No. 23-719

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

NORMA ANDERSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF OF *AMICI CURIAE* J. MICHAEL LUTTIG, PETER KEISLER, LARRY THOMPSON, STUART GERSON, DONALD AYER, ET AL., IN SUPPORT OF THE ANDERSON RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The *amici* listed in Appendix A submit this brief. *Amici* include former officials who worked in the last six Republican administrations, senior officials in the White House and Department of Justice, and others who support a strong, elected Presidency.[1] Reflecting their experience, *amici* have an interest in defending the peaceful transfer of power to a newly-elected President that is required by Article II and the Twelfth and Twentieth Amendments and is protected against insurrection by Section 3 of the Fourteenth Amendment. *Amici* speak only for themselves personally and not for any entity or other person.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief focuses on two textualist points. First, it would violate the rule of law and textualism for this Court to create an off-ramp to avoid adjudicating whether Mr. Trump is disqualified. The power to decide a dispute about a presidential candidate's constitutional qualifications is a judicial power that has been vested by the Electors Clause initially in the States, and by Article III's grant of appellate jurisdiction ultimately in this Court. Section 5 of the Fourteenth Amendment merely gives Congress power to legislate a judicial enforcement mechanism in addition to this pre-existing judicial power of the States and this Court.

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1. *Amici* state that no counsel for any party authored this brief in whole or in part, and that no entity, other than *amici* and their counsel, made any monetary contribution toward the preparation or submission of this brief.

Mr. Trump does not argue that the Constitution gives Congress judicial power over a presidential qualifications dispute. Section 5 of Article I gives Congress the power only to "be the Judge of the . . . Qualifications of its own Members." In contrast, Section 3 of the Fourteenth Amendment merely checks the judicial power of the courts by giving Congress the power by two-thirds vote to remove, for any reason, disqualification under Section 3, even after it has been judicially adjudicated.

Second, the terms of Section 3 of the Fourteenth Amendment disqualify Mr. Trump. The Court should heed the warning of Justice Holmes that cases of "immediate overwhelming interest" often "make bad law." *Northern Sec. Corp. v. United States,* 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting). Particularly because Section 3 emerged from the hallowed ground of the Civil War, this Court must accord Section 3 its fair meaning, not a narrow construction. Mr. Trump was "President of the United States." U.S. CONST. art. II, § 1, cl. 1. He never disputes that the President is an "officer." It follows, as the Fourteenth Amendment generation understood, that the "President of the United States" is an "officer of the United States." Mr. Trump incited, and therefore engaged in, an armed insurrection against the Constitution's express and foundational mandates that require the peaceful transfer of executive power to a newly-elected President. In doing so, Mr. Trump disqualified himself under Section 3.

ARGUMENT

I. STATE COURTS AND THIS COURT HAVE THE JUDICIAL POWER TO DECIDE A PRESIDENTIAL DISQUALIFICATION DISPUTE.

Resolving individual disputes of a presidential candidate's qualifications is an exercise of judicial power. Under federalism and separation of powers, state and federal courts exercise judicial power, except for Article I's two grants of enumerated judicial powers to Congress. Neither of those grants even arguably applies here. And no constitutional amendment changes the allocation of judicial power here.

A. The Electors Clause Allocates This Power To The States, Subject To This Court's Article III Judicial Review.

The Constitution limits Congress to the two judicial powers enumerated in Article I. The founding generation understood this. The oft-cited treatise of St. George Tucker explained that the Constitution vested

> [t]he judicial powers (*except in the cases particularly enumerated in the first article*) in the courts; the word *the,* used in defining the powers of the executive, and of the judiciary, is, with these exceptions, co-extensive in its signification with the word *all:* . . . .
>
> [Congress] is neither established as [a judicial court] by the constitution (*except in respect to its own members*,) nor has it been, nor can it be

> established by authority of congress; for all the courts of the United States must be composed of judges commissioned by the president of the United States, and holding their offices during good behaviour, and not by the unstable tenure of biennial elections.

St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, App. 200-205 (1803) (first and last emphasis added).

The constitutional provisions on impeachment provide one of only two "particularly enumerated" grants of judicial power to Congress. Article I, section 3, clause 6 states: "The Senate shall have the sole Power to *try* all Impeachments." (Emphasis added). Clause 6 also refers to the person subject to impeachment being "convicted" by "the Concurrence of two thirds of the Members present." And the next clause refers to "Judgment in Cases of Impeachment." Article II, Section 4, in turn subjects to Impeachment "[t]he President, the Vice President, and all civil Officers of the United States."

In contrast, in the second grant of an enumerated judicial power to Congress, the Constitution gives Congress no judicial power concerning the President, the Vice President, and all civil officers. This second grant is in Section 5 of Article I: "Each House shall be the *Judge* of the Elections, Returns and *Qualifications of its own Members*[.]" (Emphasis added). Justice Story explained the reason that this judicial power concerning "Members" was given to Congress: "If lodged in any other, than the

legislative body itself, its independence, its purity, and even its existence and action may be destroyed, or put into imminent danger." 2 J. STORY, COMMENTARIES ON THE CONSTITUTION § 831 (1833).

As the text of Article I, Section 5 confirms, this rationale does not support any power of Congress to "be the Judge of the . . . Qualifications of" the President or any officer of the United States. The founding generation would have considered it unthinkable to give Congress an unreviewable power, by a bare majority, to disqualify a President or a cabinet member when the facts or legal principles are in dispute. As James Madison explained in Federalist No. 48: "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." Madison warned against "legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations." He thus stated that the Constitution did not make "[t]he judiciary and executive members . . . *dependent on the legislative . . . for their continuance in*" office. *Id.* (emphasis added). "An ELECTIVE DESPOTISM was not the government we fought for;" but rather the founding generation fought for a government with the "effectual[] check[s] and restraint[s]" of separation of powers. *Id.*

In Section 5 of Article I, however, the word "Judge" does reflect the founding generation's understanding that it is an exercise of judicial power to decide disputed factual and legal questions about whether a particular person is qualified to hold office. Accordingly, *Barry v. United States ex rel. Cunningham,* 279 U.S. 597 (1929), holds that when a house of Congress exercises power over

a dispute about "elections, returns, and qualifications" of that house's members, that house "acts as a judicial tribunal." *Id.* at 616. The power to decide such a dispute is "judicial in character," and its exercise "necessarily involves the ascertainment of facts . . . to determine the facts and to apply the appropriate rules of law, and, finally, to render a judgment . . . ." *Id.* at 613. Before *Barry*, *Thomas v. Loney*, 134 U.S. 372 (1890), also had held that Section 5 of Article 1 gives each House "judicial power" and each House acts as a "judicial tribunal." *Id.* at 374-75. Although *Barry* and *Loney* involved elections, their rationale expressly applied to qualifications as well. As it must, because "Judge" in Article I, Section 5 applies to "Elections, Returns and Qualifications."

In stark contrast to congressional qualifications, the Constitution confers the judicial power to adjudicate *presidential* qualifications first on the state officials and courts designated by state law, and ultimately on the Supreme Court. To start, the Electors Clause in Article II, Section 1 confers power on each State to "direct" the "Manner" of "appoint[ing]" presidential electors. Each state's "far-reaching authority over presidential electors," *Chiafalo v. Washington,* 140 S. Ct. 2316, 2324 (2020), includes the "power to impose conditions on the appointment of electors," *id.* at 2324 n.6. Thus, "a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it *to exclude from the ballot* candidates who are constitutionally prohibited from assuming office." *Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (emphasis added). The Electors Clause also gives each state the power to authorize state officials and state courts "to oversee election disputes," *Bush v. Gore*, 531 U.S. 98,

113-14 (2000) (Rehnquist, C.J., concurring). A dispute over a presidential candidate's qualifications under federal law is certainly one very important kind of presidential election dispute.

Even without the Electors Clause, as a matter of federalism, generally state law may authorize state courts to interpret and apply "federal law," even when Congress has not created a justiciable cause of action. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989). The only exception is when the Constitution or a valid federal statute contains "a provision for exclusive federal jurisdiction." *Id.*

Section 2 of Article III of the Constitution directly gives the Supreme Court appellate jurisdiction, "both as to law and fact," of "*all* cases, in law and equity, arising under this Constitution, [and] the laws of the United States," except in cases where this Court has original jurisdiction. The ubiquitous "all cases" include disputes in state court raising federal issues about a presidential candidate's qualifications under the Constitution.[2] As *Bush v. Gore* held, when disputes arise relating to a presidential election, after initial resolution by the state officials or state courts designated by state law, it is "*our unsought responsibility* to resolve the federal and constitutional issues the judicial system has been forced to confront." 531 U.S. at 111 (per curiam) (emphasis added). After that resolution, the Constitution's Supremacy Clause mandates that all state legislatures, officials, and courts abide by

2. Congress has the power to make "Exceptions" and "Regulations" to this Court's appellate jurisdiction. U.S. Const. art. III, § 2, cl. 2. Congress has *not* done either concerning presidential disqualifications. *See* 28 U.S.C. § 1257.

final Supreme Court rulings on issues of federal law. *Cooper v. Aaron*, 358 U.S. 1, 4, 18-20 (1958).

To summarize, under the Electors Clause and federalism, state courts and election officials initially have authority to adjudicate whether a candidate for President is disqualified by the Constitution. Next, under Article III's authorization of appellate jurisdiction and 28 U.S.C. § 1257, this Court reviews such a ruling and makes the final judicial decision whether a presidential candidate is disqualified. Finally, under the Supremacy Clause, the Supreme Court's ruling is binding in all 50 States. That refutes any suggestion that only Congress can prevent inconsistent rulings between courts in different states on whether a presidential candidate is disqualified.

B. No Amendment Repeals This Allocation Of Judicial Power.

Nothing in any constitutional amendment limits the pre-existing power of state courts and ultimately the Supreme Court to adjudicate a presidential qualifications dispute before the election. And Mr. Trump does *not* argue that any constitutional amendment confers a power on Congress to adjudicate this case of disputed presidential qualifications.

1. Section 5 of the Fourteenth Amendment: Section 5 states: "The Congress shall have *power* to enforce, by appropriate legislation, the provisions of this article." (Emphasis added). Nothing in these fifteen words deprives the states of their pre-existing power, subject to this Court's review, to adjudicate a presidential candidate's constitutional qualifications. *See* Part I.A., *supra.* Section

5 says "power," not "the power"—much less "exclusive" or "sole power." *Compare* Art. I, § 2, cl. 5, and § 3, cl. 6. ("the sole Power"); Art. I, § 8, cl. 17 ("exclusive Legislation"). Nor does Section 5 state "No State shall" as Section 1 does. *See also* Art. I, § 10 ("No State shall" used for more than 15 prohibitions). Nor does one word in Section 5 permit any distinction between Congress's power to enforce Section 3 versus Section 1. Rather, as to Section 3 and Section 1, Section 5 gives Congress "power" to legislate an additional enforcement mechanism, and does not negate the pre-existing adjudicatory power of state courts, subject to Supreme Court review, to enforce the Constitution.

For similar reasons, Mr. Trump misplaces reliance on *In re Griffin*, 11 F. Cas. 7 (Cir. Ct. D. Va. 1869). Nothing in *Griffin* involved, addressed, or limited either a state court's pre-existing power under the Electors Clause to decide a presidential qualifications dispute or this Court's Article III appellate jurisdiction over such a state court decision.

Mr. Trump is also wrong that 18 U.S.C. § 2383 "is the exclusive means of enforcing section 3." Pet'r's Br. at 40. Like most criminal statutes, Section 2383 contains nothing like an exclusive jurisdiction provision. And it was originally adopted in the Second Confiscation Act of 1862, 12 Stat. 589, before the Fourteenth Amendment was enacted.

Moreover, exclusive federal court jurisdiction concerning who is eligible to be elected President would be in tension with the powers that the Electors Clause confers on States, but not Congress. The Electors Clause contrasts with the Elections Clause in Article I, Section 4,

Clause 1. The Elections Clause gives Congress power to "make or alter . . . regulations" on the "Manner" of holding congressional elections, but the Electors Clause gives Congress no such power concerning presidential elections. *Shelby County v. Holder*, 570 U.S. 529 (2013), held that Congress's power under Section 2 of the Fifteenth Amendment to enact "appropriate legislation" does not authorize legislation that violates federalism. *Id.* at 538, 543. For similar reasons, it would not be "appropriate legislation" under Section 5 of the Fourteenth Amendment for a statute to nullify a state court's traditional power to decide a presidential qualification dispute, subject to Supreme Court review.

Finally, Mr. Trump does *not* argue that Section 5 confers any judicial power on Congress. "[L]egislation" is a product of legislative power, not judicial power. And, unlike an adjudication, the Constitution, in Article 1, Section 7, Clause 2, requires that all legislation be presented to the President for signature or veto.

2. Section 3 of the Fourteenth Amendment: The last sentence of Section 3 reads: "But Congress may by a vote of two-thirds of each House, remove such disability." The words "[b]ut" and "remove" connote that the disability existed before Congress votes.

Mr. Trump does *not* argue that the last sentence of Section 3 confers a power on Congress to adjudicate whether there was a disability before its removal. *See* Pet'r's Br. at 41-42. Indeed, "vote" to "remove such disability" in Section 3 stands in stark contrast to "Judge" in Article I, Section 5 and "try," "convicted," and "Judgment" in Article I, Section 3, clauses 6 and

7. *See supra,* at pp. 4-6. Two-thirds of Congress may "vote" to remove a pre-existing disability for any reason, including that the disqualified person has reformed or for pure politics. And Congress need not hear evidence or otherwise satisfy procedural due process.

Mr. Trump instead argues that the combination in Section 3 of the phrase "hold any office" and Congress's power by two-thirds "vote" to "remove such disability" nullifies a state court's power to adjudicate (subject to this Court's review) a Section 3 presidential qualification dispute before election day. Pet'r's Br. at 41-46. This is wrong. To start, courts may adjudicate *before* election day three other presidential disqualifications that use "hold" or similar words. First, a criminal conviction under 18 U.S.C. § 2383 for insurrection renders a person "incapable of holding any office under the United States." Neither Mr. Trump nor anyone else suggests that such a federal criminal case cannot be adjudicated before election day.

Second, the Twenty-Second Amendment states, "[n]o person shall be elected to the office of the President more than twice." A President is "elected" under Article III, Section 1 and the Twelfth Amendment no earlier than when "[t]he Electors . . . vote by ballot for President" in mid-December. *See Chiafalo*, 140 S. Ct. at 2321, 2325 (the electors "do indeed elect a President"). Obviously, the Twenty-Second Amendment does not render a state court powerless before election day to prevent Barack Obama and George W. Bush from running on that state's ballot for a third term.

Third, Article I, Section 3, Clause 7 gives the Senate power, after impeachment and conviction, to enter a

judgment of "*disqualification to hold and enjoy* any Office of honor, Trust or Profit under the United States." (Emphasis added.) Of course, a state may give its courts power to enforce this "disqualification to hold" by barring a disqualified person from running.

Equally unavailing is Mr. Trump's reliance on the fanciful possibility that Congress by two-thirds vote might remove his disability. This does not deprive the courts of their traditional ability to adjudicate a disqualification before election day. In the other instances discussed above—the bars of 18 U.S.C. § 2383, the Twenty-Second Amendment, and disqualification by the Senate—the candidate could assert an equally unlikely fantasy that two-thirds of Congress might propose and the States might ratify a constitutional amendment that removes the disability.

Rather, the words "remove such disability" in the Fourteenth Amendment confirm that the candidate is *currently* disqualified and will remain disqualified, unless and until there is an affirmative vote by two-thirds of Congress to "remove" that disqualification. It makes no sense to put off the judicial determination of whether someone is qualified, and the potential subsequent removal of the disability by Congress, until after the election has been run. That would deprive voters of the ability to make a truly informed decision, because they could not know if they were voting for someone who cannot serve. And it would risk chaos as courts litigate whether a newly-inaugurated President is disqualified at the same time the country needs a President to be indisputably occupying the office and making enormously consequential decisions—including as commander-in-chief, appointer of

cabinet members, leader of the executive branch, vetoer of bills, etc. It is difficult to believe that the framers of the Fourteenth Amendment added Section 3 intending that the new clause operate in a way that deprives both voters of the ability to make an informed decision and ultimately-eligible Presidents of the ability to govern effectively from the outset.

3. The Twelfth Amendment: Mr. Trump does *not* argue that the Twelfth Amendment deprives state courts or this Court of jurisdiction to decide this case or gives Congress power to do so. The Twelfth Amendment left the Electors Clause intact. *See McPherson v. Blacker*, 146 U.S. 1, 26 (1892). Under the Electors Clause, each state "exclusively," *id.* at 27, makes the "apportionment of responsibility" as to which bodies "oversee [presidential] election disputes." *Bush v. Gore,* 531 U.S. at 113-14 (Rehnquist, C.J., concurring). Here, the Colorado Supreme Court properly ruled that Colorado's statutes apportioned the authority to decide this presidential disqualification dispute to Colorado's Secretary of State and state courts, subject to this Court's review.

The Twelfth Amendment vests no power in Congress to judge a dispute about a presidential candidate's qualifications if, as here, (1) there are disputed facts or disputed legal questions and (2) state courts, subject to this Court's review, have the power to adjudicate the dispute. The Twelfth Amendment repeats the words in the original Article II, Section 1, Clause 3, that after the certificates of electoral votes are opened, "the Votes shall then be counted." The phrase "shall then be counted" refers to calculating. *See* S. Johnson, *A Dictionary of the English Language* (4th ed. 1773) (the verb "count" means

"To number; to tell."). "[S]hall then be counted" does not suggest a power of Congress to act as a court that substitutes for, or overrides, state courts or this Court.

The phrase "shall then be counted" contrasts sharply with the express power to "Judge" given by Article I, Section 5 to Congress but concerning *only congressional* elections and qualifications. "[S]hall then be counted" also contrasts with the broader word "determine" that Article II, Section 1, Clause 4 employed to give Congress *other* powers concerning a state's conducting of a presidential election. Clause 4 provides: "The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes . . . ." Article II, Section 1, Clause 3, would not have used, and the Twelfth Amendment would not have repeated, the very different and narrower word "counted" to give Congress judicial powers to act as a substitute court for, or override, state courts or this Court concerning disputed presidential election results and qualifications.

The Court should ensure that nothing in its decision uses the Twelfth Amendment, or 3 U.S.C. § 15, to undermine the authority of each State, through its courts and election officials, to resolve disputes arising in connection with a presidential election, subject to review by this Court, rather than Congress. Only three years ago, Mr. Trump and his former counsel argued that the Twelfth Amendment conveys to the Vice President the ultimate power to override state court decisions and adjudicate who won a state's electoral votes. *See John Eastman's Second Memo on "January 6 Scenario,"* *Wash. Post* (Oct.

29, 2021) (linking to memo).[3] Let's not go anywhere near there again.

4. The Twentieth Amendment: Mr. Trump's brief does *not* argue that the Twentieth Amendment has any bearing on this case. Section 3 of the Twentieth Amendment does not restrict the pre-existing power of state courts and the Supreme Court to adjudicate a presidential qualification dispute before election day. Nor does it assign any judicial power to Congress. Instead, it specifies that, on inauguration day, "if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified." The use of "shall have failed" connotes that the putative President has failed to qualify without Congress doing anything. Again, Congress is given no power to "try" and "Judge" or anything that suggests a power to adjudicate. Moreover, the Twentieth Amendment was passed by Congress in March 1932, only three years after *Barry v. United States ex rel. Cunningham, supra*. If the Twentieth Amendment's framers had intended to expand Congress's limited judicial power to "Judge" beyond the "Qualifications of its own Members," U.S. CONST. art. I, § 5, to also include judicial power to judge the disputed qualifications of the President and Vice President, surely the Twentieth Amendment would say so expressly.

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3. *Available at* https://www.washingtonpost.com/context/john-eastman-s-second-memo-on-january-6-scenario/b3fd2b0a-f931-4e0c-8bac-c82f13c2dd6f/ (last visited Jan. 15, 2024).

C. The Political Question Doctrine Does Not Apply.

Mr. Trump correctly does *not* argue that his case presents a nonjusticiable political question. First, there is no textual commitment by the Constitution to Congress of the power to adjudicate a presidential candidate's disputed qualifications. The constitutional text shows the exact opposite. Part I.A–B, *supra*.

Second, there are judicially manageable standards for "insurrection against the" Constitution. *See* Part II.C, *infra*. Applying that term has a much firmer grounding in text and history than did applying "equal protection" to vote counting in *Bush v. Gore*. *See* 531 U.S. at 109 ("The contest provision, as it was mandated by the State Supreme Court, is not well calculated to sustain the confidence that all citizens must have in the outcome of elections."); *id.* at 106-07.

Moreover, if there were no judicially manageable standards here, that would render unconstitutional 18 U.S.C. § 2383—which applies to "insurrection against the authority of the United States or the laws thereof." And that statute is what Mr. Trump (incorrectly) argues is the proper and "exclusive means of enforcing section 3." Pet'r's Br. at 40.

D. Federalism And Separation Of Powers Support Traditional Court Adjudication Rather Than Sole, Unreviewable Congressional Power.

Mr. Trump's *amici* claim that if his conduct disqualifies him, then Section 3 of the Fourteenth Amendment would

be weaponized against others by partisan state courts and state officials. Such an anti-textual, policy argument has no place in this Court's constitutional jurisprudence. As this Court held in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), "we cannot allow our decisions to be affected by extraneous influences," including how the public and politicians may react. *Id.* at 291-92.

Moreover, Mr. Trump's *amici* have the weaponization risk upside down. First, the court process that the Constitution requires for adjudication of a presidential qualification dispute provides the safeguards and checks of the rule of law, federalism, and separation of powers. This includes evidence, procedural due process, recusals of adjudicators for bias, a ban on *ex parte* contacts, lower court review, the final judicial decision by the Supreme Court, and potential removal of a disqualification by a two-thirds vote of Congress.

Particularly important is the responsibility of every Supreme Court Justice to fulfill his or her solemn oath or affirmation to "faithfully and *impartially* discharge and perform all the duties incumbent upon me as Justice under the Constitution and the laws of the United States. So help me God." 28 U.S.C. § 453 (emphasis added). As Alexander Hamilton explained in Federalist No. 78, Justices—unlike politicians—have life tenure so that they will fulfill that responsibility.

Second, in contrast, if Congress has unreviewable power over Section 3 disqualifications, as some advocate, *see* Cruz *Amici* Br. at 12-13; Meijer *Amicus* Br. at 4-15, that would lack all the safeguards and checks of the rule of law,

federalism, and separation of powers. Congress consists of partisan politicians. There would be no requirements for evidence, procedural due process, recusals for bias, or bans on *ex parte* contacts. Nor any role for the states or another branch of the federal government.

As bad, any exclusive, unreviewable power of Congress to adjudicate non-member disqualifications would go both ways. A bare majority in both houses of Congress could ignore even the clearest of presidential disqualifications—a third presidential term—without any possibility of review by the courts.

Perhaps worse, a bare partisan majority, freed from any possible judicial scrutiny, also could improperly and expansively torture the meaning of "giv[ing] aid or comfort to the enemies [of the Constitution]" in Section 3 of the Fourteenth Amendment to disqualify many citizens from running for or serving in Congress or "any office, civil or military, under the United States, or under any State." Among others, "Judges of the Supreme Court" are "officers of the United States." U.S. CONST. art. II, § 2, cl. 2. An unreviewable Congress could disqualify a President, cabinet member, Justice, or anyone holding another covered federal or state position—including long after assuming office. Congress would have no reason to use the impeachment process, with its now-pointless requirement of a two-thirds concurrence in the Senate to convict.

Nothing could be more contrary to federalism and separation of powers than giving a bare majority in Congress such partisan power with no possibility of veto or review by this Court. The Constitution "divides power

among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). This is especially prudent in our divided era, where members of Congress routinely censure each other, vote against confirming Justices on partisan grounds, and vote on impeachment on party lines.

II. THE FAIR MEANING OF SECTION 3 DISQUALIFIES FORMER PRESIDENT TRUMP.

A. Section 3 Must Be Accorded Its Fair Meaning, Not A Narrow Construction

The "textualist's touchstone" is to give every constitutional provision its "*fair meaning*." A. Scalia & B. Garner, Reading Law 356 (2012) ("*Reading Law*") (emphasis in original). A narrow construction to promote judicial restraint is just as bad as an "unreasonably . . . enlarged" construction. *Id.* at 355-56. Scalia and Garner approvingly quote Justice Story that it is forbidden to narrowly construe a constitutional provision "'as if it were subversive of the great interests of society, or derogated from the inherent sovereignty of the people.'" *Id.* at 355 (quoting 1 J. Story, Commentaries on the Constitution of the United States § 423, at 300 (2d ed. 1858)). Every provision of the Constitution is part of "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, not the inferior law of the land.

The duty to use "fair meaning" is especially compelling for Section 3 of the Fourteenth Amendment for two reasons. First, Section 3 has life only because it

applies fully to those who violate its terms *and* still retain or regain enough popularity potentially to be elected or be appointed by elected officials. Section 3 would be a dead letter if the Court refused to apply it because an insurrectionist had popularity with large numbers of voters. Just as "it is not the role of this Court to pronounce the Second Amendment extinct," *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008), it is not the role of this Court to render Section 3 extinct.

Second, the Civil War generation recognized that what started as an insurrection in a single state—the secession of South Carolina in December 1860—had metastasized into a Civil War. *See The Brig Amy Warwick (The Prize Cases)*, 67 U.S. 635, 666 (1862) ("a civil war always begins by insurrection"). "More than 620,000 soldiers lost their lives in four years of conflict—360,000 Yankees and at least 260,000 rebels." J. McPherson, Battle Cry of Freedom 854 (1988) ("*Battle Cry*"). Section 3 of the Fourteenth Amendment was the Civil War generation's powerful deterrent to ensure that even an at-first localized insurrection would never again happen. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2918 (May 31, 1866) (Sen. Willey) (Section 3 "is a measure of self-defense. . . . [L]ooking to the future peace and security of the country."). That deterrent worked for over 150 years. The task of interpreting that deterrent commands respect.

Finally, there are no special interpretive rules for the many constitutional provisions that render millions of citizens unable to be President, or to hold other federal offices. R. Bernstein, "Lots of People Are Disqualified

from Becoming President," *Atlantic* (Feb. 4, 2021).[4] Section 3 and these other provisions are not improperly anti-democratic, but rather they set forth foundational rules of the Republic adopted by the People through ratification.

Indeed, the Electoral College is a similar foundational rule. The Electoral College has prevented the People's first choice—the winner of the national popular vote—from being President *five* times (1824, 1876, 1888, 2000, and 2016).

Not much would remain of our Constitution if this Court narrowly enforced the Constitution's provisions when they potentially frustrate large numbers of voters. The Electoral College, separation of powers, bicameralism, six-year rotating terms for Senators, judicial review, the First Amendment, the Second Amendment, and the many Amendments protecting criminal defendants—and much more—often lead to binding results that are contrary to the majority preferences of voters in many states and nationwide.

B. The "President Of The United States" Is An "[O]fficer of the United States."

This brief will not repeat the overwhelming support that in 1868—the pertinent time—there was widespread understanding that "the President *of the United States*," U.S. Const. art. II, § 1, cl. 1 (emphasis added), is an "officer

4. *Available at* https://www.theatlantic.com/ideas/archive/2021/02/ trump-disqualification-president/617908/ (last visited Jan. 13, 2024).

of the United States." *See, e.g.*, Pet. App. at 70a-76a, ¶¶ 144-160; J. Heilpern & M. Worley, *Evidence that the President Is an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment* (Jan. 1, 2024);[5] 1 J. KENT, COMMENTARIES ON AMERICAN LAW 334 (11th ed. 1866) ("The President is the great responsible *officer* for the faithful execution of the law . . . ." (emphasis added)).

Mr. Trump never disputes that the President is an "officer." *See* Pet'r's Br. at 24. Indeed, Mr. Trump concedes that the "Presidency is obviously an 'office'" and the President is an "officeholder[]." *Id.* at 25-26, 28. His entire argument is "that the president is not an 'officer of the United States.'" *Id.* at 20. But Article II does not define the President as merely "the president" full stop. The first sentence of Article II instead refers to the "President *of the United States of America*." (Emphasis added).[6] Given that there is no dispute that the President is an officer, the President must be an officer "of the United States of America." Mr. Trump never suggests any other entity of which the President is an officer.

Mr. Trump's brief, at 20-21, misplaces reliance on the use of "Officers of the United States" in three clauses of the Constitution as ratified in 1788. To start, others have demonstrated that these clauses support affirmance or are distinguishable. *See, e.g.*, Anderson Br. at 39-43; R. Parloff, *What Scalia Thought About Whether Presidents Are "Officers of the United States,"* LAWFARE (JAN. 24,

5. *Available at* https://papers.ssrn.com/sol3/ Delivery.cfm/SSRN_ID4681108_code2677999.pdf?abstractid=4681108&mirid=1.

6. Art, I, § 3, cl. 4 likewise refers to "[t]he Vice President of the United States."

2024);[7] Samuel Bray, *"Officer of the United States" in Context*, REASON (Jan. 22, 2024);[8] Amar *Amici* Br. at 18-21. Moreover, "context" means that "the same word or phrase" may have different interpretations in different documents. *Reading Law*, at 323.

Most important, Section 3 of the Fourteenth Amendment must be interpreted in light of "the understandings of those who ratified it." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 28 (2022). The understanding of Section 3's terms around 1868 is dispositive because, as *Reading Law* recognizes, over time, words and phrases have "shifts in meaning." *Reading Law*, at 419. This "historical development of word-senses" is why this seminal treatise has different listings for different groups of dictionaries for every 50-year period starting with "1750-1800" through "2001-present." *Id.* at 419-25.

Ultimately, Mr. Trump is wrong, and former Vice President Pence was right. On January 6, 2021, when Vice President Pence refused to violate "my oath," he wrote: "The President is the chief executive officer of the Federal Government under our Constitution."[9]

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7. *Available at* https://www.lawfaremedia.org/article/what-justice-scalia-thought-about-whether-presidents-are-officers-of-the-united-states.

8. *Available at* https://reason.com/volokh/2024/01/22/officer-of-the-united-states-in-context/.

9. *Available at* https://int.nyt.com/data/documenttools/pence-letter-on-vp-and-counting-electoral-votes/9d6f117b6b98d66f/full.pdf.

C. The January 6, 2021 Armed Attempt To Prevent The Peaceful Transfer Of Executive Power Was An "Insurrection . . . Against The" Constitution.

Mr. Trump avoids addressing whether, on January 6, 2021, there was "an insurrection . . . against" "the Constitution of the United States." There was. Mere political violence—such as violence connected with a KKK or BLM rally—is not, without more, "an insurrection . . . against" the Constitution. But here there was much more. The Colorado Supreme Court correctly held that there was an insurrection because there was a threatened and actual violent armed attempt by a large group of people "to preclude Congress from taking the actions necessary to accomplish a peaceful transfer of [executive] power." Pet. App. at 86a-89a, ¶¶ 184-189.

The peaceful transfer of executive power is not merely a norm or tradition. It is the foundational mandate of Article II of the Constitution. Section 1, Clause 1 of Article II, often called the Executive Vesting Clause, provides:

> The executive Power shall be vested in a President of the United States of America. He shall hold his Office *during the Term of four Years*, and, together with the Vice President, chosen for the same Term, *be elected*, as follows.

(Emphases added.)

As Edmund Randolph explained to the Virginia Ratifying Convention, this Executive Vesting Clause meant that a sitting President "may [not] hold his office

without being reelected. He cannot hold it over four years, unless he be reelected, any more than if he were prohibited" from running for reelection to a second term. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 486 (J. Elliot ed., 2d ed. 1836). Randolph stated that a President who loses re-election is "displaced at the end of the four years" by the Executive Vesting Clause. *Id.* And both Article II, Section 1, Clause 3 and the Twelfth Amendment state that when the electoral votes are "open[ed]" in Congress "and the votes shall then be counted," whichever candidate has "a majority of the whole number of Electors appointed," that candidate "shall be the President."

As Chief Justice Marshall put it, "the president is elected from the mass of the people and, *on the expiration of the time for which he is elected*, returns to the mass of the people again." *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (Marshall, Circuit Judge) (emphasis added). The Twentieth Amendment reiterates the mandate that a President must peacefully relinquish power to his or her successor: "The terms of the President and Vice President shall end at noon on the 20th day of January . . . ; and the terms of their successors shall then begin."

January 6, 2021 saw an insurrection against the Constitution because there was a threatened and actual use of armed force to thwart the counting of electoral votes that is mandated by the Twelfth Amendment, as part of the transfer of executive power that is required by the Executive Vesting Clause and the Twelfth and Twentieth Amendments. *Accord* Ilya Somin, *Insurrection, Rebellion, and January 6: Rejoinder to Steve Calabresi*, REASON

(Jan. 6, 2024).[10] First, the ultimate aim of the insurrection was to extend Mr. Trump's time as President beyond the four-year termination required by those constitutional provisions. "To justify and check" the President's "unique [authority] in our constitutional structure," Article II "render[s] the President directly accountable to the people through regular elections." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020). The transfer of executive power after an incumbent President loses ensures "that here, We the People rule." *Chiafalo,* 140 S. Ct. at 2328. As George Washington's Farewell Address stated, it would "destroy[]" our constitutional system if "cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government." Washington's Farewell Address, at 14 (1796).[11]

Second, the January 6, 2021 insurrection sought to prevent the vesting of the authority and functions of the Presidency in the *newly-elected* President. The Civil War generation certainly understood that the threat and use of force to prevent a newly-elected President from exercising executive power is an insurrection. Indeed, the activities of federal officials to prevent Lincoln's inauguration were one basis for Section 3 of the Fourteenth Amendment. *See* Amar *Amici* Brief, at 6-16.

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10. *Available at* https://reason.com/volokh/2024/01/06/insurrection-rebellion-and-january-6-rejoinder-to-steve-calabresi/?itm_source=parsely-api.

11. *Available at* https://www.govinfo.gov/content/pkg/GPO-CDOC-106sdoc21/pdf/GPO-CDOC-106sdoc21.pdf.

Moreover, "[t]he event that precipitated secession was the election of a president by a constitutional majority." *Battle Cry*, at 248. On Nov. 10, four days after Lincoln won, South Carolina's legislature called a convention to consider secession, and both of South Carolina's U.S. Senators resigned.[12] South Carolina seceded on December 20, 1860. That insurrection was 20 days before the next state seceded, *see Battle Cry,* at 235, and ten days before South Carolinians seized the federal arsenal at Charleston, *see Chronology*. The South Carolina convention's Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union objected to:

> *the election of a man to the high office of President of the United States*, whose opinions and purposes are hostile to slavery. He is to be entrusted with the administration of the common Government, because he has declared that that [sic] "Government cannot endure permanently half slave, half free," and that the public mind must rest in the belief that slavery is in the course of ultimate extinction.[13]

(Emphasis added.)

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12. *Chronology of Events Leading to Secession Crisis*, American Historical Association, https://www.historians.org/teaching-and-learning/teaching-resources-for-historians/sixteen-months-to-sumter/ chronology ("*Chronology*") (last visited Jan. 12, 2024).

13. *Available at* https://www.learningforjustice.org/classroom-resources/texts/hard-history/declaration-of-the-immediate-causes-which-induce-and-justify-secession (last visited Jan. 12, 2024).

As on January 6, 2021, the December 20, 1860 insurrection in South Carolina was against the forthcoming transfer of executive power to a newly-elected President. The basis of secession was not antipathy towards Congress. Republicans would not control either chamber of Congress until much later, in 1861 after secessionist Senators and representatives resigned. Before these resignations, one of the anti-secession arguments in the South was to negotiate because "it will be several years" before Republicans would control Congress. *See Battle Cry*, at 245-46 (quotations and citation omitted). And Chief Justice Roger Taney, a friend of slavery, still controlled the U.S. Supreme Court.

Of course, the cause of secessionists was uniquely odious—to protect slavery. But, in one geographical sense, Mr. Trump's insurrection against the Executive Vesting Clause and the Twelfth and Twentieth Amendments was broader than the South Carolina insurrection that triggered the Civil War. Mr. Trump tried to prevent the newly-elected President Biden from governing anywhere in the United States. The South Carolina secession prevented the newly-elected President Lincoln from governing only in that State. The threat or use of armed force to prevent a newly-elected President from exercising executive power, whether on December 20, 1860 or January 6, 2021, is an insurrection against the Constitution.

D. Mr. Trump "Engaged In" The Insurrection.

Mr. Trump "engaged in" the insurrection because (1) inciting constitutes engaging in and (2) Mr. Trump incited the threat and use of violent force as his last opportunity to stop the peaceful transfer of executive power.

First, Attorney General Stanbery informed Congress that "inciting others to engage," whether "by speech or by writing," requires "disqualification." The Reconstruction Acts, 12 Op. Att'y Gen. 182, 205 (1867); The Reconstruction Acts, 12 Op. Att'y Gen. 141, 164 (1867). This reflected well-known legal principles, applicable to treason among other crimes, that a person "is in law guilty of the forcible act" for "counselling" or "instigating others to perform" the violent act itself. *In re Charge to Grand-Jury Treason*, 30 F. Cas. 1047, 1048 (C.C.E.D. Pa. 1851). The Civil War generation surely understood that the insurrectionists included instigators of the seizing of federal forts or the firing on Fort Sumter, even if they let others do the fighting.

Second, even under *de novo* review and a clear-and-convincing evidence standard, Mr. Trump had the intent that the armed mob, at the very least, threaten physical force on January 6, 2021 in response to his speech on the Ellipse. Among other reasons this is clear and convincing is that Mr. Trump knew he had exhausted all his other options and yet still insisted he would remain President.

By December 14, 2020, (1) the electors certified by state officials had cast 306 electoral votes for Joe Biden; (2) this Court had refused to intervene, *see Texas v. Pennsylvania*, 141 S. Ct. 1230 (Dec. 11, 2020); and (3) the supreme courts in all six swing states had rejected Mr. Trump's claims.[14] On December 18, Mr. Trump was told by

14. *See, e.g.*, *Trump v. Biden*, 951 N.W.2d 568, 571-72 (Wis. Dec. 14, 2020) (rejecting challenge concerning indefinitely confined voters as "wholly without merit"); *Trump v. Raffensperger*, No. S21M0561 (Ga. Sup. Ct. Dec. 12, 2020) (rejecting writ of certiorari); *Johnson v. Sec'y of State*, 951 N.W.2d 310 (Mich. Dec. 9, 2020) ("[T]he Court

White House staff that his court challenges had failed. Ex. 78 (finding 171).[15] The next day, Mr. Trump issued his first tweet summoning his supporters en masse to Washington on January 6, 2021: "Big protest in D.C. on January 6. Be there, will be wild." Pet. App. at 93a, ¶ 202. He repeated this summons "at least twelve times." *Id.* at 94a, ¶ 204.

Mr. Trump's campaign to sway Republican officials to reverse his loss also had failed before his January 6 speech on the Ellipse. On December 26, 2020, Mr. Trump himself tweeted that "Mitch [McConnell] & the Republicans do NOTHING, just want to let it pass. NO FIGHT!" *Id.* ¶ 205. Mr. Trump's efforts with state Republican governors, elected officials, and legislators, *id.* at 92a ¶ 198, had failed to produce anything. *See* Ex. 78 (findings 75, 121, 180, 196, 210). Mr. Trump's own appointees at the Department of Justice had refused to support, and indeed contradicted, his false accusations of election fraud. *Id.* (finding 121).

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is not persuaded that it can or should grant the requested relief."); *Ward v. Jackson*, No. CV-20-0343, 2020 WL 8617817, at *2 (Ariz. Dec. 8, 2020) (unanimously rejecting claims of "misconduct," "illegal votes," and "fraud"); *Law v. Whitmer*, No. 82178, 477 P.3d 1124 (Nev. Dec. 8, 2020) (unanimously affirming detailed trial court rejection of election contest); *In re Canvassing Observation*, 241 A.3d 339, 350 (Pa. Nov. 17, 2020) (rejecting statutory claims because "[i]t would be improper for this Court to judicially rewrite the statute by imposing [observer] distance requirements where the legislature has, in the exercise of its policy judgment, seen fit not to do so"); *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, No. 31 EAP 2020, 241 A.3d 1058 (Pa. Nov. 23, 2020) (rejecting statutory claims seeking to disqualify signed mail-in or absentee ballots timely received by November 3, 2020).

15. Ex. 78 contains findings from the Final Report of the House Select Committee to Investigate the January 6th Attacks that the trial court admitted into evidence.

Perhaps most important, before the speech on the Ellipse, Vice President Pence had told an angry Mr. Trump that morning that Pence would not stop the congressional certification of Joe Biden. *Id.* (finding 321). Mr. Trump's response was to try to scare Vice President Pence with mob force. Mr. Trump primed the Ellipse crowd by warning that if Vice President Pence did not relent, "I'm going to be very disappointed in you. I will tell you right now. I'm not hearing good stories." Pet. App. at 223a-226a, ¶ 135. Mr. Trump specifically instructed the crowd four times with respect to Joe Biden's becoming President for "four more years. We're just not going to let that happen." Pet. App. at 227a-228a, ¶ 138.

After the speech, Mr. Trump continued his incitement, tweeting one hour and three minutes after being informed that the Capitol was under attack: "Mike Pence didn't have the courage . . . ." Pet. App. at 98a, ¶ 215. This tweet by itself immediately caused more violence at the Capitol. *Id.* ¶ 216. Mr. Trump told his staff that perhaps Vice President Pence "deserved to be hanged." *Id.* ¶ 218.

Ultimately, this case has a virtual confession. On December 3, 2022, Mr. Trump posted that his unfounded accusation of widespread election fraud "allows for the termination of all rules, regulations, and *articles, even those found in the Constitution*." J.A. 1332 (emphasis added). He had said much the same in his January 6, 2021 speech on the Ellipse: "When you catch somebody in a fraud, you're allowed to go by very different rules." Pet. App. at 97a, ¶ 213. Mr. Trump deliberately tried to break the Constitution—to incite threatened and actual armed force to prevent the peaceful transfer of executive power mandated by the Executive Vesting Clause and the

Twelfth and Twentieth Amendments. That constituted engaging in an insurrection against the Constitution.[16]

CONCLUSION

This Court should affirm.

January 29, 2024

Respectfully submitted,

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16. Mr. Trump has no First Amendment defense. First, the imminent violence and his intent satisfy *Brandbenburg v. Ohio*, 395 U.S. 444 (1969). Second, and independently, *Brandenburg* does not limit the express constitutional provisions that govern who may hold office, including the impeachment provisions and Section 3. *See* P. Keisler & R. Bernstein, *Freedom of Speech Doesn't Mean What Trump's Lawyers Want It to Mean*, ATLANTIC (Feb. 8, 2021), https://www.theatlantic.com/ideas/archive/2021/02/first-amendment-no-defense-against-impeachment/617962/ (last visited Jan. 12, 2024).

APPENDIX

TABLE OF APPENDICES

APPENDIX A — LIST OF *AMICI CURIAE*[*]

Charles Stevenson Abbot, Admiral, United States Navy (Retired), Deputy Commander, United States European Command, 1998-2000; Deputy Homeland Security Advisor, 2001-2003.

Donald Ayer, Deputy Attorney General, 1989-1990; Principal DeputySolicitor General, 1986-88; United States Attorney, Eastern District of California, 1982-1986; Assistant United States Attorney, Northern District of California, 1977-1979.

Louis E. Caldera, United States Secretary of the Army, 1998-2001; Director of the White House Military Office, 2009; President, University of New Mexico, 2003-2006; California State Assembly member, 1992-1997; United States Army officer, 1978-1983; currently Senior Lecturer of Business Administration, Harvard Business School.

George Conway, Board President, Society for the Rule of Law; argued *Morrison v. National Australian Bank, Ltd.*, 561 U.S. 247 (2010).

Eric Edelman, Under Secretary of Defense for Policy, 2005-2009; Principal Deputy Assistant to the Vice President for National Security Affairs, 2001-2003.

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[*] The views expressed are solely those of the individual *amici* and not any organization or employer. For each *amicus,* reference to prior and current position is solely for identification purposes.

Appendix A

Mickey Edwards, Representative of the Fifth Congressional District of Virginia, United States House of Representatives, 1977-1993; founding trustee of the Heritage Foundation and former national chairman of both the American Conservative Union and the Conservative Political Action Conference.

Stuart M. Gerson, Acting Attorney General, 1993; Assistant Attorney General for the Civil Division, 1989–1993; Assistant United States Attorney for the District of Columbia, 1972–1975.

John Giraudo, Attorney Advisor, Office of Legal Counsel, 1986-1988; Associate Deputy Secretary of Labor, December 1986-1988.

Peter Keisler, Acting Attorney General, 2007; Assistant Attorney General for the Civil Division, 2003-2007; Principal Deputy Associate Attorney General and Acting Associate Attorney General, 2002-2003; Assistant and Associate Counsel to the President, The White House, 1986-1988.

J. Michael Luttig, Circuit Judge, United States Court of Appeals, 1991-2006; Assistant Attorney General, Office of Legal Counsel and Counselor to the Attorney General, 1990-1991; Assistant Counsel to the President, The White House, 1980-1981.

John M. Mitnick, General Counsel, United States Department of Homeland Security, 2018-2019; Associate Counsel to the President, The White House, 2005-2007;

Deputy Counsel, Homeland Security Council, The White House, 2004-2005; Associate General Counsel for Science and Technology, United States Department of Homeland Security, 2003-2004; and Counsel to the Assistant Attorney General (Antitrust), United States Department of Justice, 2001-2002.

Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy, 1981-1984; Deputy Assistant Attorney General, Antitrust Division, 1975-1977; Associate Deputy Attorney General and Director, Office of Justice Policy and Planning, 1974-1975; General Counsel, Council on International Economic Policy, 1972-1974; Special Assistant to the President, 1971-1972; White House Staff Assistant, 1969-1971.

Paul Rosenzweig, Deputy Assistant Secretary for Policy, Department of Homeland Security, 2005-2009; Office of Independent Counsel, 1998-1999; United States Department of Justice, 1986-1991;currently Professorial Lecturer in Law, The George Washington University Law School.

Nicholas Rostow, General Counsel and Senior Policy Adviser to the U.S. Permanent Representative to the United Nations, New York, 2001-2005; Special Assistant to the President for National Security Affairs and Legal Adviser to the National Security Council, 1987-1993; Special Assistant to the Legal Adviser, U.S. Department of State, 1985-1987; currently, Senior Research Scholar at Yale Law School.

Appendix A

Robert Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, 1981-1984.

Christopher Shays, Representative of the Fourth Congressional District of Connecticut in the United States House of Representatives, 1987-2009

Larry Thompson, Deputy Attorney General, 2001-2003; Independent Counsel to the Department of Justice, 1995-1998; United States Attorney for the Northern District of Georgia, 1982-1986; currently, John A. Sibley Chair of Corporate and Business Law at University of Georgia Law School.

Stanley Twardy, United States Attorney for the District of Connecticut,1985–1991.

Wendell Willkie, II, Associate Counsel to the President, 1984-1985; Acting Deputy Secretary, U.S. Department of Commerce, 1992-1993; General Counsel, U.S. Department of Commerce, 1989-1993; General Counsel, U.S. Department of Education, 1985-1988; currently, adjunct Professor of Law at New York University and adjunct fellow at the American Enterprise Institute.

Richard Bernstein, Appointed by the United States Supreme Court toargue in *Carmell v. Texas*, 529 U.S. 513, 515 (2000); *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016).