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
Colorado Supreme Court

BRIEF OF RESPONDENT COLORADO REPUBLICAN STATE CENTRAL COMMITTEE IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?

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JURISDICTION

The Colorado Supreme Court issued its judgment on December 19, 2023, affirming in part and reversing in part the district court's order. The Petition for Certiorari was granted on January 5, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The Fourteenth Amendment to the Constitution provides in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Section Three of the Fourteenth Amendment provides:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having

> previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. Const. amend. XIV, § 3.

Section Five of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

SUMMARY OF ARGUMENT

The Colorado Supreme Court's decision is wrong and should be reversed.

- First, the President is not an officer of the United States to whom Section Three of the Fourteenth Amendment applies.

- Second, Section Three is not self-executing; that is, Section Three does not, absent congressional implementation, empower the fifty states and the District of Columbia each to veto national presidential candidates in their separate jurisdictions.

- Third, Section Three only applies to *holding* office, not *running* for office. Congress can remove any Section Three disqualification, which means Section Three provides no absolute obstacle to a particular candidate holding office, much less running for that office.

- Fourth, barring political parties from choosing their own candidates violates the right of association protected by the First Amendment.

As precedent and history confirm, the President is not an officer of the United States and is accordingly not subject to the disqualification provision of Section Three. Section Three only applies to specific positions on an enumerated list. That list does not include the President. In no circumstance where the Constitution refers to officers of the United States is the President included as such an officer. Rather, it is the President who appoints, selects, and commissions those officers. They serve their appointed role under his authority. As head of the executive branch, the President is *sui generis*; he, along with the Vice President, is the only elected member of the executive branch. Accordingly, Section Three's reference to "officer of the United States" is inapplicable to the presidency.

Additionally, Section Three applies only to those who have taken an oath to support the Constitution. The President does not take *that* oath.

Article II is explicit. The President takes an oath to preserve, protect, and defend the Constitution. Two oaths are contained in the Constitution: one for "Officers of the United States" and one for the President. Section Three applies only to the officers who have taken the former oath, one that President Trump never took.

Furthermore, Section Five of the Fourteenth Amendment explicitly reserves enforcement authority to Congress. Accordingly, this Court has stressed that the Fourteenth Amendment is not self-executing; it does not, without more, create a cause of action or a right to relief. *See Ownbey v. Morgan*, 256 U.S. 94, 112 (1921); *Ex parte Va.*, 100 U.S. 339, 345 (1879). Congress must provide a right to relief by legislation. State courts and state officials lack independent authority to enforce Section Three.

While Congress in 1870 enacted measures to enforce Section Three, measures that were repealed in 1948, Congress has *never* granted private litigants or state officials any right to enforce Section Three disqualification. And rightly so. Adjudication of a politically fraught and factually bound question like insurrection requires a congressional definition of the parameters and methods of disqualification to ensure due process and to avoid the division and chaos that results when separate jurisdictions assume for themselves the power to decide such a question.

Moreover, Section Three, by its terms, only applies to "hold[ing]" office, not running for office; a bar that Congress has the power to lift at any time, including after an election. As the Twentieth Amendment states, it is Congress, after elections are

completed, that enforces presidential qualifications and not the states.

Finally, the First Amendment prohibits states from usurping the ability of political parties to make their own decisions. By denying the Colorado Republican State Central Committee (CRSCC) the opportunity to put to the voters the candidate of its choice, the Colorado Supreme Court has infringed on the constitutional process in an unprecedented fashion. This Court should approach these questions with a presumption in favor of the First Amendment and recognize that it is the people, not the courts, who should select our country's next President.

ARGUMENT

The Colorado Supreme Court erroneously held that the states can dictate who qualifies to be President of the United States and that President Trump is disqualified. This ruling must be reversed.

I. The President Is Not an "Officer of the United States" Under Section Three of the Fourteenth Amendment.

Section Three of the Fourteenth Amendment disqualifies only those individuals who are included on a specific list: those who "previously [took] an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States." U.S. Const. amend. XIV, § 3.

President Trump never served in any of Section Three's specified roles as a member of Congress, a member of a state legislature, or as an executive or judicial officer of a state. Therefore, Section Three applies to President Trump only if he was an "officer of the United States." Both the constitutional text and ample additional historical evidence make clear that the President is not an officer of the United States. Moreover, the oath of office determines whether someone is subject to disqualification, and President Trump never took the oath of office delineated in Section Three.

A. The Text of the Constitution Confirms That the President is Not an "Officer of the United States."

The term officer of the United States is used rarely in the Constitution, but each time it or a closely parallel term is used, the President is excluded. The precise term "Officers of the United States" appears only twice in the Constitution. First, the Appointments Clause gives the President power to "appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States." U.S. Const. art. II, § 2, cl. 2. Second, the Commissions Clause states that the President "shall Commission all the Officers of the United States." U.S. Const. art. II, § 3. The Impeachment Clause uses a similar term, "civil Officers," that is analogous: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and

Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. II, § 4. Finally, the Oaths Clause, U.S. Const. art. VI, § 3, as discussed below, refers to "executive and judicial Officers . . . of the United States."

In each circumstance, the context of the Constitution's references establishes that the President is *not* included as an officer of the United States. The President appoints the officers of the United States and has authority to commission those officers. He is not himself, therefore, an officer of the United States.[1]

The Appointments Clause gives the President the authority to appoint the officers of the United States. It identifies certain positions the President appoints, and then states that he appoints "all other Officers of the United States." U.S. Const. art. II, § 2, cl. 2. Clearly, the President does not and cannot appoint himself. This Court has therefore emphasized that the President is not one of the individuals delineated in the Appointments Clause; that is, he is not an officer of the United States. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497–98 (2010). "The people do not vote for the 'Officers of the United States.' . . . They instead look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'" *Id.* (internal citations omitted). A person who does not hold his place by appointment "is not, strictly speaking, an officer of the

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[1] *See* Josh Blackman & Seth Barrett Tillman, *Is the President an "Officer of the United States" for Purposes of Section Three of the Fourteenth Amendment*, 15 N.Y.U. J.L. & Liberty 1 (2021).

United States." *United States v. Mouat*, 124 U.S. 303, 307 (1888).

"The Constitution for purposes of appointment . . . divides *all* its officers into two classes." *United States v. Germaine*, 99 U.S. 508, 509 (1879) (emphasis added). "Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976). The President is not a principal officer; he cannot appoint himself. Nor is the President an inferior officer; he cannot be appointed by a department head or the judiciary. Accordingly, the framework of the Constitution establishes that the President does not fall into either of the two categories that apply to "all its officers." *Germaine*, 99 U.S. at 509.

Justice Joseph Story's Commentaries on the Constitution, which predate Section Three, explained that elected officials, like the President, are not considered officers of the United States. Justice Story explained that an appointment is a prerequisite for status as an officer of the United States, concluding in his analysis,

> "civil officers of the United States" meant such as derived their appointment from and under the national government, and not those persons who, though members of the government, derived their appointment from the States, or the people of the States.

1 Joseph Story, *Commentaries on the Constitution of the United States* § 793, at 559 (Thomas Cooley ed., 4th ed. 1873). This recognition held throughout the period following the Civil War; Attorney General Benjamin Brewster in 1882 issued an opinion determining that "Officers of the United States" should be interpreted based on the language used in the Appointments Clause. Memb. of Cong., 17 U.S. Op. Att'y. Gen. 419, 420 (1882); *see also* Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section Three*, 28 Tex. Rev. L. & Pol. 350, 544 (forthcoming 2024), https://ssrn.com/abstract=4568771 [hereinafter Blackman & Tillman, *Sweeping*].

Likewise, the Commissions Clause explicitly states that the President "shall Commission all the Officers of the United States." U.S. Const. art. II, § 3. The clause is clear; the President commissions "all" of the officers of the United States. *See* Story, *supra* p. 9, at 560.[2] Since he does not commission himself, it follows that the President is not an officer of the United States.

Finally, the Impeachment Clause specifically enumerates that "[t]he President, Vice President and all civil Officers of the United States," are subject to impeachment. U.S. Const. art. II, § 4. In the context of explaining that members of Congress are not officers,

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[2] "The appointment and the commission are distinct acts[.]" *Quackenbush v. United States*, 177 U.S. 20, 27 (1900). An inferior officer under the Appointment Clause could be appointed by someone who is not the President, but would still need to be, under the text of the Commissions Clause, commissioned by the President.

Justice Story also disposed of the notion that the President is an officer of the United States:

> [The Impeachment Clause] does not even affect to consider them officers of the United States. It says, 'the president, vice-president, and *all civil officers* (not all other civil officers) shall be removed,' &c. The language of the clause, therefore, would rather lead to the conclusion, that they were enumerated, as contradistinguished from, rather than as included in the description of, civil officers of the United States."

Story, *supra* p. 9, at 559. Justice Story explicitly concluded that the President is not an officer of the United States because the Impeachment Clause delineates civil officers as a separate category from the President. This reflects the surplusage canon under which the Court is "obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The President is enumerated because otherwise the President would not be included in the reference to "all civil officers of the United States." If the President were automatically included as an officer, separate enumeration would have been unnecessary and the Impeachment Clause would have contained surplus language.

In short, where officer of the United States is used in the Appointments and Commission Clauses, or where "civil Officers of the United States," a closely analogous term, is used in the Impeachment Clause,

they are specifically defined terms of art that, under the Constitution, do not encompass the presidency. As Justice Story explained, all these provisions, taken together, emphatically recognize that the President is not an officer of the United States under the Constitution. Story, *supra* p. 9, at 559-60.

The Fourteenth Amendment's drafters did not write in a vacuum. They chose to use the particular term, officer of the United States, that had been repeatedly used elsewhere in the Constitution and that did *not* include the President. By using language identical to that used in earlier provisions, the drafters carried over the same meaning. Like language should be interpreted alike. As demonstrated by this Court in *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008), the words in the Constitution "are enshrined with the scope they were understood to have when the people adopted them." Rather than being read in an ahistorical vacuum, Section Three should be read in light of prior provisions in the Constitution that used the same language; provisions that were uniformly understood not to include the President as an "officer of the United States."[3]

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[3] *See also* Cong. Rec. Containing the Proceedings of the Senate Sitting for the Trial of William W. Belknap 130, 145 (1876); David McKnight, *The Electoral System Of The United States* 346 (1878).

B. The Oath the President Takes Is Distinct From the Oath Officers of the United States Take, Further Confirming He Is Not an Officer of the United States Under Section Three.

The difference between the oaths taken by the President and federal officials further confirms that Section Three does not apply to the President. Article VI, Section Three, of the Constitution provides that "[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." U.S. Const. art. VI, § 3.

President Trump has never taken an Article VI oath. Rather, he took a *different* oath, defined by Article II. Article II, Section One specifies that the President takes an oath to "preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, § 1. All executive and judicial officers of the United States take an oath to support the Constitution. The President takes a different, unique oath.

Attorney General Henry Stanbery defined the term "officer of the United States" in the Fourteenth Amendment as "military as well as civil officers of the United States who had taken the prescribed oath." The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141, 160 (1867). He later emphasized that the disqualification provision applies to any "person who

has at any time prior to the rebellion held any office, civil or military, under the United States, and has taken an official oath to support the Constitution of the United States." The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 182, 203 (1867). The prescribed oath Stanbery viewed as dispositive is not an oath that President Trump ever took.

This Court has emphasized "that Congress does not 'hide elephants in mouseholes' by 'alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'" *Sackett v. EPA*, 143 S. Ct. 1322, 1340 (2023) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U. S. 457, 468 (2001)). Congress does not conceal major, groundbreaking legal changes in secret "convoluted language." *Id.* The same is true of the drafters of the Constitution. But the court below ignored this principle and concluded that even though the Constitution separately specifies a distinct oath for the President, courts should simply disregard the distinction as meaningless under Section Three.

II. Section Three of the Fourteenth Amendment Vests Enforcement Authority in Congress and Does not Give Individuals or State Officials a Self-Executing Authority to Seek Disqualification.

Congress, and only Congress, has authority to enforce Section Three. In other words, Section Three is not self-executing. It is not a license for each of the fifty states and the District of Columbia to reach an independent conclusion as to who may or may not be qualified to be President. Just as private litigants lack

authority to enforce other provisions of the Fourteenth Amendment, states cannot claim for themselves authority to seek the disqualification of presidential candidates absent congressional authorization.

Section Three, like the Fourteenth Amendment generally, is designed to *limit* the power of *states* and *enhance* the power of *Congress*. To read Section Three as empowering states to veto candidates for federal elections turns this purpose on its head.[4] Under such a reading, former Confederate states could have vetoed the candidacy of Ulysses S. Grant who, in Confederate eyes, might have been characterized as "insurrectionary."

By contrast, this Court has repeatedly held that the Fourteenth Amendment does not, without more, create a self-executing "sword" for litigation. The Colorado Supreme Court wrongly set that precedent

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[4] As amicus RNC aptly phrased it:

> the Colorado Supreme Court transformed Section Three into a states'-rights superpower. According to the court, the Reconstruction Congress gave state officials—here, state courts and state election officials—the power to decide the most sensitive political questions about loyalty and legitimacy, and to then decide on that basis who may stand for election to the most important position in the national government. That claim—that the Reconstruction Congress gave States, including former Confederate States, the power to independently decide national candidates' qualifications with no congressional permission—is implausible.

RNC Amicus at 8.

aside. Section Five of the Fourteenth Amendment explicitly confers the enforcement power *on Congress*, not the states. "[I]t cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy." *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921); *Ex parte Va.*, 100 U.S. 339, 345 (1879) ("Some legislation is contemplated to make the amendments fully effective.").

A. This Court's Precedent Repeatedly Confirms That the Fourteenth Amendment is Not Self-Executing.

The Colorado Supreme Court misunderstood this Court's precedent. To justify its argument for applying Section Three, it cited *The Civil Rights Cases*, 109 U.S. 3, 11, 20 (1883). Pet. App. 46a.[5] But as the Fourth Circuit carefully explained in *Cale v. Covington*, 586 F.2d 311, 316–17 (4th Cir. 1978), in direct response to the same argument, *The Civil Rights Cases* addressed whether the Fourteenth Amendment provides a self-executing defense, which it does. Sometimes the Fourteenth Amendment is self-executing as a *shield*, providing a constitutional defense even if not explicitly provided for by statutory law. But, this Court's precedent also makes clear that the Fourteenth Amendment is not a self-executing *sword*, enabling litigants to sue—here, to disqualify presidential candidates. In *Ex parte Virginia*, this

[5] For clarity, references to the Petitioner's Appendix refer to the Appendix in this matter and not to the appendix in the CRSCC's own certiorari petition, containing the same underlying decisions.

Court held that the Fourteenth Amendment requires enabling legislation from Congress for affirmative enforcement:

> It is not said the judicial power of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged[.] Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.

Ex parte Va., 100 U.S. at 345–46. There, the Court ruled definitively that the Fourteenth Amendment is not self-executing in the way the Colorado Supreme Court claimed. Legislation is necessary for the amendment to be "effective," even for the individual rights that are protected by Section One. And no legislation has given private litigants, state courts, or secretaries of state a right to disqualify candidates. Thus, the Fourteenth Amendment provides protection as a shield, but its "function is negative, not affirmative, and it carries no mandate for particular measures of reform." *Ownbey*, 256 U.S. at 112. *See*

also Blackman & Tillman, *Sweeping*, *supra* p. 9, at 483.[6]

As this Court emphasized, Section Five "invests Congress with power to enforce" the Fourteenth Amendment "in order that the national will, thus declared, may not be a mere brutum fulmen." *The Civil Rights Cases*, 109 U.S. 3, 11 (1883). This Court's decision in *South Carolina v. Katzenbach*, cited by the Colorado Supreme Court in its discussion of self-executing rights, in fact emphasized the requirement of congressional authorization for a cause of action in its interpretation of Section Five of the Fourteenth Amendment. "[T]he Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1." *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). Likewise here, reading the Fourteenth Amendment as self-executing unleashes courts and secretaries of states in fifty-one different jurisdictions to assume the uniquely congressional responsibility of determining the enforcement parameters of Section Three—a sure recipe for electoral chaos.

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[6] *See also* Brief for United States as Amicus Curiae Supporting Respondent, *Devillier v. Texas*, U.S. No. 22-913 (argued Jan. 16, 2024) (asserting that the Fifth Amendment is not self-executing so as to provide a cause of action, even though it automatically provides substantive rights).

B. Griffin's Case Confirms That, in Accordance with Due Process, Section Three of the Fourteenth Amendment is Not Self-Executing.

Although this Court's precedent makes clear that the Fourteenth Amendment as a whole does not provide a self-executing cause of action, the Court has never had occasion to address specifically the meaning of Section Three. But in *Griffin's Case*, 11 F. Cas. 7, 22 (Va. Cir. Ct. 1869), Chief Justice Salmon Chase, riding circuit, held that Section Three is not self-executing and must be enforced by Congress. Although not a decision of this Court, *Griffin's Case* is persuasive authority from one of this Court's most significant Chief Justices, with direct knowledge of the Fourteenth Amendment's meaning. The Court should adopt Chief Justice Chase's analysis, as it has been the definitive word on Section Three for over a century.

Judge Sheffey, a former officer of Confederate Virginia, sentenced Caesar Griffin to two years' imprisonment. Griffin filed a federal action arguing that because of Judge Sheffey's role in the Confederate army, Section Three of the Fourteenth Amendment automatically disqualified Sheffey from office, thereby rendering Griffin's criminal conviction invalid. Griffin contended that the Fourteenth Amendment was a self-executing sword, "operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power." *Id.* at

23. The district court agreed and ordered Griffin's immediate discharge from custody.

On appeal, Chief Justice Chase rejected Griffin's argument, concluding that the Due Process Clause foreclosed interpreting Section Three to permit the automatic disqualification from office without a trial. *Id.* at 26. Accordingly, Chief Justice Chase held that Section Three can be enforced only by Congress:

> To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable; and these can only be provided for by Congress. Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that "congress shall have power to enforce, by appropriate legislation, the provision[s] of this article."

Id. (quoting U.S. Const. amend. XIV, § 5). He concluded that Section Three disqualification can only be imposed "by the legislations of congress in its ordinary course." *Id.* Subsequent cases recognized the reasoning of *Griffin's Case*. *See, e.g.*, *Rothermel v. Meyerle*, 136 Pa. 250, 254 (1890); *State v. Buckley*, 54 Ala. 599, 616 (1875).[7]

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[7] Courts have cited other aspects of the decision in *Griffin's Case* favorably, including this Court in *Ex parte Ward*, 173 U.S. 452,

But more importantly, *Griffin's Case* is fundamentally consistent with this Court's repeated emphasis on the need for Congress to enforce Section One of the Fourteenth Amendment. It accords with the principles this Court has articulated when discussing the Amendment's application.

If any doubt remains, the Congressional debates on Section Three make clear that it is not self-executing. Representative Thaddeus Stevens emphasized during the congressional framing debates the need for congressional enabling legislation: "I see no hope of safety unless in the prescription of proper enabling acts[.]" Cong. Globe, 39th Cong., 1st Sess. 3148 (1866).

The issue also arose during the ratification debates. In Pennsylvania, Thomas Chalfant "explored in detail the necessity and form of congressional enforcement of Section Three." Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment* 51 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591838 (quoting The Appendix to the Daily Legislative Record Containing the Debates on the Several Important Bills Before the Legislature of 1867 (George Bergner, ed., Harrisburg 1867) ("The Appendix")). Representative Chalfant made sure that no one would read Section Three as being "self-executing and automatically disqualifying certain persons without the need for any prior deliberation and judgment." *Id.*

454–55 (1899), as documented thoroughly in Blackman & Tillman, *Sweeping*, *supra* p. 9, at 377–78; *see also* Tillman Amicus § 1(A).

For Chalfant, such a reading would have been alarming: "[O]f course there would have to be some kind of trial prior to a person's disqualification," and "in order to make this section of any effect whatever, the guilt must be established." *Id.* at 43 (citing The Appendix, at LXXX). There is no record of anyone at the Pennsylvania ratifying debates registering any dissent: "no member appears to have denied Chalfant's basic assumption that Section Three required enabling legislation." *Id.* at 45.

Shortly after *Griffin's Case* was decided, Congress enacted the Enforcement Act of 1870 directed specifically at Section Three. Enforcement Act of 1870, ch. 114, 16 Stat. 140, 143–44. When advocating for the legislation, Senator Lyman Trumbull explained that "[t]he Constitution provides no means for enforcing itself, and this is merely a bill to give effect to the fundamental law embraced in the Constitution." Cong. Globe, 41st Cong., 1st Sess. 626 (1869). He reiterated that "[s]ome statute is certainly necessary to enforce the constitutional provision." *Id.* There was no contemporaneous objection to the uniform position of Senator Trumbull, Senator Stevens, and Chief Justice Chase that enforcement legislation would be required. Congress passed the Act. As Justice Samour explained in his dissent, Pet. App. 143a–44a, Congress practically adopted *Griffin's Case* by enacting enforcement legislation almost immediately after Chief Justice Chase concluded that enforcement legislation was necessary.

Thus, Congress recognized that legislation was necessary to enforce Section Three when it adopted

the now-repealed Enforcement Act of 1870, penalizing the crime of insurrection with disqualification. Here, though, President Trump has not been charged, let alone convicted, of committing the federal crime of insurrection. In fact, the only adjudication of a claim of insurrection regarding President Trump's conduct was in the Senate in impeachment proceedings, where he was *acquitted* of that charge. H. R. Res. 24, 117th Cong. (2021).

However, the court below reasoned that "[i]t would also be anomalous to say this disqualification for office-holding requires enabling legislation when the other qualifications for office-holding do not." Pet. App. 49a n.12 (citing the office holding requirements contained in Article I and Article II). There are two fundamental problems with this argument. First, Section Three specifically directs that it may be enforced by Congress through appropriate legislation. Articles I and II contain no such textual limitation. Second, Section Three's limitation reflects the unique nature of the disqualification provision, which would require the implementation of due process protections before it could be imposed. As Chief Justice Chase emphasized, to disqualify for insurrection, considerable "proceedings, evidence, decisions, and enforcements of decisions . . . are indispensable." *Griffin's Case*, 11 F. Cas. at 26. Determining whether a candidate has met the Article II age requirement is a straightforward task. Courts across the country do so consistently. Insurrection, on the other hand, is a complex, debatable, and highly political proposition that necessarily requires ample due process protections to be properly adjudicated.

These requirements illustrate why Section Three cannot be self-executing.

C. Empowering State Courts or State Secretaries of State to Decide Disqualification under Section Three Is Inconsistent with the Constitutional Design.

The Constitution vests in Congress and Congress alone the authority to enforce Section Three. Section Five "gives to [C]ongress absolute control of the whole operation of the amendment." *Griffin's Case*, 11 F. Cas. at 26. Because the Constitution commits the question of enforcing presidential disqualification to Congress, state courts and officials lack authority to interfere with that decision. As this Court has explained, state authority does not extend to setting new qualifications for federal office. *United States Term Limits v. Thornton*, 514 U.S. 779, 832–33 (1995).

This Court has held that "[t]he Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office." *Id.* State law cannot give the states authority to supersede federal election qualifications.

The Constitution's text explicitly vests in Congress, not the states, the authority to enact enforcement of presidential disqualification. The Fourteenth Amendment itself explicitly reserves disqualification authority to Congress in at least two ways. First, it gives Congress alone the power to lift disqualification by a supermajority. U.S. Const.

amend. XIV, § 3. Second, it gives Congress alone the power "to enforce, by appropriate legislation, the provisions of this article." *Id.* § 5. No textual provision vests states with any similar authority to enforce Section Three.

Other constitutional provisions repeatedly commit to Congress the exclusive authority to decide presidential qualifications. The Twentieth Amendment gives Congress authority to determine how to proceed if a President is not qualified after having been elected. It states that "Congress may by law" provide for how the qualification process is enforced. U.S. Const. amend. XX. No other authority is vested in anyone else.

Likewise, if there is a question about the President's ability to perform his responsibilities, under the Twenty-Fifth Amendment, "Congress shall decide the issue [of ability] . . . by two-thirds vote of both Houses." U.S. Const. amend. XXV, § 4. "[O]therwise, the President shall resume the powers and duties of his office." *Id.* The Constitution gives Congress sole authority to determine whether the President can maintain the presidency once he holds it, whether through impeachment or the Twenty-Fifth Amendment. No other branch of the federal government, let alone a state, is given permission to second-guess that judgment. Congress alone is vested with authority to enforce Section Three.

Without clear standards for enforcement by means of legislation adopted under Section Five of the Fourteenth Amendment, state courts and officials lack "judicially discoverable and manageable standards for resolving" Section Three challenges,

Baker v. Carr, 369 U.S. 186, 217 (1962), and instead are forced to make things up as they go along. The present case is perfectly illustrative:

> Section Three doesn't spell out the procedures that must be followed to determine whether someone has engaged in insurrection after taking the prerequisite oath. That is, it sheds no light on whether a jury must be empaneled or a bench trial will suffice, the proper burdens of proof and standards of review, the application of discovery and evidentiary rules, or even whether civil or criminal proceedings are contemplated. This dearth of procedural guidance is not surprising: Section Five of the Fourteenth Amendment specifically gives Congress absolute power to enact legislation to enforce Section Three.

Pet. App. 126a–27a (Samour, J., dissenting). Section Three contains only a disqualification provision. Accordingly, a local trial court imposed its own rules with a procedure that has no basis in the text of Section Three. The formulated standards were not "judicially discoverable" by examining the text of Section Three. In fact, those standards remain in serious dispute. In particular, the terms "engage" and "insurrection" are unclear and subject to hotly contested definitions and legal standards. The Constitution does not give a Colorado court authority to manufacture its own, state-specific test.

By disqualifying a presidential candidate from the ballot, the Colorado Supreme Court implicitly decided that any state could do the same, taking controversial positions on heavily disputed legal questions to determine that a presidential candidate committed insurrection. If the Colorado Supreme Court's decision stands, it will open the door to any state crafting its own version of the Fourteenth Amendment and its own standard of "insurrection." Every presidential candidate will face the prospect of navigating fifty-one different standards for what constitutes "insurrection," thereby erasing any notion of nationwide uniformity in determining qualifications for the presidency. Allowing states to alter or add to the qualifications for President would be "contrary to the 'fundamental principle of our representative democracy,' embodied in the Constitution, that 'the people should choose whom they please to govern them.'" *Thornton*, 514 U.S. at 783 (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)). This is a recipe for chaos. Chaos can only be avoided by concluding that the authority to enforce presidential disqualification under the Fourteenth Amendment is reserved to Congress.

III. Section Three Only Disqualifies Certain Categories of People From Holding Office, Not From Seeking It.

As stated above, the President is not an "officer of the United States" for purposes of Section Three of the Fourteenth Amendment. Even so, Section Three disqualifies certain categories of people only from

holding office: "No person *shall be* a Senator or Representative in Congress, or elector of President and Vice-President, or *hold any office*, civil or military, under the United States . . . ." U.S. Const. amend. XIV, § 3 (emphasis added). It prevents no one from *running* for office, being *selected* by a political party in a primary, or from being *elected* to office. The drafters of the Fourteenth Amendment crafted a provision that did not, by its terms, prevent people from engaging in political activity; instead, Section Three only applies to holding office.

That Section Three's disqualification provision is limited to holding office is reflected by the fact that it gives Congress plenary authority to *remove* a Section Three disqualification. Qualifications for President are set, defined, and applied by Congress. *See Thornton*, 514 U.S. at 810. And as the text of Section Three makes clear, Congress can await the outcome of an election, if it chooses, and then decide whether to yield to the will of the people by removing a disability from their chosen candidate (assuming such a disability were in place).

The Twentieth Amendment confirms this constitutional structure. It provides that "if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified." U.S. Const. amend. XX, § 3. By its terms, the Twentieth Amendment expects a scenario where an individual is elected President but is still disqualified.

IV. The First Amendment Protects a Political Party's Right to Select Its Own Nominees and to Participate in the Elective Process.

Justice Brandeis warned, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). More succinctly, Benjamin Franklin famously responded, when asked about the results of the constitutional convention, that the framers had produced "a republic," "if you can keep it." 3 James McHenry, *The Records of the Federal Convention of 1787* 85 (Max Farrand ed., 1911).

For the first time in American history, a former President has been removed from the ballot and the voters have been denied, after a 4-3 state court vote, the chance to vote for a leading Republican candidate for President. As Justice Samour warned in his dissent, this decision will inevitably lead to "the potential chaos wrought by an imprudent, unconstitutional, and standardless system in which each state gets to adjudicate Section Three disqualification cases on an ad hoc basis." Pet. App. 160a (Samour, J., dissenting). By excluding President Trump from the ballot, the Colorado Supreme Court usurped the rights of the people to choose their President.

The Colorado Supreme Court's decision violates the CRSCC's First Amendment associational rights to place on the ballot the political candidates of its choice.

U.S. Const. amend. I. This Court has regularly protected the First Amendment rights of political parties, particularly their rights to select their own candidates. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000) ("In no area is the political association's right to exclude more important than in the process of selecting its nominee."). "Under our political system, a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections." *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973). As this Court has recognized, the "exclusion of candidates . . . burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." *Anderson v. Celebrezze*, 460 U.S. 780, 787–88 (1983).

Affirming the judgment of the Colorado Supreme Court would curtail the right of voters to select the presidential candidate of their choice by preventing a leading Republican presidential candidate from even seeking election. If Section Three is self-executing, it is so not just for President Trump but for anyone whom a voter or secretary of state may wish to remove. The Colorado Supreme Court's decision will irrevocably place state courts in the position of deciding whether political candidates have engaged in "insurrection" when Congress simply has not given them authority to do so.

This Court has consistently underscored the rights of the voter in presidential elections. "In the context of a Presidential election, state-imposed restrictions implicate a uniquely important national

interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Anderson*, 460 U.S. at 794–95. Accordingly, "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental." *Bush v. Gore*, 531 U.S. 98, 104 (2000). The presidential election is the unique, quintessential moment of national representative democracy. Disqualification of a candidate based on politically suspect and tendentious theories, out of step with this Court's precedent, is inconsistent with the fundamental purpose of the presidential election, to ensure the American people have freedom to decide.

CONCLUSION

The judgment of the Colorado Supreme Court should be reversed.

Respectfully submitted,

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