No. 23-719

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
Petitioner,

v.

NORMA ANDERSON, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF CONSTITUTIONAL LAW PROFESSOR MARK A. GRABER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Mark A. Graber is the Regents Professor at the University of Maryland Francis King Carey School of Law.[1] The Regents Professorship is the highest honor in the University of Maryland System. Professor Graber is the seventh person to hold that honor. Professor Graber has taught constitutional law for over thirty years, with a specialty in American Constitutional Development. He has researched the framing of Sections Two, Three, and Four of the Fourteenth Amendment for almost a decade. Professor Graber has published several articles on the centrality of these provisions to constitutional reform during Reconstruction. He is the only scholar to have published a peer-reviewed university press book on the subject. See *Punish Treason, Reward Loyalty: The Forgotten Goals of Constitutional Reform After the Civil War* (Kansas University Press, 2023).

This amicus brief provides accurate historical information on the constitutional law of insurrection from the framing of the Constitution to Reconstruction. The following pages detail what American lawmakers, courts, and legal commentators understood to be an insurrection and what they thought constituted participating in one.

II. ARGUMENT SUMMARY

When Section Three of the Fourteenth Amendment was framed, constitutional lawyers recognized that an insurrection involved a) an assemblage, b) resisting

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[1] Counsel for the parties did not author any part of this brief; nor did counsel for any party or anyone else contribute funds for preparation or submission of the brief.

any law or interfering with the course of a governmental proceeding, c) by force or intimidation, d) for a public purpose. Persons engaged in an insurrection when they incited, assisted, or otherwise acted in concert with others bent on resisting law by force or violence for a public purpose. The Members of Congress who played a crucial role drafting Section Three stated that no difference existed between inciting and engaging in an insurrection.

The Colorado Supreme Court adopted legal standards that are consistent with how the legal community understood insurrection at the time Section Three was framed and ratified. In particular, the justices applied the correct nineteenth century standards to decide whether an insurrection occurred on January 6, 2021, and whether Donald Trump engaged in that insurrection.

III. ARGUMENT

A. A legal consensus existed from the Constitution's Framing to Reconstruction that a constitutional insurrection occurred when two or more persons by force and violence resisted the execution of any law for a public purpose.

"Insurrection" at the time Section Three of the Fourteenth Amendment was framed and ratified "had a precise and well-understood constitutional meaning."[2] That understood meaning was articulated by the Supreme Court,[3] by Supreme Court justices

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[2] See Carlton F.W. Larson, ON TREASON: A CITIZEN'S GUIDE TO THE LAW 7 (HarperCollins: New York, 2020).

[3] *Ex parte Vallandigham*, 28 F. Cas. 874, 888 (1863); *United States v. Burr*, 8 U.S. 470 (1807); *Ex parte Bollman*, 8 U.S. 75,

riding circuit,[4] by other federal judges,[5] by state court

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128 (1807); *United States v. Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807); *United States v. Vigol*, 2 U.S. 346, 347 (1795); *United States v. Mitchell*, 2 U.S. 348, 357 (1795).

[4] Stephen Field, "The Charge delivered by Judge Field to the Grand Jury Impanneled for the Circuit Court of the United States for the Northern District of California at the City of San Francisco on the Thirteenth of August, 1863," TREASON AND REBELLION: BEING IN PART THE LEGISLATION OF CONGRESS AND OF THE STATE OF CALIFORNIA (Towne & Bacon, Book and Job Printers: San Francisco, Ca, 1863) (FIELD CHARGE); *United States v. Greathouse*, 26 F. Cas. 18, 21 (C.C.N.D. Ca., 1863) (Field); *In re Charge to Grand Jury*, 30 F. Cas. 1034, 1035 (C.C.S.D.NY, 1861) (Nelson); John Catron, et al., CHARGE TO THE GRAND JURY BY THE COURT, JULY 10, 1861 (St. Louis: Democratic Book and Job Office, 1861); "The Law of Treason: Opinion of Judge Swayne Upon a Question of Constitutional Law," MEMPHIS DAILY AVALANCHE 3 (May 16, 1862); *United States v. Hanway*, 26 F. Cas. 105, 127-28 (1851) (Grier); *Charge to Grand Jury—Neutrality Laws and Treason*, 30 F. Cas. 1024, 1025 (C.C.D. Ma. 1851) (Curtis); *In re Charge to Grand Jury—Treason*, 30 F. Cas. 1046 (C.D. R.I. 1842) (Story); *United States v. Hoxie*, 26 F. Cas. 397, 399 (C.C. Vt. 1808) (Livingston); *Case of Fries*, 9 F. Cas. 924 (C.C.D. 1800) (Samuel Chase); James Iredell, "A Charge Delivered to the Grand Jury of the United States, for the District of Pennsylvania, in the Circuit Court of the United States, for the said district, held in the city of Philadelphia, April 11, 1789, by JAMES IREDELL, one of the Associate Justices of the Supreme Court of the United States," Griffin J. McRee, LIFE AND CORRESPONDENCE OF JAMES IREDELL II:567-69 (New York: D. Appleton and Company, 1858).

[5] *Greathouse*, 26 F. Cas. at 25-29 (Hoffmann); Connally F. Trigg, CHARGE TO THE GRAND JURY IN THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, AT NASHVILLE, ON THE EIGHTH DAY OF JULY, 1863 (Barry, Winham: Nashville, TN, 1863); Hon. N.K. Hall, "Charge to the Grand Jury, May 21, 1861," 3 W. L. Monthly 271 (1861); *United States v. Greiner*, 26 F. Cas. 36 (E.D. Pa. 1861); *Charge to Grand Jury—Treason & Piracy*, 30 F. Cas. 1049 (C.C.D. Ma. 1861) (Sprague); "Judge Miller's Charge," 3 W. L. Monthly 360, 362 (1860); *In re Charge to Grand Jury—Treason*, 30 F. Cas. 1032 (C.C.D.D. NY, 1861) (Smalley); *Charge*

judges,[6] and by the leading legal treatise writers during the period between ratification of the Constitution and Reconstruction.[7] George Boutwell, a member of

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to Grand Jury—Fugitive Slave Law, 30 F. Cas. 1015, 1015 (D.C. D. Ma., 1851) (Sprague); *Charge to Grand Jury—Treason*, 9 West L.J. 163 (C.C.E.D. Pa., 1851) (Kane); *Burr*, 25 F. Cas. 55 (Marshall); *United States v. Bollman*, 24 F. Cas. 1189, 1193 (C.C.D.C. 1807) (Cranch, J.).

[6] *Hubbard v. Harnden Exp. Co.*, 10 R.I. 244, 247 (1872) ("an insurrection against lawful authority"); *Worthy v. Barrett*, 63 N.C. 199, 203 (1869); *Hague v. Powers*, 39 Barb. 427 (1863) ("for the crime of treason will be committed by any citizen who shall resist by force any law of the United States, or adhere to their enemies, giving them aid and comfort"); *Nichols v. Pinner*, 18 N.Y. 295, 303 (1858) ("An intent to overthrow the government is not treason without an overt act"); *Ingram's Heirs v. Cocke,* 1 Tenn. 22, 28 (1804) (arguments of counsel).

[7] See John W. May, THE LAW OF CRIMES 224-27 (Little, Brown: Boston, MA, 1881); Frederick C. Brightly, A DIGEST OF THE DECISIONS OF THE FEDERAL COURTS, FROM THE ORGANIZATION OF THE GOVERNMENT TO THE PRESENT TIME 214-16 (Kay & Brother: Philadelphia, Pa. 1868); H.W. Halleck, ELEMENTS OF INTERNATIONAL LAW AND LAWS OF WAR 150 (J.B. Lippincott & Co.: Philadelphia, Pa. 1866); Francis Lieber, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES, IN THE FIELD: REVISED BY A BOARD OF OFFICERS 34 (D. Van Nostrand: New York, 1863); Daniel Agnew, OUR NATIONAL CONSTITUTION: ITS ADAPTION TO A STATE OF WAR OR INSURRECTION: A TREATISE 7-8 (C. Sherman, Son & Co. (Philadelphia, Pa. 2d ed., 1863); William Whiting, THE WAR POWERS OF THE PRESIDENT, AND THE LEGISLATIVE POWERS OF CONGRESS IN RELATION TO REBELLION, TREASON, AND SLAVERY 93-110 (J.L. Shorey: Boston, Ma. 1862); Francis Wharton, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES: COMPRISING A GENERAL VIEW OF THE CRIMINAL JURISPRUDENCE OF THE COMMON AND CIVIL LAW AND A DIGEST OF THE PENAL STATUTES OF THE GENERAL GOVERNMENT, AND OF MASSACHUSETTS, NEW YORK, PENNSYLVANIA, VIRGINIA, AND OPINION: WITH THE DECISIONS ON CASES ARISING UPON THOSE STATUTES (Vols. 1-2) 1:75-76, 665 2:486-97 (Kay and Bro: Philadelphia, Pa., 5th ed., 1861); Henry Flanders, AN EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES: DESIGNED AS A MAN-

the Joint Committee on Reconstruction responsible for drafting the Fourteenth Amendment, set out the nineteenth century consensus when writing *The Constitution of the United States at the End of the First Century* (1895).[8] These nineteenth century American jurists understood an insurrection against the United States to be an attempt made by an assemblage to ob-

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UAL OF INSTRUCTION 229 (E.H. Butler: Philadelphia, Pa. 1860); Andrew W. Young, THE CITIZEN'S MANUAL OF GOVERNMENT AND LAW: COMPRISING THE ELEMENTARY PRINCIPLES OF CIVIL GOVERNMENT; A PRACTICAL VIEW OF THE STATE GOVERNMENTS; AND OF THE GOVERNMENT OF THE UNITED STATES; A DIGEST OF COMMON AND STATUTORY LAW, AND OF THE LAW OF NATIONS; AND A SUMMARY OF PARLIAMENTARY RULES FOR THE PRACTICE OF DELIBERATIVE ASSEMBLIES (enlarged ed.) 147 (H. Dayton: New York, 1858); Simon Greenleaf, A TREATISE ON THE LAW OF EVIDENCE (Vol. III) 211-21 (C.C. Little & J. Brown: Boston, Ma. 1842-53); S.G. [Simon Greenleaf], "On the Law of Treason," 14 MONTHLY L. REP. 406 (1851); Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION (Vol. III) 667-72 (Hilliard, Gray: Boston, Ma. 1833); William A. Duer, OUTLINES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES 183-84 (Collins and Hannay: New York 1833); Nathan Dane, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW: WITH OCCASIONAL NOTES AND COMMENTS 6:685-89 (Cummings, Hilliard & Co.: Boston, Ma. 1823-29); William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 305-06 (H.C. Carey & I. Lea: Philadelphia, Pa. 1825); James Wilson, LECTURES ON LAW, THE WORKS OF THE HONORABLE JAMES WILSON, L.L.D.: LATE ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, AND PROFESSOR OF LAW IN THE COLLEGE OF PHILADELPHIA 3:97-99 (ed., Bird Wilson) (Lorenzo Press: Philadelphia, Pa. 1804). But see, Joel P. Bishop, COMMENTARIES ON THE CRIMINAL LAW I:365, 495, 509 II:692-95 (Little, Brown: Boston, Ma., 1856-58).

[8] George S. Boutwell, THE CONSTITUTION OF THE UNITED STATES AT THE END OF THE FIRST CENTURY 319-20 (D.C. Health: Boston, MA, 1896).

struct by force the implementation of federal law for public reasons. General agreement existed among judges and influential legal commentators that the four elements of an insurrection were a) an assemblage, b) resistance to a law, c) force or intimidation, and d) a public purpose. Section Three used "insurrection" in this commonly understood sense, while limiting the scope of that provision to insurrections against the "Constitution of the United States" as opposed to insurrections against state laws.[9]

1. A legal consensus existed from the Constitution's Framing to Reconstruction that a constitutional insurrection did not require an effort to overturn the government.

Americans in the nineteenth century regarded "insurrection" as a synonym for "levying war," with the proviso, as Chief Justice John Marshall noted in *United States v. Burr,* that "levying war" was a "technical term."[10] "Levying war" in the constitutional sense did

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[9] One of Petitioner's amicus briefs concedes that "the term 'insurrection' may have had a relatively well-understood common law meaning at the time of ratification," but insists—without citing a single source published from 1789 to 1868—that "the term 'insurrection . . . against the [Constitution]'" did not. *Brief of Amicus Curiae Claremont Inst.*, p. 20 (brackets and ellipsis added). The sources discussed in this brief discuss the **constitutional** meaning of insurrection. No evidence exists that the persons responsible for Section Three thought the phrase "insurrection . . . against the [Constitution]" provided a new definition of insurrection.

[10] *In re Burr*, 8 U.S. at 471. See *Greathouse*, 26 F. Cas. at 22; *Hanway*, 26 F. Cas. at 127; Agnew, OUR NATIONAL CONSTITUTION 7.

not require, as several amici briefs claim,[11] an attempt to overthrow the national government, massive armies too strong to be resisted by ordinary law enforcement, an invasion, a violent national conflict, or a declaration of war.[12] Persons levied war against the United States when they sought to overthrow the federal government, but also when they resisted by force federal authority or the implementation of any federal law. Adjudicating a case arising from the Whiskey Insurrection, Justice William Patterson in *United States v. Mitchell* (1795) declared "an insurrection with an avowed design to suppress public offices, is an act of levying war."[13] When charging a jury during the Civil War in 1861, District Judge David Allen Smalley maintained, "If a body of people conspire and meditate an insurrection, to resist or oppose the laws of the United States by force, they are only guilty of a high misdemeanor; but, if they proceed to carry such intention into execution by force, they are guilty of treason by levying war."[14]

Judges and treatise writers during the nineteenth century differed on the precise difference between a rebellion and insurrection. But they agreed that the phrase "insurrection or rebellion" covered small-scale violent resistance to authority as well as attempts to

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[11] *Brief of Amici Curiae America's Future, et al*, pp. 28-29; *Brief of Amici Curiae States of States of Indiana, West Virginia, et al*., p. 10; *Brief of Amicus Curiae of State of Kansas*, pp. 21-22; *Brief of Amicus Curiae Wyoming Secretary of State Chuck Gray*, p. 6; *Brief of Amici Curiae Gavin M. Wax, et al*., p. 21.

[12] See Rawle, A VIEW OF THE CONSTITUTION, supra note 7, at 305.

[13] *United States v. Mitchell*, 2 U.S. at 355.

[14] *In re Charge to Grand Jury—Treason* (Smalley), 30 F. Cas. at 1033.

overthrow the national government. Most commentators made one of two distinctions. Francis Lieber maintained that a "rebellion" was an insurrection in which the insurgents intended to overthrow the government. "The term *rebellion*," he wrote, "is applied to an insurrection of large extent" (emphasis in original).[15] *Webster's Dictionary* in 1865 defined "insurrection" as "a rising up of individuals to prevent the execution of law by force of arms," "revolt" as "a casting off the authority of a government with a view to put it down by force," and "rebellion" as an "extended insurrection and revolt."[16] More often, judicial opinions and commentary distinguished a "rebellion" from "a mere insurrection."[17] Senator Willard Saulsbury of Delaware maintained that an "insurrection" is "the act of unorganized individuals" as opposed to rebellions which required "States or organized political communities."[18] This Court adopted a similar distinction between insurrections and rebellions in *Brig Amy Warwick* (1863) when describing the Civil War as "no loose, unorga-

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[15] Lieber, INSTRUCTIONS FOR THE GOVERNMENT, supra note 7 at 34.

[16] DR. WEBSTER'S UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 702 (Bell and Daldy: London, 1865).

[17] *Metropolitan Bank v. Van Dyck*, 27 N.Y. 400, 465 (1863). See *Chancely v. Bailey*, 37 Ga. 532, 548 (1868) ("If the late war had been marked merely by the armed resistance of *some* of the citizens of the State to its laws, or to the laws of the Federal Government, as in the cases in Massachusetts in 1789, and in Pennsylvania in 1793, it would very properly have been called an insurrection"); *Johnson v. Jones*, 44 Ill. 142, 149 (1867) ("The rebellion was more than an insurrection").

[18] CONG. GLOBE, 37th Cong., 2nd Sess. 2898 (1862). See *Texas v. White & Chiles*, 25 Tex. Supp. 465, 521 (1868) ("mere insurrection of individuals"); *Bishop v. Jones & Petty*, 28 Tex. 294, 313 (1866) (referring to "local unorganized insurrection").

nized insurrection, having no defined boundary or possession."[19] Numerous state cases quoted or paraphrased this passage.[20]

Several amici briefs correctly observe that nineteenth century Americans often spoke of "insurrection" and "rebellion" in the same sentence.[21] Both were considered serious crimes, deserving of serious sanctions, and meriting disqualification from office-holding. This association no more "equates" "rebellion" and "insurrection"[22] than Section Three's declaration disqualifying those who had held "any office, civil or military" equates civil and military offices. General Henry Halleck contrasted rebellions with "mere insurrection, . . . the acts of such *individual* insurgents . . . in resisting or opposing the authority of the government."[23] The Supreme Court in the *Amy Warwick/Prize Cases*, declared: "Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government."[24]

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[19] *Brig Amy Warwick*, 67 U.S. 635, 673 (1863).

[20] *Smooth v. Brazelton*, 48 Tenn. 44, 55 (1870); *Hill v. Boyland*, 40 Miss. 618, 630, 632 (1866); *Pennywit v. Kellogg*, 13 Ohio Dec. Reprint 389, 390 (1870); *White & Chiles*, 25 Tex. Supp. at 544; *Hall v. Keese*, 31 Tex. 504, 543 (1868).

[21] See *Brief of Amici Curiae States of Indiana, West Virginia, et al.*, pp. 10-14; *Brief of Amicus Curiae State of Kansas*, pp. 23-27.

[22] *Brief of Amici Curiae States of Indiana, West Virginia, et al.*, p. 2.

[23] Halleck, ELEMENTS 155.

[24] *Brig Amy Warwick*, 67 U.S. at 666.

An insurrection could be aimed at secession or overturning the government, but as demonstrated in the insurrection trials of persons involved in the Whiskey Insurrection, the Fries Insurrection, the Christiana Riots, and Taos Insurrection, insurrections were often local affairs.[25] Insurrections occurred in 1794, when Pennsylvania farmers burnt the house of a tax collector; in 1799, when John Fries and friends made a show of arms that resulted in the release of persons charged with federal tax evasion; in 1847, when Hispanic and Native Americans attacked occupying American officials in New Mexico; in 1851, when Pennsylvanians obstructed official efforts to capture an alleged fugitive slave; and in 1856, when rival forces were violently resisting laws on slavery.[26] Prison breaks were described as insurrections,[27] particularly when the persons freed were traitors.[28] Both federal and state authorities after the Civil War described Klan violence as "insurrections."[29]

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[25] Americans during the Civil War were familiar with the various forms that insurrections could take. One widely circulated account included Shay's Rebellion, the Whiskey Insurrection, the Burr Insurrection, and John Brown's raid as examples of insurrections that occurred in the United States before the Civil War. "American Rebellions—Past and Present," APPLETON POST 2 (May 11, 1865).

[26] Franklin Pierce, PROCLAMATION 66—LAW AND ORDER IN THE TERRITORY OF KANSAS, FEB. 11, 1856, AMERICAN PRESIDENCY PROJECT, avail., https://perma.cc/6V45-J9ER (last accessed 1/27/2024).

[27] *State v. Halford*, 40 S.C.L. 58 (1852).

[28] *State v. John Mills*, 2 Del. Case. 238, 239 (1798).

[29] *Ex parte Moore*, 64 N.C. 802, 804 (1870); Ulyssess S. Grant, PROCLAMATION 197—LAW AND ORDER IN THE STATE OF SOUTH CAROLINA, Mar. 24, 1871, AMERICAN PRESIDENCY PROJECT, avail., https://perma.cc/BSE8-BG8Z, (last accessed 1/27/2024).

The constitutional law of treason and insurrection when Section Three was framed made clear distinctions between "levying war against the United States" and "adhering to their Enemies." Persons levied war when they engaged in an insurrection by allying with others who owed allegiance to the United States to resist by force federal law. Persons "adhered to their enemies" when they supported foreign efforts to subvert American laws and interests. Constitutional authorities in the United States during the Civil War emphasized the "levying war" prong of the treason clause and of federal statutes punishing treason. When charging the jury in *United States v. Greathouse,* Justice Stephen Field explained why confederates "must be brought within the first clause of the definition of treason" when he stated, "the second clause . . . applies only to the subjects of a foreign power in a state of open hostility with us."[30] The second clause, he continued, "does not embrace rebels in insurrection against their own government. An enemy is always the subject of a foreign power who owes no allegiance to our government or country.[31]

The several amicus briefs that emphasize the two forms of treason[32] fail to acknowledge that both treasons had the same elements. Actions assisting domestic insurgents that constituted levying war or engaging in an insurrection against the United States

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[30] *Greathouse*, 26 F. Cas. at 22.

[31] *Id*. See Trigg, CHARGE TO THE GRAND JURY, *supra* note 5, at 12; "The Law of Treason," *supra* note 4, at 3.

[32] *Brief of Amicus Curiae James Madison Center for Free Speech*, pp. 9-15; *Brief of Amicus Curiae U.S. Sen. Ted Cruz*, pp. 21-22; *Brief of Amicus Curiae Wyoming Secretary of State Chuck Gray*, pp. 10-11; *Brief of Amici Curiae Gavin M. Wax, et al*., pp. 17-21.

constituted aiding and comforting when assisting the foreign enemies of the United States. Judge Ogden Hoffman, Jr., contended in *Greathouse*:

> Every act which, if performed with regard to a public and foreign enemy, would amount to 'an adhering to him, giving him aid and comfort,' will, with regard to a domestic rebellion, constitute a levying of war. And, conversely, every act which, with regard to domestic rebellion, will constitute 'a levying of war,' will, with regard to a foreign enemy, constitute 'an adhering to him, giving him aid and comfort.'[33]

2. A legal consensus existed from the Constitution's Framing to Reconstruction on the four elements of an insurrection.

An insurrection required an "assemblage."[34] Justice Benjamin Curtis spoke of "A combination, or conspiracy by which different individuals are united in one common purpose."[35] The precise numbers of persons resisting law by force had no bearing on whether an insurrection occurred. Justice Samuel Chase in *Case of Fries* (1800) declared, "the quantum of the force employed neither lessens nor increases the crime—whether by one hundred or one thousand per-

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[33] *Greathouse*, 26 F. Cas. at 25 (Hoffmann, J.). See Trigg, CHARGE TO THE GRAND JURY, *supra* note 5, at 10; Greenleaf, "On the Law of Treason," *supra* note 4, at 3.

[34] See Larson, ON TREASON, *supra* note 2, at 34 ("The nineteenth-century decisions insisted that a lone individual was incapable of levying war by himself").

[35] *Charge to Grand Jury—Neutrality Laws and Treason* (Curtis), 30 F. Cas. at 1025.

sons, is wholly immaterial."[36] That resistance was futile did not excuse the insurrection. The North Carolina Supreme Court in *Shortridge v. Macon* (1867) declared, "the armed attempts of a few, attended by no serious danger to the Union, and suppressed by slight exertions of the public force, come, unquestionably, within the constitutional definition."[37]

An insurrection against the United States required resistance to "any statute"[38] or "some public law of the United States."[39] Curtis reminded a grand jury: "The law does not distinguish between a purpose to prevent the execution of one, or several, or all laws."[40] An insurrection could be directed at a legislature as well as at executive officials. William Rawle declared an effort to "coerce repeal of a general law" to be "an overt act of levying war."[41] Justice Field's opinion in *Greathouse* held that any effort to "coerce [the] conduct" of government constituted an insurrection.[42]

An insurrection proceeded with violence or intimidation by numbers.[43] Justice Robert Grier stated: "there must be a conspiracy to resist by force, and an

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[36] *Case of Fries*, 9 F. Cas. at 931.

[37] *Shortridge v. Macon*, 61 N.C. 392, 395 (1867).

[38] See *Charge to Grand Jury—Fugitive Slave Law* (Sprague), 30 F. Cas. at 1015.

[39] *Charge to the Grand Jury—Neutrality Laws and Treason* (Curtis), 30 F. Cas. at 1025.

[40] *Id.*

[41] Rawle, A VIEW OF THE CONSTITUTION, *supra* note 7, at 305-06.

[42] *Greathouse*, 26 F. Cas. at 22 ("coerce its conduct, . . . defeat the execution and compel the repeal of one of its public laws").

[43] *Burr*, 25 F. Cas. at 163, 165.

actual resistance by force or arms or intimidation by numbers."[44] Marshall asserted:

> the most comprehensive definition of levying war against the king, or against the United States, which I have seen, requires an assemblage of men, ready to act, and with an intent to do some treasonable act, and armed in warlike manner, or else assembled in such numbers, as to supersede the necessity of arms.[45]

This force need not resemble a military engagement. Lieber noted: "Armed or unarmed resistance by citizens of the United States against the lawful movements of their troops, is levying war against the United States, and is therefore treason."[46]

An insurrection had a public purpose.[47] Chase insisted: "When the intention is universal or general, as to effect some object of a general public nature, it will be treason."[48] The public purpose could be to rectify a perceived injustice. Judge John Kane's charge to the jury spoke of "insurrections to redress by force national grievances; or to reform real or imaginary evils of a public nature."[49] The crucial element was that "the

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[44] *Hanway*, 26 F. Cas. at 128. See *In re Charge to Grand Jury—Treason* (Story), 30 F. Cas. at 1046.

[45] *Bollman*, 24 F. Cas. at 1193.

[46] Lieber, INSTRUCTIONS FOR THE GOVERNMENT, *supra* note 7, at 36.

[47] See Larson, ON TREASON, *supra* note 2, at 27.

[48] *Case of Fries*, 9 F. Cas. at 931.

[49] See David R. Forbes, A TRUE STORY OF THE CHRISTIANA RIOT 120 (The Sun Printing House: Quarryville, Pa. 1898).

insurgents had no private or special interest"[50] in the matter, not whether the insurgents' cause was just.

No reported case nor prominent legal treatise published between independence and the ratification of the Fourteenth Amendment insisted that insurrections attempt to overthrow the government. As Story declared:

> it is not necessary, that it should be a direct and positive intention entirely to subvert or overthrow the government. It will be equally treason, if the intention is by force to prevent the execution of any one or more general and public laws of the government, or to resist the exercise of any legitimate authority of the government in its sovereign capacity.[51]

"[T]he words 'levying war,'" Curtis asserted, "include not only the act of making war, for the purpose of entirely overturning the government, but also any combination forcibly to oppose the execution of any public law of the United States, if accompanied or followed by an act of forcible opposition to such law."[52]

Members of Congress and journalists during and immediately after the Civil War acknowledged that past incidents uniformly regarded as insurrections had not been attempts to overthrow the government. Representative Ephraim Eckley detailed the "whiskey insurrection" and Burr rebellion in a speech delivered

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[50] See *Id.*

[51] *In re Charge to Grand Jury—Treason* (Story), 30 F. Cas. at 1047.

[52] *Charge to the Grand Jury—Neutrality Laws and Treason* (Curtis), 30 F. Cas. at 1025.

during the debates on the Fourteenth Amendment.[53] Neither threatened to replace by force duly elected national officials. Representative Fernando Wood of New York the previous year spoke of the "rebels who were engaged in the Whiskey Insurrection."[54] The *Brooklyn Daily Eagle* on March 1, 1866, counted 13 past efforts "to resist [federal] authority," few of which involved efforts to overthrow the national government.[55]

B. The Supreme Court of Colorado relied on the correct historical understanding of insurrection when determining whether the events of January 6 were an insurrection.

The Colorado Supreme Court's analysis of "insurrection" is consistent with our history. The justices observed that the Colorado state trial court had concluded that "an insurrection as used in Section Three 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."[56] The majority opinion then cited various historical sources finding that "an insurrection is more than a riot but less than a rebellion," and correctly observed that "[n]o authority supports the position . . . that insurrectionary conduct must involve a particular length of time or geographic location."[57] The justices properly concluded the Court "need not adopt a single, all-encompassing

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[53] CONG. GLOBE, 39th Cong., 1st Sess. 2534 (1866).

[54] CONG. GLOBE, 38th Cong., 1st Sess. App. 87 (1864).

[55] "Thirteen Rebellions in the United States," BROOKLYN DAILY EAGLE 4 (Mar. 1, 1866).

[56] Pet. App. 85a, ¶182.

[57] *Id.*, 85a-86a ¶183.

definition of the word 'insurrection,'" because for this purpose, "any definition . . . would encompass a concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish a peaceful transfer of power in this country."[58]

The Colorado Supreme Court correctly found that the events of January 6 were consistent with the legal understanding of "insurrection" when Section Three was framed. Each element of a constitutional insurrection was present. There was an assemblage. Hundreds of people breached the Capitol Building and thousands trespassed on federal land. The Colorado Supreme Court observed, "it is undisputed that a large group of people forcibly entered the Capitol."[59] There was clear resistance to federal law. The trespassers intended to disrupt the proceedings mandated by the Electoral Count Act. *Anderson v. Griswold* states, "substantial evidence in the record showed that the mob's unified purpose was to hinder or prevent Congress from counting the electoral votes as required by the Twelfth Amendment and from certifying the 2020 presidential election."[60] The resistance made extensive use of force. Many in the mob engaged in crimes of violence or threatened crimes of violence. The Colorado Supreme Court stated, "[T]he mob repeatedly and violently assaulted police officers who were trying to defend the Capitol."[61] Calls to "Hang Mike Pence" did not suggest an attempt to achieve goals by rational persuasion. Thousands of trespassers engaged in

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[58] *Id.*, 86a-87a ¶184.

[59] *Id.*, 87a-88a ¶186.

[60] *Id.*, 88a-89a ¶188.

[61] *Id.*, 88a ¶187.

intimidation by numbers. Reasonable members of Congress could presume that those who trespassed on federal land were serving as backup for those engaged in violence inside the Capitol Building.

The events in Washington, DC, on January 6, 2021, satisfied each element of an insurrection to the same or greater degree as the events in western Pennsylvania in 1794 that are universally acknowledged to constitute the whiskey insurrection. The assemblage that invaded the nation's capital on January 6 was far more numerous than the assemblage that disrupted tax collection in 1794. The assemblage in 2021 was resisting the peaceful transition of federal power and not merely a particular federal tax. The assemblage in Washington was responsible for a greater loss of life, more injuries, and more property damage than the assemblage in western Pennsylvania. The public purpose of the 2021 assemblage was resisting an alleged stolen election. The public purpose of the 1794 assemblage was resisting an unconstitutional tax.

C. A legal consensus existed when Section Three was framed and ratified that persons engaged in insurrections whenever they knowingly incited, assisted, or participated in an insurrection.

Persons "engage" in an insurrection against the United States by playing any role in an assemblage resisting by force the implementation of any law of the United States for public reasons. Americans before, during, and immediately after the Civil War accepted Blackstone's dictum, "in treason, all are principals."[62]

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[62] St. George Tucker, BLACKSTONE'S COMMENTARIES (Young and Small: Philadelphia, Pa. 1803) 36. See *Burr*, 25 F. Cas. at 178.

Curtis immediately before the Civil War and Field during the Civil War observed: "the law knows no accessories in treason; but that everyone who, if it were a felony, would be an accessory, is, in the law of treason, a principal traitor."[63] Members of Congress during the Civil War quoted or paraphrased this principle on the floor of the House and Senate.[64] Several Reconstruction Era cases held that supplying money or horses to the confederacy was treason.[65]

A person need not participate in every element of an insurrection to be an insurrectionist. In *Ex parte Bollman* (1807), Marshall asserted: "if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all of those who perform any part, however minute or remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."[66] During the Civil War and Reconstruction, persons were convicted of insurrection who engaged in no violence.[67] Philip Thomas was barred from the Senate under Section Three for giving his son $100 knowing that the

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[63] FIELD CHARGE, *supra* note 4, at 43 (quoting Curtis).

[64] CONG. GLOBE, 37th Cong., 2d Sess. 2169; CONG. GLOBE, 37th Cong., 2d Sess., App. 169 (1862).

[65] *Smitherman v. Sanders*, 64 N.C. 522, 524-25 (1870) ("the plaintiff actually furnished money to equip rebel soldiers. So the act *per se* aided the rebellion, and amounted as much to treason against the government of the United States, as if he had furnished arms, or volunteered as a soldier. . . . This is the principle of the decision in *Martin v. McMillan,* 63 N.C. 486 (1869). There, the fact of furnishing horses for the Confederate army, was an act which of itself aided the rebellion, and amounted to treason.").

[66] *Ex parte Bollman*, 8 U.S. at 126. See FIELD CHARGE, *supra* note 4, at 30.

[67] *Greathouse*, 26 F. Cas. at 29 (charge of Hoffman, J.).

money would most likely be spent in ways that aided the Confederate insurgence.[68]

Nineteenth century judges and legal commentators regarded those who incited insurrections as insurrectionists. Curtis maintained that treason or insurrection was committed by "every one who counsels, commands, or procures others to commit an overt act of treason, which is accordingly committed."[69] Abstract discussion not aimed at instigating action did not provide grounds for prosecution,[70] but words intended to inspire forcible resistance to law were treasonable. Kane condemned as insurrectionists those who "counsel and instigate others to acts of forcible oppugnation to the provisions of a statute." "[S]uccessfully to instigate treason," he concluded, "is to commit it."[71]

1. The history of the Second Confiscation Act demonstrates that Republicans during the Civil War thought persons who incited insurrections engaged in insurrections.

The Second Confiscation Act supports the view that the persons responsible for Section Three of the Fourteenth Amendment understood "engaged in insurrection" broadly. Section One of the Second Confiscation Act prescribes punishments for "every person who shall hereafter commit the crime of treason against the United States." Persons so convicted could be sentenced to

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[68] See Asher C. Hinds, PRECEDENTS OF THE HOUSE OF REPS. OF THE UNITED STATES 1:466-70 (Government Printing Office, Washington DC 1907).

[69] Greenleaf, "On the Law of Treason," *supra* note 7, at 419-20.

[70] See *In re Charge to Grand Jury* (Nelson), 30 F. Cas. at 1035.

[71] *Charge to Grand Jury—Treason & Piracy* (Sprague), 10 F. Cas. at 1049.

death or imprisoned for at least five years and fined at least ten thousand dollars.[72] Section Two prescribes punishments for "any person [who] shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States." Persons so convicted could be sentenced to prison for no more than ten years and fined no more than ten thousand dollars or both. Section Three disqualifies from holding office all persons who perform any action described in Sections One and Two.[73]

The drafters of the Second Confiscation Act, many of whom would later draft Section Three of the Fourteenth Amendment, maintained that Section Two of the Second Confiscation Act established a single offense and not four distinctive offenses consisting of incitement, setting on foot, assisting, and engaging in an insurrection. Senator Daniel Clark of New Hampshire informed the Senate that the select committee he chaired that drafted the Confiscation Act did "not apprehend that [Section Two] creates more than one offense . . . We did not intend that it should create more than one offense, and all to be punished alike."[74] Senator Jacob Howard of Michigan asked Clark to confirm that "the Senator from New Hampshire sets up no distinction between inciting a rebellion or insurrection, setting on foot a rebellion or insurrection, assisting in a rebellion or insurrection, or engaging in a rebellion or insurrection."[75] Clark replied, "certainly."[76] "We did not mean to multiply the offenses," he added,

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[72] 12 *Stat*. 589, 589 (1862).

[73] *Id.* at 589-90.

[74] CONG. GLOBE, 37th Cong., 2d Sess. 2169.

[75] *Id.*

[76] *Id.*

"but to give a description broad enough to bring the offender to trial."[77]

Republicans agreed that no differences existed between the offenses covered by the "crime of treason" in Section One and "incit[ing], set[ting] on foot, assist[ing], or engag[ing] in any rebellion or insurrection" set out in Section Two of the Second Confiscation Act. Howard and Senator Benjamin Wade of Ohio declared the offenses identical.[78] Senator Ira Harris of New York observed that any competent prosecutor would charge an offender with violating both Sections One and Section Two.[79] Section Two, in his view, was merely insurance against a judge who rejected the inherited common/constitutional law of treason or a jury that did not wish to punish a traitor with the more severe penalties marked out in Section One.[80]

The claim in several amicus briefs that the "inclusion of 'incite' (and 'set on foot' and 'assist') alongside 'engage' in the Second Confiscation Act . . . conclusively demonstrates that they mean different things"[81] would have startled Republican members of the Thirty-Seventh Congress and fatally undermined Section Three of the Fourteenth Amendment. Howard, who introduced the final version of Section Three to the Senate, spoke for the Republican Party when maintaining there was "no distinction between inciting a

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[77] *Id.*

[78] *Id.*, 2168, 2173.

[79] *Id.*, 2169.

[80] *Id.*

[81] *Brief of Amicus Curiae James Madison Center for Free Speech,* p. 4. For similar arguments, see *Brief of Amicus Curiae Wyoming Secretary of State Chuck Gray*, pp. 15, 18; *Brief of Amici Curiae Gavin M. Wax, et al.*, p. 15.

rebellion or insurrection, setting on foot a rebellion or insurrection, assisting in a rebellion or insurrection, or engaging in a rebellion or insurrection."[82]

The persons who framed the Second Confiscation Act and Section Three of the Fourteenth Amendment thought the persons who incited insurrections more blameworthy than the insurgents they inspired. Harris asserted that execution was the appropriate punishment for persons who "incited and led on this rebellion."[83] Clark declared: "In the circumstances of this rebellion, where there is a great variety of shades of guilt, where there is the man who leads on and incites the rebellion, and the man who is drawn into it, the committee thought there should be a difference in punishment."[84]

2. Even a purely textual analysis demonstrates the absurdity of treating "incite" and "engage" as having distinctive meanings.

The text of the Second Confiscation Act confirms that Republicans did not make any distinction between inciting an insurrection and engaging in an insurrection. Section Nine of the Second Confiscation Act frees "all slaves of persons who shall hereafter be engaged in rebellion against the United States."[85] If Sections One and Two of the Second Confiscation Act establish five distinct offenses, then Section Nine does not free slaves of persons who after July 17, 1862,

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[82] CONG. GLOBE, 37th Cong., 2d Sess. 2169.

[83] *Id.* 2169.

[84] *Id.* 2166.

[85] 12 *Stat.* at 591.

committed treason against the United States, incited rebellion, set on foot rebellion, or assisted rebellion.

Interpreted consistently with how various amici read the Second Confiscation Act, Jefferson Davis, Robert E. Lee, and others could have avoided constitutional disqualification by claiming that they had committed treason. If, as these amici claim,[86] Section Two of the Confiscation Act distinguishes inciting an insurrection from engaging in an insurrection, then by punishing treason in Section One of the Second Confiscation Act, Republicans must have distinguished treason from engaging in an insurrection. Jefferson Davis and associates, according to this logic, were immune from constitutional disqualification because they were traitors, not insurgents or rebels. Traitors, in this hypothetical view, perform acts that do not constitute inciting, setting on foot, assisting, or engaging in insurrections because the latter actions are punished separately in Second Two of the Second Confiscation Act. Unsurprisingly, no amici suggest what such treasonous acts might be when championing an interpretation of federal law that compels the nonsensical conclusion that the Fourteenth Amendment disqualifies only persons who engaged in an insurrection against the United States without committing treason.

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[86] *Brief of Amicus Curiae James Madison Center for Free Speech*, p. 4; *Brief of Amicus Curiae Wyoming Secretary of State Chuck Gray*, pp. 15, 18; *Brief of Amici Curiae Gavin M. Wax, et al.*, p. 15.

D. The Supreme Court of Colorado relied on the correct historical understanding of engaging in an insurrection when determining whether Trump engaged in an insurrection on January 6.

The Colorado Supreme Court's finding that President Trump "engaged in" the insurrection that took place on January 6 is consistent with the historical sources. *Anderson v. Griswold* correctly asserted that "'engaged in' requires 'an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose.'"[87] The justices carefully reviewed the historical sources. Both Marshall and Curtis were correctly cited for the proposition that "an individual need not directly participate in the overt act of levying war or insurrection for the law to hold him accountable as if he had."[88]

The Colorado Supreme Court made ample findings supporting the conclusion that Trump engaged in an insurrection under the standards in place when Section Three was framed and ratified. Specifically, the justices declared:

> President Trump's direct and express efforts, over several months, exhorting his supporters to march to the Capitol to prevent what he falsely characterized as an alleged fraud on the people of this country were indisputably overt and voluntary. Moreover, the evidence amply showed that President Trump undertook all these actions to aid and further a common unlawful purpose that he himself conceived and set in mo-

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[87] Pet. App. 91a, ¶194.

[88] *Id.*, 90a-91a, ¶193.

> tion: prevent Congress from certifying the 2020 presidential election and stop the peaceful transfer of power.[89]

The Colorado Supreme Court observed that Trump's role in the insurrection went beyond incitement. The justices concluded:

> President Trump did not merely incite the insurrection. Even when the siege on the Capitol was fully underway, he continued to support it by repeatedly demanding that Vice President Pence refuse to perform his constitutional duty and by calling Senators to persuade them to stop the counting of electoral votes. These actions constituted overt, voluntary, and direct participation in the insurrection.[90]

Trump did not merely conspire, as did Aaron Burr in the first decade of the nineteenth century. As the Colorado Supreme Court found, the former president planned, instigated, and participated in the effort to prevent by force the peaceful transition of presidential power.

Anderson v. Griswold correctly applied nineteenth century legal standards when using evidence that Trump lied about election results, brought frivolous lawsuits challenging those elections, and performed various illegal actions that might, standing alone, fall short of nineteenth century standards for engaging in an insurrection[91] to prove Trump's intention to foment

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[89] *Id.*, 99a, ¶221.

[90] *Id.*, 100a, ¶223.

[91] HOUSE SELECT COMM. TO INVESTIGATE THE JAN. 6 ATTACK ON THE UNITED STATES CAPITOL, FINAL REPORT, H.R. Doc. No. 663, 117th Cong., 2d Sess. 3-5 (2022). See Bennie G. Thompson,

an insurrection on January 6. Frederick Brightly, a leading legal commentator during the Civil War, observed that "everything tending to show that there was an intention to make public resistance to a law of the United States" is relevant to determining whether a person had engaged in treason. Brightly stated, "it is competent to show, that a long time before the alleged treasonable occurrence, facts had occurred, which would explain certain particulars relied on to show a treasonable intent, and make them show a different intent."[92] Under this principle of nineteenth century law, evidence that Trump was willing to overturn the 2020 national election by illegal means supports the conclusion that his intention on January 6, 2021, was to provoke a mob to interfere illegally and forcibly with the presidential transition process.

E. The constitutional standards in place for engaging in an insurrection when Section Three was framed did not and will not create slippery slopes.

The parade of horribles in several of Trump's amicus briefs[93] fail to acknowledge that insurrection was not politicized and insurrection prosecutions rarely occurred in the United States from the ratification of the Constitution until the end of Reconstruction when federal and state courts uniformly accepted the con-

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"Foreword: Chairman," *id.* at x; Liz Cheney, "Foreword: Vice Chair," *id.*, at xv.

[92] Brightly, A DIGEST, *supra* note 7, at 215-16.

[93] See *Brief of Amici Curiae America's Future, et al*, pp. 32-33; *Brief of Amicus Curiae the Hon. Peter Meijer*, pp. 20-27; *Brief of Amici Curiae Judicial Watch, Inc., et al.*, pp. 15-20; *Brief of Amicus Curiae Landmark Legal Foundation*, pp. 3-12; *Brief of Amicus Curiae U.S. Sen. Ted Cruz*, pp. 22-29.

stitutional principles articulated by the Colorado Supreme Court. Legal authorities carefully distinguished planned insurrections from spontaneous riots. Justice Robert Grier charged the grand jury in *United States v. Hanway* that a defendant who was not leagued with violent resisters to federal law could not be prosecuted for treason.[94] Grier insisted that spontaneous riots were not insurrections, that insurrections required a commitment to use force to resist law, not spur of the moment violence.[95] Treason in the nineteenth century was committed by those who actively instigated violent resistance to United States law, not by those who merely commented favorably on protest activity from afar.

No example discussed in the parade of horribles in Trump's various amici briefs is remotely analogous to Donald Trump's sustained and self-conscious effort to prevent illegally and forcibly the peaceful transfer of presidential power or any instance of acknowledged insurrection from the ratification of the Constitution until the ratification of Section Three of the Fourteenth Amendment. Trump's amici briefs discuss actions by lone individuals who were not acting as part of an assemblage (i.e., a member of Congress pulling a fire alarm to prevent a congressional vote);[96] legal behavior (i.e., promoting a bail fund for arrested protestors)[97] non-violent illegal behavior (i.e., sit-ins in congressional offices) or non-violent protestors at a protest where some persons engaged in violence;[98] ef-

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[94] *Hanway*, 26 F. Cas. at 126.

[95] *Id.*, at 128-29.

[96] *Brief of Amicus Curiae Landmark Legal Foundation*, pp. 6-8.

[97] *Brief of Amici Curiae Judicial Watch, Inc., et al.*, pp. 16-17.

[98] *Brief of Amici Curiae America's Future, et al*, pp. 32-33;

forts to resist local law enforcement (i.e., Black Lives Matters protests),[99] and speeches too distant in time or place from force or violence to be considered incitement under either the law of 1866 or 2024 (i.e., blaming a threat made to a federal justice on a speech made two years previously).[100]

In stark contrast to the incidents described in those briefs, the Colorado Court found that Donald Trump acted as part of an assemblage that he helped bring into being; that Trump was resisting the enforcement of federal and constitutional rules, that Trump took numerous illegal actions to prevent the peaceful transition of presidential power; that Trump engaged in an ongoing course of conduct aimed at producing violent resistance to the peaceful transfer of presidential power; that Trump was attempting to incite his supporters to attack Congress; and that Trump's speech occurred sufficiently close in time and place to when and where the insurrection took place to be considered an incitement.

IV. CONCLUSION

The Colorado Supreme Court's conclusion that Donald Trump engaged in an insurrection by inciting a mob to attack the Congress of the United States is supported by the constitutional law of insurrection from the ratification of the Constitution to Reconstruction. That law defined an insurrection as an assemblage resisting law or coercing a legislature by force or violence for a public purpose. Persons engage in an insurrection when they knowingly or voluntarily incite or as-

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Brief of Amicus Curiae U.S. Sen. Ted Cruz, pp. 26-27.

[99] *Brief of Amicus Curiae U.S. Sen. Ted Cruz*, p. 26.

[100] *Brief of Amici Curiae Judicial Watch, Inc., et al.*, pp. 17-18.

sist an assemblage resisting law or coercing a legislature by force or violence for a public purpose.

The Colorado Supreme Court found facts that demonstrated that Donald Trump engaged in an insurrection by 1866 standards. Historical analysis cannot determine whether legal understandings in place when Section Three was framed and ratified should compel constitutional decision-making in 2024. The history does establish, however, that standards were firmly in place when Section Three was framed and ratified, that Donald Trump engaged in an insurrection under those standards, and that these standards provide a sound basis for distinguishing behavior that warrants disqualification from holding office from behavior that does not.

Respectfully submitted,

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