

No. 23-719

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**In the Supreme Court of the United States**

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DONALD J. TRUMP,

*Petitioner,*

v.

NORMA ANDERSON, et al.,

*Respondents.*

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*On Writ of Certiorari to the  
Supreme Court of Colorado*

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**BRIEF OF AMICUS CURIAE  
SHERRILYN A. IFILL IN SUPPORT OF  
RESPONDENTS AND AFFIRMANCE**

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## **INTEREST OF AMICUS CURIAE**

Sherrilyn Ifill is a civil rights lawyer and scholar who, for more than three decades, has litigated cases under the 14th Amendment. She has also written scholarly articles about the 14th Amendment's scope and meaning.<sup>1</sup>

Professor Ifill currently holds the Vernon E. Jordan Distinguished Chair in Civil Rights at Howard Law School, where later this year she will launch the 14th Amendment Center for Law & Democracy. In that capacity, Ifill will train and equip law students and lawyers in the development of litigation, scholarship, and public education initiatives focused on fulfilling the promise of the 14th Amendment.

From 2013 to 2022, Ifill served as President & Director-Counsel of the NAACP Legal Defense Fund (LDF), where she supervised a team of over 50 lawyers litigating civil rights cases, including a range of cases brought under the 14th Amendment. LDF has a long and distinguished history of litigation, which has shaped this Court's understanding and interpretation of the 14th Amendment.

## **INTRODUCTION SUMMARY OF ARGUMENT**

Amicus files this brief to underscore that Section 3 is not some historical relic or afterthought but is instead a vital and integral part of the 14th Amendment. It is designed to ensure that the ambitious rights that the 14th Amendment guarantees can withstand the resistance that its framers knew was sure to recur—not just in the immediate post-War period, but far into the future. Its

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<sup>1</sup> No counsel for a party authored this brief in whole or in part and no person other than amici or their counsel made any monetary contribution to its preparation or submission.

object was the insurrectionist spirit that, Frederick Douglass foresaw, would be “passed from sire to son”—an “enmity” that would “not die out in a year; it will not die out in an age.”

The 14th Amendment, at its most ambitious, was “a plan for rebuilding a shattered nation.” Cong. Globe, 39th Cong., 1st Sess. 69 (1866) (speech of Sen. Thaddeus Stevens). Viewed even modestly, it compelled a stunning transformation of the trajectory of this country’s ongoing struggle for a more perfect union. Drafted and ratified in the urgency of the post-Civil War environment, and in the wake of the assassination of President Lincoln, the 14th Amendment represents an inspiring feat of ambitious legislative vision and political pragmatism. Without question, the rights to equal protection and due process conferred in Section 1 constitute the heart of the Amendment. But the provisions designed to protect those rights from being snuffed out are of equal importance to the Amendment’s overall structure, strength and meaning.

A principal concern of the Congress that drafted and debated the 14th Amendment was ensuring that the rights guaranteed in Section 1 would have the chance to come to fruition. Key to this goal was ensuring, in Section 3, that former rebels and insurrectionists would not resume power and frustrate the promise of the new republic. Section 3 is designed to protect our multiracial constitutional democracy. To abandon Section 3 now would destabilize the balance struck by the 14th Amendment’s framers—a balance between guaranteed rights and structural tools that would allow those rights to withstand resistance to the vision and scope of the Amendment’s core promises.

Section 1, the most well known provision, guarantees birthright citizenship, due process of laws, protection for the privileges and immunities of citizenship, and equal protection of laws. Its focus was ensuring the full citizenship of Black people for the first time in our country's history. But the 14th Amendment's framers understood that the transformative potential of Section 1 would require protection from usurpation or abuse. Sections 2 and 3 of the 14th Amendment were designed to provide that protection. Section 2 sets forth a representational punishment regime for states that deny voting rights to Black men. Section 3 was designed to protect the political, judicial and military ranks of our republic against those who, having held office previously, demonstrated their disloyalty to the Constitution. As the congressional Joint Committee on Reconstruction explained, to return to political power those who violated their oath to uphold the Constitution and leave vulnerable the integrity of the republic would be a "madness and folly." H.R. Rep. No. 39-30, at 98 (1866). To do so now would be no less so.

Section 3 was enacted for such a time as this, and for such a figure as President Trump. Perhaps we hoped we would never need to activate its use again, and certainly not against an officer as highly positioned as the President of the United States. Section 3's use is compelled in only the most rare and extreme circumstances.

January 6th, and the weeks leading up to it, was such a circumstance. President Trump's effort to overturn the results of the November 2020 election—by targeting the legitimacy of votes cast by Black voters in select "urban" areas that his followers would associate with race, by using racist dog whistles to describe voters in those

jurisdictions and those charged with counting the votes, by making relentless and unfounded attacks on Black poll workers, and by leading an assault on the Capitol that featured the Confederate flag parading through its halls—represents precisely the dangers that the 14th Amendment’s framers sought to protect our republic against. Donald Trump has been found by the State of Colorado to have engaged in insurrection. That finding was made by a legitimate state court, after a trial on the merits at which Mr. Trump presented a case in opposition, and was upheld by that state’s supreme court. By its plain language, Section 3 thus disqualifies Mr. Trump from holding state or federal office, absent amnesty granted by two-thirds of each house of Congress.

## ARGUMENT

- I. **Section 3 Plays a Vital Role in the Overall Architecture and Integrity of the 14th Amendment.**
  - A. **The 14th Amendment Balances an Assertion of Rights with Pragmatic Structural Protections.**

The 14th Amendment is the blueprint for what has been called America’s “Second Founding.” Eric Foner, the foremost historian of the Reconstruction period, whose most recent book bears that name, describes the 14th Amendment as “the most important amendment added to the Constitution since the Bill of Rights in 1791.”<sup>2</sup> While principally securing citizenship for Black people—formerly enslaved and free—the 14th Amendment “changed and broadened the meaning of freedom for all

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<sup>2</sup> Ted Widmer, *Searching for the Perfect Republic: Eric Foner on the 14th Amendment*, Guardian (Nov. 15, 2023, 5:00 AM), <https://www.theguardian.com/law/2023/nov/15/eric-foner-14th-amendment-trump>.

Americans.”<sup>3</sup> Ratified in 1868, three years after the formal end of the Civil War, the 14th Amendment was drafted, debated, and constructed with a driving vision in mind: that Black people in America would be full citizens, and that the citizenship rights of Black people would be protected against actions by states. Birthright citizenship, protection for the privileges and immunities of citizenship, guarantees of due process and equal protection of laws are explicitly enumerated in Section 1, rightfully regarded as the most consequential provision of the 14th Amendment. But the Reconstruction Congress that debated and adopted the 14th Amendment was equally concerned with ensuring that the rights enumerated in Section 1, and the new country that would be created as a consequence, would be protected against forces that were certain to resist and perhaps even unravel the promise of the new post-Civil War republic.

One threat that preoccupied the Framers was what they knew would be ongoing resistance to full Black citizenship by southern states. They had reason to be concerned. In his *Report on Conditions in the South*, Carl Schurz, an emissary sent by President Andrew Johnson to co-sign Johnson’s optimistic view of post-War sentiments in the South, told instead a harrowing story of resistance and active opposition to the status of freedmen.<sup>4</sup> Black people were subject to Black Codes, which criminalized merely walking on public roads, and created perverse work contracts that held freedmen in virtual slavery. Mississippi’s Black Code, regarded as one of the worst, was extensive. Among other heinous provisions, it made it

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<sup>3</sup> Eric Foner, *Reconstruction: America’s Unfinished Revolution 1863-1877*, 257-58 (1988).

<sup>4</sup> Carl Schurz, *Report on the Condition of the South* (1865).

illegal for Black people over 18 years old to be without employment, deemed it unlawful for Black people to assemble at any time of the day, and made white people who “associated with freedmen, free Negroes, or mulatoes . . . on terms of equality,” guilty of vagrancy and subject to a \$150 fine. Black people associating with whites were subject to a \$200 fine.<sup>5</sup> Black southerners were victims of random violence and murder at the hands of white supremacists for minor infractions or violations of the social order that southern whites continued to enforce. If some believed that the 13th Amendment, which abolished slavery automatically afforded freedmen the status of citizens, the conditions reported on in the Schurz report, and in other testimony reviewed by the congressional Joint Committee on Reconstruction made clear that this was not the case.

While the 14th amendment includes no express guarantee of voting rights or protection against acts of disenfranchisement, we know that the members of Congress drafting and debating the Amendment feared, indeed expected, that southern states would attempt to block Black enfranchisement. Such an outcome, it was understood, would produce two unwelcome results: Black men who had been loyal to the Union, some fighting valiantly in the Union Army would be disenfranchised, while disloyal white former Confederates would be rewarded with the vote. Second, and even more pragmatically alarming for the Republicans, southern states would swell their power by adding Black citizens to

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<sup>5</sup> Scott Yenor, *Black Codes of Mississippi*, Teaching American History (last visited Jan. 29, 2024), <https://teachingamericanhistory.org/document/black-codes-of-mississippi>.

their population count for representation, tilting the balance of congressional power in favor of states, that until months before had been fully engaged in the project of insurrection and rebellion. Some Radical Republicans fought to deny the vote to all who had actively participated in the insurrection. Instead, a political compromise produced Section 2 of the Amendment, which instead creates a regime of representational punishment for recalcitrant states that deny the vote to eligible voters.

The second preoccupation of the 14th Amendment's framers was the prospect of the return to power of the very individuals who had participated in the rebellion. Once again, these fears were well-founded. First, the Schurz *Report on Conditions in the South* documented the continuation of a stubborn and deep-seated spirit of insurrection in the south. Schurz reported with some alarm that there was "an utter absence of national feeling" among white southerners. "Treason," he warned, "does...not appear odious in the south."<sup>6</sup> Moreover, he documented the return to leadership positions of officials who had been in office before and during the rebellion. Indeed, it was President Andrew Johnson's reckless appointment of former insurrectionists to governing positions in southern governments that encouraged Congress to form its own Committee to study conditions in the South and make recommendations that would ensure the adoption of measures that would protect post-war southern governments against political control of the former rebels. The Committee denounced the actions of southern state governments which "place[d] at once in power leading rebels, unrepentant and unpardoned, excluding with contempt those who had

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<sup>6</sup> Carl Schurz, *Report on the Condition of the South* (1865).

manifested an attachment to the Union.” H.R. Rep. No. 39-30, at XVI (1866). The attempt by white Georgia voters to elect as their new Senator the former Vice President of the Confederacy, Alexander Stephens, was cited for special contempt by the Committee. *Id.*

The firm belief that loyalty to the United States must be prerequisite to holding office (a view shared among both Radical and moderate Republicans), was not solely a concern about officeholders in the immediate aftermath of the war. Radical Republicans and abolitionists alike understood the need to permanently safeguard the Republic. Representative John Bingham, a principal drafter of the 14<sup>th</sup> Amendment, understood the project to be one which would restore “political rights and powers [to the southern states] under such irrevocable guarantees as will *forevermore* secure the safety of the Republic . . . .” Cong. Globe, 39<sup>th</sup> Cong, 1<sup>st</sup> Sess. 2542 (1866) (statement of Representative John Bingham) (emphasis added).

Frederick Douglass, whose speeches and writings made him among the most prominent and influential abolitionist voices before, during and after the Civil War, vehemently insisted as the 14<sup>th</sup> Amendment was being debated, that Black voting rights was the linchpin to Black citizenship as and provided essential protection against what he believed would be ongoing, generations-long anger and violence from southern whites. Without the vote, Douglass believed that Black people would be left at the mercy of angry revenge-fueled whites, not only in the immediate post-War period, but far into the future. Douglass, who knew more than most about southern whites, including the persistence of an insurrectionist spirit, saw no end to the need for Black people to protect



themselves against the anger of defeated white rebels. It was an anger Douglass believed would be generational, “passed from sire to son.” This “enmity” or “malignant spirit,” Douglass predicted, would “not die out in a year; it will not die out in an age.”<sup>7</sup>

### **B. Section 3 is a Vital Tool of Self-Protection for Our Republic.**

Section 3 was the means by which the 39<sup>th</sup> Congress sought to protect against the re-establishment of political power by former insurrectionists. There were alternatives debated for how this might be executed. Stripping former insurrectionists of their voting rights was one method debated at length. But although the methods of how best to protect against the political empowerment of former insurrectionists were the subject of intense debate, Republicans who led the Reconstruction Congress were unified in their view that loyalty to the Constitution must be a prerequisite for public service. What ultimately became Section 3’s provisions barring insurrectionists who had violated their oath of office, from serving in federal or state government or in the military, was a compromise that it was believed would protect against the return to power of unrepentant former rebel leaders, whom many southerners continued to regard as “the best portion of our citizens.”<sup>8</sup>

The adoption of this compromise was an explicit rejection of President Johnson’s vision of Reconstruction

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<sup>7</sup> Frederick Douglass, *What the Black Man Wants*, Speech at the Massachusetts Anti-Slavery Society at Boston (April 1865), available at <https://www.loc.gov/resource/rbaapc.23100/?sp=8&st=text>.

<sup>8</sup> Eric Foner, *Second Founding: How the Civil War and Reconstruction Remade the Constitution* 89 (2019).

(or as he preferred to call it ‘restoration’), in which former rebel states would be welcomed with open arms back into the Union, led by men who had without inquiry or evaluation of loyalty to the country, taken the reins once again of local leadership. Indeed, former rebels had not only returned to lead state offices. Many sought to be seated in the House and Senate as the duly elected congressional representatives of their state. “The Vice-President of the Confederacy, four Confederate Generals, five Confederate colonels, six Confederate cabinet officers, and fifty-eight Confederate Congressmen, none of whom was able to take the oath of allegiance” sought to be seated when Congress opened.<sup>9</sup>

To allow former insurrectionists to hold office would, the Joint Committee on Reconstruction believed, render the United States, “powerless for its own protection,” allowing “[t]reason, defeated in the field” to prevail in political office. H.R. Rep. No. 39-30, at XI. By making loyalty to the Constitution a prerequisite for serving in public office, the 39<sup>th</sup> Congress equipped our republic with a critical tool of self-protection.

But the 39<sup>th</sup> Congress also well understood that the return to office by insurrectionists would ultimately defeat the guarantees of citizenship and equal protection in Section 1. The Senate was hearing directly from Black people in southern states about the conditions in which they were living under white rule. Violence was rampant. Black Codes were enacted in states throughout the South rendering freedmen unable to rent a home in town, walk on public roads without proof of employment, or to sell,

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<sup>9</sup> W.E.B. Du Bois, *Black Reconstruction in America* 260-61 (1935).

barter or exchange merchandise without permission of that white employer. Black conventions and assemblies in Alabama, Georgia, North Carolina, South Carolina and New York, the latter attended by Black delegates from across the country, were meeting and issuing petitions and resolutions, which were sent directly to the Senate and to President Johnson. In these petitions they described the dire conditions of life under the control of unrepentant and violent white leaders. Du Bois, *supra*, at 232-34. Black Mississippians were unable to “assemble” because of fears of hostility and violence, but in a simple petition explained they their “fear that they were to be re-enslaved.” *Id.* at 230-31. Black Alabamans reported that a number of their churches had been burned and that they were routinely subject to violent threats, and that “many of their people daily suffer almost every form of outrage and violence at the hands of whites....that many of their people are now in a condition of practical slavery, being compelled to serve their former owners without pay and to call them ‘master.’” *Id.* at 232. All emphasized the need for Black voting rights as the only means of self-protection against “Southern hate” and “malign hostility.” *Id.* at 235. These and other reliable accounts convinced abolitionist Senators that “the reconstructed states were in the power of the rebels.” *Id.* at 314.

Rights were meaningless without protection. Section 1 would have no integrity or meaning if the defeated insurrectionists could, having laid down their arms, take up the gavel and pen to continue their rebellion. For this reason Section 3 is integral to the overall vision of the amendment. All of the Amendment’s provisions reflect an Interlocking set of priorities– a bold and expansive promise of citizenship for Black people, and the pragmatic tools for protecting the promise of full citizenship, and

protecting the integrity of the republic. The Amendment reflects a masterful integration of aspiration and a clear-eyed assessment of the challenges ahead. When viewed in this light, Section 3 is a vital part of the infrastructure of the 14th Amendment. That it has seldom been used is neither surprising nor unwelcome. Insurrection in a stable democracy should be rare and firmly rejected. But when it occurs, its proponents must be barred from political leadership.

## **II. Trump’s Insurrection Exemplifies the Threat Anticipated by Section 3.**

Former President Donald Trump fomented, encouraged, and participated in an insurrection designed to overturn the results of the 2020 presidential election and interfere with the peaceful transfer of power. This has been recognized and affirmed by courts,<sup>10</sup> , political leaders of both parties,<sup>11</sup> and the pre-eminent scholar of the Reconstruction period.<sup>12</sup>

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<sup>10</sup> *Anderson v. Griswold*, 2023 CO 63, *cert. granted sub nom., Trump v. Anderson*, No. 23-719, 2024 WL 61814 (U.S. Jan. 5, 2024).

<sup>11</sup> Mary Clare Jalonick, *Sen. Mitch McConnell Rebukes RNC, Calls Jan. 6 ‘Violent Insurrection’*, PBS NewsHour (Feb 8, 2022, 6:55 PM), <https://www.pbs.org/newshour/politics/sen-mitch-mcconnell-rebuked-rnc-calls-jan-6-violent-insurrection> (“McConnell said Tuesday.”); Jonathan Weisman and Annie Karni, *McConnell Denounces R.N.C. Censure of Jan. 6 Panel Members*, N.Y. Times (Feb. 8, 2022), <https://www.nytimes.com/2022/02/08/us/politics/republicans-censure-mcconnell.html>; Tal Axelrod, *Pelosi Condemns Trump Amid Newly Reported Details of His Inaction on Jan. 6*, ABC News (Jan. 7, 2024), <https://www.msn.com/en-us/news/politics/pelosi-condemns-trump-amid-newly-reported-details-of-his-inaction-on-jan-6/ar-AA1mBkLc>.

<sup>12</sup> Fabiola Cineas, *What Reconstruction Teaches Us About White Nationalism Today*, Vox (Jan. 21, 2021, 4:30 PM),

Trump did so by encouraging millions of his followers to come to the Capitol on January 6th with orders to “take back our country.”<sup>13</sup> Trump encouraged his assembled supporters to go to the Capitol to “stop the steal.” H.R. Rep. No. 117-663, at 500 (2022). He called his duly elected successor as President “illegitimate” and told them that “different rules ”apply” when you “catch somebody in a fraud.” *Id.* at 71, 520. He knew that many in the crowd were armed, but dismissed safety concerns, saying, “They’re not here to hurt me.” *Id.* at 585, 640.

Trump explicitly exhorted the crowd to “fight like hell.” *Id.* at 586. Promising he would accompany them, Trump told his followers on January 6th that once at the Capitol they would “try and give our Republicans, the weak ones . . . the kind of pride and boldness that they need to take back our country.” *Id.* Trump also made Vice President Mike Pence, a target of his anger, and encouraged the crowd to do so as well.

Later when protesters shouted, “Hang Mike Pence,” and assembled a mock gallows outside the Capitol, Trump reportedly told aides that his Vice President deserved the crowd’s anger, because of Pence’s refusal to acquiesce to Trump’s illegal plan to replace legitimate state electors with his own.<sup>14</sup>

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<https://www.vox.com/22241397/reconstruction-white-nationalism-eric-foner-trump> (quoting Eric Foner).

<sup>13</sup> Maggie Haberman, *Trump Told Crowd ‘You Will Never Take Back Our Country with Weakness*, N.Y. Times, <https://www.nytimes.com/2021/01/06/us/politics/trump-speech-capitol.html>.

<sup>14</sup> Anderson Resp. Br. to Pet. for Cert. at 27.

During the most violent part of the insurrection, Trump tweeted, encouraging the crowd to “BE STRONG,” and continuing to urge Vice President Pence to “[d]o it[!]”<sup>15</sup> As the violence continued, Trump watched on television, refusing to heed calls that he call-off the mob despite pleas from his daughter, the Senate Majority Leader, the Ranking Member of the House, the Chair of the Senate Judiciary Committee Lindsey Graham, and many other Republicans. H.R. Rep. 117-633, at 592-96.

But Trump’s attempt to overturn the election began well before January 6th. The use of racist tropes and stereotypes were key features of his efforts. Trump stoked his followers for over month with a false narrative discrediting the votes cast by voters in jurisdictions with high concentrations of Black voters. Trump’s claim of having won the election was premised on this charge. His narrative was not subtle. Trump insisted that votes cast in Detroit, in Philadelphia, and in Atlanta had been miscounted, handled improperly, manufactured or destroyed.<sup>16</sup> In the weeks following Election Day, Trump repeatedly sought to discredit votes cast in those cities.

Trump’s targeting of those jurisdictions was not accidental. By targeting “urban” areas that his followers would associate with race and using racist dog whistles to describe voters in those jurisdictions and those charged with counting the votes, Trump created a narrative his followers would embrace. His relentless and unfounded

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<sup>15</sup> Petitioners’ Opposition to Respondent Trump’s Anti-Slapp Motion to Dismiss at 21, *Anderson v. Griswold*, No. 2023CV032577 (Colo. Dist. Ct. Oct. 4, 2023).

<sup>16</sup> Second Amended Complaint for Declaratory & Injunctive Relief at 9, *Mich. Welfare Rts. Org. v. Trump*, 600 F. Supp. 3d 85 (D.D.C. Nov. 20, 2020) (No. 20-03388).

attacks on two Black polls workers, Shaye Moss and her elderly mother Ruby Freeman, were blatantly racist in nature. At one point, Trump referred to the women as “hustlers.”<sup>17</sup>

Trump’s racially targeted actions seeking to disqualify votes cast by Black voters have resulted in four lawsuits: two charging violations of 42 U.S.C. § 1983 (“the KKK Act”), one filed on behalf of the United States, and one by the NAACP Legal Defense Fund.<sup>18</sup>

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<sup>17</sup> H.R. Rep. No. 117-663, at 46, 218, 274 (inviting Detroit officials to the White House and phone calls asking those officials to reject votes from Detroit); *id.* at 223-24, 293 (tweets and public statement by Trump in November after election encouraging Atlanta officials to participate in his scheme); *id.* at 307 (attacks on Georgia poll workers Shaye Moss and Ruby Freeman and phone call to Georgia official asking them to find extra votes); Jane C. Timm, *Fact Check: Trump’s Bogus Claim of More Votes in Detroit than People*, NBC News (Nov. 18, 2020, 1:26 PM), <https://www.nbcnews.com/politics/2020-election/fact-check-trump-s-bogus-claim-more-votes-detroit-people-n1248121>(claiming more votes were cast than people in Detroit); Maryclaire Dale & Alanna Durkin Richer, *Few Legal Wins so far as Trump Team Hunts for Proof of Fraud*, *Associated Press* (Nov. 11, 2020, 6:01 PM), <https://apnews.com/article/joe-biden--donald--trump--politics--virus--outbreak--campaigns--22665ea3884c47f883b416e4bd03bf54> (describing Philadelphia as a “mountain of corruption & dishonesty”); Konstantin Toropin, et al., *‘Just Ridiculous’: CNN Speaks to Georgia Voter the Trump Campaign Falsely Accused of Casting Ballot in the Name of a Dead Woman*, CNN (Nov. 19, 2020, 10:56 AM), <https://www.cnn.com/2020/11/18/politics/fact-check-georgia-dead-voter-deborah-jean-christiansen/index.html> (promoting a fake story of voter fraud in Atlanta).

<sup>18</sup> Indictment, *United States v. Trump*, 2023 WL 4883396 (D.D.C. 2023) (No. 23-cr-00257); Second Amended Complaint for Declaratory & Injunctive Relief, *Mich. Welfare Rts. Org. v. Trump*, 600 F.Supp. 3d 85 (D.D.C 2022) (No. 20-CV-03388).

Trump's followers acted on his racial targeting. On November 4, 2020, a mob of white protesters surrounded the TCF Center in Detroit where ballots were being counted.<sup>19</sup> There were several reports of people taking photographs of Georgia voters in their cars at their respective voting locations.<sup>20</sup>

The former President's lawyer, Rudy Giuliani, added to the racialized narrative of Trump's false claims, accusing the two Black poll workers—Ms. Moss and Ms. Freeman— of improperly handling votes and confiscating flash drives of vote tabulations, suggesting that they were “passing [the flash drives] between them like vials of heroin.” H.R. Rep. No. 117-663, at 226, 280, 305. Moss later testified under oath that what her mother passed her was, in fact, a ginger mint. A Trump follower harassed the

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<sup>19</sup> Davey Alba, *There's a Simple Reason Workers Covered Windows at a Detroit Vote-Counting Site*, N.Y. Times (Nov. 5, 2020), <https://www.nytimes.com/2020/11/05/technology/michigan-election-ballot-counting.html>. Georgia election officials received death threats; Linda So, *Special Report: Trump-Inspired Death Threats are Terrorizing Election Workers*, Reuters (June 11, 2021, 11:00 PM), <https://www.reuters.com/investigates/special-report/usa-trump-georgia-threats/>; Jason Szep and Linda So, *A Reuters Special Report: Trump Campaign Demonized Two Georgia Election Workers – and Death Threats Followed*, Reuters (Dec. 1, 2021, 8:00 PM), <https://www.reuters.com/investigates/special-report/usa-election-threats-georgia/>; Stephen Fowler, *“Someone's Going to Get Killed”: Election Official Blasts GOP Silence on Threats*, GPB News (Dec. 1, 2020, 3:54 PM), <https://www.gpb.org/news/2020/12/01/someones-going-get-killed-election-official-blasts-gop-silence-on-threats>.

<sup>20</sup> *Democracy Defended*, Thurgood Marshall Institute at 93 (Sep. 2, 2021), [https://www.naacpldf.org/wp-content/uploads/LDF\\_2020\\_DemocracyDefended-1-3.pdf](https://www.naacpldf.org/wp-content/uploads/LDF_2020_DemocracyDefended-1-3.pdf).



two election workers, visited their homes, and attempted to press them to “confess” to having engaged in illegal activity.<sup>21</sup> Another follower attempted to execute a so-called “citizens’ arrest” of Moss and Freeman by showing up at the home of Moss’ elderly grandmother, demanding entry.<sup>22</sup>

For Black Americans, this particular threat carries profound and terrifying significance. The guise of a “citizens’ arrest” was often used to take custody of innocent Black people who were then lynched.<sup>23</sup>

Ruby Freeman testified before the January 6th Committee that, after being targeted by President Trump as part of his insurrectionist scheme, she no longer feels safe. “Can you imagine how it feels to be targeted by the President of the United States?,” she asked. “There is nowhere I feel safe,” the 64 year-old Freeman testified. The Georgia Board of Elections later confirmed that

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<sup>21</sup> Jason Szep and Linda So, *Kanye West Publicist Pressed Georgia Election Worker to Confess to Bogus Fraud Charges*, Reuters (Dec. 23, 2021, 3:41 PM), <https://www.reuters.com/business/media-telecom/kanye-west-publicist-pressed-georgia-election-worker-confess-bogus-fraud-charges-2021-12-10/>.

<sup>22</sup> Deepa Shivaram, *Shaye Moss Staffed an Election Office in Georgia. Then She Was Targeted by Trump*, NPR (June 22, 2022, 5:15 AM), <https://www.npr.org/2022/06/22/1106459556/shaye-moss-staffed-an-election-office-in-georgia-then-she-was-targeted-by-trump>.

<sup>23</sup> Tariro Mzezewa, *The Arbery Murder Defendants Say They Were Attempting to Make a Citizen’s Arrest. is that Legal?*, N.Y. Times (Nov. 22, 2021), <https://www.nytimes.com/2021/11/22/us/citizens-arrest-arbery-murder-trial.html>; Ira P. Robbins, *Citizen’s Arrest and Race*, 20 Ohio St. J. Crim. L., 133, 149-50 (2022).

Trump and Giuliani’s allegations against Freeman and Moss were false and “unsubstantiated.”<sup>24</sup> Two years later Moss and Freeman successfully sued Rudy Giuliani for defamation and were awarded a judgment of nearly \$150 million.<sup>25</sup> But the damage was done. Moss and Freeman testified that they still feel unsafe, and precautions are undertaken to ensure their safety.

Death threats from white supremacists plagued Black officials, especially postal and other federal workers, in the aftermath of the Civil War. White officials of the Freedman’s Bureau were also subject to violent attack by white racists. Attempts to overturn elections when Black or Republican candidates won was also a feature of Reconstruction. These challenges by southern whites often involved violence—threats, intimidation, and in far too many cases murder.<sup>26</sup> The remarkable similarity of the threats and violence precipitating Trump’s insurrection to similar attacks in the south during the Reconstruction is an uncanny, but important indication that Section 3 remains relevant and important to the protection of our republic.

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<sup>24</sup> State of Georgia, Report of Investigation Fulton County-Poll Worker Fraud (Mar. 7, 2023), <https://sos.ga.gov/sites/default/files/2023-06/SEB2020-059%20ROI%20redacted.pdf>.

<sup>25</sup> Dan Berman et. al., *Rudy Giuliani Ordered to Pay Nearly \$150 Million in Damages*, CNN (Dec. 15, 2023, 7:29 PM), <https://www.cnn.com/politics/live-news/rudy-giuliani-defamation-trial-verdict/index.html>.

<sup>26</sup> Fabiola Cineas, *What Reconstruction Teaches Us About White Nationalism Today*, Vox (Jan. 21, 2021, 4:30 PM), <https://www.vox.com/22241397/reconstruction-white-nationalism-eric-foner-trump>.

It is perhaps no wonder, that the violent insurrectionists who Trump ordered to “walk down to the Capitol” and whose rampaging he refused to denounce or discourage, stormed the Capitol bearing Confederate flags alongside Trump flags.<sup>27</sup> They fully internalized the racially-fueled messaging of Trump’s plan to overturn the election by any means necessary, including violence. One insurrectionist even paraded a large Confederate flag across the second floor of the Capitol—an affront that even members of the Reconstruction Congress never witnessed, and likely could not have imagined.<sup>28</sup>

In effect by targeting and seeking to disqualify legitimate votes cast by Black voters to fuel his effort to overturn the results of the presidential election, former President Trump’s insurrection touched on key concerns of the 39<sup>th</sup> Congress in its drafting of, and deliberations about the 14th Amendment.

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<sup>27</sup> Resp’t’s Br. 16; Pet. App. 97a; Eric Cortellessa, *Trump Refused Multiple Requests to Call Off Mob, Jan. 6 Panel Details*, TIME (July 21, 2022, 10:54 PM), <https://time.com/6199490/trump-jan-6-oath-dereliction-duty/>. *Defining Images from the Jan 6th Capitol Attack*, Reuters (Jan. 5, 2024, 9:29 AM), <https://www.reuters.com/pictures/defining-images-jan-6th-capitol-attack-2024-01-05/7WVBUQOSLVMDFKOTTWBJHY5WEQ/>.

<sup>28</sup> Elliott C. McLaughlin, *Before January 6, Insurgents Waving Confederate Flags Hadn’t Been Within 6 miles of the US Capitol*, CNN (Jan. 7, 2021, 2:44 PM), <https://www.cnn.com/2021/01/07/us/capitol-confederate-flag-fort-stevens/index.html>.

### **III. Applying Section 3 to Trump Serves the Interest of Democracy.**

#### **A. Ineligible Candidates Should Not Be Permitted to Run for Office.**

This case has been met with opposition from an array of voices, including some who concede the appropriate application of Section 3, but argue that to remove Donald Trump from the ballot would interfere with the will of voters and thus constitute an undemocratic exercise of judicial power.

The opposite is true. Failure to apply the constitutional prerequisite for the office of President Trump would constitute an undemocratic exercise of power. Applying the law equally to everyone regardless of station, and despite popular opposition, is the very essence of the rule of law—a fundamental pillar of democracy. To allow an individual who does not meet the constitutional prerequisites to run for office would send the message that a candidate's popularity, or the prominence of the office she seeks, determines whether the law will be applied.

Donald Trump is no more qualified to remain on the ballot for President than a 30-year-old seeking the presidency, or a 40-year-old born in France, or a former president who was elected to serve in office twice before. U.S. Const. art. II, § 1, cl. 5. To ignore the clear and unequivocal text of Section 3 and the intention of those who drafted it on the theory that applying Section 3 to the office of the presidency, or to this particular candidate, would somehow “disenfranchise” those who wish to vote for Mr. Trump, would place craven political calculation and fear ahead of principled decision-making. For the

Supreme Court to involve itself in such a calculation would be very grave indeed.

Ineligibility for the ballot is not an unknown or unfamiliar concept in elections in the U.S. Every election cycle all over the country, some potential candidates miss filing deadlines, or fail to garner enough signatures to appear on the ballot. Others lack the funds to mount a campaign. Still others are unable to meet residency requirements for particular offices. In most states, membership in the state bar for a minimum number of years is a prerequisite to appearing on the ballot for judicial office.

These are all eligibility requirements that if not met, disqualify potential candidates from appearing on ballots. Section 3, although broader in scope, functions as these prerequisites do. It is a nationwide eligibility requirement for federal and state office, barring from office those who previously violated their oath of office by participating in insurrection or rebellion. It no more disenfranchises voters than does removing a candidate from the ballot who failed to meet age or residency requirements.

With some measure of humility, we should remember that the framers of Section 3 are the only members of Congress who, *en masse*, confronted the consequences of disloyalty among those in public office. They witnessed first-hand the violent rending of this country, and oversaw its repair. To ignore their considered and experienced determination that loyalty must be a prerequisite to service would be arrogance and folly of the worst kind.

**B. Applying Section 3 to Trump's Insurrection Will Not Subject Ordinary Protesters to Disqualification.**

The contention that applying Section 3 to President Trump will “open up the floodgates,” allowing it to be wielded as a sword against those engaged in protected First Amendment activity are either cynically perverting the history of political protest in this country or are seeing monsters in the shadows. Insurrection is not protest. Insurrection as defined by the Colorado Supreme Court makes the distinction between insurrection and protest clear. What made January 6th an insurrection, the court explained is that it was a “concerted and public use of force or threat of use of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish the peaceful transfer of power in this country.” *Anderson*, 2023 CO at 99.

No mere rally or protest against governmental action or inaction can be confused with insurrection. The attempt to suggest that the widespread protests that swept our country in 2020 to denounce the killing by police of unarmed African Americans might be regarded as insurrection is a patently cynical attempt at false equivalence, designed to try and cloak January 6th with the protective covering of our country's long history of civil rights protests. But no fair understanding of insurrection would attach to protests following the murder of George Floyd by police in Minneapolis. Neither protests against police violence, nor anti-war protests during the Iraq and Vietnam Wars, nor demonstrations for the protection of women's rights, nor public opposition to judicial or governmental decisions, have been undertaken with the goal of overthrowing the legitimately

elected or appointed governmental leadership. Even when accompanied by sporadic acts of violence, protests in the U.S. centered on issues of injustice and rights seek change *from* government, not the usurpation or hijacking of legitimate government by a mob.<sup>29</sup>

Other courts have found no problem distinguishing between protests – even ones marked by violence – and what occurred on January 6. As one court explained, “what happened on that day [January 6] was nothing less than the attempt of a violent mob to prevent the orderly and peaceful certification of an election as part of the transition of power from one administration to the next . . . That mob was trying to overthrow the government . . . That was no mere protest.”<sup>30</sup>

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<sup>29</sup> Karina Zaiets et al., *We Looked at the Protester Demands from Across the Nation and Compared Them with Recent Police Reforms*, USA Today (July 24, 2020, 5:02 PM) (“[Demanding] all police departments in this country be investigated by democratically elected, independent civilian review boards.”), <https://www.usatoday.com/in-depth/news/2020/07/20/protester-demands-police-policy-change-chokehold-ban/5357153002/>; Keeanga-Yamahtta Taylor, *Did Last Summer’s Black Lives Matter Protests Change Anything?*, New Yorker (Aug. 6, 2021) (“[Demanding] the redistribution of resources away from police and toward other public agencies that are better equipped to change patterns of violence and crime.”), <https://www.newyorker.com/news/our-columnists/did-last-summer-protests-change-anything>.

<sup>30</sup> *United States v. Mazzocco*, No. 21-cr-54, ECF No. 32 at 24 (D.D.C. Oct. 4, 2021) (emphasis added); *see also United States v. Munchel*, 991 F.3d 1273, 1285 (D.C. Cir. 2021) (characterizing events of January 6 as an “insurrection”); *United States v. Krauss*, No. 23-cr-34, 2023 U.S. Dist. LEXIS 201271, at \*1 (D.D.C. Nov. 9, 2023) (“Krauss was part of the mob that stormed the Capital during the insurrection on January 6, 2021.”); *United States v. Grider*, 617 F. Supp. 3d 42, 46 (D.D.C.

The findings made by the Colorado trial court and upheld by the state appellate courts are compelling, sound, and supported by a voluminous record and testimony at trial. The court's finding that Trump engaged in insurrection was supported "by clear and convincing evidence." Having been afforded a fair process and review by independent courts, the conclusion that Trump participated in insurrection is consistent with the function of adjudication and law in our system of democracy.

Democracy will be strengthened if citizens are able to observe a transparent and sound legal process, overseen by independent judges of integrity, for evaluating Mr. Trump's claim of eligibility. Americans can feel confident that the laws governing who can serve in office, who can vote, and who can participate in public life are uniformly and equally applied, no matter the popularity, reach or power of the person seeking to participate.

That some might seek to abuse Section 3 for political or other nefarious means in the future is not a justification for failure to apply the law. Indeed, to refrain from its application for fear of its abuse by bad faith actors would hold the rule of law hostage.

Allowing a constitutionally disqualified candidate to appear on the ballot despite a finding of participation in insurrection would powerfully undermine the fact and perception of the rule of law and fundamental fairness.

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2022) ("This criminal case is one of several hundred arising from the insurrection at the United States Capitol on January 6, 2021.").



**CONCLUSION**

The judgment of the Colorado Supreme Court should be affirmed.

Respectfully submitted,

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