander of the French Order of Merit for his contributions to European constitutional development.

Maryam Ahranjani is the Ron and Susan Friedman Professor of Law at the University of New Mexico and a former visiting professor of law at the University of Nevada-Las Vegas William S. Boyd School of Law. Professor Ahranjani teaches and writes in the areas of constitutional rights, criminal law and procedure, and education law and directs the UNM chapter of the Marshall-Brennan Constitutional Literacy Project. Professor Ahranjani has received national and local awards for her scholarship, teaching, and service.

Lee C. Bollinger is the President Emeritus of Columbia University, which he led for over two decades, from 2002 to 2023. He is Columbia's first Seth Low Professor of the University, a member of the Law School faculty, and one of the nation's preeminent First Amendment scholars. A member of the American Academy of Arts and Sciences and the American Philosophical Society, Bollinger is also the

recipient of multiple honorary degrees from universities in the United States and abroad.

Erwin Chemerinsky is the Dean of the University of California Berkeley School of Law, where he holds the title of Jesse H. Choper Distinguished Professor of Law. He frequently argues appellate cases, including in the United States Supreme Court. He is the author of 14 books, including leading casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction, and has authored over 200 law-review articles. In 2017, *National Jurist* magazine again named Dean Chemerinsky as the most influential person in legal education in the United States. In 2016, he was named a fellow of the American Academy of Arts and Sciences.

Alan Chen is the Thompson G. Marsh Law Alumni Professor of Law at the University of Denver's Sturm College of Law, where he teaches and writes about free-speech doctrine and theory. He is the co-author of two books concerning the First Amendment and has written numerous scholarly articles that have been published in many of the leading national law journals.

Kent Greenfield, is Professor of Law and Dean's Distinguished Scholar at Boston College Law School, and a scholar of the U.S. Constitution and the First Amendment. He has authored three books on law, two constitutional law casebooks, and over four dozen scholarly articles. He is the principal author of the two Supreme Court volumes of Moore's Federal Practice. He is a member of the American Law Institute and a former Supreme Court clerk to Justice David Souter.

Martha Minow is the 300th Anniversary University Professor at Harvard University and former dean of Harvard Law School. She is the author or editor of 18 books and has authored over 200 law-review articles, including *Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Expression* (2021). Her many public lectures include the 2017 Alexander Meikeljohn Lecture on the First Amendment at Brown University. She is a fellow of the American Academy of Arts and Sciences and a fellow of the American Philosophical Society.

Geoffrey R. Stone is the Edward H. Levi Distinguished Professor of Law at The University of Chicago. He has been a member of the faculty for 50 years and during that time has served both as Dean of The University of Chicago Law School and Provost of the University. Besides editing or writing more than a dozen books on constitutional law, he has been an Editor of *The Supreme Court Review* since 1981; the leading author since 1985 of two leading casebooks, *Constitutional Law* (9th ed. 2022) and *The First Amendment* (7th ed. forthcoming in 2024), and Chief Editor of a 25-volume Oxford University Press series entitled *Inalienable Rights*. He is a Fellow of the American Academy of Arts and Sciences and a member of the American Law Institute and the American Philosophical Society.

II. INTRODUCTION[2]

Amici submit this brief to help the Court evaluate defendant Donald Trump's defense—rejected below—that it would violate the First Amendment to invoke Section Three of the Fourteenth Amendment ("the Disqualification Clause") to disqualify him from appearing on the ballot in the 2024 Colorado Republican presidential primary.[3]

Donald Trump's First Amendment defense is meritless because the Disqualification Clause poses no threat to speech or expression protected by the First Amendment. As a threshold matter, any effect that the Disqualification Clause could have on First Amendment rights would be self-limiting, as the Clause applies only to a unique category of persons who assumed their positions voluntarily—namely, current and former officeholders who violated their oath—and simply makes a

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[2] Throughout this brief, unless otherwise indicated, emphases were added to quotations, while internal citations, footnotes, brackets, ellipses, and the like were omitted from them.

[3] Last year, a New Mexico state court invoked the Disqualification Clause to remove New Mexico County Commissioner Couy Griffin from office based on his role in the Jan. 6 insurrection. *See* Findings of Fact, Conclusions of Law and Judgment, *State of New Mexico, ex rel. White v. Griffin*, No. D-101-CV-2022-00473 (N.M. 1st Judicial Dist. Ct. Sept. 6, 2022), *available at* https://www.citizensforethics.org/wp-content/uploads/2022/09/D101CV202200473-griffin.pdf. In that case, amici submitted a brief explaining why Griffin had no First Amendment defense to disqualification and removal. The New Mexico court agreed with and adopted amici's analysis. *See id.* at ¶¶ 55–60.

vitally important addition to the list of qualifications for holding office. More important, any speech capable of triggering constitutional disqualification will also fall within long-established First Amendment exceptions, including that for "speech integral to illegal conduct"—speech that encourages, induces, furthers a conspiracy to take, or credibly threatens to take, violent or criminal action. Trump's speech was so likely to induce violent, criminal action and was so threatening that it does not enjoy First Amendment protection.

For all these reasons and others set forth below, the Court should uphold the trial court's order finding that Trump's First Amendment defense lacks merit.

III. TRUMP HAS NO FIRST AMENDMENT DEFENSE TO CONSTITUTIONAL DISQUALIFICATION.

A. The Disqualification Clause is narrowly targeted and represents a highly important addition to the list of qualifications for holding office.

The Disqualification Clause poses no threat to protected speech and expression. The scope of the Clause is limited to persons who (1) "previously [took] an oath" as an officeholder "to support the Constitution of the United States," but instead either (2) "engaged in insurrection or rebellion against" that Constitution's authority or gave aid or comfort to its enemies. This category of persons is so circumscribed that, between the end of Reconstruction and 2022, the

Clause was successfully invoked only once.[4] The Clause covers only a category of persons who have chosen their status voluntarily—first by seeking and obtaining office, second by taking an oath to support the Constitution, and third by violating that oath.

The right to seek and hold office is and always has been a qualified one; and a state has a "legitimate interest" in "exclud[ing] from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.). Candidacy has always been limited by qualifications—including the age, citizenship, and residency qualifications that the Constitution itself imposes on the president and members of Congress.[5] The Disqualification Clause is nothing more or less than an additional constitutional qualification for officeholding. *See Griffin v. White*, No. 22-0362 KG/GJF, 2022 WL 2315980, at *12 (D.N.M. June 28, 2022) ("Section Three of the Fourteenth Amendment narrows the First Amendment right to run for office[.]"). Indeed, Congressional proponents of the Clause pointed out that, unlike an

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[4] *See* Myles S. Lynch, *Disloyalty and Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WILLIAM & MARY BILL OF RIGHTS J. 153, 155, 210–214 (2021) [hereinafter *Disloyalty*]. As mentioned, there has now been a second case: Couy Griffin's, in 2022.

[5] *See* U.S. CONST., art. I, § 2, cl. 2; *id.*, art. I, § 3, cl. 3; *id.*, art. 2, § 1, cl. 5; *Disloyalty* at 153 (referring to Disqualification Clause as "the other qualifier" for "holding any public office under the United States or any state").

unconstitutional "bill of attainder," which "impose[s] *punishments*,"[6] the Disqualification Clause "merely changed the *qualifications* for public office." Mark A. Graber, *Their Fourteenth Amendment and Ours*, JUST SECURITY (Feb. 16, 2021) [hereinafter *Their Fourteenth Amendment & Ours*].[7] One Senator "pointed out that preexisting constitutional bans on officeholding were not punishments. 'Does, then, every person living in this land who does not happen to have been born within its jurisdiction undergo pains and penalties and punishment all his life,' he queried, 'because by the Constitution he is ineligible to the Presidency?'" *Id.*

Though merely a qualification for office and not "penal," the Clause is a qualification of the utmost importance. "After the Civil War," a scholar explains, "Congress recognized that its losers would continue to fight—if not on the battlefield, then in the political arena. So one condition for readmission into the Union was that confederate states needed to ratify the Fourteenth Amendment," including its Disqualification Clause. Myles S. Lynch, *Disloyalty and Disqualification: Reconstructing Section 3 of the Fourteenth*

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[6] The Constitution bars Congress from passing a bill of attainder. *See* U.S. Const. art. I, § 9, cl. 3. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977).

[7] *Available at* https://www.justsecurity.org/74739/their-fourteenth-amendment-section-3-and-ours/.

Amendment, 30 WILLIAM & MARY BILL OF RIGHTS J. 153, 155 (2021) [hereinafter *Disloyalty*]. "*The oath to support the Constitution is the test.* The idea being that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress." *Worthy v. Barrett*, 63 N.C. 199, 204, *appeal dismissed sub nom. Worthy v. Comm'rs*, 76 U.S. 611 (1869) (emphasis in original). The Clause was one of the "most heavily debated" provisions of the Fourteenth Amendment during the Thirty-Ninth Congress. *Disloyalty*. In the course of that debate, "what began as a temporary disenfranchisement of every disloyal Southerner eventually became permanent disqualification from holding public office for those who betray their oath to uphold the Constitution of the United States." *Id.*; *see also Their Fourteenth Amendment and Ours*.

Because the Disqualification Clause imposes a *constitutional* qualification on office-holding, its impact on First Amendment rights cannot be analyzed the same way that courts analyze the impact of a mere statute. Rather, the Clause stands on an equal footing with the First Amendment. As alluded to above, Congressional opponents of the Clause argued that, although the Clause was to become part of the Constitution, it was *itself* an unconstitutional bill of attainder. They maintained that "the constitutional commitment to procedural justice forbade Americans from passing a constitutional amendment that authorized bills of attainder," even if that amendment was properly passed using the Article V amendment procedures. *Their Fourteenth Amendment and Ours*. But Republicans "rejected the notion of

unconstitutional amendments." *Id*. One Senator pointed out that "nothing in the Constitution prohibited Americans from ratifying amendments making exceptions to the Constitution's ban on bills of attainder and ex post facto laws. He asserted, '. . . It is said that the law is ex post facto in its character; what if it is? Have not the people the right, by a constitutional amendment, to enact such a law?'" *Id*.

The Disqualification Clause thus stands on the same constitutional footing as the First Amendment, and moreover, has too narrow a scope of operation to significantly impair protected speech or expression. Indeed, its narrow scope makes it a good candidate for applying the canon that specific provisions prevail over conflicting general ones,[8] which should give the Court additional comfort that no First Amendment violation will flow from applying the Disqualification Clause to a former officeholder like Trump, whose conduct fell squarely within the Clause's highly specific and narrowly targeted scope of operation.

B. The First Amendment does not protect speech capable of triggering constitutional disqualification.

Because no constitutional amendment can be dismissed as being itself unconstitutional,[9] courts are obligated to *harmonize* conflicting

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[8] *See, e.g., City of Albuquerque v. N.M. State Corp. Comm'n*, 605 P.2d 227, 229 (N.M. 1979); *Clouse ex rel. Clouse v. State*, 16 P.3d 757, 760 (Ariz. 2001).

[9] *See* Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 ARK. L. REV. 217, 243–45 (2016).

amendments, giving effect to each whenever possible. To resolve conflicts between constitutional provisions, "the United States Supreme Court and state courts have resorted to a number of canons of statutory and constitutional interpretation, including the tenets that the courts must harmonize conflicting constitutional provisions and must value specific rules over general ones."[10] Accordingly, where two constitutional provisions are in genuine "tension" with each other, the Supreme Court "attempts to strike a balance between the values implicated by the two clauses," *United States v. Woodley*, 751 F.2d 1008, 1020–21 (9th Cir. 1985) (en banc) (Norris, J., concurring), with the objective of "harmonizing constitutional provisions which appear, separately considered, to be conflicting." *Reid v. Covert*, 354 U.S. 1, 54 (1957).[11]

For two reasons, harmonizing the Disqualification Clause with the First Amendment is easy.

First, the First Amendment and the Disqualification Clause share the common goal of fostering democracy—the former by ensuring that "debate on public issues" remains "uninhibited, robust, and wide-open," *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964),[12] and the latter by

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[10] Recent Case, *Constitutional Interpretation—Guinn v. Legislature of Nev., 71 P.3D 1269*, 117 HARV. L. REV. 972 (2004).

[11] *See also State of R.I. v. Palmer*, 253 U.S. 350, 386 (1920); *Burdick v. United States*, 236 U.S. 79, 93–94 (1915); *Cohens v. State of Va.*, 19 U.S. 264, 393 (1821); *Marbury v. Madison*, 5 U.S. 137, 174 (1803) (no clause in Constitution "is intended to be without effect.").

[12] *See also Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council*

preventing oath-breakers with a proven hostility to constitutional government from holding the reins of state power.

Second, any speech affected by the Disqualification Clause will also fall within long-recognized First Amendment exceptions, such as that for "speech integral to illegal conduct" ("the integral-speech exception"). *See generally* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 1, 59 (2024) (forthcoming) [hereinafter *Sweep & Force*].[13] Under that exception, broadly speaking, a defendant cannot raise a First Amendment defense merely because an illegal act required speech to further or complete it.

The principle underlying the integral-speech exception is that the First Amendment's protections "are not absolute." *Virginia v. Black*, 538 U.S. 343, 358–59 (2003). "[C]ontent-based restrictions on speech have been permitted . . . when confined to the few historic and traditional categories of expression long familiar to the bar. Among these categories are . . . speech integral to criminal conduct." *United States v. Alvarez*, 567 U.S. 709, 717 (2012). The Supreme Court has rejected "the contention that conduct [that is] otherwise unlawful is always immune from state regulation [merely] because an integral part

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31, 138 S. Ct. 2448, 2464 (2018) (First Amendment is "essential to our democratic form of government" and "furthers the search for truth.").

[13] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751 (last revised Sept. 19, 2023).

of that conduct is carried on by" means of speech. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

Courts repeatedly have held that making a "course of conduct" illegal "has never been deemed an abridgment of freedom of speech . . . merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Cox v. L.A.*, 379 U.S. 559, 563 (1965) (quoting *Giboney*, 336 U.S. at 502). Thus, "[i]t rarely has been suggested that the constitutional freedom for speech . . . extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *N.Y. v. Ferber*, 458 U.S. 747, 761–62 (1982) (quoting *Giboney*, 336 U.S. at 498). "Put another way, speech is not protected by the First Amendment when it is the very vehicle of the crime itself." *United States v. Rowlee*, 899 F.2d 1275, 1278 (2d Cir. 1990).

To prevent its overbroad application, the integral-speech exception should be limited to situations where "speech tends to cause, attempts to cause, or makes a threat to cause some illegal conduct . . . other than the speech itself." Eugene Volokh, *The Speech Integral to Criminal Conduct Exception*, 101 CORNELL L. REV. 981, 986–87 (2016). The integral-speech exception thus "opens the door" to considering other narrowly defined and historically recognized First Amendment exceptions that represent "special cases" of the overarching integral-speech exception. *Id.* at 1011, ¶ 3. Two such "special cases," discussed below, are **(1)** speech integral to federal laws that criminalize encouraging, inducing, or furthering a conspiracy to take, violent action

(*see* Part III.B.1, *infra*); and **(2)** speech likely to incite "imminent lawless action" (*see* Part III.B.2, *infra*). Also relevant here is the First Amendment exception for "true threats" (*see* Part III.B.3, *infra*).

1. The First Amendment does not protect speech integral to federal crimes prohibiting the solicitation or encouragement of violence.

"[W]hile one must use some caution about unduly expanding [the integral-speech exception], conspiracy and solicitation are at its core. Thus, efforts to steal elections, to pressure state officials to manufacture votes, to pressure other officials (such as the Vice President) to violate their constitutional duties in service of a constitutional coup—would all be unprotected by the First Amendment." *Sweep & Force* at 59. "To the extent that those activities are swept up by [the Disqualification Clause], there would be no conflict." *Id*.

Conspiracy and solicitation "in service of a constitutional coup" inevitably invite violence. That was the case here, where Trump's electoral machinations culminated in a violent attack on the Capitol. Fortunately, a variety of federal criminal statutes outlaw speech that encourages, induces, or furthers a conspiracy to take, violent action. Such speech garners no First Amendment protection, as demonstrated by the fact that courts have upheld federal criminal-conspiracy and criminal-solicitation statutes against First Amendment challenges similar to Trump's. *See, e.g., United States v. Rahman*, 189 F.3d 88, 114–15 (2d Cir. 1999); *United States v. Lebron*, 222 F.2d 531, 536 (2d Cir. 1955).

In *Rahman*, the Second Circuit observed that "freedom of speech . . . do[es] not extend so far as to bar prosecution of one who uses a public speech . . . to commit crimes." *Id.* at 116–17. The court noted that "[n]umerous crimes under the federal criminal code are, or can be, committed by speech alone," adding: "Notwithstanding that political speech . . . [is] among the activities most jealously guarded by the First Amendment, one is not immunized from prosecution for such speech-based offenses merely because one commits them through the medium of political speech . . . . Of course, courts must be vigilant to [e]nsure that prosecutions are not improperly based on the mere expression of unpopular ideas. But if the evidence shows that the speeches crossed the line into criminal solicitation, procurement of criminal activity, or conspiracy to violate the laws, the prosecution is permissible." *Id.* at 117.

After reviewing a number of Supreme Court and other appellate precedents, the court discerned "a line . . . between expressions of belief, which are protected by the First Amendment, and threatened or actual uses of force, which are not." *Id.* at 115. "Words of this nature—ones that instruct, solicit, or persuade others to commit crimes of violence—violate the law and may be properly prosecuted regardless of whether they are uttered in private, or in a public speech, or in administering the duties of a religious ministry." *Id.* at 117. As the *Rahman* court observed, numerous federal criminal offenses pass muster under the First Amendment despite being "characteristically committed through speech," *Rahman*, 189 F.3d at 117, including the use of "conspiratorial

or exhortatory words" to facilitate "preparatory steps towards criminal action." *Id.* at 116.[14]

Trump's conduct is of a type that easily falls within the proscribed category of speech that encourages, induces, or furthers a conspiracy to take, violent or criminal action. Prior to his Jan. 6 speech on the Ellipse, Trump tweeted that the Jan. 6 protest would be "wild"—words that served as "a call to arms" for "tens of thousands of his supporters around the country," including "many extremists and conspiracy theorists."[15] During his speech, he "not only knew that his supporters were angry, but also that some of them were armed"; yet "he ad-libbed, deliberately stoking their rage even more."[16] "At one point he said: 'And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore.' The word 'fight,' or a variation thereof, appeared only twice in the prepared text. President Trump would go on to utter the word twenty times during his speech at the Ellipse."[17] In sum: President Trump "summoned a mob, including armed

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[14] *See, e.g.*, 18 U.S.C. §§ 2(a), 37, 241*, 371*, 373(a), 1512(c)(2) & (k)*, 1751(d), 1951 & 2384; 21 U.S.C. § 846. (Asterisks denote statutes that Trump has been charged with violating.) *See also* 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 10.35, at 10-42.30–10-42.31 (2021) (listing crimes employing speech).

[15] *Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol*, 117th Cong., at 499 (2023).

[16] *Id.* at 540.

[17] *Id.*

extremists and conspiracy theorists, to Washington, DC on the day the joint session of Congress was to meet. He then told that same mob to march on the U.S. Capitol and 'fight.' They clearly got the message."[18]

Because Trump's speech—and any speech arguably affected by the Disqualification Clause—is speech integral to one or more federal crimes of established constitutionality, the First Amendment never comes into play, and Trump has no First Amendment defense.

2. The First Amendment does not protect speech that incites imminent lawless action.

Speech capable of triggering constitutional disqualification also is likely to incite "imminent lawless action," which enjoys no First Amendment protection.

Under *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), the First Amendment does not protect speech that is both "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action." The Disqualification Clause—which, it bears repeating, is not a mere *statute* but a constitutional provision—clearly falls on the acceptable side of the line drawn in *Brandenburg*. There is a nearly exact congruence between the types of verbal incitement denied protection under *Brandenburg* and the types of insurrectionist speech that triggers the Clause. To the extent that their oath-breaking takes the form of speech, oath-breakers who "engage[] in insurrection or

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[18] *Id*. The trial court's factual findings and description of events accord with those of the Select Committee. *See* Final Order at ¶¶ 85–145.

rebellion" against the Constitution's authority represent the paradigmatic case of a speaker who incites or helps to produce "lawless action"—action that is not merely "*imminent*" or "*likely*" to occur but that actually *did* occur, in the form of an insurrection or rebellion.

As the trial court's Final Order thoroughly documents,[19] Trump's disqualifying conduct—to the extent that it involved speech at all—garners no First Amendment protection. Trump did not engage in "the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence";[20] rather, his Jan. 6 speech on the Ellipse was both "directed to inciting or producing imminent lawless action" and was "likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447. The trial court's exhaustive and entirely correct analysis requires no further elaboration here.

3. The First Amendment does not protect speech that constitutes a "true threat" to others.

Speech that triggers disqualification also may fall within the "true threat" exception, which denies First Amendment protection to "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. at 359–60. To prove up this exception, the government must show that the defendant "consciously disregarded a substantial risk that his

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[19] *See id.* at ¶¶ 264–298.

[20] *Brandenburg*, 395 U.S. at 448.

communications would be viewed as threatening violence." *Counterman v. Colorado*, 143 S. Ct. 2106, 2112 (2023).

Trump left no doubt that he "mean[t] to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"[21]—namely, that he intended at a minimum to incite his supporters to prevent legislators, through threats of violence, from voting to certify the presidential election. In view of the events of January 6, legislators "who hear[d] or read the threat [could] reasonably consider that an actual threat ha[d] been made." *United States v. Wheeler*, 776 F.3d 736, 743 (10th Cir. 2015). For example, the trial court found that Trump's tweet at 2:24 pm on January 6, stating that the Vice President "didn't have the courage to do what should have been done," was interpreted by Congressman Eric Swalwell as "painting a 'target' on the Capitol and threatening the Vice President and their 'personal safety and the proceedings' to certify the election."[22]

There can be equally little doubt that Trump "consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Counterman*, 143 S. Ct. at 2112. For example, the trial court found that on January 6, Trump not only delivered an incendiary speech that "was intended as, and was

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[21] *Virginia v. Black*, 538 U.S. at 359–60.

[22] Final Order at ¶ 172.

understood by a portion of the crowd as, a call to arms,"[23] but thereafter "ignored pleas to intervene and instead called Senators urging them to help delay the electoral count. When told that the mob was chanting 'Hang Mike Pence,' Trump responded that perhaps the Vice President deserved to be hanged. . . . Trump also rebuffed pleas from Leader McCarthy to ask that his supporters leave the Capitol . . . ."[24]

Trump's violent, incendiary speech calling on others to violate the law is not the kind of speech afforded First Amendment protection. Nothing in the First Amendment should inhibit this Court from carrying out its constitutional duty to disqualify Trump from appearing on the 2024 Republican presidential-primary ballot.

IV. CONCLUSION

For all the reasons stated above, the Court should hold that Donald Trump has no First Amendment defense to constitutionally mandated disqualification from appearing on the 2024 Colorado Republican presidential-primary ballot.

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[23] *Id*. at ¶ 145.

[24] *Id*. at ¶ 180.

Respectfully submitted on November 29, 2023.

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CERTIFICATE OF SERVICE

I certify that on this 29th day of November, 2023, a true and correct copy of the forgoing **BRIEF OF AMICI FLOYD ABRAMS, BRUCE ACKERMAN, MARYAM AHRANJANI, LEE C. BOLLINGER, ERWIN CHEMERINSKY, ALAN CHEN, KENT GREENFIELD, MARTHA MINOW, AND GEOFFREY R. STONE IN SUPPORT OF PETITIONERS/PLAINTIFFS** was served on the following parties or their counsel electronically via ICCESS to:

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