

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 CAPITOL POLICE OFFICERS PRESENT
AT THE U.S. CAPITOL ON JANUARY 6, 2021, AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*¹

Amici Curiae are current and former United States Capitol Police officers who, collectively, have dedicated more than 150 years to their shared mission to protect the United States Congress. On January 6, 2021, *amici* and their fellow law enforcement officers risked their lives to defend the Capitol from a violent attack, suffering significant physical and psychological injuries in the process. They were violently assaulted, spat on, tear-gassed, bear-sprayed, subjected to racial slurs and epithets, and put in fear for their lives. See Am. Compl. ¶¶ 157–64, *Smith v. Trump*, No. 21-cv-2265 (D.D.C. Dec. 3, 2021).

In August 2021, *amici* filed a complaint in the United States District Court for the District of Columbia against former President Donald J. Trump and others involved in the January 6 attack on the Capitol. *Smith v. Trump*, No. 21-cv-2265 (D.D.C.). Among other claims, *amici* assert that Mr. Trump and others conspired to use force, intimidation, or threats to prevent Congress from certifying the results of the 2020 presidential election, in violation of the Ku Klux Klan Act. That case is ongoing.

In *Smith v. Trump*, as here, Mr. Trump has argued that his statements leading up to and on January 6 urging people to forcibly prevent Congress from certifying the results of the 2020 presidential election are protected by the First Amendment. That is wrong,

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to this brief's preparation or submission. See Sup. Ct. R. 37.6.

as the court in *Smith v. Trump* recognized. 2023 WL 417952, at *3 (D.D.C. Jan. 26, 2023).² The First Amendment does not immunize Mr. Trump from accountability for his behavior on and leading up to January 6, 2021.

Mr. Trump devotes scant attention to the First Amendment issue in this case, yet a ruling by this Court that Mr. Trump's relevant actions are protected by the First Amendment would have broad impact, not only in *Smith v. Trump* and other civil and criminal cases stemming from the events of January 6, but also in future civil and criminal cases concerning public unrest and the First Amendment. Ultimately, Mr. Trump has failed to establish on the record before the Court in this case that the First Amendment protects the conduct relevant to the Colorado Supreme Court's determination. *Amici* take no position on the other questions presented in this case.

² Although Mr. Trump appealed the District Court's denial of his motion to dismiss based on his claim of presidential immunity, he has not appealed the District Court's rejection of his First Amendment argument.

SUMMARY OF THE ARGUMENT

On January 6, 2021, then-President Donald J. Trump stood before a crowd of over 50,000 people and directed them to “walk down to the Capitol” with him and “fight like hell” to “take back our country” because the 2020 election had been stolen from him, a situation which, he said, allowed him and his supporters “to go by very different rules.” Appendix to Petition for Writ of Certiorari at 291a, 317a.³ Mr. Trump’s audience, primed by months of Mr. Trump’s relentless and baseless attacks on the legitimacy of the 2020 presidential election, obeyed his orders and engaged in an unprecedented assault on democracy. Mr. Trump now claims that the First Amendment shields him from any responsibility for the consequences of his actions. There is no reasonable reading of the First Amendment that confers freedom to engage in insurrection.⁴

January 6 marked the violent culmination of a months-long course of conduct designed to secure Mr. Trump’s hold on power despite his defeat in the 2020 presidential election. Even before Election Day, Mr. Trump had been claiming that the only way he could lose the election was if it were “rigged.” *Anderson v. Griswold*, 2023 WL 8770111, at *40 (Colo. Dec. 19,

³ On future reference, citations to the Appendix to Petition for Writ of Certiorari, which contains Mr. Trump’s January 6 speech, will be identified by page number only.

⁴ *Amici* take no position on whether Respondents have adequately shown that Mr. Trump engaged in an insurrection under Section Three of the Fourteenth Amendment. *Amici*’s brief is limited to addressing the First Amendment issues raised in Mr. Trump’s petition and brief. Pet. 28; Pet’r Br. 37.

2023). When confronted with the reality of his defeat, Mr. Trump rejected the indisputable evidence he had lost and immediately began working to persuade the public that the election had been stolen. Without evidence, he repeatedly claimed that “Swing States” had found “massive VOTER FRAUD.” *Id.* He sought to pressure state officials across the nation to overturn the election results, even calling local officeholders directly to persuade them to adopt his fictional narrative. *Id.* Mr. Trump’s public pressure campaign against these officials had grave consequences, as he intended it would: wide swaths of the public believed his claims and joined in, threatening state officials with harassment and violence. *Id.* at *41. Mr. Trump was well aware of those activities and his role in instigating them. *Id.* Yet Mr. Trump disregarded the growing swell of chaos and continued to “fan the flames” of national discord anyway. *Id.* So-called “Stop the Steal” rallies proliferated nationwide. *Id.*

Mr. Trump’s efforts to disrupt the post-election process failed one after another. The date drew near when Congress would certify the election results and confirm President Biden’s victory in the election, as the Constitution and the Electoral Count Act require. Mr. Trump, still refusing to accept defeat, called for a “[b]ig protest in D.C. on January 6,” the day Congress would meet to certify the 2020 election results, infamously telling his supporters: “Be there, will be wild!” *Anderson*, 2023 WL 8770111, at *41. Tens of thousands heeded his call, including members of violent far-right extremist groups—whom he specifically courted—and many individuals who came armed. *Id.* at *41–42; *see also id.* at *47 (noting that Mr. Trump “told the Proud Boys to ‘stand back and stand by’

during a debate for the 2020 presidential election”).

Mr. Trump had worked for months to fashion a powder keg. On January 6, he threw the match. That afternoon, Mr. Trump addressed the crowd he had summoned to the Ellipse, just blocks away from the Capitol, where Congress was certifying the election’s results. He told those gathered before him to “confront this egregious assault on our democracy,” and “show strength” or else “you’re not going to have a country anymore.” *Anderson*, 2023 WL 8770111, at *43. Mr. Trump’s audience did as it was told. Attackers breached the Capitol’s defenses, forced entry, and temporarily obstructed Congress’s electoral vote count. *Id.* In the process, the attackers violently assaulted *amici* and other Capitol Police officers, striking them and spraying them with toxic chemicals. Am. Compl. ¶¶ 157–64, *Smith*, No. 21-cv-2265.

Based on Mr. Trump’s involvement in the January 6 attack, Respondents—a group of Colorado electors—challenged his eligibility to be on the State’s 2024 Republican presidential primary ballot, arguing he was disqualified under Section Three of the Fourteenth Amendment because he “engaged in insurrection.” The Colorado Supreme Court agreed. Mr. Trump’s defense, both below and before this Court, rests in part on a claim that his participation in the January 6 attack on the Capitol was protected First Amendment expression and therefore cannot support a finding that he engaged in insurrection. Pet’r Br. 37–38. That First Amendment defense fails for two independent reasons.

First, the First Amendment does not protect speech that forms an integral part of unlawful

activity. The Colorado courts did not disqualify Mr. Trump from the ballot because of his speech, but rather because it found he had engaged in insurrection. It is well settled that the First Amendment does not shield a defendant from liability “merely because [his] conduct was . . . carried out by means of language.” *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 514 (1972) (citation omitted). To hold otherwise “would make it practically impossible ever to enforce laws against . . . many . . . agreements and conspiracies deemed injurious to society.” *Id.* (citation omitted). Put differently, “[s]peech intended to bring about a particular unlawful act has no social value; therefore, it is unprotected.” *United States v. Hansen*, 599 U.S. 762, 783 (2023); *see also United States v. Miselis*, 972 F.3d 518, 533 (4th Cir. 2020) (“Speech taking some form other than abstract advocacy,” such as conspiracy, solicitation, aiding and abetting, and other civil and criminal misconduct, simply “doesn’t implicate the First Amendment.”) (internal quotation marks omitted). The speech at issue here—including Mr. Trump’s explicit instructions to a vast crowd to assault the Capitol and disrupt the proceedings of Congress—is precisely the kind of speech that is excluded from the First Amendment’s protections.

Second, if the First Amendment is implicated at all, it offers no protection for speech, like Mr. Trump’s, that incites violence. In *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), this Court set forth a test for determining when pure speech crosses the line from protected expression to unprotected incitement to violence. It held that advocacy may be lawfully proscribed where it “is directed to inciting or producing imminent lawless action and is likely to incite or

produce such action.” *Id.* at 447. Mr. Trump’s January 6 speech was replete with “incendiary rhetoric” such as calls to “fight,” “fight like hell,” and to “walk down to the Capitol” to “take back our country!” *Anderson v. Griswold*, 2023 WL 8006216, at *21, *42 (Colo. Dist. Ct. Nov. 17, 2023). These words, interpreted as a “call to arms” by Mr. Trump’s audience, exceeded the bounds of permissible speech. *Id.* at *21. They exhorted the crowd to adopt any means necessary to stop the constitutionally required electoral certification process then underway. Violence and lawless action were not only likely to result from these words—they actually did. Three law enforcement officers died, and many others were injured in the riot. JA335, JA1330.

For these reasons, the First Amendment poses no obstacle to the Colorado Supreme Court’s decision to disqualify Mr. Trump from the ballot. This Court should affirm the general principle that speech like Mr. Trump’s, calling for and in service of the violence seen at the Capitol on January 6, is not protected by the Constitution.

ARGUMENT

I. The First Amendment Is No Defense Because Mr. Trump’s Speech Was Integral to His Unlawful Activity

Speech integral to an alleged act of insurrection, like Mr. Trump’s speech on and leading up to January 6, lies entirely outside the First Amendment’s ambit.

“First Amendment rights may not be used as the means or the pretext for achieving ‘substantive evils’ which the legislature has the power to control.” *Cal. Motor Transp.*, 404 U.S. at 515 (quoting *NAACP v.*

Button, 371 U.S. 415, 444 (1963)). Accordingly, the First Amendment does not shield a defendant from liability “merely because [his] conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *Id.* at 514 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)); *United States v. Stevens*, 559 U.S. 460, 468 (2010) (noting that “[f]rom 1791 to the present” the First Amendment has permitted restrictions on speech integral to misconduct) (citation omitted). “[W]here speech becomes an integral part of” misconduct, “a First Amendment defense is foreclosed even if the [claims] rest[] on words alone.” *United States v. Freeman*, 761 F.2d 549, 551–52 (9th Cir. 1985) (Kennedy, J.).

The Court has applied this principle to numerous forms of civil and criminal misconduct that are or can be committed by speech alone. *See United States v. Williams*, 553 U.S. 285, 298 (2008) (“Many long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech . . . that is intended to induce or commence illegal activities.”) (citation omitted); *Cal. Motor Transp.*, 404 U.S. at 511–13, 515 (upholding civil antitrust conspiracy claim and rejecting argument that defendants’ conduct involved advocacy protected by the First Amendment). Consider, for example, the “promotion of a particular piece of contraband,” “solicitation of unlawful employment,” or “picketing with the sole, unlawful and immediate objective of inducing a target to violate the law.” *Hansen*, 599 U.S. at 783 (cleaned up). To hold that the First Amendment protects such unlawful speech-acts “would make it practically impossible ever to enforce laws against . . .

agreements and conspiracies deemed injurious to society.” *Giboney*, 336 U.S. at 502. Significantly, the rule that the First Amendment does not protect speech integral to unlawful activity holds true “even if [the speech] spring[s] from the anterior motive to effect political or social change.” *Freeman*, 761 F.2d at 551; *see also Cal. Motor Transp.*, 404 U.S. at 513 (stating participants in unlawful activity “cannot acquire immunity by seeking refuge under the umbrella of ‘political expression’”).

Courts around the country routinely reject defendants’ attempts to invoke the First Amendment to avoid liability for misconduct involving, or even undertaken solely through, speech or expressive activity. *See, e.g., United States v. Mackey*, 652 F. Supp. 3d 309, 340–41 (E.D.N.Y. 2023) (rejecting First Amendment defense in case involving alleged conspiracy to spread disinformation on Twitter during the 2016 election); *Sines v. Kessler*, 558 F. Supp. 3d 250, 285–86 (W.D. Va. 2021) (rejecting First Amendment defense to claims of conspiracy to commit racial violence arising out of 2017 Charlottesville rally). Courts have even specifically considered and rejected the precise First Amendment arguments Mr. Trump makes on essentially the same facts. *See, e.g., United States v. Trump*, 2023 WL 8359833, at *15 (D.D.C. Dec. 1, 2023) (holding, in criminal case against Mr. Trump arising from his efforts to overturn the 2020 election, including the January 6 riot, that “prohibiting and punishing speech integral to criminal conduct does not raise any Constitutional problem”) (internal quotation marks omitted).

Under this Court’s precedents, the conduct at issue here, including its speech components, falls

squarely outside the bounds of the First Amendment. Here, the Colorado Supreme Court defined “engag[ing] in” “insurrection” as “an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose” of the “insurrection.” *Anderson*, 2023 WL 8770111, at *40; *see also id.* at *38 (defining “insurrection” as a “concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish a peaceful transfer of power in this country”). Engaging in an insurrection may be accomplished through speech alone. *Id.* at *39 (“[W]hen a person has, by speech or by writing, incited others to engage in rebellion, [h]e must come under the disqualification.”) (quoting *The Reconstruction Acts*, 12 Op. Att’y Gen. 182, 205 (1867)). Like other unlawful speech-acts, such as solicitation (“the intentional encouragement of an unlawful act,” *Hansen*, 599 U.S. at 771), aiding and abetting (“the provision of assistance to a wrongdoer with the intent to further an offense’s commission,” *id.*), and conspiracy (“a joint commitment to an ‘[unlawful] endeavor,’” *Ocasio v. United States*, 578 U.S. 282, 287 (2016) (citation omitted)), engagement in insurrection, when committed through speech, is a “speech-based offense[]” from which “one is not immunized from prosecution . . . merely because one commits [it] through the medium of political speech,” *United States v. Rahman*, 189 F.3d 88, 117 (2d Cir. 1999) (per curiam).

In short, just as “solicitation of unlawful employment,” *Hansen*, 599 U.S. at 783, “a false statement made to a Government official,” *United States v. Alvarez*, 567 U.S. 709, 720 (2012) (plurality), and speech integral to a “conspir[acy] to monopolize trade and

commerce in the transportation of goods,” *Cal. Motor Transp.*, 404 U.S. at 509, are “unprotected,” so too is Mr. Trump’s call to antidemocratic rioting. *Hansen*, 599 U.S. at 783. Far from mere advocacy, Mr. Trump’s speech “has no social value,” is “intended to bring about a particular unlawful act,” and is not protected by the First Amendment. *Id.* This Court should hold, consistent with its precedents, that the First Amendment does not apply to Mr. Trump’s statements leading up to or on January 6 promoting the attack on the Capitol.⁵

⁵ Even if only some of Mr. Trump’s statements were unprotected, *all* of his statements could still be considered as evidence of his intent to “prevent the U.S. government from taking the actions necessary to accomplish a peaceful transfer of power.” *Anderson*, 2023 WL 8770111, at *38. “The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a[n] [offense] or to prove motive or intent.” *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993); *see also, e.g., Haupt v. United States*, 330 U.S. 631, 642 (1947) (“[S]tatements showing . . . hostility to the United States . . . clearly were admissible on the question of intent” to commit treason); *United States v. Pierce*, 785 F.3d 832, 841 (2d Cir. 2015) (“[S]peech . . . [can be] used to establish the existence of, and [the speaker’s] participation in, [an unlawful] enterprise”); *United States v. Fullmer*, 584 F.3d 132, 158 (3d Cir. 2009) (even “political speeches” can “provide circumstantial evidence from which a [factfinder] could . . . reasonably infer[] that [the speaker] was involved in a conspiracy”); *cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926–27 (1982) (“[S]peeches might be taken as evidence that [the speaker] gave other specific instructions to carry out violent acts or threats.”). In using Mr. Trump’s statements to assess his intent, the Colorado Supreme Court followed the many other courts that have inferred nefarious intent from speech—including in cases arising from the January 6 attack. *See, e.g., United States v. Nordean*, 2022 WL 17583799, at *17 (D.D.C. Dec. 11, 2022); *United States*

II. Mr. Trump’s Speech Is Not Protected Under *Brandenburg*

In this case, Mr. Trump has argued that his speech was protected under *Brandenburg*. It is not, because Mr. Trump’s speech on and leading up to January 6 was integral to his participation in unlawful conduct. *See supra* Section I. The *Brandenburg* analysis does not apply to unlawful acts, like engaging in an insurrection, that merely happen to involve speech. *See United States v. Bell*, 414 F.3d 474, 482 n.8 (3d Cir. 2005) (“*Brandenburg* clearly does not apply to the kind of unprotected or unlawful speech or speech-acts (e.g., aiding and abetting, extortion, criminal solicitation, conspiracy, harassment, or fighting words) at issue”); *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 265 (4th Cir. 1997) (explaining that *Brandenburg* does not apply “to speech other than advocacy”). But even if this Court were to conclude that *Brandenburg* is the appropriate framework to evaluate Mr. Trump’s statements, his First Amendment defense still fails.

The First Amendment draws a “line between permissible advocacy and impermissible incitation to crime or violence.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 420 (1992) (Stevens, J., concurring in the judgment) (citation omitted). *Brandenburg* makes clear that the First Amendment does not protect speech that “is directed to inciting or producing imminent lawless action and is likely to incite or produce such

v. Robertson, 588 F. Supp. 3d 114, 124 (D.D.C. 2022), *aff’d*, 86 F.4th 355 (D.C. Cir. 2023); *United States v. DeGrave*, 539 F. Supp. 3d 184, 209 (D.D.C. 2021); *United States v. Chansley*, 525 F. Supp. 3d 151, 164 (D.D.C. 2021).

action.” 395 U.S. at 447. It makes no difference whether speech implicitly or explicitly encourages lawless action; either may constitute incitement. See *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (per curiam) (applying *Brandenburg* and looking for any “rational inference” from “the import of the language” that the speech was intended to or likely to lead to violence).

Mr. Trump’s January 6 speech bears all the hallmarks of incitement. Starting with the lead-up to January 6, Mr. Trump had already stoked feelings of distrust and anger among his supporters with respect to the legitimacy of the 2020 presidential election. *Anderson*, 2023 WL 8770111, at *47. Before and after the 2020 election, Mr. Trump told his supporters that the only way he could lose “is if the election is rigged.” *Id.* at *48. He claimed that Democrats had stolen the election from him, and that the results were “a fraud on the American public.” *Id.* It is against this backdrop that Mr. Trump invited his followers to Washington, D.C., on January 6, exhorting them to “[b]e there” because it “will be wild.” *Id.* at *41; see *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) (plurality opinion) (“[T]he line between permissible advocacy and impermissible incitation to crime or violence depends . . . on the setting in which the speech occurs,” as well as “on exactly what the speaker had to say.”); *FCC v. Pacifica Found.*, 438 U.S. 726, 744 (1978) (“[B]oth the content and the context of speech are critical elements of First Amendment analysis.”).

When Mr. Trump stepped up to the podium on January 6 to deliver his speech, Congress was preparing to convene at the Capitol—just a short walk away—to certify the electoral count and to declare the winner of the presidential election based on that

count. *See Anderson*, 2023 WL 8770111, at *42–43. Mr. Trump knew that at least some attendees were prepared for violence, were willing to fight, and would perceive his words as a call to action. *See id.* at *49–50. Nevertheless, Mr. Trump made the following statements:

- Mr. Trump declared that “[w]hen you catch somebody in a fraud, you’re allowed to go by very different rules. . . . And if you don’t fight like hell, you’re not going to have a country anymore.” *Id.* at *43; 313a.
- When informed that people were chanting “Hang Mike Pence,” Mr. Trump “responded that perhaps the Vice President deserved to be hanged.” *Anderson*, 2023 WL 8770111, at *43.
- Mr. Trump also told the crowd: “[A]fter this, we’re going to walk down, and I’ll be there with you [W]e’re going to walk down to the Capitol [Y]ou’ll never take back our country with weakness. You have to show strength and you have to be strong.” *Id.* at *43; 291a.
- Mr. Trump exhorted the mob to “walk down Pennsylvania Avenue” to give “weak” Republicans “pride and boldness . . . to take back our country.” 317a.
- Mr. Trump told the crowd at the January 6 rally that “[w]e will never give up” or “concede,” 286a, because “[y]ou don’t concede when there’s theft involved,” *Anderson*, 2023 WL 8770111, at *48; 286a, and “[w]e must

stop the steal and then we must ensure that such outrageous election fraud never happens again, can never be allowed to happen again,” 314a.

On the basis of these and other statements before, during, and after Mr. Trump’s speech, both the Colorado District Court and the Colorado Supreme Court determined that *Brandenburg* was satisfied.⁶ *See Anderson*, 2023 WL 8006216, at *41–43; *Anderson*, 2023 WL 8770111, at *46–51. The “obvious and unmistakable” message of Mr. Trump’s speech was that his audience had “an obligation to fight back and to fight aggressively.” *Anderson*, 2023 WL 8770111, at *48. And Mr. Trump’s words evinced an intent to spur “his riled-up supporters to walk down to the Capitol and fight.” *Id.* at *50. The likely effect of these words was to cause imminent lawlessness and violence. *Id.* That danger was not just likely: Mr. Trump got the “fight” that he asked for. As detailed in a staff report published by the Senate Committee on Homeland Security and Governmental Affairs and the Senate Committee on Rules and Administration, “[t]hroughout the seven hours of the riot on the Capitol grounds, law enforcement officers faced verbal and absolutely brutal, violent physical abuse.” JA1328 (internal quotation marks omitted). *Amici* were among the law enforcement officers targeted with such brutal violence.

⁶ Other courts have agreed that Mr. Trump’s speech was both directed to inciting and likely to incite violence and imminent lawless action. *See Thompson v. Trump*, 590 F. Supp. 3d 46, 118 (D.D.C. 2022) (Mr. Trump’s speech was “plausibly . . . a ‘positive instigation of a mischievous act.’”) (quoting John Stuart Mill, *On Liberty* 100 (London, John W. Parker & Son, 2d ed. 1859)).

Mr. Trump offers three arguments as to why his statements are not incitement under *Brandenburg*. All three are without merit.

First, Mr. Trump argues that “[t]he *Brandenburg* standard does not turn on whether violence actually occurs in response to a person’s speech.” Pet’r Br. 37. But, although actual violence is not a prerequisite for finding speech “likely” to incite violence, the fact that violence in fact occurred on January 6 plainly supports a finding that it was likely to occur. In *Claiborne Hardware*, the Court held that defendant Charles Evers’ speeches “did not transcend the bounds of protected speech set forth in *Brandenburg*,” but observed that “[i]f [they] had been followed by acts of violence, a substantial question would be presented whether [he] could be held liable for the consequences of that unlawful conduct.” 458 U.S. at 928.

Second, Mr. Trump argues that rhetorical appeals to “fight like hell” and “take back our country” are “common in political discourse.” Pet’r Br. 37. But Mr. Trump’s speech to an assembled and armed crowd went beyond abstract appeals to “fight” for a cause and instead directed his audience specifically to “walk down to the Capitol” where they should “show strength” and not be afraid to ignore the usual “rules.” *Anderson*, 2023 WL 8770111, at *43; 291a, 313a. Indeed, Mr. Trump invited his supporters to come to Washington, D.C., on the day Congress was to certify the electoral count, knowing that they would understand his exhortations as calls for violence to disrupt certification. *See Anderson*, 2023 WL 8770111, at *50 (“Professor Simi . . . identified a pattern of calls for violence that his supporters responded to, and explained how that long experience allowed [President]

Trump to know how his supporters responded to his calls for violence using a shared language[.]”). While calls to “fight” for a cause are “common” in political rhetoric, Mr. Trump’s words were “directed to inciting or producing *imminent* lawless action.” *Brandenburg*, 395 U.S. at 447 (emphasis added). Mr. Trump also himself disclaimed the “common” implication of his use of the word “fight” when he told his audience that the alleged election fraud permitted them “to go by very different rules.” 313a. This sort of call for violence by a presidential candidate for a major political party is not only uncommon, it is unprecedented.

Third, Mr. Trump argues that “[a]n inquiry into a speaker’s intent can never” transform protected speech into unprotected speech, criticizing the Colorado courts for their reliance on Professor Peter Simi’s testimony about intent. *See* Pet’r Br. 37–38. But *Brandenburg* and its progeny make clear that intent is key to determining whether speech is protected or not. *See Brandenburg*, 395 U.S. at 447 (looking to whether “advocacy is directed to inciting or producing imminent lawless action”); *see also Counterman v. Colorado*, 600 U.S. 66, 76 (2023) (“[T]he First Amendment precludes punishment, whether civil or criminal, unless the speaker’s words were intended (not just likely) to produce imminent disorder.”) (internal quotation marks omitted); *Hess*, 414 U.S. at 109 (holding words can “be punished by the State” when they are “*intended to produce, and likely to produce, imminent disorder*”) (emphasis added). Mr. Trump’s contention that intent may be used only “as a *shield* for speakers who are accused of constitutionally unprotected utterances,” Pet’r Br. 38, would vitiate *Brandenburg*’s incitement doctrine, under which the State

may impose liability upon a finding of intent to produce violence or disorder.

Thus, even if Mr. Trump's speech is treated as subject to the *Brandenburg* inquiry, *Brandenburg* offers no safe harbor.

CONCLUSION

For these reasons, this Court should reject Mr. Trump's First Amendment defenses to the question of whether he engaged in insurrection and should be disqualified from being listed on the 2024 presidential primary ballot under Section Three of the Fourteenth Amendment.

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