No. 23-719

In the Supreme Court of the United States

DONALD J. TRUMP,
Petitioner,
v.
NORMA ANDERSON, ET AL.,
Respondents.

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

ANDERSON RESPONDENTS' BRIEF IN RESPONSE TO PETITIONER DONALD J. TRUMP'S PETITION

Jason Murray
Counsel of Record
Sean Grimsley
Eric Olson
Isabel Broer
OLSON GRIMSLEY KAWANABE HINCHCLIFF & MURRAY LLC
700 17th Street, Suite 1600
Denver, CO 80202
303.535.9151
jmurray@olsongrimsley.com

Counsel for Respondents

Donald Sherman
Nikhel Sus
Jonathan Maier
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON

Martha Tierney
TIERNEY LAWRENCE STILES LLC

Mario Nicolais
KBN LAW, LLC

QUESTIONS PRESENTED

Petitioner Donald J. Trump offers a single question presented, which wrongly conflates at least seven discrete legal and factual issues in his Petition. Properly framed, the questions presented are:

1. Whether a challenge to the constitutional qualifications of a candidate for President presents a non-justiciable political question?

2. Whether the Presidency and the President fall within the list of offices and officers to which Section 3 of the Fourteenth Amendment applies?

3. Whether states may exclude from the ballot candidates who are ineligible to hold office under Section 3?

4. Whether Congress must first pass legislation under Section 5 of the Fourteenth Amendment before a state can enforce Section 3 of the Fourteenth Amendment, even if state law provides a cause of action to enforce it?

5. Whether, by intentionally mobilizing, inciting, and encouraging the violent attack on the United States Capitol on January 6, 2021, Trump "engaged in insurrection" against the Constitution for purposes of Section 3?

6. Whether the state trial court's factual finding that Trump intentionally incited a violent insurrection on January 6, 2021, was clearly erroneous?

7. Whether the Electors Clause requires this Court to override the Colorado Supreme Court's interpretation of the Colorado Election Code?

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INTRODUCTION

For the reasons the Anderson Respondents explained in their response to the Petition filed by the Colorado Republican State Central Committee ("Colorado Republican Party"), the urgency and importance of this case merit the Court granting certiorari on some of the questions presented. But Trump's petition lumps no fewer than seven distinct legal and factual issues into a single imprecise question presented. While some of the discrete issues raised by Trump in his brief warrant the Court's attention, others do not.

The Anderson Respondents agree the Court should grant certiorari on questions about the legal interpretation of Section 3 of the Fourteenth Amendment (questions 2–5 as framed above) and on related justiciability issues (question 1 as framed above). Although the Colorado Supreme Court's decision on each of these issues was correct, these are important issues of first impression that this Court should resolve.

That said, the Court should not take up any issues (like question 6) that would require the Court to re-weigh the facts found by the state trial court. The trial court had the benefit of hearing testimony from fifteen witnesses alongside hours of video evidence and dozens of other exhibits. Based on the totality of the evidence and its weighing of witness credibility, the trial court found by "clear and convincing evidence" that Trump was the "factual cause" of the insurrection on January 6, 2021, having intentionally

incited the mob to violence in a desperate ploy to cling to power. That factual finding is entitled to substantial deference, and Trump's petition does not offer any plausible basis for overturning it. Instead of re-weighing facts, the Court should limit its review to whether the facts found by the trial court satisfy the legal standard for engaging in insurrection under Section 3.

Additionally, the Court should decline Trump's invitation to second-guess the Colorado Supreme Court's interpretation of the Colorado Election Code. First, Trump's argument is both waived and forfeited because he did not present his Electors Clause claim below and because he invited the state court to make the very deviations from state-law deadlines about which he now complains. Second, the Colorado Supreme Court did not "transgress the ordinary bounds of judicial review," *Moore v. Harper*, 600 U.S. 1, 36 (2023), but simply resolved whether Colorado's Election Code provides a cause of action to exclude a constitutionally ineligible candidate from a presidential primary ballot. And finally, deciding this case on state-law grounds would only kick the important federal issues here down the road, because similar challenges to Trump's candidacy are pending in many other states, each with different state election codes.

STATEMENT

The Anderson Respondents explained most of the relevant procedural and factual background in their Brief in Response to Colorado Republican State Central Committee Petition ("Resp. to CO Rep. Pty. Pet.") in Case No. 23-696, at 3–14. They incorporate that discussion by reference here and add only a few additional facts that relate to new claims that Trump has advanced.

First, Trump notes that "[t]he district court did not . . . hold a hearing within five days of the filing" of the initial petition as required by COLO. REV. STAT. § 1-4-1204(4). Pet. 8. Trump neglects to mention that this delay was his own doing. The Anderson Respondents made clear from the outset they were prepared to try the case within five days. They said as much in a motion for expedited hearing they filed the day after filing the petition. Second Supp. App. 3a.[1] At the initial status conference, the Anderson Respondents again stated they were prepared for trial and requested a hearing as soon as possible. It was Trump who asked that the trial court set a hearing date no earlier than November 2023.

Second, Trump claims that the district court did not issue its decision within 48 hours of the hearing as required by COLO. REV. STAT. § 1-4-1204(4). Pet. 9. That is wrong. After the close of evidence on

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[1] The Anderson Respondents refer to the appendix to this Brief in Response as "Second Supp. App.", and the appendix to their Brief in Response in Case No. 23-696 as "Supp. App."

November 3, 2023, the trial court continued the hearing until November 15, 2023, when it held closing arguments and closed the hearing. Pet. App. 16a, 9c.[2] The trial court issued its decision within 48 hours, on November 17, 2023. *Id.* at 16a, 1c. And once again, Trump never objected to this procedure in the trial court, even though the trial court specifically asked the parties in advance to advise it whether this process would satisfy state law. Second Supp. App. 14a–15a. Instead, all parties (including Trump) advised the trial court that they either believed the 48-hour requirement did not apply or that it was waivable and that they would waive it. *Id.*

Third, while Trump now argues that the Colorado courts' interpretation of the Colorado Election Code violates the Electors Clause in the federal Constitution, this was never an argument he made below. Nor did he lack opportunity. The trial court squarely held that the Colorado Election Code provides a cause of action to exclude constitutionally ineligible candidates from the ballot, in reasoning that mirrored what the Colorado Supreme Court later held. *See* Pet. App. 24b–34b, 75c–82c. Yet Trump's brief in the Colorado Supreme Court did not mention the Electors Clause, and for that reason the Colorado

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[2] Instead of citing to the appendix filed by Petitioner Colorado Republican Party in Case No. 23-696, Trump filed his own petition appendix including duplicate material. To avoid confusion between the Anderson Respondents' two response briefs, citations to "Pet. App." in this brief will refer to the original Petition Appendix filed by the Colorado Republican Party, not to the new appendix filed by Trump.

Supreme Court's opinion did not address it. *See generally* Pet. App. 1a–360a; Trump Opening-Answer Brief, http://bit.ly/3tz8Ht5 .

REASONS FOR GRANTING CERTIORARI

A. The Petition Raises Five Questions of Significant National Importance That the Court Should Take Up

The Anderson Respondents agree the Court should grant certiorari. As explained more fully in their response to the Colorado Republican Party's petition, the weighty Fourteenth Amendment questions here warrant the Court's attention even in the absence of a split, and this case presents an ideal vehicle for resolving them. *See* Resp. to CO Rep. Pty. Pet. 15–13.

However, the Court should grant certiorari on discrete issues rather than on the indiscriminate hodgepodge of legal and factual issues raised in Trump's petition. As properly framed, this case presents five questions that warrant this Court's attention (two of which overlap with questions presented in the Colorado Republican Party's petition):

> 1. Whether a challenge to the constitutional qualifications of a candidate for President presents a non-justiciable political question?

2. Whether the Presidency and the President fall within the list of offices and officers to which Section 3 of the Fourteenth Amendment applies?

3. Whether states may exclude from the ballot candidates who are ineligible to hold office under Section 3?

4. Whether Congress must first pass legislation under Section 5 of the Fourteenth Amendment before a state can enforce Section 3 of the Fourteenth Amendment, even if state law provides a cause of action to enforce it?

5. Whether, by intentionally mobilizing, inciting, and encouraging the violent attack on the United States Capitol on January 6, 2021, Trump "engaged in insurrection" against the Constitution for purposes of Section 3?

The Colorado Supreme Court resolved each of these questions correctly.

First, the political question doctrine does not apply here because there is no "textually demonstrable constitutional commitment of the [Section 3] issue to a coordinate political department" nor is there "a lack of judicially discoverable and manageable standards for resolving it." Pet. App. 98a–113a; *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (quoting *Nixon v. United States*,

506 U.S. 224, 228 (1993)). To the contrary, Article II of the Constitution grants state legislatures near plenary authority to "direct" the "manner" of appointing presidential electors. U.S. Const. art. II, § 1, cl. 2. This includes the authority to pass laws restricting ballot access to only constitutionally eligible candidates and providing causes of action that enable state courts to enforce that restriction. Moreover, by requiring a two-thirds supermajority of both houses of Congress to lift disqualification, Section 3 makes clear the power to decide its applicability in the first instance does not reside with Congress. U.S. Const. amend. XIV, § 3 (providing that "Congress may by a vote of two-thirds of each House, remove such disability"). As the Colorado Supreme Court recognized, "if Congress were authorized to decide by a simple majority that a candidate is qualified under Section Three . . . this would nullify Section Three's supermajority requirement." Pet. App. 103a.

Nor do the remaining constitutional provisions Trump cites confer any (much less exclusive) decision-making authority on Congress to judge the constitutional eligibility of presidential candidates. For instance, the Twelfth Amendment simply sets forth the process by which presidential electors submit votes and how those votes are counted. It confers no substantive decision-making power on Congress other than requiring the House of Representatives to act where no candidate receives an electoral majority. U.S. Const. amend. XII. Section 3

of the Twentieth Amendment provides that, if a President-elect dies or fails to qualify before taking office, the Vice President-elect steps in. The only responsibility it commits to Congress is determining how a temporary, acting President is selected where both the President- and Vice President-elect fail to qualify. U.S. Const. amend. XX, § 3. Nothing suggests Congress has exclusive authority to determine whether a President-elect meets constitutional qualifications. And even if Congress had power to evaluate the qualifications of a *president-elect* after the electors voted, nothing gives Congress any role in evaluating *candidate* qualifications before an election. Article II delegates elector selection to the states, not to Congress.[3]

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[3] Trump falsely states that "every court except Colorado" that has addressed Section 3 challenges against him "has held that question is nonjusticiable and reserved to Congress." Pet. 20. In reality, other than the decision below, no appellate court has addressed the question and two have expressly declined to reach it. *See, e.g., Castro v. N.H. Sec'y of State*, — F. 4th. —, 2023 WL 8078010 at *5 (1st Cir. 2023) ("confin[ing] analysis to the issue of standing"); *Davis v. Wayne Cnty. Election Comm'n*, 2023 WL 8656163, at *16 fn.18 (Mich. Ct. App. Dec. 14, 2023) (ruling solely on state law grounds). And in other contexts, courts and administrative bodies have adjudicated on the merits challenges to presidential candidates' qualifications under state ballot access procedures, rejecting arguments that such challenges present non-justiciable political questions. *See, e.g., Lindsay v. Bowen*, 750 F.3d 1061, 1063–65 (9th Cir. 2014) (upholding exclusion of 27-year-old from presidential primary ballot and holding that the Twentieth Amendment does not render the

Nor is there anything about the concept of "engaging in insurrection" that eludes judicially discoverable and manageable standards. Interpreting and applying such provisions is precisely what courts do. Pet. App. 109a–113a. That concept is far less elusive than "due process" and "equal protection," Fourteenth Amendment standards courts grapple with all the time.

Chaos would ensue were the Court to accept Trump's argument that the Twelfth or Twentieth Amendments grant Congress exclusive authority to determine presidential qualifications. Trump offers no explanation why anyone would design a system where voters must wait until after a presidential election is over before learning whether the winning candidate is qualified to hold office. That is a recipe for ensuring the events of January 6, 2021, become a regular part of American politics. Far better to allow states to hash out such issues at the ballot access stage well before elections (subject, of course, to judicial review), so that the public knows who is qualified for office before they cast their ballots.

Second, as the Anderson Respondents have explained, Section 3 applies to the President and the Presidency. Resp. to CO Rep. Pty. Pet. 17–19. It applies to the President because he is an "officer of the United States" and swears an oath to "preserve,

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issue nonjusticiable); *Elliott v. Cruz*, 137 A.3d 646 (Pa. Commw. Ct. 2016), *aff'd*, 635 Pa. 212 (2016); *Williams v. Cruz*, OAL Dkt. No. STE 5016-16 (N.J. Off. of Admin. Law Apr. 12, 2016), https://perma.cc/7G6F-AL3J.

protect, and defend" the Constitution, which no doubt includes an obligation to "support" it. *Id.*; *see also* Pet. App. 113a–146a. And while Trump argues that Section 3 does not cover the Presidency because it is not an "office under" the United States, even the Colorado Republican Party refused to make this dubious claim in a full-throated way. *See* Resp. to CO Rep. Pty. Pet. 18–19.

The Constitution repeatedly refers to the Presidency as an "office" and requires the president to swear an "oath of office" before assuming the execution of his "office." *See, e.g.,* U.S. Const. art. I, § 3, art. II, §§ 1, 4; amends. XII, XXII, XXV. And it refers to an office "under the United States" in several contexts that plainly include the Presidency. *See id.* art. I, § 3, cl. 7 (Impeachment Clause), § 6, cl. 2 (Incompatibility Clause), § 9, cl. 8 (Emoluments Clause). That the President holds an "office" is not "bur[ied]," as Trump claims, Pet. 23–24; it is a basic fact of American civics. And during Reconstruction, both supporters and opponents of the Fourteenth Amendment *agreed* that Section 3 disqualified confederate leaders like Jefferson Davis from *all* federal office, including the Presidency, unless they received amnesty from Congress. *See*, *e.g.,* Pet. App. 129a–130a; Pittsburgh Commercial, June 29, 1867 (Section 3 applies to "any office civil or military, State or Federal, even to the Presidency"); Public Ledger, Oct. 3, 1871 (similar, by opponent of the Fourteenth Amendment); Milwaukee Daily Sentinel, July 3, 1867 (defending proposed Section 3 as modest because

"[e]ven Jefferson Davis, unless by some miracle of justice he should first expiate his atrocious crimes upon the gallows, may be rendered eligible to the Presidency by a two-thirds vote of Congress"). During Congressional debates over Section 3, members of Congress likewise agreed that the words "any office, civil or military, under the United States" included the Presidency. Cong. Globe, 39th Cong., 1st Sess. 2899 (1866).

Third, the Colorado Supreme Court correctly held that Section 3 may be enforced prior to an election and need not wait until the disqualified person takes office. *See* Pet. App. 58a–60a. Section 3 does not, by its express terms, prevent a person from *seeking* office. The same is true for other presidential qualifications such as age, residency, or citizenship. *See*, *e.g.*, U.S. Const. art. II, § 1, cl. 5 (laying out these requirements to be "eligible to the Office of President"). Yet states' "legitimate interest in protecting the integrity and practical functioning of the political process" allow them "to exclude from the ballot [presidential] candidates who are constitutionally prohibited from *assuming office*." *See Hassan v. Colorado*, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (emphasis added). Colorado's legislature has required that only those qualified to hold the office may appear on the presidential primary ballot. *See infra* 19–21. That law falls squarely within Colorado's broad Article II authority to "direct" the "manner" of appointing presidential electors. *See supra* at 7–8.

This case does not implicate *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). While that case held that states could not add an "additional qualification" for office, the Court clarified that its holding did not cast doubt on states' ability to enforce qualifications in the Constitution, expressly including "§ 3 of the 14th Amendment." *Id.* at 787 n.2, 835–36.

Nor does Congress's power to remove the Section 3 disability by a two-thirds vote imply otherwise. Just the opposite. Congress's power to "remove" a disability connotes that the disability *already exists* the moment that an individual engages in insurrection. Thus, Trump is currently ineligible for office, and has been since January 6, 2021. Trump remains free to petition Congress to remove this disability by a two-thirds vote. But implausible speculation that Congress might in the future grant him amnesty does not negate Trump's present disqualification or prevent states from enforcing it.

Fourth, for reasons the Anderson Respondents have explained in response to the Colorado Republican Party's Petition, the Colorado Supreme Court correctly concluded that federal implementing legislation is not the exclusive means of enforcing Section 3. *See* Resp. to CO Rep. Pty. Pet. 19–21.

Fifth, based on the facts found by the trial court, Trump's intentionally mobilizing, inciting, and encouraging an armed mob to attack the United States Capitol on January 6 satisfies the legal definition of "engag[ing] in insurrection." Pet. App. 162a–195a; William Baude & Michael Stokes

Paulsen, *The Sweep and Force of Section 3*, 172 U. Pa. L. Rev. (forthcoming 2024) (manuscript at 63–104, 112–22), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532751 (surveying the historical evidence about the meaning of "engaged in insurrection," and concluding that the question of whether Trump's conduct on January 6 meets this definition "is not even close").

Trump claims that the historical meaning of "insurrection" was limited to "taking up of arms and waging war upon the United States," but he cites not one source to support this claim. Pet. 27. As this Court has held, "[i]nsurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government." *The Prize Cases*, 67 U.S. (2 Black) 635, 666 (1862). "Insurrection" is thus necessarily less than "civil war" or full-scale "rebellion."

Instead, an "insurrection" refers to a "rising of any body of people within the United States, to attain or effect by force or violence any object of a great public nature" or "to resist, or to prevent by force or violence, the execution of any statute of the United States." *Case of Fries*, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800) (Chase, J.); *United States v. Hanway*, 26 F. Cas. 105, 127–28 (C.C.E.D. Pa. 1851) (similar); *United States v. Mitchell*, 2 U.S. (2 Dall.) 348, 349 (C.C.D. Pa. 1795) (Marshall, C.J.) (similar). Dictionary definitions from before the Civil War likewise defined "insurrection" as "[a] rising against civil or political

authority; the open and active opposition of a number of persons to the execution of law in a city or state." Noah Webster, *An American Dictionary of the English Language* 613 (1860). In the case of Section 3, the insurrection must specifically be "against" "the Constitution," meaning that the violent uprising is intended to prevent the execution of the Constitution.

But whatever the outer bounds of "insurrection" are, *any* plausible definition grounded in historical understanding would encompass "a concerted and public use of force" by "a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish a peaceful transfer of power in this country." Pet. App. 166a. That was exactly what happened on January 6. *Id.* at 166a–172a. A mob of thousands descended on the Capitol and engaged in a coordinated and violent assault for the purpose of preventing the counting of the electoral votes mandated by the Constitution. *Id.* at 166a–172a, 88c–89c. The attackers, many of whom were armed or clad in tactical gear, "assaulted law enforcement officers, engaging them in hours of hand-to-hand combat and using weapons such as tasers, batons, riot shields, flagpoles, poles broken apart from metal barricades, and knives against them." *Id.* at 60c, 88c–89c. Many law enforcement officers were injured, and one lost his life. *Id.* at 61c. The attackers breached the Capitol and entered the House and Senate chambers, forcing lawmakers and the Vice President to halt their constitutional duties and flee for their lives to a secure location. *Id.* at 59c–61c. This

attack was an "insurrection" against the Constitution by any standard.

Moreover, by inciting insurrection, Trump "engaged in" it for purposes of Section 3. As Attorney General Stanbery explained in his authoritative opinion interpreting Section 3, the phrase "engaged in" covers any "direct overt act, done with the intent to further the rebellion."[4] 12 U.S. Op. Att'y Gen. 141, 164 (1867). He made clear that "persons may have engaged in rebellion without having actually levied war or taken arms." *Id.* at 161. And in a second opinion, he clarified that while "[d]isloyal sentiments, opinions, or sympathies would not disqualify . . . when a person has, by speech or by writing, *incited others* to engage in rebellion, [h]e must come under the disqualification." 12 U.S. Op. Att'y Gen. 182, 205 (1867) (emphasis added). President Andrew Johnson and his Cabinet directed the Union army to follow this understanding during Reconstruction. James D. Richardson, A Compilation of the Messages and Papers of the Presidents, Volume VI, 528–531 (1897).

This interpretation mirrored a long line of case law defining what it meant to "levy war" under the Treason Clause. As Chief Justice Marshall explained, "if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those

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[4] Because Stanbery was interpreting Section 3 in the specific context of the Civil War, his opinions generally referred to "rebellion" rather than "insurrection." But of course, "engaged in" in Section 3 modifies both "insurrection" and "rebellion" and must carry the same meaning in both contexts.

who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." *Ex parte Bollman*, 8 U.S. 75, 126 (1807). In accordance with this rule, courts held that "levying war" was not limited to taking up arms but included "inciting and encouraging others" to insurrection. *In re Charge to Grand Jury*, 30 F. Cas. 1032, 1034 (C.C.S.D. N.Y. 1861); *accord In re Charge to Grand Jury-Treason*, 30 F. Cas. 1047, 1048–49 (C.C.E.D. Pa. 1851). Just as incitement to treasonous violence sufficed for the capital offense of "levying war," so too incitement to insurrection suffices to be disqualified for having "engaged in" insurrection.

Trump argues that he never explicitly "told his supporters to enter the Capitol." Pet. 27. That he did not use those precise words is irrelevant. In factual findings that this Court should not re-weigh, *see infra* 22–31, the trial court concluded that Trump's speech when considered in context, "incited imminent lawless violence" and "was intended as, and was understood by the crowd as, a call to arms." Pet. App. 57c–58c, 214a. Trump's speech to the angry and armed crowd included explicit commands to violence ("walk down to the Capitol" and "fight like hell"), implicit commands ("go by a very different set of rules," "we're not going to let" the election be certified), and tweets during and after the attack endorsing the assault. *See id.* at 50c–58c, 65c–71c; 186a–195a. As the court found, Trump's words and deeds "were the factual cause of" the attack, and Trump "endorsed and intended the

actions of the mob." Pet. App. 57c–58c, 70–71c, 193a–195a. It would make no sense to adopt a legal standard that would give a free pass to the single person most responsible for the violent attack on the Capitol merely because he incited others to commit violence in his name rather than take up arms himself. Such a rule would contradict the core purpose of Section 3—to disqualify the oath-breaking leaders of insurrections and rebellions.

B. The Court Should Deny Certiorari on The Remaining Questions

1. Trump's Electors Clause Claim Is Meritless and Forfeited

The Court should not review Trump's claim that the Colorado Supreme Court's ruling somehow violated the Electors Clause under *Moore*, 600 U.S. 1. Not only did he waive that argument and invite the error he now asserts, but the Colorado Supreme Court's interpretation of the Colorado Election Code did not "transgress the ordinary bounds of judicial review such that they arrogate themselves the power vested in state legislatures to regulate federal elections." *Id.* at 36.

Trump never raised the Electors Clause issue until filing his Petition here. He never mentioned it in his briefs before the Colorado Supreme Court, even though he had every reason to raise it there—by that time the state trial court had already interpreted the

Colorado Election Code to permit the Anderson Respondents' challenge *and* had already issued the procedural rulings on statutory deadlines Trump now complains about. Trump Opening-Answer Brief, http://bit.ly/3tz8Ht5; Pet. App. 13a–14a. Not surprisingly, the Colorado Supreme Court did not address the Electors Clause argument in its decision. This Court "has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision [it] ha[s] been asked to review.'" *Hemphill v. New York*, 595 U.S. 140, 148 (2022); *see also Babcock v. Kijakazi*, 595 U.S. 77, 82 n.3 (2022) (declining to consider question "neither pressed nor passed upon below"). Trump cannot point to any place in the record where he preserved this argument as required by Supreme Court Rule 14(g)(i). *See generally* Pet. 18 n.30.

Trump also invited the alleged error. *United States v. Wells*, 519 U.S. 482, 488 (1997) (recognizing that courts of appeals have adopted "invited error doctrine" that "a party may not complain on appeal of errors that he himself invited or provoked the district court to commit" (quotation omitted)). The Anderson Respondents made clear they were ready to proceed in five days. Second Supp. App. 3a. It was Trump who asked that the trial court hold the hearing after the

five-day deadline.[5] He also stipulated that the trial court did not need to issue a decision within 48 hours of the hearing. *Id.* at 15a. ("The parties disagree on whether a requirement that the Court rule within 48 hours of the close of the hearing applies to this case. Those parties that believe the requirement applies agree that any such requirement is waivable and further agree to waive any such requirement."). But, in any event, the trial court did issue its decision within 48 hours of the hearing. The hearing did not end on November 3—the trial court continued the hearing until November 15, when the parties presented closing arguments. Pet. App. 16a, 9c. The court then issued its decision within 48 hours on November 17. *Id.* at 16a, 1c.

There was also no error, much less one that "so exceed[s] the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures." *Moore*, 600 U.S. at 37. Colorado law limits participation in presidential primaries to those political parties fielding a "qualified candidate." Pet. App. 29a; COLO. REV. STAT. § 1-4-1203(2)(a). And other provisions of the Code help explain what it means to be "qualified," referring to a candidate who "desires the office and is qualified to assume its duties if elected." Pet. App. 53a–55a; COLO.

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[5] Trump did so after wasting time with a frivolous removal to federal court: he removed the case even though the Secretary of State, who was the named defendant, had not consented to removal as required by 28 U.S.C. §§ 1441(a) and 1446(b)(2)(A). Second Supp. App. 9a–13a.

REV. STAT. § 1-4-1101(1). Because the Election Code requires the candidate to be qualified to be on the ballot, the Anderson Respondents stated a valid claim that including Trump on the ballot would be a "wrongful act" by the Secretary of State. *Id.* at 51a–55a (quoting COLO. REV. STAT. § 1-1-113).

Trump first argues that placing a candidate on the ballot who is disqualified under Section 3 of the Fourteenth Amendment cannot be a "wrongful act" under COLO. REV. STAT. § 1-1-113(1) because, unlike other constitutional qualifications, "Section 3 merely bars individuals from *holding* office, not from seeking or winning election to office." Pet. 29. But that is simply a rehash of his argument about the meaning of Section 3, which is wrong for the reasons explained above. And because Trump is not qualified to hold the office of President, he is not a "qualified candidate" under the Colorado Election Code. *See* Pet. App. 51a–60a.

Trump next argues that the Colorado Supreme Court misread Section 1-4-1203(2)(a) of the Election Code as limiting presidential primary ballot access to only "qualified" candidates. Pet. at 29–30. That provision expressly limits participation in the primary to parties that have "a qualified candidate." COLO. REV. STAT. § 1-3-1203(2)(a). Trump's argument that this requires that a party field only one qualified candidate before it can place countless unqualified candidates on the ballot is absurd. The Colorado Election Code does not require the Secretary of State to place 16-year-olds and foreign-born citizens on a

party's primary ballot when the party fields at least one qualified candidate. Nothing in the Colorado Election Code or common-sense mandates such a reading. *See Hassan*, 495 F. App'x at 948 ("[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."); *Carson v. Reiner*, 2016 CO 38, ¶ 17 (acknowledging that Section 1-1-113 "clearly comprehends challenges to a broad range of wrongful acts committed by officials charged with duties under the [election] code").

Trump last complains that the state trial court did not strictly adhere to statutory deadlines. But he never explains how extending those deadlines somehow deprived the Colorado legislature any of its power to regulate presidential elections. Statutory deadlines in the Colorado Election Code like the ones Trump cites are waivable under Colorado law. *See Nicholls v. Barrick*, 62 P. 202, 204 (Colo. 1900) (holding that deadline in Election Code now codified at COLO. REV. STAT. § 1-11-214 was waivable); *Mahaffey v. Barnhill*, 855 P.2d 847, 849 (Colo. 1993) (holding that failure to hold trial by deadline under a different provision did not deprive the court of jurisdiction). Even if they were not, extending a procedural deadline—particularly at the behest of the now-complaining party—does not wrest power from the state legislature; it ensures the state legislature's regulations are applied fairly and correctly.

Finally, there is no reason for the Court to review this issue here. Courts and Secretaries of State across the country are grappling with the meaning of Section 3 of Fourteenth Amendment and its application to Trump. They are looking for guidance. Resolving this case on an idiosyncratic issue of the Colorado Supreme Court's interpretation of Colorado's presidential primary law would only perpetuate confusion. And it would not avoid the Section 3 questions; it would only kick them down the road until another state with a different election code—or Colorado during the general election—keeps Trump off the ballot. *See, e.g.,* Pet. 19 (discussing Maine Secretary of State decision keeping Trump off primary ballot); *Growe v. Simon*, 997 N.W.2d 81 (Minn. 2023) (holding that state law does not permit challenge to Trump's placement on primary ballot but leaving open possibility of challenge to placement on general election ballot); *Davis v. Wayne Cnty. Election Comm'n*, No. 368615, No. 368628, 2023 WL 8656163 (Mich. Ct. App. Dec. 14, 2023), *appeal denied sub nom., LaBrant v. Sec'y of State*, No. 166470, 2023 WL 8897825 (Mich. Dec. 27, 2023) (same).

2. The Court Should Deny Questions That Relitigate Factual Findings

Trump complains about the trial court's factual findings and the Colorado Supreme Court's holding that "the record fully supports" those findings. Pet.

App. 195a. But these factual questions are not suitable for this Court's review.

In finding by clear and convincing evidence that Trump engaged in insurrection, the trial court made detailed factual findings relying on multiple witnesses, including eyewitnesses to the events leading up to and on January 6; videos of Trump's speeches and other public statements, including prior praise for political violence by his supporters and Trump's admission that he knew his "supporters 'listen to him like no one else'"; unrebutted expert testimony placing Trump's approach to political violence in context; and unrebutted evidence of Trump's intent while the mob attacked the Capitol and disrupted the peaceful transfer of power. Pet. App. 31c–71c.

These findings should not be disturbed for several reasons.

First, the trial court cataloged a litany of specific incidents before January 6 where Trump had encouraged political violence by his supporters and saw how his supporters responded to this encouragement.

For example, the trial court found that in response to a "barrage of harassment and violent threats by Trump's supporters" against state election officials after the 2020 election, "Georgia election official Gabriel Sterling . . . issue[d] a public warning to Trump to 'stop inspiring people to commit potential acts of violence' or '[s]omeone's going to get killed.'" Pet. App. 42c. Rather than condemn the harassment

and violent threats or even just stay silent, Trump instead "retweeted a video of that press conference with a message repeating the very rhetoric Sterling warned would cause violence." *Id.* The trial court found that "[f]ar-right extremists understood Trump's refusal to condemn the violence cited in the video and his doubling down on the motivation for that violence as an endorsement of the use of violence to prevent the transfer of presidential power." *Id.*

The trial court described another eighteen examples of Trump either calling for, praising, or celebrating those who called for or committed political violence. *Id.* at 33c–37c. And it concluded, based on testimony from a Trump associate and Trump's own statements, that Trump knew "his supporters 'listen to him like no one else,'" and that "Trump's supporters are 'very reactive' to his words." *Id.* at 32c.

Second, the trial court evaluated the reaction that Trump's comments had in the political extremist community, such as when he told the violent white supremacist group the "Proud Boys to 'stand back and stand by,'" and that those words were "turned . . . into a mantra" that "extremists understood . . . as a directive to be prepared for future violence." *Id.* at 35c–36c.

Third, the trial court found that Trump laid the groundwork to falsely claim that the 2020 election was "stolen" well before the election occurred. *Id.* at 38c–41c. He repeated this false claim over and over, even after he knew he had lost and had exhausted all legal paths to challenge his defeat. *Id.* Indeed, the

trial court found that "Trump put forth no evidence at the Hearing that he believed his claims of voter fraud." *Id.* at 41c.

Fourth, Trump directed his supporters repeatedly to come to Washington, D.C. on January 6, the date set by law for the counting of electoral votes. *Id.* at 44c–48c. He started with a tweet on December 19, saying "Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6. Be there, will be wild!" *Id.* at 44c. The trial court found that this tweet "focused the anger he had been sowing about the election being stolen on the January 6, 2021, joint session" and the "message he sent was that to save democracy, his supporters needed to stop the January 6, 2021 joint session." *Id.* at 45c. He "repeated his invitation to come to Washington, D.C. on January 6, 2021 at least a dozen times." *Id.*

Fifth, on January 6, Trump did several things that the court found showed that he intentionally incited the mob. He "did everything in his power to fuel" his supporters' "anger with claims he knew were false about having won the election and with claims he knew were false that Vice President Pence could hand him the election." *Id.* at 48c. And "[d]espite knowing the risk of violence and knowing that crowd members were angry and armed, Trump still attended the [Ellipse] rally and directed the crowd to march to the Capitol." *Id.* at 50c. And he "did not advise federal law enforcement agencies that in his speech . . . he was going to instruct the crowd to march to the Capitol." *Id.* at 47c.

Sixth, based on the evidence at trial, the trial court found that Trump's speech "incited imminent lawless violence" both explicitly and implicitly. *Id.* at 57c. The court highlighted 22 passages from Trump's Ellipse speech—nearly all of which were not in the prepared remarks—that supported its conclusion that Trump intended to incite violence. *Id.* at 50c–56c. "[E]xplicitly," Trump incited violence "by telling the crowd repeatedly to 'fight' and to 'fight like hell,' to 'walk down to the Capitol,' and that they needed to 'take back our country' through 'strength.'" *Id.* "[I]mplicitly," Trump incited violence "by encouraging the crowd that they could play by 'very different rules' because of the supposed fraudulent election," and that "we will never give up, we will never concede . . . You don't concede when there is theft involved." *Id.* The court concluded that "the call to 'fight' and 'fight like hell' was intended as, and was understood by a portion of the crowd as, a call to arms" and therefore "Trump's conduct and words were the factual cause of, and a substantial contributing factor to … the attack on the United States Capitol." *Id.* at 57c–58c.

Seventh, Trump intentionally exacerbated the attack while it was ongoing. *Id.* at 65c–71c. At 2:24 pm, an hour after he learned that crowds were attacking the Capitol, he tweeted: "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!"

Id. at 190a, 65c. This tweet predictably incited further violence, refocusing his supporters' rage on the Capitol and the lawmakers inside it. *Id.* at 190a, 65c. In the minutes after Trump's tweet, the crowd surged violently forward. *Id.* at 65c–66c.

Eighth, for roughly three hours after learning of the violent attack on the Capitol, Trump did nothing to stop it. *Id.* at 219a–220a, 65c–71c. At no point did Trump mobilize law enforcement or National Guard reinforcements to quell the attack. *Id.* at 67c–69c. At no point did Trump heed advisors' and allies' pleas for intervention. *Id.* at 191a–192a, 67c. Instead, he kept calling members of Congress urging them to do the mob's bidding and stop the electoral count, rebuffing Congressman Kevin McCarthy's pleas for aid by saying, "I guess these people are more upset about the election than you are." *Id.* at 191a–192a, 67c. When told that the mob was chanting "Hang Mike Pence," Trump responded that perhaps the Vice President deserved to be hanged. *Id.* at 191a, 67c. While the trial court did not consider Trump's failure to act as independent conduct amounting to engagement in insurrection, it found such evidence directly relevant to Trump's intent to incite the insurrection. *Id.* at 97c–98c. Had he inadvertently incited a mob to attack the Capitol, as Commander in Chief he would have taken immediate action to stop it.

Ninth, the mob's attack on the Capitol was intended to disrupt the peaceful transfer of power. *Id.* at 58c–64c, 82c–89c. "The mob was armed with a

variety of weapons including guns, knives, tasers, sharpened flag poles, scissors, hockey sticks, pitchforks, bear spray, pepper spray, and other chemical irritants." *Id.* at 60c. Unrebutted testimony from law enforcement officers at the Capitol vividly proved that they "feared for their lives as well as the lives of their fellow officers, the Vice President, and the Members and staff inside the Capitol." *Id.* at 61c. Trump's own witness, Congressman Ken Buck, concluded that "the attack was 'meant to disturb' Congress's 'electoral vote count.'" *Id.* at 64c.

Tenth, at trial Trump repeatedly cited the same handful of statements, including his use of the word "peacefully" once in his January 6 speech, to claim he did not intend violence. But the trial court considered these facts in context and concluded that "[w]hile Trump's Ellipse speech did mention 'peaceful' conduct in his command to march to the Capitol, the overall tenor was that to save the democracy and the country the attendees needed to fight." *Id.* at 57c. And after reviewing all the evidence, the trial court found that "[a]t no point did Trump ever credibly condemn violence by his supporters but rather confirmed his supporters' violent interpretations of his directives." *Id.* at 37c.

Professor Peter Simi, an expert in political extremism, has spent thousands of hours doing fieldwork with political extremist groups including the Oath Keepers, Proud Boys, and the Three Percenters. *Id.* at 21c. He explained that political extremists use "coded" language "so that there is

plausible deniability." *Id.* at 28c. Given Trump's long history of extreme rhetoric, Trump's lone reference to "peaceful" in his January 6 speech easily fits within this pattern, particularly given his decision to add the word "fight" nearly twenty times to the speech outside of the prepared remarks. *Id.* at 55c–57c. In context, a reasonable factfinder could infer that Trump knew and intended that his more violent and extreme supporters would understand his isolated references to being "peaceful" as insincere and focus instead on his explicit and implicit calls to violence.

Weighing all this evidence, the trial court concluded that Trump engaged in insurrection against the Constitution. And the Colorado Supreme Court had no difficulty affirming this finding.

The trial court's factual findings are entitled to deference under the Court's clearly erroneous standard. *Glossip v. Gross*, 576 U.S. 863, 881 (2015); *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). The Court does not overturn plausible factual findings even when it is "convinced that [it] would have decided the case differently," particularly where, as here, "an intermediate court reviews, and affirms, a trial court's factual findings." *Glossip*, 576 U.S. at 881–82 (quoting *Anderson*, 470 U.S. at 573, and *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (for proposition that the Court "will not 'lightly overturn' the concurrent findings of the two lower courts")); *see also Hernandez v. New York*, 500 U.S. 352, 366 (1991) (plurality opinion) ("[I]n the absence of exceptional circumstances, we would defer to state-court factual

findings, even when those findings relate to a constitutional issue.") (collecting cases).

The trial court's factual findings are entitled to special weight because they included detailed findings on witness credibility. Pet. App. 164a–172a, 177a–195a; *see id.* at 19c–75c. The trial court weighed the testimony of the Anderson Respondents' eight witnesses, including law enforcement officers who defended the Capitol on January 6, a congressman who was present in the House chamber that day, and experts on political extremism and the military's domestic role, among others. *Id.* at 19c–24c. The trial court made credibility findings, explaining why it weighed the testimony as it did. *Id.* at 19c–29c. The trial court determined that one of Trump's senior advisors was "not a credible witness" whose testimony was "illogical" and "devoid of any evidence in the record." *Id.* at 25c. Similarly, the trial court discredited the speculation of one Trump witness that "Antifa was involved in the attack," which "lacked credibility" and was "evidence of [the witness's] inability to discern conspiracy theory from reality." *Id.* at 28c. It concluded that testimony of some other Trump witnesses was either "largely irrelevant" or supported the Anderson Respondents' case. *Id.* at 26c–28c, 32c, 57c. The trial court also weighed videos, photographs, reports, investigative findings, and other documents, introduced by Anderson Respondents and Trump alike, and ultimately relied on 42 exhibits. *Id.* at 33c–35c, 37c–70c.

The trial court's consideration of this evidence, together with the Colorado Supreme Court's affirmation, entitles its findings to special deference within the already-deferential parameters of the clearly erroneous standard. *Glossip*, 576 U.S. at 881–82; *Anderson*, 470 U.S. at 573. The Court should not revisit them now.

CONCLUSION

The Petition for Writ of Certiorari should be granted, limited to the Questions Presented as framed in this brief.

Respectfully submitted,

Jason Murray
Counsel of Record
Sean Grimsley
Eric Olson
Isabel Broer
OLSON GRIMSLEY KAWANABE HINCHCLIFF & MURRAY LLC
700 17th Street. Suite 1600
Denver, CO 80202
303.535.9151
jmurray@olsongrimsley.com

Counsel for Respondents

Donald Sherman
Nikhel Sus
Jonathan Maier
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON

Martha Tierney
TIERNEY LAWRENCE STILES LLC

Mario Nicolais
KBN LAW, LLC

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